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Message from the Editor-in-Chief

Cosmos Eubany

I am honored to steer the California Real Property Journal through Volume 39, 2021. It is the vision of the Journal to present informative, interesting, timely, and thought-provoking pieces for our members. We have a stellar team on the Editorial Board including: Managing Editor Norman Chernin; Bar Business Editor Neil Kalin; Issue Editors Emily Madueno, Brandon Barker, Bryan Payne, and Brian Jacobs; and Executive Editors Steve Blake and Antonia Bethel.

This issue will, as per tradition, take an in-depth look at legislative updates as well as a look at the top real estate cases of 2020. In addition, it will address some of the continuing effects of COVID-19 on the practice of law, specifically on construction contracts and the operation of commercial buildings.

We are extremely pleased about the pieces we are curating for 2021. Issue 2 will be dedicated to the housing crisis, Issue 3 will contain general articles on real property law, and Issue 4 will be dedicated to diversity in the profession. At this time, we have already reached our publication capacity for Issue 2; however, we are looking for authors for Issues 3 and 4. Please contact me at the email address below if you are interested in writing on a topic. Also, if you are interested in being an editor or a member of the editorial board please reach out to me as well.

Cheers,

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Combining California Codes: ADUs, Rent Control, and Unit Retention

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I. INTRODUCTION

The housing crisis in California has come to a head. People are sleeping in tents on the streets,[1] apartments are jammed full of multiple families, and the rental rates are higher than ever before.[2] California is struggling with how to deal with this housing crisis. This crisis is pushing state and local legislators to change the amount of housing units available for rent or purchase, either by increasing new supply or preventing a decrease of current supply.

California attempted to address its lack of available housing and its homeless, or on-the-edge-of-homeless, population in Fall 2019 when the state passed rent control, accessory dwelling unit (ADU), and density laws. In total, Governor Gavin Newsom signed eighteen housing-oriented bills to try to boost housing production, density, and accessibility.[3] Whether these laws will impact the housing crisis positively or merely impact the housing market is an open question.

These laws predated the COVID-19 pandemic, which began ten months before this article was written. In California, the pandemic has increased unemployment, exacerbated the existing housing crisis, and created newfound uncertainty for the whole housing market. While this article will not specifically address the pandemic's effect on the housing crisis, the COVID-19 pandemic has potentially reduced the interest of developers, investors, and owners in taking advantage of the bills signed into law in November 2019. This article will look at what those laws are, how they work together or separately, and how they may impact the real estate markets around the state.

II. THE MAJOR HOUSING LAWS OF 2019

A. AB 1482 – Tenant Protection Act of 2019[4]

While Assembly Bill 1482, the Tenant Protection Act of 2019 (TPA), was touted as a way to stop exorbitant rents and give people more affordable housing, the law does nothing of the kind. The TPA institutes statewide rent caps,[5] just-cause eviction,[6] and assisted and affordable housing.[7] The rent control section went into effect January 1, 2020, but is retroactive for any rent increases that occurred since March 19, 2019.[8] It does not decrease any current rents but limits the percentage by which a landlord can increase rent within a twelve-month period as follows: no more than five percent (5%) plus the Consumer Price Index (CPI) rate for that metropolitan area,[9] but no more than ten percent (10%) of the overall rent.[10] Based on past CPI rates, most likely this allows landlords to increase rents 7 to 8 percent within a twelve-month period across California. When the TPA was passed, CPI was 2.7% in the San Francisco region[11] and 3.3% in Los Angeles County in January 2020.[12] As for the just-cause evictions section, the list of reasons for removing tenants is limited.[13] By contrast, if the property is owner-occupied or a single-family unit, the list of reasons is more expansive.[14]

To satisfy some legislators and real estate associations, the TPA exempts most single-family residences, meaning houses and condominiums, from both the rent cap and just-cause eviction sections.[15] To encourage continued real estate development in California, the TPA exempts new construction developments on a rolling ten-year basis from both rent control and just-cause evictions.[16] The TPA also allows market rates when the tenant vacates the unit, also known as vacancy decontrol.[17] Further, the law prohibits local governments from having a stronger rent cap going forward, with two exemptions: one, future local rent stabilization ordinances that were already in place by September 1, 2019; and two, future local rent stabilization measures adopted or amended after September 1, 2019, that are more protective than the TPA.[18] Both exemptions were crucial to convince industry associations, such as the California Apartment Association, to sanction the bill.[19] The exemptions, however, did not appease the California Association of Realtors, who remained fervently opposed to AB 1482 as failing to actually address "rental housing or help more people find an affordable place to live. It discourages new rental housing."[20]

As for tenant rights groups, they initially praised the TPA as a renter protection bill, but the final was more watered down than they had hoped.[21] AB 1482 allegedly creates a "safety net" for Californians to guard against local municipalities that cannot or will not pass local rent caps and just-cause eviction laws, in that it is the default when no local ordinance exists. However, any local rent stabilization that already existed before September 1, 2019, remains the default so long as its provisions are at least as protective of the tenant as the TPA's.[22] As a result, depending on the property and the location, sometimes the local rules will apply and other times the TPA will be the standard.[23] Thus, the TPA did not succeed in creating a statewide safety net for tenants.

B. Accessory Dwelling Unit Laws: AB 68 – Land Use: Accessory Dwelling Units[24]; AB 881 – Accessory Dwelling Units[25]; SB 13 – Accessory Dwelling Units[26]; and AB 670 – Common Interest Developments: Accessory Dwelling Units[27]

Three intertwined Accessory Dwelling Unit (ADU) bills—Assembly Bill 68, Assembly Bill 881, and Senate Bill 13—came forward to improve the approval process and remove barriers to adding ADUs to single-family and multi-unit properties. Each was dependent on the passage of the others. They determine to what extent a local government can impose standards for the construction of or designation of areas for ADUs,[28] and how a local government may regulate junior accessory dwelling units (JADUs).[29] Typically, ADUs are units that are separate from the original unit, whereas JADUs are units carved out of original units.[30]

These laws are intended to reform and streamline local review. They authorize local governments to create guidelines and provisions for ADUs within their jurisdiction, but restrict local governments to limiting ADUs solely due to lack of water or sewer services, or impacts on traffic and public safety.[31] If local governments do not have ADU laws or their laws conflict with these three ADU laws, then local governments must ministerially approve any submitted applications for ADUs with no architectural, landscaping, zoning, or development standards.[32]

In addition, Assembly Bill 670 was passed to deal with homeowner association guidelines or covenants, conditions, and restrictions (CC&Rs) that might otherwise prohibit ADUs allowed under AB 881 or AB 68. The law renders portions of any CC&Rs with such restrictions void and unenforceable.[33]

C. SB 330 – Housing Crisis Act of 2019[34]

Senate Bill 330, the Housing Crisis Act of 2019, was passed to speed up housing construction for five years by reducing the timelines for obtaining permits, removing barriers to housing applications, and eliminating the power of local municipalities to reduce the number of units on a parcel.[35] The law is intended to increase home density by reducing the barriers to new construction, and guarding against decreased density by requiring that the number of new units remains the same or higher when replacing demolished units.[36] SB 330 has altered the way parcels are reviewed for new construction, both negatively and positively. Cities have had to implement new fees and procedures for applications and project review.[37]

III. THE LAWS OF 2019 INTERACT WITH ONE ANOTHER: ACCESSORY DWELLING UNITS ALLOWED ON SINGLE-FAMILY PROPERTIES MEANS RENT CONTROL AND HOUSING DENSITY LAWS APPLY

The TPA's exemption for single-family properties under California rent control includes homes with ADUs or JADUs, so long as they are owner-occupied.[38] Historically, extended family or friends tended to occupy these units, but now renters can occupy them. When homeowners add an ADU or carve out a JADU, they can rent out these units without being subject to either rent cap or just-cause eviction rules in the TPA, so long as they reside in the main dwelling. However, in areas where local ordinances, such as the Los Angeles Rent Stabilization Ordinance (RSO),[39] supersede the TPA, homeowners who add an ADU to rent it out can unknowingly move the property from the TPA's rent stabilization exemption to the RSO's jurisdiction.[40]

As homeowners introduce more ADUs to single-family neighborhoods, SB 330 will come into play. The inability to reduce home density includes the inability to destroy a home with an ADU and rebuild a newly constructed single-family home. The ability to push new construction without the red tape that previously existed means that the owner of a multi-family complex can add more units as ADUs to increase the number on site.

IV. THE NEW HOUSING LAWS ARE HAVING UNPREDICTED EFFECTS ON CALIFORNIA'S RESIDENTIAL REAL ESTATE MARKET

As homeowners add ADUs to or establish JADUs in their primary residences, they increase the number of units on the lot. Owner-occupants can increase rents and remove tenants freely under the TPA exemption from rent caps and just-cause eviction rules. However, if owner-occupants move out, they lose their TPA exemption, meaning that the TPA's rent control and just-cause eviction rules apply. As owners add ADUs to or establish JADUs in a single-family investment property, they have pulled the property out of the single-family exemption and moved it under the jurisdiction of AB 1482, requiring a rent cap on any rental rate increase and allowing evictions only with just-cause.

Further, if homeowners sell the property after adding ADUs or JADUs, any demolition or remodeling of the property by the new owners must contain the same number of units on the final permit.[41] For example, if a home with a JADU is considered a teardown and sold to an investor, the investor must redevelop the property with at least two units, such as a duplex, home with an ADU, home with a JADU, or a triplex or higher. In certain towns, properties with ADUs or JADUs that in the past would have sold for a higher teardown value because new owners could have demolished the old rundown units to build a single new "McMansion,"[42] now are selling for less because any new development must retain the same number of units. In other towns, properties with two units can be sold and demolished for development of a single-family home with a JADU to be incorporated after the certificate of occupancy has been issued.

Another hurdle to increasing density arises as developers attempt to add housing in areas that are traditional single-family neighborhoods, and communities oppose any efforts to increase density, despite the developers' rights and city's obligations under SB 330.[43]

V. CONCLUSION

This review of California's 2019 rent control, density, and ADU laws sought not only to help explain these bills, but also to assess how they interact with one another. Today it is unclear if these new laws are accomplishing more than wreaking havoc on the real estate markets. Little affordable housing has been developed, rental rates are increasing despite that many tenants cannot pay because of the COVID-19 pandemic,[44] and the homeless crisis remains severe and potentially exacerbated by the pandemic. The future may be different, but approximately one year after passage, these laws have had a less-than-stellar start. Skeptics may chalk it up to the effects of the COVID-19 pandemic, but with the current real estate market roaring around the state, it actually could be the best market for an investor to thrive.

Endnotes

1 Margot Kushel, *The Rise of California's Tent Cities*, UCSF via The Conversation (June 14, 2018) https://www.universityofcalifornia.edu/news/rise-californias-tent-cities?.

2 Dep't of Numbers, California Residential Rent and Rental Statistics, https://www.deptofnumbers.com/rent/california/#:~:text=California%20Real%20Gross%20Rent%20Trends,the%20series%20b.egan%20in%202005 (last visited Dec. 11, 2020).

3 Press Release, Office of Governor Gavin Newsom (Oct. 9, 2019).

4 Tenant Protection Act of 2019 (TPA) (Stats 2019, ch. 597 (AB 1482)) became effective January 1, 2020, and is codified at Civil Code sections 1946.2 and 1947.12-1947.13.

5 Tenant Protection Act of 2019 (TPA) (Stats 2019, ch. 597 (AB 1482)) became effective January 1, 2020, and is codified at Civil Code section 1946.2.

6 Tenant Protection Act of 2019 (TPA) (Stats 2019, ch. 597 (AB 1482)) became effective January 1, 2020, and is codified at Civil Code section 1947.12.

7 Tenant Protection Act of 2019 (TPA) (Stats 2019, ch. 597 (AB 1482)) became effective January 1, 2020, and is codified at Civil Code sections 1946.2, 1947.12, and 1947.13.

8 Tenant Protection Act of 2019 (TPA) (Stats 2019, ch. 597 (AB 1482)) became effective January 1, 2020, and is codified at Civil Code section 1947.12(h)(1).

9 Tenancy: Rental Payment Default: Mortgage Forbearance: State of Emergency: COVID-19 (Stats 2020, ch. 37 (AB 3088)) and is codified at Civil Code section 1947.12(g)(1)(A).

10 Tenant Protection Act of 2019 (TPA) (Stats 2019, ch. 597 (AB 1482)) became effective January 1, 2020, and is codified at Civil Code section 1947.12(a)(1).

11 San Mateo County Ass'n of Realtors, Coalition for Housing Equality, *AB 1482 (Statewide Rent Control Information)* 21, https://www.samcar.org/userfiles/file/AB-1482-Information.pdf (last modified Sept. 12, 2019).

12 Jenna Chandler, *Here's How California Rent Control Works*, Curbed Los Angeles (Jan. 6, 2020), https://la.curbed.com/2019/9/24/20868937/california-rent-control-law-bill-governor.

13 Tenant Protection Act of 2019 (TPA) (Stats 2019, ch. 597 (AB 1482)) became effective Jan. 1, 2020, and is codified at Civil Code section 1946.2(b(2).

14 Tenant Protection Act of 2019 (TPA) (Stats 2019, ch. 597 (AB 1482)) became effective January 1, 2020, and is codified at Civil Code section 1946.2.

15 Tenant Protection Act of 2019 (TPA) (Stats 2019, ch. 597 (AB 1482)) became effective January 1, 2020, and is codified at Civil Code section 1946.2(e)(8).

16 Tenant Protection Act of 2019 (TPA) (Stats 2019, ch. 597 (AB 1482)) became effective January 1, 2020, and is codified at Civil Code section 1946.2(e)(7).

17 Tenant Protection Act of 2019 (TPA) (Stats 2019, ch. 597 (AB 1482)) became effective January 1, 2020, and is codified at Civil Code section 1947.12(b).

18 Tenant Protection Act of 2019 (TPA) (Stats 2019, ch. 597 (AB 1482)) became effective January 1, 2020, and is codified at Civil Code section 1946.2(g)(1)(A)-(B).

19 Cal. Apartment Ass'n, *AB 1482 Clears Senate; CAA Amendments Diminish Most Threatening Impacts* (Sept. 6, 2019), https://caanet.org/caa-amendments-diminish-most-threatening-impacts-of-ab-1482/.

20 Cal. Ass'n of Realtors, *C.A.R. Statement on Rent Cap Bill* (Aug. 30, 2019), https://www.car.org/en/aboutus/mediacenter/newsreleases/2019releases/ab1482.

21 Zoie Matthew, *California's Legislature Just Passed a Statewide Rent Control Bill*, L.A. Magazine (Sept. 11, 2019), https://www.lamag.com/citythinkblog/california-rent-control/.

22 Tenant Protection Act of 2019 (TPA) (Stats 2019, ch. 597 (AB 1482)) became effective January 1, 2020, and is codified at Civil Code section 1946.2(g)(1)(A)-(B).

23 For example, in the City of Los Angeles, a property built before 1978 would be subject to L.A. Rent Stabilization Ordinance, but anything newer than 1978 until the last ten years would be subject to the TPA. A property built in the last ten years would be free of all rent control and just cause eviction rules.

24 Land Use: Accessory Dwelling Units (Stats 2019, ch. 655 (AB 68)) became effective January 1, 2020, and is codified at Government Code sections 65852.2 and 65852.22.

25 Accessory Dwelling Units (Stats 2019, ch. 659 (AB 881)) became effective January 1, 2020, and is codified at Government Code section 65852.2.

26 Accessory Dwelling Units (Stats 2019, ch. 653 (SB 13)) became effective January 1, 2020, and is codified at Government Code sections 65852.2, 65302.2 and 65852.2 and Health & Safety Code section 17980.12.

27 Accessory Dwelling Units (Stats 2019, ch. 659 (AB 881)) became effective January 1, 2020, and is codified at Government Code section 65852.2.

28 Land Use: Accessory Dwelling Units (Stats 2019, ch. 655 (AB 68)) became effective January 1, 2020, and is codified at Government Code section 65852.2

29 Land Use: Accessory Dwelling Units (Stats 2019, ch. 655 (AB 68)) became effective January 1, 2020, and is codified at Government Code section 65852.22.

30 Cal. Dep't of Housing and Cmty. Dev., *Accessory Dwelling Units (ADUs) and Junior Accessory Dwelling Units (JADUs)*, https://www.hcd.ca.gov/policy-research/accessorydwellingunits.shtml#newlaws (last visited Dec. 11, 2020).

31 Accessory Dwelling Units (Stats 2019, ch. 659 (AB 881)) became effective January 1, 2020, and is codified at Government Code section 65852.2(a).

32 Land Use: Accessory Dwelling Units (Stats 2019, ch. 655 (AB 68)) became effective January 1, 2020, and is codified at Government Code section 65852.2(b).

33 Common Interest Developments: Accessory Dwelling Units (Stats 2019, ch. 659 (AB 670)) became effective January 1, 2020, and is codified at Civil Code section 4751(a).

34 Housing Crisis Act of 2019 (Stats 2019, ch. 654 (SB 330)) became effective January 1, 2020, and is codified at Government Code sections 65589.5, 65905.5, 65913.10, 65940, 65941.1, 65943, 65950, and 66300-66301.

35 Senator Nancy Skinner, *Gov. Newsom Signs SB 330, "Housing Crisis Act of 2019"* (Oct. 9, 2019), https://sd09.senate.ca.gov/news/20191009-gov-newsom-signs-sb-330-%E2%80%9Chousing-crisis-act-2019%E2%80%9D.

36 Housing Crisis Act of 2019 (Stats 2019, ch. 654 (SB 330)) became effective January 1, 2020, and is codified at Government Code section 66300(d)(2)(A)(i) and (ii).

37 Examples include Santa Cruz, https://www.sccoplanning.com/Portals/2/County/Planning/zoning/SB330%20Guide%20-%20Housing%20Crisis%20Act%20of%202019.pdf; Hayward, https://www.hayward-ca.gov/services/permits/housing-crisis-act-2019-sb-330-preliminary-review-application; Murrieta, https://www.murrietaca.gov/DocumentCenter/View/3128/IB-215_Housing-Crisis-Act-SB330; and Laguna Hills, https://www.ci.laguna-hills.ca.us/Faq.aspx?QID=142.

38 Tenant Protection Act of 2019 (TPA) (Stats 2019, ch. 597 (AB 1482)) became effective January 1, 2020, and is codified at Civil Code section 1946.2(e)(5).

39 L.A. County Code, ch. 8.52. *See also* Information About L.A. County's Rent Stabilization Ordinance, https://dcba.lacounty.gov/rentstabilization-ordinance/ (last visited Jan. 14, 2021).

40 City of L.A., *Accessory Dwelling Unit Ordinance, Background & Frequently Asked Questions* 3, https://planning.lacity.org/ordinances/docs/ADU/InformationSheet.pdf (last updated Jan. 2017).

41 Housing Crisis Act of 2019 (Stats 2019, ch. 654 (SB 330)) became effective January 1, 2020, and is codified at Government Code section 66300(d)(2)(A)(i) and (ii).

42 Madeline Stone, *Why Is It Called a McMansion*, Bus. Insider, (Sept. 10, 2016), https://www.businessinsider.com/why-is-it-called-a-mcmansion-2016-9.

43 Carol Ruiz, *Referendum Violating SB 330 Will Exacerbate California's Housing Crisis*, Bus. Wire, (Aug. 4, 2020), https://www.businesswire.com/news/home/20200804005392/en/Referendum-Violating-SB-330-Will-Exacerbate-California%E2%80%99s-Housing-Crisis.

44 Elizabeth Kneebone & Carolina Reid, *COVID-19 and California's Vulnerable Renters*, U.C. Berkeley, Terner Ctr. for Housing Innovation (Aug. 4, 2020), https://ternercenter.berkeley.edu/research-and-policy/covid-19-and-californias-vulnerable-renters/.

Lien Times:
The Lighter Side of Real Property Law

By Richard G. Witkin & Bella Roscigno, artist*

*Ubiquitous disclaimer: Any delight or dismay derived from viewing this illustration is not the responsibility of the Journal. Blame these folks.

Real Estate Case Update

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I. TOP TEN CASES

As always, it can be challenging to select the top ten real estate cases for our annual overview. The past year, even with the impact of COVID-19 on courts, was no exception, though there were fewer real estate cases overall than in past years. As is our tradition, several "related cases" as well as "honorable mentions" are included here.

The cases this year tended to represent a broad offering of real estate issues, as opposed to highlighting a concentration in any given area. As such, we have included cases representing ten diverse topics, including the California Environmental Quality Act (CEQA), recording and priorities, inverse condemnation, landlord and tenant, and land use. There were only two California Supreme Court cases on our list this year. One addressed whether the issuance of permits is discretionary or ministerial in the context of categorical exemptions from CEQA. The second addressed whether a statutory eminent domain pre-trial procedure can be "imported" into inverse condemnation proceedings. The single U.S. Supreme Court case addressed whether a Clean Water Act permit is required when a discharge from a point source into navigable waters is something less than "direct."

Nevertheless, there were still several important decisions in both California and the Ninth Circuit appellate courts, including:

1. The statute of limitation applicable to escape assessments where an accurate and timely change of ownership statement was not filed with State Board; and

2. The necessary requirements for demonstrating a valid electronic signature for purposes of an arbitration agreement.

In addition, California courts addressed such "bread and butter" topics such as:

1. Whether a holdover clause in a lease constituted a penalty;

2. Whether a county impliedly accepts dedication of a privately-owned drainpipe through mere use; and

3. Is the statute of limitations applicable to a county's interpretation of vesting tentative map conditions.

Also included is an "honorable mention" case addressing water diversions, possibly signaling a long-expected uptick in water-related litigation.

With the focus of current events on COVID-19 shutdown orders and payment or eviction moratoria and their effects on landlords, tenants, lenders, and borrowers, or the future of the commercial real estate market, it may seem odd that no coronavirus pandemic-related decisions are included in this year's Top 10 selection. Thus far, though, no such cases have reached the courts of appeal and resulted in substantive reported decisions. Consistent with past practices, we have focused on decisions of precedential value only for the cases discussed in this article.

While selecting cases for inclusion is inevitably a subjective affair, the cases addressed below, including the "honorable mentions," met our standard for inclusion: widespread impact on the practice of real property law in California. Accordingly, we offer the following as the most significant real estate cases of 2020.[1]

II. TOP TEN CASES OF 2020

1. *Protecting Our Water and Environmental Resources v. County of Stanislaus*[2]

Whether challenged permits are considered discretionary or ministerial for purposes of applying the categorical exemption depends on whether the agency exercises its judgment in issuance.

This California Supreme Court case addresses how the County of Stanislaus treated the issuance of well permits under CEQA,[3] and specifically, whether such permits should be entirely exempt from CEQA analysis as "ministerial" decisions. With plaintiff and defendant advocating opposite extremes, the court took a middle path.

The County of Stanislaus's well permitting ordinance,[4] which incorporated by reference state well construction standards,[5] treated all well permits as exempt from CEQA. The permissible reasons for granting such an exemption include where the issuance of the permit is purely ministerial rather than discretionary on the part of the public agency.[6] In contrast to a discretionary project, where "an agency is required to exercise judgment or deliberation in deciding whether to approve an activity,"[7] ministerial projects "are those for which 'the law requires [an] agency to act … in a set way without allowing the agency to use its own judgment.'"[8] Plaintiffs alleged that the county "misclassified" well construction permits as ministerial when, in fact, the county could deny or condition a permit on project changes to address environmental impacts per the state standards, which govern features such as well distance from contamination sources. While the trial court ruled all the county's non-variance well permits were ministerial, the court of appeal reversed, holding that the county's issuances of all well construction permits were discretionary decisions based on Standard 8.A's horizontal separation requirement alone.

The California Supreme Court granted review. The court noted that the "key question is whether the public agency can use its subjective judgment to decide whether and how to carry out or approve [the] project."[9] The court immediately answered that question as follows: "Whether County's issuance of the challenged permits is discretionary or ministerial depends on the circumstances. As a result, County may not *categorically* classify all these projects as ministerial. For the same reason, plaintiffs have not demonstrated that *all* issuance decisions are properly designated as discretionary."[10] After finding the so-called "functional test" for distinguishing discretionary projects from ministerial projects inapplicable,[11] the court identified the main issue as whether Standard 8.A required the county to exercise discretion in issuing well permits. Accordingly, the court analyzed whether the county's categorical classification of all such permits as ministerial was erroneous and an abuse of discretion under CEQA. The court concluded Standard 8.A's plain language authorized the county to exercise "judgment or deliberation when [it] decides to approve or disapprove" a permit because the standard "makes clear that individualized judgment may be required."[12] For example, "an adequate horizontal distance" may depend on "[m]any variables" and "[n]o set separation distance is adequate and reasonable for all conditions."[13] Significantly, "approval of all lesser distances requires agency approval 'on a case-by-case basis,'"[14] which the court found conferred significant discretion on the county health officer.

The court rejected the county's argument that its limited discretion justified the ministerial characterization, commenting, "[j]ust because the agency is not empowered to do everything does not mean it lacks discretion to do anything."[15] The court also rejected that it was required to defer[16] to county's "ministerial" classification, noting that the county was not interpreting an ordinance that it had drafted, but, rather, state standards incorporated by reference. Similarly, the court found that the county's decision was not entitled to deference and did not comport with the *Yamaha* factors because its determination did not rely on factual determinations, but instead constituted a claim that "the [ministerial] exemption applies to an entire category of permits, as a matter of law."[17]

However, the court rejected plaintiff's and the court of appeal's position "that the issuance of a [well] permit under Chapter 9.36 is always a discretionary project," pointing out that "[t]he fact that an ordinance contains provisions that allow the permitting agency to exercise independent judgment in some instances does not mean that all permits issued under that ordinance are discretionary."[18] Because Standard 8.A "only applies when there is a contamination source near a proposed well,"[19] the court concluded that all well construction permits are not necessarily discretionary projects. It therefore reversed the holding that all permit issuances are discretionary, but held that plaintiffs were entitled to a declaration that the county's blanket ministerial categorization was unlawful.

Comment: Categorical exemptions under CEQA are meant to preempt challenges where an agency truly has no ability to change the outcome of a project, even if environmental impacts are identified. A typical example is the issuance of building permits. However, as this case demonstrates, decisions are not always "purely ministerial" or "purely discretionary," and the court took an entirely common sense (and unsurprising) middle path between these two extremes. Critical to the court's analysis here was not whether regulations grant a local agency discretion in the abstract, but whether regulations relevant to a specific permit at issue conferred meaningful discretion.[20] Thus, while "blanket categorization" of well permits, and other similar types of permits, will no longer be permissible, a significant number of permit decisions likely will still be construed as ministerial based on their individual characteristics. Where permit decisions are in fact discretionary, environmental review should be limited to those environmental impacts that an agency actually has the discretion to address.[21]

2. *Constellation-F, LLC v. World Trading 23, Inc.*[22]

Holdover clause that increased rent by 150 percent was not a penalty that was void under Civil Code section 1671 because the clause did not mention damages; no evidence of oppressive coercion existed; and even if it constituted liquidated damages, the presumption of validity was not overcome.

A recurring theme in commercial real estate law is the concept of the unenforceable penalty. In *Constellation-F*, the context is a commercial lease with a holdover clause that the tenant characterized as an unenforceable penalty, but which the landlord characterized as a "graduated rental."

Constellation-F, LLC leased a warehouse to World Trading 23, Inc. The lease, which terminated on February 28, 2016, contained a provision whereby the base rent would increase by 150 percent if World Trading did not vacate by the termination date. After extending the lease—and suspending the holdover rent—once, World Trading refused to vacate on the new termination date of April 1, 2016, and did not vacate until June 15, 2016. Constellation responded by filing an unlawful detainer action seeking damages for breach of contract. The trial court awarded damages for past-due rent, late fees, interest, failure to maintain and repair, and costs incurred from loss of use, but held that the holdover rent clause was an unenforceable penalty.

On appeal the court identified the holdover rent provision in the lease at issue as a "graduated rental,"[23] and cited *Vucinich v. Gordon* for the proposition that such provisions are enforceable in commercial leases "even if the increased rent is much greater than the base rent."[24] The court considered *Vucinich* to be controlling, and disagreed with the trial court's assessment of that case as merely one "that dealt primarily with a merger of fee title and leasehold interest."[25] Rather, *Vucinich* rejected the same argument made by World Trading, that the holdover provision was a penalty that was void under Civil Code section 1671: "Neither the question of penalty nor of liquidated damages is involved in this action."[26] Importantly, when *Vucinich* was decided, section 1671 allowed parties to a contract to agree on an amount that would be "presumed to be the amount of damage sustained by breach" of that contract, but only when "from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."[27] The *Vucinich* court emphasized the word "damage" and the court here noted that the statute did not fit the *Vucinich* facts because "a holdover clause provides for 'a graduated rental,'"[28] which is the rate for leasing property, not damages. Thus, the court here concluded that *Vucinich* was correct in holding that section 1671 did not apply.

The court's policy rationale was that section 1671 and the case law interpreting it "aim to combat unfair and unreasonable coercion arising from an imbalance of bargaining power."[29] The court interpreted "coercion" as meaning "no element of free rational choice on the part of the obligor insofar as his performance is concerned,"[30] and made clear that "[w]hen the concern about oppressive coercion is absent, Civil Code section 1671 does not apply."[31] Thus, the court concluded that "World Trading failed to show this holdover provision amounted to an illegal liquidation of damages" because it did not prove that Constellation had market power,[32] or that it faced oppressive coercion. Accordingly, the court upheld the holdover agreement, "which the parties [had] determined by their free, solemn and voluntary act,"[33] and reversed the judgment.

The lengthy dissent addressed "whether the liquidated damages provision in a pre-printed commercial lease, which established the holdover rent at 150 percent of the base rent, is an unenforceable penalty." The dissent concluded that it was, and accused the majority of "completely disregard[ing] the test set out in *Ridgley v. Topa Thrift & Loan Association*[34] and *Garrett v. Coast & Southern Federal Savings & Loan Association*,[35] and instead superimpos[ing] a new test by which one may challenge a liquidated damages provision."[36] This new test, according to the dissent, requires a challenger to "analyze each contracting party's respective market power and persuade a court that there was enough of an imbalance of market power between the parties to invalidate the damages provision."[37]

Comment: The dissent's opinion did not address the fundamental dispute between it and the majority, which was *why* it believed the holdover provision constituted a liquidated damages provision in the first place. In fact, both the dissent and the majority opinions essentially assumed either that the holdover clause was or was not a liquidated damages provision without adequate analysis as to why the clause should or should not be so characterized. To the majority, the absence of the term "damages" in the clause as well as its characterization as an increased rental seemed to be dispositive, while the dissent appeared to conclude that such a sharp increase in rent could only be a penalty. Nevertheless, the majority also relied on the absence of coercion and the lack of presumption that a liquidated damages clause in a commercial context is invalid, so parties to commercial leases should take note of this decision when contemplating a lease with a holdover clause involving graduated rent.

Related Case: *Graylee v. Castro*[38]

Addressing an "unenforceable penalty" in the context of a residential lease, this case relied on the more traditional analysis of whether a stipulated judgment bore any reasonable relationship to actual anticipated damages.

In this case, landlord Graylee filed an unlawful detainer action against tenants, which culminated in a handwritten stipulation for entry of judgment. The stipulation, awarded Graylee possession of the property and provided for entry of a $28,970 judgment (consisting of unpaid rent and damages, attorney's fees and costs) "ONLY IF [the tenants] Fail[ed] to comply with [the] terms" of the stipulation, which included vacating the property by 3:00 p.m. on October 31, 2018.[39] When tenants did not vacate until later in the day on October 31, 2018, Graylee filed a motion for entry of the $28,970 judgment, which the trial court granted.

On appeal, the tenants argued that the $28,970 judgment constituted an unenforceable penalty under Civil Code section 1671(b), which governs liquidated damages clauses, because the amount of the judgment bore "no reasonable relationship to the range of actual damages the parties could have anticipated would flow from a breach of the stipulation."[40] The court first rejected the landlord's argument that section 1671 did not apply here because subdivision (a) of that section makes the entire section inapplicable to "'any case where another statute expressly applicable to the contract prescribes the rules or standard for determining the validity' of a liquidated damages provision."[41] Instead of section 1671, the landlord argued that only Code of Civil Procedure section 664.6 applied. While the court acknowledged that the "another statute" exception in section 1671(a) "allows courts to enter judgment under the terms of a settlement agreement," it "does not allow a court to endorse or enforce a provision in a settlement agreement or stipulation which is illegal, contrary to public policy, or unjust."[42]

The court next found that because the $28,970 judgment would only be triggered upon the tenants' failure to comply with the stipulation, a liquidated damages analysis must apply. A liquidated damages clause is presumed valid "unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made."[43] Such a clause is unenforceable as a penalty "if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach."[44] Thus, the damages must arise "from the breach of the stipulation, not the alleged breach of the underlying contract, because it is the breach of the stipulation that allows [the plaintiff] to enter judgment against [the defendant]."[45] After analyzing three cases addressing the issue,[46] the court found the current case to be unlike *Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* There, the court held that a discount to be applied to an amount admittedly owing only if timely payments were made was not an unenforceable penalty because the discount would simply cease to apply if the settlement terms were not met. By contrast, the amount here was contested, and the stipulation did not involve a discount at all. Instead, tenants would pay nothing if they complied by the designated date and time, or everything if they did not. Finding that the amount of the stipulated judgment bore no reasonable relationship to actual anticipated damages caused by breach of the settlement agreement, especially one so minor, the court concluded that it was an unenforceable penalty.

Comment: The unenforceable penalty issue has been highlighted in several recent cases,[47] and the decisions underscore two issues. First, if the parties enter into a stipulated judgment, a key factor is whether the settlement was a compromise of a disputed claim. An unenforceable penalty is less likely to be found if the fact and amount of the claim is not disputed. Second, and of critical importance where the underlying amount is disputed, a judgment that allows one party to recoup for breach of a settlement agreement must link the damages to the breach of that agreement, not the amount of the original dispute that was later settled.

3. *Honchariw v. County of Stanislaus*[48]

Developer's challenge to a county's interpretation of vesting tentative map conditions of approval was not barred by ninety-day statute of limitations period because

the claim challenged the interpretation, rather than the validity, of the conditions.

Developers and agencies often spar over conditions of approval attached to project approvals, and the law requires such challenges to be brought within a short time, normally ninety days. As this case illustrates, the timeframe is different, however, when the developer is challenging whether the agency has accurately interpreted those conditions, as opposed to challenging the conditions themselves.

Plaintiff Nicholas Honchariw (Developer) proposed to develop eight residential lots on a 33.7-acre parcel of land overlooking the Stanislaus River. In 2012, the county conditionally approved Developer's application for a vesting tentative map. A primary concern for the county was the source of water service for the four one-acre lots. To address this issue, the county imposed four conditions of approval to the vesting tentative map. The county contended that those conditions required a fire suppression system with functional fire hydrants in place before final approval. By contrast, Developer understood the conditions to mean that a functional fire suppression system could be built out at the time of development, therefore it was not a prerequisite for approval of the final map. In August 2017, Developer filed a petition for writ of mandate and complaint for damages alleging county's demand for a fire suppression system with functional fire hydrants violated his vested rights. The trial court ruled in favor of the county, and Developer timely appealed on the ground that the trial court misinterpreted the conditions placed on the approved vesting tentative map.

On appeal, the county asserted that Developer's challenge to the project's conditions of approval was barred by the ninety-day statute of limitations under Government Code section 66499.37 ("[a]ll persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the decision or of the proceedings."),[49] measured from when the county imposed the conditions. However, the court of appeal pointed out that Developer's dispute was not with the "reasonableness, legality or validity"[50] of the conditions adopted in 2012, but instead with the county later allegedly misinterpreting the conditions in connection with the submission of the final map. The court noted that a claim challenging the interpretation of a condition of approval—as opposed to its validity—does not accrue until it is clear what interpretation the agency has adopted and that the interpretation is the agency's final position, so as to make any further negotiations futile.[51]

Based on the evidence, the court found that the county's final position was established one or two months before Developer filed his complaint, and that Developer filed its challenge to the county's interpretation of the tentative map conditions within ninety days of learning the county's final position. Emphasizing that a claim of "misinterpretation" is distinct from a claim challenging the "validity" of the condition of approval, and that the two types of claims accrue at different times, the court found Developer's suit to be timely because it challenged a misinterpretation of conditions of approval, and therefore was not barred by the ninety-day statute of limitations.[52]

Comment: The disputes between Honchiraw and the county have spawned a number of interesting published decisions, of which this is the latest installment. Only the statute of limitations portion of the court's opinion was certified for publication, while the portion addressing interpretation of the conditions of approval was not. Thus, the court of appeal did not reveal whether or how it directed the trial court to proceed on remand, nor whether it was sympathetic to one party's interpretation over the other. However, certifying for publication the portion distinguishing between a challenge to the validity of a condition of approval versus a challenge to the interpretation of that condition is important because it signals a recognition that not all disputes regarding conditions of approval are garden variety. To the contrary, conditions of approval are often complex and subject to different interpretations and any ambiguity may render the conditions vulnerable to a delayed challenge based on "interpretation." To ensure the protections of the short ninety-day statute, agencies would be wise to ensure that the language in their conditions is clear and that the understandings of the respective parties are in sync.

4. *Weiss v. People Ex Rel. Department of Transportation*[53]

Eminent Domain Law provision for expedited determination of dispute affecting compensation cannot be "imported" into inverse condemnation proceedings because the provision was intended to facilitate the determination of just compensation owed, not whether a taking has occurred.

Eminent domain law and inverse condemnation law certainly overlap, primarily the concept of just compensation applicable in both. However, this case turns on their differences. The government typically files an eminent domain action, admits liability to pay just compensation, and the parties only dispute the amount. The property owner typically files an inverse action and the government usually disputes liability for just compensation. As *Weiss* demonstrates, due to these differences, not all pre-trial statutory procedures applicable to eminent domain cases automatically apply to inverse cases.

This case involved homeowners who sued the Department of Transportation and the Orange County Transportation Authority (collectively, "Agencies") for inverse condemnation and nuisance due to two sound walls the Agencies built across the freeway. The owners alleged that the sound walls increased noise and dust near their homes, interfering with their enjoyment of their homes and diminishing their property values. The Agencies filed two motions to dismiss the inverse condemnation and nuisance claims under Code of Civil Procedure, section 1260.040, arguing that the homeowners could not establish that the sound wall imposed a direct, substantial, and peculiar burden on their properties that differed from the burden imposed on other properties in their neighborhood. The trial court agreed and granted the motions. However, the court of appeal reversed, finding that the Eminent Domain Law provision allowing for expedited adjudication of compensation issues could not be imported into the inverse condemnation context for adjudication of a public entity's liability.[54] In doing so, the court of appeal disagreed with *Dina v. People ex rel. Department of Transportation*,[55] which had affirmed the trial court's use of section 1260.040 to adjudicate liability. The California Supreme Court granted review to resolve the conflict.

While the Agencies conceded that section 1260.040 "does not directly apply to inverse condemnation actions," they urged the court to import section 1260.040 "into the body of inverse condemnation law as a matter of judicial development."[56] The court declined for several reasons. First, it found that section 1260.040 was not intended to provide for a case-dispositive motion in eminent domain actions because the issue of liability is typically not disputed. Unlike an eminent domain action, where "the public entity concedes liability at the outset," and thus there is "no question that [the public entity] has 'taken or damaged' the property at issue,"[57] "an inverse condemnation action proceeds under the rules governing ordinary civil actions"[58] and the main dispute is usually whether a taking has occurred.[59] This creates a distinction between eminent domain and inverse condemnation proceedings that also results in different evidentiary procedures.

Second, because issues relating to compensation are decided in the liability phase of an inverse condemnation action, resolution of such issues is often dispositive where "claims of property damage or constructive taking frequently are the sole basis of liability."[60] By contrast, the public entity typically has already conceded at least partial liability at the outset of an eminent domain action, so section 1260.040 facilitates early resolution of eminent domain actions by addressing evidentiary issues that affect the amount of compensation before the eve of trial. Third, and similarly, earlier resolution of compensation issues encourages pretrial settlement in eminent domain cases—a goal the court of appeal found legislative history supports.[61] The same is not necessarily true of inverse cases, where the threshold issue is typically liability.

The court also cited the general principle of leaving to the Legislature "the adoption and amendment of statewide rules governing trial court proceedings,"[62] and that courts "do not have the authority to adopt procedures or policies that conflict with statutory law or the Rules of Court."[63] It found that to be the case here because "nothing in section 1260.040's language or legislative history suggests that the Legislature intended the motion procedure it authorizes to be used in inverse condemnation actions," nor did the Agencies point to any statutory or constitutional rule requiring such a procedure in the inverse condemnation context.[64]

The Agencies primarily relied on *Chhour v. Community Redevelopment Agency*,[65] to assert that the court can "import" Eminent Domain Law provisions into inverse condemnation law. Assessing *Chhour*, the court interpreted it as applying to the rules governing the right to compensation, rather than the rules governing the general course of proceedings.[66] The court emphasized that the point of section 1260.040 is to provide "a procedural tool for trial courts to make evidentiary and legal rulings on questions related to the valuation of the condemned property before the parties engage in final pretrial settlement efforts."[67] With that goal in mind, the court found it "unsurprising that the language of section 1260.040 does not appear to contemplate that the procedure would be used to request entry of judgment."[68] Rather, it "supplements, and does not replace any other pretrial or trial procedure otherwise available to resolve an evidentiary or other legal issue affecting the determination of compensation."[69] While the court acknowledged it would not always be error to use procedure from the Eminent Domain Law in the inverse condemnation context, it concluded that in a case like this, where the Agencies' motion presented a mixed question of law and fact, importing section 1260.040 was improper. Unlike a summary adjudication, it was not clear whether the trial court resolved factual disputes or how the court reached its decision that the owners could not meet their burden of showing that the injuries suffered were "peculiar" to their properties.

Comment: The Supreme Court concluded by cautioning lower courts to "be careful not to prioritize efficiency and conservation of judicial resources over access to justice and procedural fairness."[70] While eminent domain and inverse condemnation case law do overlap, the court here repeatedly emphasized that evidentiary issues are different in the two contexts because liability is typically conceded in an eminent domain proceeding, but often hotly disputed in an inverse claim. Thus, the "fast tracking" that section 1260.040 facilitates makes sense in the eminent domain context, but not in inverse condemnation, where the Legislature's reasons for encouraging prompt resolution do not necessarily apply. In the inverse context, liability issues are properly determined by bench trial or on summary judgment with the attendant procedural safeguards, not through a motion procedure designed for another context.

5. *Prang v. Los Angeles County Assessment Appeals Board No. 2*[71]

Where accurate and timely change of ownership statement was not filed with State Board, four-year statute of limitation did not apply to escape assessments because Revenue and Taxation Code section 480.1 requires strict compliance.

This case addresses what, if any, statute of limitations applies to a "reachback" by a county assessor to collect "escape assessments" where an off-record change of ownership occurred at the entity level but was not properly reported to the State Board of Equalization. Critical to that determination is what is necessary to meet the filing requirements of section 480.1 of the Revenue and Taxation Code.

In 2006, Downey Landing, LLC (Downey) merged with Downey Landing SPE, LLC (Downey SPE). That transaction was deemed to have effected a "change in ownership" of a shopping center that Downey owned, triggering a reassessment of the base property value. However, while Downey SPE filed a certificate of merger in 2006 with the Los Angeles County Assessor's office, it was silent as to whether it owned any property, and Downey SPE did not file a Form BOE-100-B[72] with the State Board of Equalization until 2013. Two years later, the Assessor sent Downey SPE Notices of Assessed Value Change and Adjusted Property Tax Bills reassessing the base value of the property as of 2006, and demanding payment of "escape assessments" totaling $16,014,000 for the amount of property tax that would have been collected had the parcels been reassessed in 2006.

Downey SPE filed an appeal with the Los Angeles County Assessment Appeals Board, which agreed that a four-year statute of limitations applied because the certificate of merger was the "equivalent of [a] BOE-100-B filing."[73] Because the Assessor had "actual and constructive notice of [the] change in control/ownership in 2009,"[74] only about half the escape assessment was recoverable by the Assessor. The Assessor filed a petition for writ of administrative mandate challenging the appeals board's ruling, which the trial court overturned for two reasons. First, the court found "that section 480.1's express requirement that a 'change in ownership statement' be filed with the State Board was to be strictly enforced"[75] based on legislative intent and the overall legislative scheme. Second, even if substantial compliance with section 480.1 sufficed, it was lacking here because the certificate of merger did not indicate "whether and to what extent, if any, [Downey SPE] owned real property in the County."[76]

The court of appeal summarized the issues as "(1) Whether the agency properly determined that the prerequisites for the Assessor to levy retroactive escape assessments under section 532, subdivision (b)(3) were not met, which hinges on (2) Whether the agency properly determined that Downey SPE had met section 480.1's filing requirements."[77] Revenue and Taxation Code section 532 gives an assessor the authority to reassess property values if a qualifying triggering event occurs, and if the reassessment is timely.[78] A qualifying triggering event includes "when a 'change in ownership has occurred.'"[79] A change in ownership of corporations, partnerships, and limited liability companies can constitute a change in the ownership of property held by those entities.[80] Timeliness depends on the reason for the reassessment. If due to assessor error, then a four-year statute of limitations applies, "unless the valuation error 'result[ed] from the taxpayer's fraud, concealment, misrepresentation, or failure to' furnish required information."[81] However, reassessment for reasons not involving the assessor's judgment are subject to no time limit.[82]

Applying this framework, the court of appeal found "every single one of the prerequisites for the escape assessments challenged by Downey SPE is not only satisfied, but is undisputedly so": (1) a change in ownership that qualified the property for reassessment undisputedly occurred; (2) the property was underassessed beginning in fiscal year 2007-2008 through 2015; and (3) Downey SPE did not file a "change in ownership statement" with the State Board as section 480.1 requires.[83] The only question was whether strict compliance with section 480.1 was required. The court found strict compliance was required based on both legislative intent[84] and policy. Strict compliance supports the goal of precluding entities from engaging in complex transactions "aimed at concealing changes in ownership" to "evade reassessment and to sidestep the constitutional mandate of equal taxation of individuals and legal entities."[85] Further, the court found the requirement to file a "change in ownership statement" with the State Board to be "critical to the State Board's dual roles as a centralized clearinghouse and as a repository of expertise."[86]

The court rejected Downey SPE's argument that *Dreyer's Grand Ice Cream, Inc. v. County of Alameda*[87] foreclosed the unlimited reachback, noting that section 532(b)(3) was enacted eight years after *Dreyer's*. Coupled with section 532(b)(3)'s mandate regarding escape assessments, the court agreed that it was overruling *Dreyer's*. The court also rejected the laches argument amicus proffered, pointing out that "laches, as an equitable doctrine, is not available to a party with unclean hands,"[88] and it found that Downey SPE did not have clean hands.[89]

Comment: The *Prang* court was very clear that an unlimited reachback period exists under section 532(b)(3), and that "this unlimited period trumps *any and all* shorter limitation periods, including the eight-year limitation period set forth in subdivisions (b)(1) and (b)(2)."[90] Thus, where strict compliance with section 480.1 or section 480.2 is absent, no time limit exists on an assessor's ability to reassess and impose escape assessments on noncompliant properties. Significantly, the language of the decision applies both to section 480.1 (applicable to changes of control of a legal entity) and to section 480.2 (applicable to changes of ownership of the legal entity).

Related Case: *731 Market Street Owner, LLC v. City and County of San Francisco*[91]

This case looked at "change of ownership" in a different context—where the sale of real property included a long-term lease—and analyzed whether a change of ownership had occurred as to the lease for local real property transfer tax assessment when the underlying real property was sold.

731 Market Street Owner, LLC entered into a forty-five-year lease with tenant Garfield Beach CVS, LLC for the ground floor of its commercial building, and paid the City of San Francisco a "Real Property Transfer Tax" based on the rents due over the lease's life. Four years later, 731 Market sold the building and was required to pay the city a transfer tax in the amount of over $1.6 million, which included the rents due over the remaining forty-one years of the CVS lease. The city denied 731 Market's claim for a refund, which was filed on the basis that it had already paid tax on the lease. 731 Market then sued the city, relying on California's documentary transfer tax statute[92] and cases interpreting it to argue that the phrase "realty sold" in the San Francisco property transfer tax ordinance[93] did not include transfers of property with lease terms of more than thirty-five years. The trial court ruled in favor of 731 Market, holding that the city's tax ordinance excludes the 2015 transfer of the underlying property subject to CVS's long-term lease.

The court of appeal examined *Thrifty Corp. v. County of Los Angeles*,[94] which determined that because long-term leases can give a bundle of rights approximating an interest such as an estate in fee simple, long-term leases can be subject to the state's property transfer tax. Thus, a "change in ownership" for property tax purposes includes "[t]he creation of a leasehold interest in taxable real property for a term of 35 years or more (including renewal option)."[95] Accordingly, *Thrifty* held that the documentary transfer tax did not apply to a transfer of property with a lease of twenty years with an option to extend for an additional ten years.

The *731 Market* court then looked for guidance on how to determine the length of a lease for the property transfer tax. In *McDonald's Corp. v. Board of Supervisors*,[96] the court held that only the prospectively available term of the lease, not the entire length of the lease, should be calculated for tax purposes.

Applying the rationale of *Thrifty* and *McDonald's*, the court of appeal here determined that the creation of the CVS lease was a "change in ownership" under the state tax code because the lease was for more than thirty-five years. Thus, the creation of the original lease constituted "realty sold" to trigger taxation under section 11911. However, the court found that the property sale did not effect a "change in ownership" of the lease because CVS maintained all the same rights as under the original lease, meaning that the "primary economic value of land encumbered by a lease"[97] and beneficial ownership stayed with CVS. Since CVS's primary ownership interest in the leasehold never changed hands up to and including the time of the second transaction, there was no "realty sold" under the court's analysis of section 11911.

Comment: The court's basic message to the city was that its interpretation was unreasonable and would produce absurd results. It pointed out that allowing reassessment whenever the fee changes hands in land subject to any lease with a remaining term of thirty-five years could result in an enormous tax increase for a lessee whose lease requires the lessee to pay property taxes. The court expressed concern that such an increase could occur merely because the lessor has sold that interest to a third party—a transfer over which the lessee has no control.[98] Moreover, the court speculated that a building valued and taxed due to a sale one day could be taxed the same amount again the very next day if the building owner leased out the space, thus taxing the same income stream twice in two days. It rejected such an approach as elevating form over substance.

6. *Ruiz v. County of San Diego*[99]

County did not impliedly accept dedication of privately owned drainpipe that was connected to county drain system where county did not design, construct, install, or maintain private pipe, and no inverse condemnation occurs where county was reasonable in maintaining its own storm system.

Does the flow of water from a public pipe segment through a private pipe segment convert the private segment to a public improvement? The answer depends on whether the public entity's actions—such as design, repair, and maintenance—result in implied acceptance of the private pipe into the public system.

Sonia and Hector Ruiz purchased a home in a subdivision in 1998. In 2014 and 2016, the home flooded when an underground storm drain pipe below their house failed. An investigation revealed that when the subdivision was built in 1959, the developer replaced the above-ground concrete channels through which a stream ran with corrugated metal pipe beneath the Ruiz property, which eventually rusted out. Although the Ruiz pipe connected with and was a continuation of the valley's storm drain system, "[t]he County did not design, construct, install, or maintain the Ruiz pipe," and in fact did not accept the developer's offer to dedicate an easement to the Ruiz pipe in 1959.[100]

The Ruizes sued the county for trespass, nuisance, inverse condemnation, and declaratory relief, alleging that the county "acted 'unreasonably' in discharging water through the Ruiz pipe without inspecting or maintaining the pipe,"[101] and that the county had acquired an easement to the Ruiz pipe by using it for fifty years, which required the county to maintain the Ruiz pipe. The trial court agreed, finding in the Ruizes' favor on the inverse condemnation cause of action because continuous use by water from the county's drains and inlets caused the pipe to deteriorate and fail, in turn causing the flooding and damage to Ruiz's property. The court found the county had implicitly accepted a drainage easement, which required it to maintain the pipe.[102] It awarded the Ruizes $328,033 in costs and damages plus $529,540.40 in attorney's fees for inverse condemnation.

The court of appeal began by noting that while "a private landowner may transfer an interest in real property to the public by making an offer of dedication," there must be either express or implied acceptance by the public of that offer; without acceptance, "there is no public property interest."[103] Because it was undisputed the county did not expressly accept the offer of dedication, the court of appeal assessed whether acceptance had been implied. The Ruizes relied on several cases that addressed similar factual circumstances. One was *Locklin v. City of Lafayette*,[104] which involved downstream property owners whose property was damaged by a creek with increased flow resulting from public upstream development. The *Locklin* court held that

> [u]tilizing an existing natural watercourse for drainage of surface water runoff … does not transform the watercourse into a public storm drainage system. A governmental entity must exert control over and assume responsibility for maintenance of the watercourse if it is to be liable for damage caused by the streamflow on a theory that the watercourse has become a public work.[105]

Based on *Locklin*, the court here concluded that "[t]he County's use of [the Ruiz] pipe as part of a public drainage system [did] not, without evidence of 'control' or 'maintenance' transform the privately owned pipe into a public work."[106]

Even more on point was *DiMartino v. City of Orinda*,[107] where the court of appeal reversed the trial court's decision on similar facts, opining that "[t]he key question is whether connection of a private pipe segment to an admittedly public pipe segment converts the former to a public improvement."[108] *DiMartino* found that a public entity's mere use of a private pipe for area drainage, without more, was not enough to establish an implied acceptance of an offer of dedication. Thus, the court here agreed with *DiMartini* that even a public entity's use of a privately owned pipe over an extended period of time did not establish implied acceptance without evidence of maintenance or repair. Such evidence was lacking here; instead the evidence showed that the pipe under the Ruiz's property "serve[d] their development interests alone."[109] The court rejected the Ruizes' factual arguments as unsupported by evidence, as well as the Ruizes' analogy to *Skoumbas v. City of Orinda*[110] because that case involved a discharge of water onto the plaintiffs' property.

Turning to the inverse condemnation argument, the court noted that just compensation must be paid for public use of private property, and defined "public work" as including "private uses incidental to, or necessary for, the public work or improvement."[111] However, the court concluded that "public work" and "public use" are not the same, and that "Article 1, section 19 does not compel a finding that a privately owned storm drain pipe connected to a public storm drain system is a public use for purposes of imposing inverse condemnation liability."[112]

The court then considered whether the trial court erred in finding that the county had acted unreasonably in not making sure it was not damaging the Ruiz pipe. The test for reasonableness includes the purpose of the improvements; amount of water added to the streamflow by those improvements; and cost of mitigating measures available, balancing those costs "against the magnitude of the potential for downstream damage."[113] The court found the "critical inquiry" here to be "not whether the public entity acted reasonably with respect to someone else's property, but whether 'the [public entity] acted reasonably in its maintenance and control over those portions of the drainage system it does own.'"[114] It found "no evidence to sustain even an implied finding that the County acted unreasonably with respect to County property."[115] Moreover, undisputed evidence existed that the county was not responsible for a significant amount of the drainage, and the court found the Ruizes failed to carry their burden to properly apportion damages.[116]

Comment: The court's analysis focused primarily on the conclusion in analogous case law that a "public entity must do more to impliedly accept an offer of dedication that it previously expressly rejected" than allow public water to flow through a private drain pipe, and the follow up question, "how much more" will suffice to constitute acceptance of a dedication. Here the court determined that actions such as installing a privately owned pipe, or providing trucks, dirt, and water for installation would be sufficient. However, it found no evidence here that the county "participated in planning, constructing, maintaining, inspecting, or repairing the Ruiz pipe."[117] The court also devoted substantial time to reviewing the evidence, particularly the fact that the Ruiz pipe replaced a concrete drainage channel that had been placed in a natural watercourse.[118]

<u>Related Case</u>: *Pakdel v. City and County of San Francisco*[119]

This case follows last year's game-changing United States Supreme Court decision in *Knick v. Township of Scott*,[120] which eliminated the "state-litigation requirement" of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[121] whereby a claim was not ripe until plaintiff had sought compensation for the alleged taking through state law procedures. Here, the Ninth Circuit Court of Appeals assessed *Williamson County*'s remaining prong—the finality requirement—in the context of San Francisco's tenancy in common (TIC) ordinance.[122]

As part of its process to clear a backlog of TIC properties seeking to be converted to individually owned condominium property, the city of San Francisco created the Expedited Conversion Program (ECP). The ECP allowed for streamlined conversion of TICs to condominiums if the TIC owner agrees to offer any tenant a lifetime lease in the converted property.[123] Plaintiffs submitted an ECP application to the city's Department of Public Works, which approved their tentative conversion map in 2016. In November 2016, plaintiffs signed an agreement with the city committing to offer a lifetime lease to their tenants. However, in June 2017, plaintiffs twice requested that the city waive the lifetime lease requirement or, in the alternative, compensate them for transferring the lifetime lease. Because plaintiffs had not made these requests before expressly agreeing not to seek a waiver of ECP requirements, the city denied both requests.

Plaintiffs sued alleging a violation of the federal Takings Clause. Although the trial court dismissed the claim because plaintiffs had not sought compensation through a state court proceeding to satisfy *Williamson County*, the court of appeals only analyzed *Williamson County*'s finality requirement because *Knick* had been decided in the meantime. The court noted that "a final decision exists when (1) a decision has been made 'about how a plaintiff's own land may be used' and (2) the local land-use board has exercised its judgment regarding a particular use of a specific parcel of land, eliminating the possibility that it may 'soften[] the strictures of the general regulations [it] administer[s].'"[124] Accordingly, "a plaintiff must 'meaningful[ly]' request and be denied a variance from the challenged regulation before bringing a regulatory takings claim" or it "cannot claim to have obtained a 'final' decision."[125]

Here, plaintiffs did not dispute that they had allowed each objection period to lapse, expressly waived their right to seek an exemption from the Lifetime Lease Requirement, or received a partial refund of their ECP application fee because they offered the lifetime lease to the tenants.[126] Addressing the dissent's argument that Plaintiffs' belated attempts—six months after final approval—to request an exemption satisfied the finality requirement, the court stated that "[t]akings plaintiffs cannot make an end run around the finality requirement by sitting on their hands until every applicable deadline has expired before lodging a token exemption request that they know the relevant agency can no longer grant."[127]

The court also rejected that requiring plaintiffs to follow the prescribed procedures amounted to imposition of "an administrative exhaustion requirement in the guise of a finality requirement."[128] While acknowledging that section 1983 plaintiffs do not need to exhaust administrative remedies, the court explained that "in the takings context, a property owner's failure to seek a variance through procedures made available by the local land-use authority meant that the authority had not reached a final decision."[129]

The dissent disagreed that the city had not reached a final decision, noting that "*Williamson County*'s 'finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury,' not whether a request for 'variances' followed the decisionmakers' administrative procedures."[130] It found that under the facts of this case, no variance could be given; therefore, the decision was final and plaintiffs' claim was ripe. To the extent that the majority characterized plaintiffs' requests for exemption to be "untimely and expressly waived," the dissent found this to be a merits ruling that should properly be determined by remand to the district court. Finally, the dissent characterized plaintiffs' failure to seek a timely variance as having "missed a deadline imposed by an ordinance that the City … had broad authority to waive."[131]

Comment: The dissent characterized the majority's position as "elevat[ing] adherence to administrative procedure above the question of whether the City has reached a final decision."[132] However, the dissent did not address the length of time it took for plaintiffs to make their request or their repeated and express agreements to the lifetime lease requirement, both of which led to the majority quite legitimately asking how the finality requirement could retain any force under the dissent's interpretation.[133] Confirming *Williamson County*'s finality requirement, the majority rejected "that because [plaintiffs] ignored the finality requirement for long enough, it no longer applies to them."[134]

Related case: *Bridge Aina Lea, LLC v. State of Hawaii Land Use Commission*[135]

This case refines the contours of *Lucas v. South Carolina Coastal Council*[136] and *Penn Central Transportation Company v. City of New York*,[137] in the context of the reversion of a land use classification that allegedly constituted a taking under the Fifth Amendment.

The complicated facts involved 3,000 acres in Hawaii zoned for agricultural use, of which the Hawaii Land Use Commission reclassified 1,060 acres as urban in 1989 so the landowner could develop a mixed residential community. The commission imposed several conditions that ran with the land, one of which required the developer to make 60 percent of the proposed 2,760 residential units affordable. The land changed hands several times, with Bridge Aina Lea, LLC acquiring the 3,000-acre parcel in 1999 for $5.2 million. However, by 2005, the 1,060 acres remained undeveloped, allegedly due to the cost of compliance with the affordable housing condition, despite the commission having reduced it from 60 percent to 20 percent. In 2010, after many years of delay by successive landowners, the commission voted to revert the zoning of the 1,060 acres to agricultural due to lack of progress. While the Hawaii Supreme Court ultimately overturned the reversion, Bridge sued, claiming that the reversion was an unconstitutional taking. The jury found a taking under both *Lucas v. South Carolina Coastal Council*[138] and *Penn Central Transportation Company v. City of New York*.[139]

The Ninth Circuit Court of Appeals immediately rejected the jury's and district court's conclusions, emphasizing that "[w]here a regulation 'denies all economically beneficial or productive use of land,' the multi-factor analysis established in *Penn Central* is not applied," because *Lucas* supplies the relevant rule.[140] Thus, if the jury found the reversion deprived Bridge of all economically beneficial use of the property, *Penn Central* would not apply; "if the reversion fell short of a total taking," *Penn Central* applies.[141] Evaluating a taking under *Lucas*, the court found the land at issue to have retained substantial value because Bridge's expert testified that the 1,060 acres retained $6.36 million in value as agricultural land of an otherwise $40 million value as urban land. "Absent more, there is no *Lucas* liability for this less than total deprivation of value."[142]

Turning to the *Penn Central* factors, which "depend[] largely on the particular circumstances [in the] case" at hand,[143] the court found that "[m]ere fluctuations in value during the process of government decisionmaking, absent extraordinary delay, are incidents of ownership [and] cannot be considered as a taking in the constitutional sense."[144] Addressing investment-backed expectations, the court noted that an objective assessment involves "reasonable probability, … not starry eyed hope of winning the jackpot if the law changes,"[145] taking into account "the regulatory environment at the time of the acquisition of the property."[146] It found dispositive that Bridge had not "substantially compl[ied] with representations made to obtain reclassification,"[147] most significant of which was to build affordable housing. Finally, with respect to the nature of the governmental action, the court found that the reversion was not "clearly arbitrary and unreasonable" given Bridge's failure to satisfy the affordable housing condition. Thus, balancing the *Penn Central* factors, the court found the reversion did not effect a taking.

Comment: This case is a good example of how a party's actions can ultimately undermine its position, as the court here repeatedly returned to the missed deadlines and broken promises to begin development and provide affordable housing in its assessment of the *Penn Central* factors. However, the key point of the case is its clarification of the interplay between *Lucas* and *Penn Central*: if a taking occurs under *Lucas*, *Penn Central* simply does not apply. Conversely, if no taking occurs under *Lucas*, the *Penn Central* factors apply. Because the hallmark of *Lucas* liability is the absence of *all* economic value, it makes sense, as the court here demonstrated, to first make a *Lucas* determination, and only then proceed to *Penn Central*, if necessary. While this may seem straightforward, the court was responding to a federal jury that found a taking under both *Lucas* and *Penn Central*.

7. *County of Maui, Hawaii v. Hawaii Wildlife Fund*[148]

The Clean Water Act requires a permit when there is a direct discharge from a point source into navigable waters or when there is the "functional equivalent" of a direct discharge.

Courts have long struggled with certain vagaries of the Clean Water Act, particularly the applicability of the National Pollutant Discharge Elimination System (NPDES) permit system with respect to point source pollution. While purporting to reverse the "middle ground" holding of the court of appeals, the Supreme Court appears to straddle the fence in only a slightly different fashion.

The County of Maui owns and operates four wells at a wastewater treatment plant, and it injected treated effluent into the wells for disposal. It was undisputed that the treated effluent reached the Pacific Ocean from the wells, with studies confirming a hydrogeologic connection. Several environmental organizations, including Hawaii Wildlife Fund, sued the county, alleging that discharging effluents at the injection wells without a NPDES permit violated the Clean Water Act (CWA).[149] The district court granted summary judgment to the environmental organizations, finding that "the discharge from Maui's wells into the nearby groundwater was "functionally one into navigable water."[150]

The Ninth Circuit affirmed the county's liability under the CWA based on its discharge of pollutants from a point source. The pollutants were "fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water," where the pollutants reaching navigable water are more than de minimis.[151] The court of appeals disagreed with the district court that "liability under the Clean Water Act is triggered when pollutants reach navigable water, regardless of how they get there"—but it did not address "when if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA."[152]

The U.S. Supreme Court granted certiorari to determine "whether the Act 'requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source,' in this instance, 'groundwater.'"[153] To answer this, the Court needed to determine whether there had been "any addition of any pollutant to navigable waters from any point source," so it began with the word "from," the scope of which was the subject of "dramatic" disagreement among the parties.[154] While the environmental groups argued to adopt the Ninth Circuit's "fairly traceable" standard, the County of Maui argued that a point source must be the last conveyance from which a pollutant was conducted into navigable waters to fall within the reach of the statute. The Supreme Court rejected both positions and arrived in the middle.

The Court first rejected plaintiffs' argument that to fall within the permitting requirement, "the discharge from a point source must 'proximately cause the pollutants' eventual addition to navigable waters."[155] The Court rejected this proposal because it did not find that proximate cause would "significantly narrow[] the statute beyond the words 'fairly traceable' themselves."[156] Looking next at the history and structure of the statute, the Court doubted "that Congress intended to give EPA the authority to apply the word 'from' in a way that could interfere as seriously with States' traditional regulatory authority—authority the Act preserves and promotes—as the Ninth Circuit's 'fairly traceable' test would."[157] Finally, the EPA's own interpretation "opposed applying the Act's permitting requirements to discharges that reach groundwater only after lengthy periods."[158]

The Court next explained why Maui's interpretation—that the permitting requirement did not apply if a pollutant had to travel though any amount of groundwater from the point source to navigable water—was too narrow. The Court posed hypotheticals such as that of a pipe owner seeking to avoid regulation by moving a pipe a few yards from navigable water so that the pollutant would not be discharged directly into it: "We do not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations of the Clean Water Act."[159] Maui argued that the statute's language required the Court to accept Maui's interpretation, and "that the statutory meaning of 'from any point source' is not about where the pollution originated, but about how it got there."[160] But the Court rejected this "means-of-delivery" test as imposing an "esoteric definition of 'from'" that did "not remotely fit in this context," where strong evidence showed that Congress was referring to an origin and a destination, not merely a conveyance.[161]

The Court also rejected the EPA's contention that "'all releases of pollutants to groundwater' are excluded from the scope of the permitting program, 'even where pollutants are conveyed to jurisdiction surface waters via groundwater.'"[162] The Court found such an interpretation to be "neither persuasive nor reasonable."[163] While Congress did not require a permit for all discharges to groundwater, the Court pointed out that it also did not require "none." Moreover, the Court found it "difficult to reconcile EPA's interpretation with the statute's inclusion of 'wells' in the definition of 'point source,' for wells most ordinarily would discharge pollutants through groundwater."[164] Thus the Court held that "the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge," which the Court found would "best capture[] … those circumstances in which Congress intended to require a federal permit."[165]

The Court clarified that it meant that "an addition [to navigable waters] falls within the statutory requirement that it be 'from any point source' when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means."[166] The key factors the Court referenced that would influence this determination are time and distance. The Court gave examples where too much of one or the other could result in no permitting requirement. The Court repeatedly emphasized that "the word 'from' seeks a 'point source' origin. Context imposes natural limits as to when a point source can properly be considered the origin of pollution that travels through groundwater."[167]

Justice Kavanaugh concurred to point out that "the Court's interpretation of the Clean Water Act regarding pollution 'from' point sources adheres to the interpretation set forth in Justice Scalia's plurality opinion in *Rapanos v. United States*,"[168] which reasoned that "the Clean Water Act does not merely 'forbid the addition of any pollutant directly to navigable waters from any point source,' but rather the 'addition of any pollutant to navigable waters.'"[169] Justice Thomas dissented, joined by Justice Gorsuch, arguing that "the functional equivalent of a direct discharge" impermissibly departs from the statutory text. He interpreted the word "addition" as meaning that only a direct discharge is subject to the permit requirement because a pollutant must come from its most immediate source (e.g., groundwater or a point source). Justice Alito's lengthy dissent criticized the majority's rule as one which "provides no clear guidance and invites arbitrary and inconsistent application," arguing that there are only two interpretations of "a discharge 'from' a 'point source,'" and that the majority's middle ground adheres to neither.[170] He further argued that states could regulate such discharges as nonpoint sources.[171]

Comment: The Court acknowledged that its holding was not a simple bright-line approach, and that "middle instances" might be difficult to resolve, but because of the many potentially relevant factors that must be applied to factually different cases, the Court eschewed more specific language. While this could result in expanded permit requirements, the Court emphasized that the EPA had been applying the permitting provision to discharges through groundwater for more than thirty years, and it noted that judges can exercise discretion based on context.

Justice Thomas's focus on the term "addition" is arguably just another way of defining "from" in the service of adhering to what he contended was textually inevitable. He essentially concluded that adherence to his interpretation of the text superseded congressional intent: "Our job is to follow the text even if doing so will supposedly undercut a basic objective of the statute."[172] Justice Alito's dissent hinged on the notion that the activities in this case should be regulated by the state as nonpoint source pollution. However, nonpoint source pollution "arises from many dispersed activities over large areas," and "is not traceable to any single discrete source" due to its "diffuse" nature,[173] which is why the Ninth Circuit rejected that argument in its decision in this case.[174]

8. *Fabian v. Renovate America, Inc.*[175]

Electronic initials and signature on contract were not valid where party seeking to compel arbitration could not show the specific circumstances under which the initials and signature were obtained to demonstrate that the other party actually entered into the contract.

Electronic signatures through services such as DocuSign have become ubiquitous and are a particularly useful tool during a pandemic. This case demonstrates, however, that the convenience of these services is counterbalanced by strict procedures that cannot be glossed over.

Rosa Fabian received an unsolicited phone call from Renovate America, Inc., offering to install and finance solar panels for her home. All communications between Fabian and Renovate America occurred telephonically, and Renovate alleged that Fabian electronically signed the financial agreement with Renovate. When Fabian filed a complaint against Renovate alleging that the solar panels were improperly installed and that Renovate had violated the Consumers Legal Remedies Act,[176] the Unfair Competition Law,[177] and the California Contract Translation Act,[178] Renovate filed a petition to compel arbitration. The solar panel financial agreement included an arbitration provision that stated "[b]y initialing below, the Property Owner acknowledges and agrees to the terms set forth" in the arbitration provision. The agreement contained electronic initials and the words "DocuSigned by Rosa Fabian," but Fabian disputed that she had signed the contract, and asserted that her signature had been "placed" on the contract by Renovate without her consent, authorization, or knowledge. Although Renovate produced a declaration from its Senior Director of Compliance Operations confirming that Fabian "was present and signed the document,"[179] the trial court found that Renovate had not established that Fabian had electronically signed the contract and denied Renovate's motion to compel arbitration.

On appeal, Renovate argued that it had proved by a preponderance of the evidence that Fabian electronically signed the contract. The court of appeal acknowledged that "the burden of authenticating an electronic signature is not great," and that authentication may be established "by presenting evidence of the contents of the contract in question and the circumstances surrounding the contract's execution."[180] Renovate relied on *Newton v. American Debt Services, Inc.*[181] for the proposition that the electronic initials and signature were legally binding because DocuSign "is a company used to electronically sign documents in compliance with the U.S. Electronic Signatures in Global and National Commerce Act (ESIGN)."[182] However, the court here pointed out that unlike *Newton*, where "the declarant … proved that the 'docusigned' electronic signature was the plaintiff's by explaining the process used to verify the signature," Renovate "did not provide any evidence from or about DocuSign in its petition, reply, or supplemental declaration," including how the contract was sent to Fabian, how her signature was placed on the contract, or how the contract was returned to Renovate.[183] Thus, it rejected the DocuSign authentication argument.

The court also rejected that Renovate's declaration supported a finding of authentication as a matter of law. It relied on *Ruiz v. Moss Bros. Auto Group, Inc.*,[184] where the defendant-employer's declaration "summarily asserted" that the plaintiff-employee electronically signed the agreement, yet the employee asserted that he did not recall signing the agreement.[185] The *Ruiz* court held that the manager's declarations were insufficient to authenticate the employee's signature because they did not explain: how, or on what basis, the manager inferred that the electronic signature was "the act of" the plaintiff-employee; that the date and time printed on the agreement were accurate; that the electronic signature could only have been placed on the agreement by a person using the plaintiff-employee's unique identification number and password; and that the agreement was therefore signed by the plaintiff.[186]

Similarly, here, the court found Renovate only "summarily asserted" that Fabian "entered into" the contract, without indicating who presented Fabian with either a physical or electronic copy of the contract, where and when the contract was signed, "or how Renovate ascertained that Fabian was present when the Contract was signed."[187] Further, Renovate did not reference DocuSign or the process used to obtain and verify Fabian's electronic initials and signature. "Most importantly, Renovate did not explain how Fabian's electronic initials and signature were the 'act of Fabian' by offering evidence that DocuSign assigned Fabian a unique 'identity verification code' to initial and sign the Contract."[188] Failing to provide such specifics "left a critical gap in the evidence supporting Renovate's petition."[189] Accordingly, the court of appeal found no error in the trial court's denial of Renovate's petition to compel arbitration and it affirmed the trial court's order.

Comment: The use of DocuSign has become a nearly universal practice in California real estate transactions, particularly those involving residential properties. This case serves as a reminder that the fact of common practice, alone, does not resolve the authenticity of a purported electronic signature and an evidentiary basis must be laid to establish electronic signatures were the act of the purported signatory, if that signatory denies signing the document in question.

9. *Moore v. Teed*[190]

Where real estate agent represented to buyer that he "and his team of professionals" could renovate a fixer-upper for far less than the work ended up costing, both benefit-of-the-bargain and out-of-pocket costs were proper damages for fraud committed by a fiduciary, and agent was liable for attorney's fees under Contractors' State License Law.

While the remedy for fraud in real estate transactions is typically limited to out of pocket expenses, courts are split on whether that should be the rule when a fiduciary commits fraud. This case weighs in.

Justin Moore hired real estate agent Richard Burden Teed to help him purchase a "fixer upper" house in the Pacific Heights neighborhood of San Francisco and then renovate the property. Teed billed himself as a real estate agent with "over 25 years of experience as a building contractor" with "an extensive background in historic restorations,"[191] and he assured Moore that he could renovate a fixer-upper in a cost-effective manner. Thinking Teed was a licensed contractor, Moore purchased a $4.8 million fixer-upper based on Teed's estimate that he and his team of professionals could implement the renovations for $900,000, which included $200,000 for foundation work. After the close of escrow, bids for the work ranged from $1.6 million to $2.4 million, so Teed's team performed demolition and built a foundation, but the foundation turned out to be defective because it lacked any waterproofing despite the property's high water table.

Moore eventually sued Teed and other defendants for breach of contract, negligent and intentional misrepresentation, negligence, breach of fiduciary duties, negligence per se, violation of unfair competition laws, recovery against license bonds, and fraud. During litigation, Moore's expert witness, a construction cost estimator, testified as to four items of damages:

> (1) the difference in value between the actual cost of Teed's renovations using 2011-2012 pricing rates and the promised cost of $900,000; (2) the actual cost to demolish and replace the foundation; (3) the value of the lost use of the property; and (4) the increased costs due to the delay in the renovations. She also estimated that the original architect's design would have cost more than $4.4 million to build in 2011-2012, that the foundation alone should have been estimated at $620,000, and that the differences between her estimates and Teed's were because Teed's contained "many significant omissions, including the cost of materials, installation, and installing a fire sprinkler system.[192]

The jury found in favor of Moore on all but the breach of contract claim, awarding benefit-of-the-bargain damages for the difference between the promised and actual cost of the renovation at 2011-2012 rates, plus increased costs due to delay, as well as out-of-pocket costs for the actual cost to replace the foundation, and loss of use, for a total of $934,322 after off-set. The jury also awarded $2.2 million in attorney's fees and costs based on Teed's violation of the Contractors' State License Law.[193] Teed appealed the damages award, contending that "benefit-of-the bargain damages cannot be awarded alongside out-of-pocket damages as a matter of law," that "benefit-of-the-bargain damages are not a permissible form of recovery for fraud actions involving the purchase of real property," and that the damages award was based on "speculative assumptions about a hypothetical project that was never built."[194]

The court of appeal first addressed whether benefit-of-the-bargain and out-of-pocket damages may be awarded on a tort claim. Teed relied on *Simon v. San Paolo U.S. Holding Co.*[195] as holding that they may not "because the defendant's fraud was not the cause of plaintiff's failure to obtain the property."[196] However, *Simon* explicitly stated that "nothing we say in this case affects the scope of damages recoverable for fraud committed by a *fiduciary*."[197] Turning to Teed's contention that "benefit-of-the-bargain damages are never recoverable for fraud claims involving real property transactions, even when the fraud is perpetrated by a fiduciary," the court acknowledged a split in authority on this issue. Some courts allow benefit-of-the-bargain,[198] while others limit damages to out-of-pocket costs.[199]

While the Legislature has generally directed that out-of-pocket rather than benefit-of-the-bargain damages apply to fraud claims involving the purchase, sale, or exchange of real property,[200] the Supreme Court has clarified that "[t]his section does not apply, however, when a victim is defrauded by its fiduciaries. In this situation, the 'broader' measure of damages provided by [Civil Code] sections 1709 and 3333 applies."[201] Section 1709 makes such a defendant "liable for any damage which [the victim] thereby suffers," and section 3333 allows for the "measure of damages … which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."[202] The court found that "these two statutes support imposing benefit-of-the-bargain damages in real property transactions involving a fraudulent fiduciary 'because a fiduciary should be responsible to compensate his or her principal for the full amount of the loss caused by his or her breach of duty.'"[203] Concluding that the broader measure of damages "ensures that a faithless fiduciary is held to account for the full amount of the loss of which his breach of faith is a cause,"[204] the court here found the application of both benefit-of-the-bargain and out-of-pocket damages to have been appropriate.

Finally, the court rejected Teed's contention that the award of attorney's fees under section 7160 was improper because the statute did not apply to him. To the contrary, section 7160 applies where "[a]ny person … is induced to contract for a work of improvement … in reliance on false or fraudulent representations or false statements knowingly made."[205] Teed argued that for someone to be "induced to contract," there must be an actual contract, and the jury found there was no contract between Moore and Teed. The court sidestepped this argument, finding that "section 7160 permits an attorney fee award against a defendant who fraudulently induces a person to enter into home improvement contracts with his confederates."[206] The court noted that section 7160 "does not exempt noncontracting parties from liability," where one solicits a contract under false pretenses.[207] Moreover, the jury instruction clearly defined "contractor" so that, given the ample evidence, the jury could find Teed to be a "contractor" within the meaning of section 7026, which provides that one can be deemed a contractor by offering to undertake, or purporting to have the capacity to undertake renovations "by or through others."

Comment: The court in this case found the arguments in favor of allowing benefit-of-the-bargain damages to be stronger than the counter arguments, concluding that a faithless fiduciary should be "held to account for the full amount of the loss of which his breach of faith is a cause."[208] The court found support in *Alliance Mortgage v. Rothwell*[209] for the proposition that a "broader measure of damages" applies when fraud is perpetrated by a fiduciary.[210] However, the Supreme Court in *Alliance Mortgage* did not actually resolve the split of authority on this issue, meaning the topic will undoubtedly surface again.

10. *Gamerberg v. 3000 E. 11th St., LLC*[211]

Undisclosed parking affidavit giving one property owner access to an adjacent property, even if characterized as an irrevocable license akin to an easement, was not enforceable against subsequent purchaser without actual or constructive notice.

The evolution of the law regarding the revocability and durability of an "irrevocable license" continues in this case involving property subject to a "parking affidavit" granted more than fifty years ago on property whose current owner had no actual or constructive knowledge of the grant.

This case involves two adjacent parcels, one purchased by Steve Soroudi through his limited liability corporation, 3000 E. 11th St., LLC in 1994 ("Property 1"), and the other purchased by Ruben Gamerberg in 2007 ("Property 2"). In 1950, Property 1's former owner executed a parking affidavit granting Property 2's former owner the right to use eight parking spaces on Property 1 so that a warehouse could be built on Property 2. The parking affidavit was filed with the Los Angeles Department of Building and Safety (LADBS) but was never recorded, and Property 2's former owner apparently never used the parking spaces. Neither Soroudi nor Gamerberg were aware of the existence of the parking affidavit; however, when Gamerberg approached LADBS about expanding the warehouse on Property 2, LADBS told him of the parking affidavit and that it could be "grandfathered in" to meet the parking requirements for the expansion. Soroudi did not respond to Gamerberg's subsequent inquiries about the parking spaces, but because LADBS issued Gamerberg a building permit, Gamerberg spent $600,000 adding a new building behind the warehouse and redeveloping the warehouse on Property 2.

Upon completion, LADBS advised Gamerberg that if he could not gain access to the parking spaces, his only option was to sue Soroudi, which Gamerberg did, seeking, among other things, an irrevocable license. The trial court found that an irrevocable license had been created in 1950 based on Gamerberg's predecessor's expenditures to build the warehouse. The license was binding on "successors in interest even if they took title with no knowledge of the parking affidavit,"[212] based on *Noronha v. Stewart*.[213]

On Soroudi's appeal, the court asked "whether the 1950 parking affidavit can be construed to create an irrevocable license in favor of Gamerberg that is binding on Soroudi, a subsequent purchaser without notice."[214] The court first reviewed the characteristics of an irrevocable license. First, it "may be created by express permission or by acquiescence (that is, by 'tacitly permit[ing] another to repeatedly do acts upon the land' 'with full knowledge of the facts' and without objecting)."[215] Second, an irrevocable license is a personal right that confers no interest in the land.[216] Third, while generally a license can be revoked at any time for no reason or compensation,[217] "[a]n otherwise revocable license becomes irrevocable when the licensee, acting in reasonable reliance either on the licensor's representations or on the terms of the license, makes substantial expenditures of money or labor in the execution of the license," and the license "remains irrevocable for a period sufficient to enable the licensee to capitalize on his or her investment" based on the doctrine of equitable estoppel.[218]

Assuming that an irrevocable license existed, the court found it could not be binding on a subsequent purchaser who takes without notice. It distinguished *Noronha*, relied on by the trial court, as involving buyers who purchased a property with an encroaching fence that they could see and that the prior owner testified he had disclosed at the time of the purchase. By contrast, no party in the current case knew of the parking affidavit because it was not recorded. Soroudi argued, and the court agreed, that the better rule was embodied in *Churchill v. Russell*,[219] in which a license granted by one property owner to his neighbors to draw well water would have been irrevocable against the original owner, but was not against a subsequent purchaser who took the property without notice of the agreement. As the *Churchill* court stated,

> Under these circumstances it was necessary for the defendants, in asserting their equitable interest, to allege and prove, and for the court to find, the existence of such notice in order to support their equitable claim. This proposition is so familiar that no citation of authorities is necessary to support it.[220]

The court noted that "California courts have long recognized that '[a]n irrevocable license … is for all intents and purposes the equivalent of an easement,'"[221] which is "unenforceable against a subsequent purchaser without notice (except in limited circumstances not applicable here)."[222] Thus, the court held that "when an easement or other use is not visible and does not provide actual notice to the purchaser, it must be recorded to be enforceable."[223]

Comment: The term "irrevocable license" has proved difficult to define, with one commentator calling it a "contradiction in terms"[224] and many courts deeming it to be "for all intents and purposes the equivalent of an easement."[225] The court here clearly agreed with the defendant that to treat irrevocable licenses differently than easements would make no sense. While also supportive of the move to stop using the term altogether,[226] the court focused instead on the recording statutes[227] to effectuate its purpose. Thus, it appeared satisfied to assume an irrevocable license existed here, but to treat it as an easement, because easements are unenforceable against a subsequent purchaser without notice.[228]

III. HONORABLE MENTIONS

1. *Parkford Owners for a Better Community v. County of Placer*[229]

Challenge to expansion of self-storage facility was moot because it was filed after construction was nearly complete; and by not briefing mootness issue on appeal, plaintiffs failed to carry burden of demonstrating reversible error.

This case examines the consequences of waiting to seek injunctive relief under CEQA and land use law, particularly where injunctive relief is sought six months into construction of the project.

Treelake Storage is a commercial self-storage facility that was authorized through modification of a conditional use permit ("CUP") that had originally been granted for recreational vehicle and boat storage for residents of the Treelake Village development project. The facility was expanded several times through CUP modifications, with the latest expansion approval occurring in August 2016. Parkford Owners for a Better Community filed a petition for writ of mandate in February 2017 alleging violations of CEQA and the Planning and Zoning Law, and requesting a temporary restraining order and preliminary injunction. Based on construction having been in progress for six months and Parkland's failure to demonstrate irreparable harm or immediate danger, or a likelihood of prevailing on the merits, the trial court denied interim relief. In addressing the merits of the petition, the trial court rejected Parkford's CEQA claim, finding the challenged building permit to be ministerial. It then granted judgment on the pleadings with respect to the Planning and Zoning Law claim, on the basis that the claim was barred by the ninety-day statute of limitations under Government Code section 65009.

On Parkford's appeal, real parties in interest and the county argued that Parkford's claims were moot because the mini-storage expansion was fully constructed, and thus the relief sought by Parkford could no longer be effective. Significantly, Parkford ignored the mootness argument in its reply brief. After briefly reviewing general mootness principles, the court cited *Wilson & Wilson v. City Council of Redwood City*,[230] which held an action challenging a modified redevelopment project on CEQA and other grounds was mooted by completion of the project where plaintiff never sought injunctive relief to stop it. Specifically, *Wilson* held that a project's completion moots challenges to resolutions authorizing it and to actions seeking an Environmental Impact Report (EIR) to study it. For this point, *Wilson* relied on *Hixon v. County of Los Angeles*,[231] which affirmed a trial court's refusal to order an EIR prepared for a street improvement project because the complained-of impact—removal of a substantial number of roadside trees—had already occurred: "The project is ended, the trees are cut down and the subject is now moot insofar as resort to a planning or informational document, which is what an EIR is."[232]

The court here concluded that, as in *Wilson*, neither bad faith nor "unseemly race" to complete construction to moot the action existed. Moreover, the court found that Parkford bore partial responsibility for its claims becoming moot because it failed to timely seek any stay of construction, instead waiting until the project was nearly completed to do so. The case thus resembled *Wilson* "to the extent that [Parkford] failed to take steps to retain the status quo pending resolution of its claims by seeking injunctive relief or a stay until … the project was nearly complete."[233] Finally, possible exceptions to mootness—such as the need to resolve "important issues of broad public interest that are likely to reoccur"[234]—were not at issue because Parkford had not even attempted to address the issue of mootness or persuade the court that the issues were not moot in its appellate briefs.

Comment: Plaintiffs in this case had several strikes against them, including that issuance of the challenged building permit was a ministerial act that is exempt from CEQA, and that building permits had been secured for expansion of the storage facility on multiple occasions without incident or complaint. In addition, there was no evidence real parties in interest were trying to evade CEQA or Planning and Zoning Law requirements, while on the other hand Parkford waited more than six months, until the project was almost complete, to seek relief. Moreover, while real parties were able to show distinct harm if relief was granted, Parkford made no such showing. This questionable strategy, coupled with Parkford's failure to address the mootness issue, set the stage for the court of appeal's relatively quick conclusion that completion of the project simply rendered Parkford's challenge moot.

2. *Stanford Vina Ranch Irrigation Company v. State of California*[235]

State Water Resources Control Board had statutory authority to promulgate regulations that characterized water diversions as unreasonable use where such diversions would threaten minimum flows necessary to support endangered fish species, and regulations did not constitute a taking as there can be no vested right in unreasonable use.

This case examines the constitutionally enshrined concept of "reasonable use" of water in a state with both increasingly conflicting demands and increasing periods of severe drought.

Between 2011 and 2017, California experienced a severe drought, and significantly reduced surface water flows in the state's rivers threatened many species already in danger of extinction. Thus, in 2014, the governor declared a state of emergency, and several statutory amendments were enacted allowing for the State Water Resources Control Board to adopt emergency regulations "to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water … and to require curtailments when water is not available under the diverter's priority of right."[236] Those regulations included in-stream flow requirements for Deer Creek, which hosted two species of endangered anadromous fish. Specifically, the regulations provided that

> it is a waste and unreasonable use under Article X, section 2 … to continue diversions that would cause or threaten to cause flows to fall beneath the drought emergency minimum flows listed in subdivision (c), except as provided in section 878.1. [¶] (b) The Deputy Director for the Division of Water Rights (Deputy Director) may issue a curtailment order upon a determination that without curtailment of diversions flows are likely to be reduced below the drought emergency minimum flows specified in subdivision (c).[237]

With respect to Deer Creek, the regulations set forth flow rates depending on whether salmon or steelhead were present, and, in fact, the board issued curtailment orders in June and October 2014, and again in April and October 2015. After the second curtailment order, Stanford Vina Ranch Irrigation Company, which had diversion rights in Deer Creek, sued for inverse condemnation on the basis that those regulations and curtailment orders constituted a taking of Stanford Vina's vested water rights for "public 'fishery enhancement purposes.'"[238] Stanford Vina also challenged the board's authority to define unreasonable use of water as prohibiting one use of water in favor of an alternative use of water. The board responded that it had the authority to "regulate the unreasonable use of water" based on *Light v. State Water Resources Control Board*,[239] that substantial evidence supported that immediate action was needed to prevent waste and unreasonable use of water, and that Stanford Vina did not have a vested right to the unreasonable use of water. The trial court agreed with the board based on "the unique circumstances present in this case—persistent and extreme drought conditions threatening to dewater high priority streams during critical migration periods for threatened and endangered fish species."[240]

On Stanford Vina's appeal, the court noted that both riparian and appropriative rights are governed by the rule of reasonableness as well as the public trust doctrine.[241] The court characterized the rule of reasonableness as "the overriding principle governing the use of water in California,"[242] with "the reasonableness of any particular use depend[ing] largely on the circumstances."[243] Citing *Light v. State Water Resources Control Board*,[244] the court here concluded that the board had the authority to act "to prevent unreasonable and wasteful uses of water, regardless of the claim of right under which the water [was] diverted."[245] Given this authority, the court rejected "that the survival of protected species of fish is not an appropriate consideration in water use regulation."[246] Thus, the court found the emergency regulations valid.

The court rejected that the curtailment orders substantially affected Stanford Vina's fundamental vested right, finding "no provision of law which authorizes an unreasonable use or endows such use with the quality of a legally protectible interest merely because it may be fortuitously beneficial to the lands involved."[247] Because the board's regulations defined as unreasonable any diversions that dropped the flow of Deer Creek below the emergency minimum flows, the court found no taking because Stanford Vina had no vested right to divert water in contravention of the emergency regulations. Similarly, the court found no violation of the rule of priority because "no one can have a protectible interest in the unreasonable use of water [citation] and when the rule of priority clashes with the rule against unreasonable use of water, the latter must prevail."[248]

Comment: The court's conclusion that Stanford Vina had no vested right to the use of water that could be infringed or "taken" by the board's order to reduce usage to maintain streamflows for the protection of fish may seem tautological, but the rule of reasonableness was codified in the California Constitution in 1928.[249] Courts have interpreted "reasonableness" depending on the particular facts and circumstances of each case,[250] and what is reasonable in one circumstance may be waste in another.[251] However, courts have consistently upheld the state's authority to enact legislation regulating the use of water for "reasonable" purposes, and to determine what is reasonable and what is not, subject to factual analysis.[252] With the possibility of competing interpretations of "reasonableness" likely to increase as demand expands and supply contracts, this decision can be seen as a confirmation of the state's mediating role.

Endnotes

1 The Top Ten cases were selected with invaluable input from other real property law practitioners, and in particular, the author would like to thank Karl E. Geier, shareholder emeritus with Miller Starr Regalia and Editor-in-Chief of Miller & Starr, California Real Estate, 4th, and Basil ("Bill") Shiber, a shareholder with Miller Starr Regalia and contributing author of several chapters of Miller & Starr, California Real Estate, 4th, for their contributions to this article.

2 *Protecting Our Water & Envtl. Res. v. Cty. of Stanislaus*, 10 Cal. 5th 479 (2020).

3 Pub. Res. Code §§ 21000-21189.3.

4 Stanislaus Cty. Code, ch. 9.36.

5 *See* Cal. Dep't of Water Res. Bulletin No. 74, Well Water Standards.

6 Pub. Res. Code § 21080(b); Cal. Code Regs. tit. 14, § 15268(a) (CEQA Guidelines).

7 CEQA Guidelines, § 15357.

8 CEQA Guidelines, § 15002(i)(1).

9 *Protecting Our Water & Envtl. Res.*, 10 Cal. 5th at 493 (citing Cal. Code Regs. tit. 14, § 15357).

10 *Id.*

11 *See* CEQA Guidelines, §§ 15002(i), 15357, 15369; *Friends of Juana Briones House v. City of Palo Alto*, 190 Cal. App. 4th 286, 302 (2010). The court did not apply the functional test here because this case did not involve the status of any individual permit.

12 *Protecting Our Water & Envtl. Res.*, 10 Cal. 5th at 496.

13 *Id.*

14 *Id.*

15 *Id.* at 498.

16 *Yamaha Corp of America v. State Bd. of Equalization*, 19 Cal.4th 1, 12 (1998).

17 *Protecting Our Water & Envtl. Res.*, 10 Cal.5th at 499 (citing *Yamaha Corp of America v. State Bd. of Equalization*, 19 Cal.4th at 7).

18 *Sierra Club v. Cty. of Sonoma*, 11 Cal. App. 5th 11 (2017) (relevant question is not whether regulations grant discretion in abstract, but whether regulations relevant to specific permit at issue conferred meaningful discretion).

19 *Protecting Our Water & Envtl. Res.*, 10 Cal.5th at 500.

20 *Sierra Club*, 11 Cal. App. 5th at 25.

21 See *McCorkle Eastside Neighborhood Grp. v. City of St. Helena*, 31 Cal. App. 5th 80, 94 (2018) (local agency's power to conduct design review did not make a project discretionary because the agency lacked any discretion to address environmental effects during that review).

22 *Constellation-F, LLC v. World Trading 23, Inc.*, 45 Cal. App. 5th 22 (2020).

23 *Vucinich v. Gordon*, 51 Cal. App. 2d 434, 435 (1942).

24 *Constellation-F, LLC*, 45 Cal. App. 5th at 26.

25 *Id.* at 27.

26 *Vucinich*, 51 Cal. App. 2d at 437.

27 Former Civ. Code § 1671.

28 *Constellation-F, LLC*, 45 Cal. App. 5th at 27.

29 *See Garrett v. Coast & Southern Fed. Sav. & Loan Ass'n*, 9 Cal.3d 731, 734 (1973) (punitive charges for late payments on consumer loan installments constitute a form of coercion).

30 *Blank v. Borden*, 11 Cal. 3d 963, 971 (1974).

31 *Constellation-F, LLC*, 45 Cal. App. 5th at 28.
32 *See, e.g., United States v. Aluminum Co. of America*, 148 F.2d 416, 424-426 (2d Cir. 1945).
33 *Vucinich*, 51 Cal. App. 2d at 438; *see also Jade Fashion & Co., Inc. v. Harkham Indus., Inc.*, 229 Cal. App. 4th 635, 649-651 (2014).
34 *Ridgley v. Topa Thrift & Loan Ass'n*, 17 Cal. 4th 970 (1998).
35 *Garrett*, 9 Cal. 3d 731.
36 *Constellation-F, LLC*, 45 Cal. App. 5th at 32.
37 *Id.*
38 *Graylee v. Castro*, 52 Cal. App. 5th 1107 (2020).
39 *Id.* at 1111.
40 *Id.* at 1113.
41 *Id.*
42 *Timney v. Lin*, 106 Cal. App. 4th 1121, 1127 (2003); *Vitatech Int'l, Inc. v. Sporn*, 16 Cal. App. 5th 796, 807 (2017) ("a court cannot validly enter a judgment or order which is void even if the parties agree to it").
43 *Graylee*, 52 Cal. App. 5th at 1114 (quoting Civ. Code, § 1671(b)).
44 *Purcell v. Schweitzer*, 224 Cal. App. 4th 969, 974 (2014).
45 *Vitatech Int'l, Inc.*, 16 Cal. App. 5th at 810.
46 *See Greentree Fin. Grp., Inc. v. Execute Sports, Inc.*, 163 Cal. App. 4th 495 (2008); *Jade Fashion & Co., Inc.*, 229 Cal. App. 4th 635; *Vitatech Int'l., Inc.*, 16 Cal. App. 5th 796.
47 *See, e.g., Constellation-F, LLC*, 45 Cal. App. 5th 22; *Red & White Distribution, LLC v. Osteroid Enters., LLC*, 38 Cal. App. 5th 582 (2d Dist. 2019); *Vitatech Int'l, Inc.*, 16 Cal. App. 5th 796.
48 *Honchariw v. Cty. of Stanislaus*, 51 Cal. App. 5th 243 (2020).
49 *Id.* at 255 (quoting Gov't Code § 66499.37).
50 *Id.* at 255.
51 *Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185, 1191(2013) ("[G]enerally, a limitations period runs from the moment a claim accrues, which is the occurrence of the last element of cause of action").
52 Gov't Code § 66499.37.
53 *Weiss v. People ex rel. Dep't of Transp.*, 9 Cal. 5th 840 (2020).
54 *Weiss v. People ex rel. Dep't of Transp.*, 20 Cal. App. 5th 1156 (2018).
55 *Dina v. People ex rel. Dept. of Transp.*, 151 Cal. App. 4th 1029 (2007).
56 *Weiss*, 9 Cal. 5th at 1160.
57 *San Diego Gas & Electric Co. v. Superior Court*, 13 Cal. 4th 893, 939 (1996).
58 *Weiss*, 9 Cal. 5th at 1161.
59 *See Prop. Reserve, Inc. v. Superior Court*, 1 Cal. 5th 151, 189-190 (2016).
60 *San Diego Gas & Elec. Co.*, 13 Cal. 4th at 939-40.
61 *Weiss*, 9 Cal. 5th at 1162 (citing, e.g., CLRC Valuation Recommendations at p. 571).
62 *See In re Cook*, 7 Cal. 5th 439, 459 (2019).
63 *Jameson v. Desta*, 5 Cal. 5th 594, 612 (2018).
64 *Weiss*, 9 Cal. 5th at 1163-64.
65 *Chhour v. Cmty. Redevelopment Agency*, 46 Cal. App. 4th 273 (1996).
66 *See Regency Outdoor Advertising, Inc. v. City of L.A.*, 39 Cal. 4th 507, 529 (2006).
67 *Weiss*, 9 Cal. 5th at 1167.
68 *Id.*
69 *Id.*
70 *Id.* at 1170 (quoting *Elkins v. Superior Court*, 41 Cal. 4th 1337, 1353 (2007)).
71 *Prang v. L.A. Cty. Assessment Appeals Bd. No. 2*, 54 Cal. App. 5th 1 (2020).
72 The form required to be filed by acquiring legal entities for compliance with Revenue and Taxation Code section 480.1.
73 *Prang*, 54 Cal. App. 5th at 10.
74 *Id.*
75 *Id.*
76 *Id.* at 11.
77 *Id.* at 11.
78 Rev. & Tax. Code § 532(b)(3) ("where property has escaped taxation, in whole or in part, or has been underassessed, following a change in ownership or change in control and … a change in ownership statement, as required by Section 480.1 or 480.2 was not filed with respect to the event giving rise to the escape assessment or underassessment, an escape assessment shall be made for each year in which the property escaped taxation or was underassessed").
79 Cal. Const., art. XIII A, § 2(a); Rev. & Tax. Code § 110.1; *926 North Ardmore Ave. LLC v. Cty. of L.A.*, 3 Cal. 5th 319, 326 (2017).
80 *See, e.g.,* Rev. & Tax. Code § 64.
81 *Id.* § 51.5(b), (c); *Montgomery Ward & Co. v. Cty. of Santa Clara*, 47 Cal. App. 4th 1122, 1130 (1996).
82 *Sunrise Retirement Villa v. Dear*, 58 Cal. App. 4th 948, 957 (1997).
83 *Prang*, 54 Cal. App. 5th at 15.
84 *See Stockton Teachers Ass'n CTA/NEA v. Stockton Unified School Dist.*, 204 Cal. App. 4th 446, 462 (2012).

85 *Title Ins. & Tr. Co. v. Cty. of Riverside*, 48 Cal. 3d 84, 95-96 (1989).
86 *Prang*, 54 Cal. App. 5th at 21.
87 *Dreyer's Grand Ice Cream, Inc. v. Cty. of Alameda*, 178 Cal. App. 3d 1174 (1986).
88 *Magic Kitchen LLC v. Good Things Int'l, Ltd.*, 153 Cal. App. 4th 1144, 1165 (2007).
89 *Prang*, 54 Cal. App. 5th at 18 ("the Assessor's delay in levying the escape assessments was a direct result of Downey SPE's own failure to timely file an informationally sufficient document with the state agency having the expertise to evaluate that information").
90 *Id.* at 16.
91 *731 Mkt. St. Owner, LLC v. City & Cty. of S.F.*, 50 Cal. App. 5th 937 (2020).
92 Rev. & Tax. Code § 11911(a).
93 S.F. Bus. & Tax Regulations Code art. 12-C, §§ 1101-1118.
94 *Thrifty Corp. v. Cty. of L.A.*, 210 Cal. App. 3d 881 (1989).
95 *Id.* at 885.
96 *McDonald's Corp v. Bd. of Supervisors*, 63 Cal. App. 4th 612 (1998).
97 *Pac. Southwest Realty Co. v. Cty. of L.A.*, 1 Cal. 4th 155, 168 (1991).
98 *See id.*
99 *Ruiz v. Cty. of San Diego*, 47 Cal. App. 5th 504 (2020).
100 *Id.* at 511.
101 *Id.* at 513.
102 *Skoumbas v. City of Orinda*, 165 Cal. App. 4th 783 (2008).
103 *Baldwin v. City of L.A.*, 70 Cal. App. 4th 819, 837 (1999).
104 *Locklin v. City of Lafayette*, 7 Cal. 4th 327 (1994).
105 *Id.* at 370.
106 *Ruiz v. Cty. of San Diego*, 47 Cal. App. 5th at 515.
107 *DiMartino v. City of Orinda*, 80 Cal. App. 4th 329 (2000).
108 *Id.* at 343. *See also Ullery v. Cty. of Contra Costa*, 202 Cal. App. 3d 562, 568-570 (1988) (while public entity's use of private land for public purpose over time may constitute implied acceptance of offer of dedication, public entity must take affirmative steps evidencing dominion or control over the property, such as maintenance and repair work).
109 *Ruiz*, 47 Cal. App. 5th at 519.
110 *Skoumbas*, 165 Cal. App. 4th 783.
111 Cal. Const. art. I, § 19.
112 *Ruiz*, 47 Cal. App. 5th at 526.
113 *Locklin*, 7 Cal. 4th at 337.
114 *Skoumbas*, 165 Cal. App. 4th at 787.
115 *Ruiz*, 47 Cal. App. 5th at 527.
116 *See Locklin*, 7 Cal. 4th at 339.
117 *Ruiz*, 47 Cal. App. 5th at 518.
118 *See Skoumbas*, 165 Cal. App. 4th at 795 (a pipe placed in a natural watercourse is considered a natural watercourse).
119 *Pakdel v. City & Cty. of S.F.*, 952 F.3d 1157 (9th Cir. 2020).
120 *Knick v. Township of Scott*, __U.S.___, 139 S. Ct. 2162 (2019).
121 *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985).
122 S.F. Subdiv. Code § 1396.4.
123 *Id.* § 1396.4(g)(1).
124 *Adam Bros. Farming, Inc. v. Cty. of Santa Barbara*, 604 F.3d 1142, 1147 (9th Cir. 2010).
125 *S. Pac. Transp. Co. v. City of L.A.*, 922 F.2d 498, 503 (9th Cir. 1990).
126 See S.F. Subdiv. Code § 1396.4(h).
127 *Pakdel*, 952 F.3d at 1166.
128 *Id.* at 1167.
129 *Id.* (citing *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 193).
130 *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 193.
131 *Pakdel*, 952 F.3d at 1172.
132 *Id.*
133 *See Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 190 (rejecting the landowner's position that it could satisfy the finality requirement by "request[ing] variances from the Commission ... after the Commission approved the proposed plat").
134 *Pakdel*, 952 F.3d at 1168. Note that a petition for rehearing en banc was denied in October 2020 (977 F.3d 928 (9th Cir 2020), and plaintiffs do not appear to have sought certiorari with the Supreme Court).
135 *Bridge Aina Lea, LLC v. State of Haw. Land Use Comm'n*, 950 F.3d 610 (9th Cir. 2020).
136 *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).
137 *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978).
138 *Lucas*, 505 U.S. 1003.
139 *Penn Cent. Transp. Co.*, 438 U.S. 104.
140 *Esplanade Props. LLC v. City of Seattle*, 307 F.3d 978, 984 (9th Cir. 2002) (quoting *Lucas*, 505 U.S. at 1027).
141 *Bridge Aina Lea, LLC*, 950 F.3d at 626.
142 *Id.* at 628 (citing *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1347 (Fed. Cir. 2004) (92 percent loss of value "manifestly insufficient" under *Lucas*).
143 *Palazzolo v. R.I.*, 533 U.S. 606, 617 (2001).
144 *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002).

145 *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (en banc).

146 *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1345 (Fed. Cir. 2018).

147 *Bridge Aina Lea, LLC*, 950 F.3d at 635.

148 *Cty. of Maui, Haw. v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020).

149 33 U.S.C. §§ 1251-1388.

150 *Id.* at 1469 (quoting *Cty. of Maui, Haw. v. Haw. Wildlife Fund*, 24 F. Supp. 3d 980, 998 (Haw. 2014)).

151 *Cty. of Maui, Haw. v. Haw. Wildlife Fund*, 886 F.3d 737, 747 (9th Cir. 2018).

152 *Id.* at 749.

153 *Cty. of Maui, Haw.*, 140 S. Ct. at 1468.

154 *Id.* at 1469.

155 *Id.* at 1470.

156 *Id.* at 1471.

157 *Id.* (citing S. Rep. No. 92–414, at 73 (1971)).

158 *See McClellan Ecological Seepage Situation (MESS) v. Cheney*, 763 F. Supp. 431, 437 (E.D. Cal. 1989).

159 *County of Maui, Haw.*, 140 S. Ct. at 1473 (comparing *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202-204 (1976)).

160 *Id.* at 1470.

161 *Id.* at 1473.

162 84 Fed. Reg. 16810, 16811.

163 *County of Maui, Haw.*, 140 S. Ct. at 1474.

164 *Id.*

165 *Id.* at 1476.

166 *Id.*

167 *Id.*

168 *Rapanos v. United States*, 547 U.S. 715 (2006).

169 Id. at 743.

170 *Cty. of Maui, Haw.*, 140 S. Ct. at 1483.

171 *See* 33 U.S.C. §§ 1285(j), 1314(f), 1329(i), 1239(b)(l), (h).

172 *Baker Botts L. L. P. v. ASARCO LLC*, 576 U.S. 121, 135 (2015).

173 *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 508 (9th Cir. 2013).

174 *County of Maui, Haw.*, 886 F.3d at 745.

175 *Fabian v. Renovate America, Inc.*, 42 Cal. App. 5th 1062 (4th Dist. 2019).

176 Civ. Code §§ 1750-1785.

177 Bus. & Prof. Code § 17200.

178 Civ. Code § 1632.

179 *Fabian*, 42 Cal. App. 5th at 1066.

180 *Ruiz v. Moss Bros. Auto Grp., Inc.*, 232 Cal. App. 4th 836, 846 (2014).

181 *Newton v. Am. Debt Servs.*, 854 F. Supp. 2d 712, 731 (N.D. Cal. 2012).

182 *Fabian*, 42 Cal. App. 5th at 1068 (citing 15 U.S.C. §§ 7001-7031).

183 *Id.* at 1069.

184 *Ruiz*, 232 Cal. App. 4th 836.

185 *Id.* at 839, 843.

186 *Id.* at 844.

187 *Fabian*, 42 Cal. App. 5th at 1069-70.

188 *Id.* at 1070.

189 *Id.*

190 *Moore v. Teed*, 48 Cal. App. 5th 280 (2020).

191 *Id.* at 283.

192 *Id.* at 286.

193 Bus. & Prof. Code § 7160.

194 *Moore v. Teed*, 48 Cal. App. 5th at 287.

195 *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal. 4th 1159, 1176 (2005).

196 *Id.*

197 *Id.* at 1190, n.4 (emphasis added). *See also Alliance Mortg. Co. v. Rothwell*, 10 Cal. 4th 1226, 1240-41 (1995) (broader measure of damages awarded where "the defrauding party stands in a fiduciary relationship with the victim of fraud").

198 *E.g., Fragale v. Faulkner*, 110 Cal. App. 4th 229, 238 (2003); *Strebel v. Brenlar Invs., Inc.*, 135 Cal. App. 4th 740, 744-45 (2006).

199 *E.g., Hensley v. McSweeney*, 90 Cal. App. 4th 1081, 1086 (2001); *Overgaard v. Johnson*, 68 Cal. App. 3d 821, 826-28 (1977).

200 Civ. Code § 3343(a).

201 *Alliance Mortg. Co. v. Rothwell*, 10 Cal. 4th at 1241.

202 *Moore*, 48 Cal. App. 5th at 289.

203 *Fragale*, 110 Cal. App. 4th at 238-39 (quoting 2 Miller & Starr, Cal. Real Est. § 3.33, at 190-91 (3d ed. 2000) (nn. omitted). *See Salahutdin v. Valley of Cal., Inc.*, 24 Cal. App. 4th 555 (1994) (affirming benefit-of-the-bargain damages against a fiduciary in a real estate fraud action).

204 *Moore*, 48 Cal. App. 5th at 290.

205 *Id.* at 295.

206 *See ACCO Engineered Sys., Inc. v. Contractors' State License Bd.*, 30 Cal. App. 5th 80, 88 (2018) (Contractors' state license law is to be broadly construed.).

207 *Moore*, 48 Cal. App. 5th at 296.

208 *Pepitone v. Russo*, 64 Cal. App. 3d 685, 688 (1976).

209 *Alliance Mortg. Co.*, 10 Cal. 4th 1226.

210 *Id.* at 1241.

211 *Gamerberg v. 3000 E. 11th St., LLC*, 44 Cal. App. 5th 424 (2020).

212 *Id.* at 428.

213 *Noronha v. Stewart*, 199 Cal. App. 3d 485 (1988).

214 *Gamerberg*, 44 Cal. App. 5th at 428.

215 *Shoen v. Zacarias*, 33 Cal. App. 5th 1112, 1119 (2019).

216 *Richardson v. Franc*, 233 Cal. App. 4th 744, 758-59 (2015) (license "merely makes lawful an act that otherwise would constitute trespass").

217 *Id.* at 751.

218 *Id.* at 751, 757-58.

219 *Churchill v. Russell*, 148 Cal. 1 (1905).

220 *Id.* at 6. *See Indus. Disposal v. City of East Chi.*, 407 N.E.2d 1203, 1206 (Ind. Ct. App. 1980) (third party without notice "takes the land free of any rights of the licensee").

221 *Barnes v. Hussa*, 136 Cal. App. 4th 1358, 1370 (2006).

222 *See Mesmer v. Uharriet*, 174 Cal. 110, 116 (1916).

223 *See* Civ. Code §§ 1213, 1214.

224 Smith, Neighboring Prop. Owners § 7:2 (Dec. 2019 supp.).

225 *Barnes*, 136 Cal. App. 4th at 1370. *Accord Shoen*, 33 Cal. App. 5th at 1120.

226 *Gamerberg*, 44 Cal. App. 5th at 433 (citing Restatement (Third) of Prop.: Servitudes §§ 1.2(4) ("[a]s used in this Restatement, the term 'easement' includes an irrevocable license to enter and use land in the possession of another"); 7.14 cmt. a ("[i]nstead of drawing a distinction between servitudes based on the way they were created, the rules stated in this section distinguish among them on the basis of the function they serve")).

227 *See* Civ. Code §§ 1213, 1214.

228 *Mesmer*, 174 Cal. at 116. The court also cited cases like *Blackburn v. Lefebvre* 976 So. 2d 482 (Ala. Ct. Civ. App. 2007) and *Tatum v. Dance*, 605 So. 2d 110 (Fla. Dist. Ct. App. 1992), as examples of irrevocable licenses that were binding on subsequent purchasers because they were recorded or other notice was given.

229 *Parkford Owners for a Better Cmty. v. Cty. of Placer*, 54 Cal. App. 5th 714 (2020).

230 *Wilson & Wilson v. City Council of Redwood City*, 191 Cal. App. 4th 1559, 1573 (2011).

231 *Hixon v. Cty. of L.A.*, 38 Cal. App. 3d 370 (1974).

232 *Id.* at 378.

233 *Parkford Owners for a Better Cmty.*, 54 Cal. App. 5th at 725 (citing *Santa Monica Baykeeper v. City of Malibu*, 193 Cal. App. 4th 1538, 1551 (2011)).

234 *Id.*

235 *Stanford Vina Ranch Irrigation Co. v. State of Cal.*, 50 Cal. App. 5th 976 (2020).

236 Water Code § 1058.5(a); S.B. No. 104, 2013-2014 Reg. Sess. § 10.

237 Cal. Code Regs. tit. 23, former § 877(a), (b).

238 *Stanford Vina Ranch Irrigation Co.*, 50 Cal. App. 5th at 992.

239 *Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463 (2014).

240 *Stanford Vina Ranch Irrigation Co.*, 50 Cal. App. 5th at 993.

241 *Santa Barbara Channelkeeper v. City of San Buenaventura*, 19 Cal. App. 5th 1176, 1184 (2018).

242 *People ex rel. State Water Res. Control Bd. v. Forni*, 54 Cal. App. 3d 743, 750 (1976).

243 *Light*, 226 Cal. App. 4th at 1479.

244 *Id.* at 1484-85.

245 *Stanford Vina Ranch Irrigation Co.*, 50 Cal. App. 5th at 1001.

246 *Id.* at 1003.

247 *Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132, 143-144 (1967).

248 *El Dorado Irrigation Dist. v. State Water Resources Control Bd.*, 142 Cal. App. 4th 937, 965-966 (2006).

249 Cal. Const. art. 10, § 2.

250 *See Joslin*, 67 Cal. 2d at 138.

251 *See Tulare Dist. v. Lindsay-Strathmore Dist.*, 3 Cal. 2d 489, 567 (1935).

252 See, e.g., *People ex rel. State Water Res. Control Bd.*, 54 Cal. App. 3d 743; *Joslin*, 67 Cal. 2d at 138-39; *Light*, 226 Cal. App. 4th at 1483.

2020 Legislative Highlights

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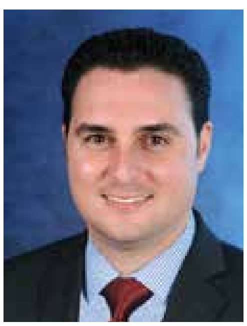

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I. INTRODUCTION

When the 2020 session of the California State Legislature opened on January 6, 2020, the Democratic Party held a veritable governmental "trifecta" with veto-proof supermajorities in the California State Senate and State Assembly and with Governor Gavin Newsom occupying the governor's office. With this one-party hegemony in place, the stage was set for the Legislature to undertake major progressive actions to address California's most chronic political problems, including the affordable housing shortage, homelessness, and the increasing poverty rate. Then the COVID-19 pandemic overwhelmed the State, resulting in a suspension of the legislative session from March 16, 2020 until May 4, 2020. One effect of this crisis was to refocus the Legislature's attention away from the traditional progressive agenda and onto enacting measures intended to ameliorate the crippling effects of the pandemic-induced economic shutdown and to counteract the spread of COVID-19. Consequently, when the 2020 session ended on August 31, 2020, several progressive bills that had been considered high priority at the start of the session remained unfinished. Affordable housing is one example of this refocusing with only a few housing bills making it past the finish line while the Legislature focused instead on the pending eviction crisis by enacting the COVID-19 Tenant Relief Act of 2020 (Assembly Bill (AB) 3088), which is reviewed in Section VIII Landlord/Tenant. Despite the change in focus, some housing legislation did get enacted that may be of assistance to residential developers, including an increase in density bonuses for affordable projects (AB 2345), some streamlining of approval processes (AB 831 and AB 168), and an extension of certain housing entitlements (AB 1561), all of which are reviewed in Sections IV Density Bonus, V Environment, and VII Housing. One crisis that did compete with COVID-19 for attention was the wildfire crisis. The 2020 wildfire season set a new record as the largest in California's modern history. The Legislature's responses intended to address this alarming development are reviewed in Sections IX Property Insurance and XII Wildfires. Also of major significance are the changes in property tax exemptions and the homestead exemption reviewed in Sections X Property Taxes and VI Homestead.

Overall, the 2020 legislative session will serve as a reminder of how crisis events can re-shape the legislative landscape and dominate existing political agendas. This legislative review selectively focuses on laws enacted in 2020 that the authors believe are the most significant for real property law practitioners. It does not, therefore, cover every real-property-related law enacted in 2020. In particular, this review does not cover new laws that affect only a specific locality or that are primarily revenue raising or funding measures. This article also provides only summary references to the text of the bills selected for comment. Practitioners should always review the actual chaptered versions, including specific references to the statutory provisions, rather than rely solely on the summaries in this article. The Legislature's website provides copies of these bills at http://leginfo.legislature.ca.gov under "Bill Information" for Session Year 2019-2020. Unless otherwise noted, all laws discussed became operative on January 1, 2021.

II. CONTRACTS

A. Assembly Bill 3254 (Limón): Contracts; Translations

Amends Civil Code Section 1632.

AB 3254 modifies the existing requirement that a person engaged in a trade or business who negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, orally or in writing, shall in the course of entering into specified consumer contracts, deliver to the other party to the contract or agreement before the execution thereof, a translation of the contract or agreement in the language in which the contract or agreement was negotiated. AB 3254 adds to this requirement the delivery of the translation not only to the parties to the contract, but also to any other person who will be signing the contract or agreement such as a co-signer.

See also AB 2471 (Maienschein) discussed in Section XI.B below regarding rescission of contracts by senior citizens.

III. DEEDS

A. Senate Bill 1305 (Roth): Revocable Transfer on Death Deeds

Amends Probate Code Section 5600.

In 2015, the Legislature enacted AB 139 (Gatto, ch. 293), which established a five-year pilot program that allowed owners of real property, until January 1, 2021, to transfer their property upon death, outside the normal probate procedure, through a written instrument known as a "revocable transfer on death deed." Because of concerns about possible misuse of this transfer vehicle, the Legislature directed the California Law Revision Commission (CLRC) to study the consequences of this pilot program and to report back to the Legislature by January 1, 2020. The report was issued in November 2019. However, the COVID-19 pandemic interrupted the Legislature's focus on this issue. The purpose of SB 1305 is to provide the Legislature with more time to consider the issue by extending the January 1, 2021 sunset for one additional year, until January 1, 2022.

IV. DENSITY BONUS

A. Assembly Bill 2345 (Gonzalez): Planning and Zoning; Density Bonuses; Annual Report; Affordable Housing

Amends Government Code Sections 65400 and 65915.

The density bonus law is a well-established program that encourages otherwise market rate developers to reserve some housing units for low-income occupants, in exchange for increased density and other development incentives and concessions. While the goal of the density bonus concept is to increase affordable housing stock, the program has come under criticism during the housing crisis for having limited impacts on actual affordable housing development. The criticism centers on the fact that a developer need only develop a relatively small amount of affordable units to receive the density bonus. Prior law only required 10% lower income units or 5% very low income units to qualify, with some enhancements to get up to a maximum 35% density. Thus, developers can create projects that are nearly all market rate while receiving higher than normal density.

The Planning and Zoning Law requires the planning agency of a city or county to provide by April 1 of each year an annual report to, among other entities, the Department of Housing and Community Development that includes, among other specified information, the number of net new units of housing that have been issued a completed entitlement, a building permit, or a certificate of occupancy, thus far in the housing element cycle, as provided. This bill would require that the annual report include specified information regarding density bonuses granted in accordance with specified law.

AB 2345 establishes an enhanced density bonus program that follows a model that the City of San Diego previously implemented. The City of San Diego noted a significant increase in the density bonus applications that it received after implementing the program. The primary change is that developers will be entitled to up to a 50% density bonus based on the number and type of income-restricted units. For example, 15% very low income, 24% low income, or 44% moderate income units can qualify for a maximum density bonus.

AB 2345 builds on the concept from last year's AB 1763 (Chiu), which established an 80% density bonus for 100%

affordable developments. Whereas AB 1763 excluded the density bonus units from the 100% affordability calculus, AB 2345 now includes all units (except a management unit) within the 100% affordability restrictions.

The American Planning Association opposed the bill on the grounds that the bill did not require enough affordable units relative to the increase in allowable density, and the California State Association of Counties also registered its opposition. The League of California Cities maintained a "watch" position concerning the bill but no cities lodged a formal opposition. Given that AB 2345 adopts a program that was initially developed and successfully "test-run" by a city, perhaps the lack of opposition is unsurprising.

V. ENVIRONMENT

A. Assembly Bill 168 (Aguiar-Curry): Planning and Zoning; Annual Report; Housing Development; Streamlined Approvals

Amends Government Code Sections 65400, 65913.4, and 65941.1.

AB 168 preserves California Native American tribes' rights to consult on development projects even where the project is subject to a ministerial streamlined approval process. AB 168 is an effort to reconcile two recently adopted but potentially conflicting policies. In 2014, the Legislature adopted AB 52, which revised CEQA to acknowledge that an adverse change to a tribal cultural resource may result in significant environmental effects. AB 52 allows any California Native American tribe that is traditionally and culturally affiliated with the geographic area of a project to request a consultation that must occur prior to the release of the environmental impact report or (mitigated) negative declaration.

Three years later, in 2017, the Legislature adopted SB 35, which mandates a ministerial streamlined approval process for certain multi-family development projects. Because the SB 35 process is ministerial, projects that are subject to streamlining under this statute are not subject to CEQA, and there is no tribal consultation process.

AB 168 bridges this gap. The bill requires local government agencies to notify California Native American tribes that are traditionally and culturally affiliated with the area of any SB 35 streamlining applications. The California Native American tribe may then request a scoping consultation related to the project's impact on tribal cultural resources. The California Native American tribe, the developer, and the local agency can then agree that the project would not affect tribal cultural resources or can agree to mitigation measures. If the parties cannot reach an agreement, then the project will not be subject to streamlined approval and will instead require CEQA review.

B. Senate Bill 288 (Wiener): California Environmental Quality Act; Exemptions; Transportation-Related Projects

Amends Public Resources Code Section 21080.20. Adds and repeals Public Resources Code Section 21080.25.

SB 288 creates a statutory exemption from CEQA for several categories of public transportation projects. The bill's goal is to streamline the post-pandemic creation of environmentally-friendly transit projects by, ironically, eliminating environmental review of such projects. In broad terms, the exemptions apply to pedestrian and bicycle facilities, wayfinding for transit riders, transit prioritization projects, conversions to bus-only lanes on highways, new bus or light rail services, refueling infrastructure for zero-emission buses, and projects to reduce minimum parking requirements.

In practice, the impact of SB 288 on environmental review may be relatively minor. The Senate's analysis estimates that approximately 90% of such projects are delivered through one of the "categorical exemptions" listed under CEQA. This makes sense, given that these types of projects tend to reduce carbon emissions or congestion or both. However, categorical exemptions are subject to exceptions, and therefore still contain some uncertainty as to whether environmental review is needed. Without certainty, disputes over the need for environmental review lead to litigation that costs both time and money. The statutory exemptions provide more certainty. The Senate's analysis notes that exempting projects from CEQA can expedite project delivery by anywhere from six months to four years.

The exemptions only apply to projects being carried out by public agencies, and the bill contains additional requirements for projects that are over $100,000,000 in scope.

VI. HOMESTEAD

A. Assembly Bill 1885 (Committee on Budget): Debtor Exemptions; Homestead Exemption

Amends Code of Civil Procedure Section 704.730.

AB 885 modifies prior law regarding the homestead exemption that specifies a portion of equity in a homestead, as defined, is exempt from execution to satisfy a judgment debt. AB 1885 eliminates the prior existing tiered exemptions that set the amount of the homestead exemption at either $75,000, $100,000, or $175,000, depending on certain characteristics of the homestead's residents, and instead establishes a value-based homestead exemption that is the greater of $300,000 or the countywide median sale price of a single-family home in the calendar year prior to the calendar year in which the judgment debtor claims the exemption, not to exceed $600,000. These amounts adjust annually for inflation. AB 1885 not only greatly increases the minimum amount homeowners can use to protect their primary residence, but also provides greater relief for residents of higher priced counties like those in the San Francisco Bay or Los Angeles areas.

B. Assembly Bill 2463 (Wicks): Enforcement of Money Judgments; Execution; Homestead

Amends Code of Civil Procedure Sections 703.150 and 704.760. Adds Code of Civil Procedure Section 699.730.

AB 2463 is intended to prevent creditors from transforming common unsecured debts into instruments to force the sale of debtors' homes, which is a highly sensitive issue given California's ongoing housing crisis and the historic amount of unpaid consumer debt accruing as a result of the current COVID-19 epidemic. In particular, AB 2463 prohibits a court-ordered sale of a judgment debtor's principal place of residence in order to satisfy a judgment lien if the underlying judgment was based on a consumer debt, other than a debt secured by the debtor's principal place of residence when it was incurred. It defines "consumer debt" as debt incurred by an individual primarily for personal, family, or household purposes and excludes from the definition of "consumer debt" any obligations arising out of (a) wages or employment benefits; (b) taxes; (c) child support; (d) spousal support; (e) fines and fees owed to governmental units; (f) tort judgments; and (g) debts greater than $75,000, both when incurred and at the time the sale of the house is sought, other than student loans, that are currently owed to a financial institution. The $75,000 threshold is subject to adjustment for inflation by the Judicial Council.

Finally, AB 2463 requires a judgment creditor, when applying to a court for sale of a judgment debtor's dwelling, to swear under oath either that the underlying judgment was not for a consumer debt, or if for a consumer debt, which exclusion is applicable.

VII. HOUSING

A. Assembly Bill 725 (Wicks): General Plans; Housing Element; Moderate-Income and Above Moderate-Income Housing; Suburban and Metropolitan Jurisdictions

Amends Government Code Section 65583.2.

Each city and county is required to prepare a Housing Element within its General Plan that identifies sites to meet its share of the housing need for its region. Housing Elements must plan for sites at various income levels based on the need at that level. AB 725 goes a step beyond simply identifying sites meeting housing needs; it requires that a certain percentage of those sites be zoned for multi-family housing. Beginning January 1, 2022, metropolitan cities (not counties) will have to zone at least 25% of their moderate and above moderate housing to sites with zoning that allows at least four units of housing. For moderate, it must be zoned at less than 100 units per acre.

The intent of AB 725 is to encourage more development in the "missing middle." That is, development that is not single family residential or mid- or high-rise construction. The idea is that most housing is too expensive to develop; single family residential is a supposedly inefficient use of land, while mid-rise buildings have a higher cost to construct. The goal is to encourage more fourplexes, garden apartments, town homes, and similar housing stock with similar construction costs to single family homes but with more units per square foot.

Even though several cities will not be subject to AB 725's requirements, the bill seems to be a one-size-fits-all approach that does not necessarily take into account local conditions or housing markets. It will only apply to cities with populations above 25,000 that are in a metropolitan statistical area with a population of 2,000,000 or greater. But this still encompasses many cities that might not be suitable for, or have demand for, these types of housing.

B. Assembly Bill 831 (Grayson): Planning and Zoning; Housing; Development Application Modifications

Amends Government Code Section 65913.4.

AB 831 is clean-up legislation for Senator Wiener's SB 35, adopted in 2017. SB 35 provides a ministerial streamlined approval process for certain multi-family housing and mixed-use projects. Because SB 35 provides a ministerial process, local jurisdictions do not have discretion to deny such projects. As developers have begun to apply for project approvals through cities' SB 35 streamlining procedures, various questions and problems with the procedures have begun to arise. AB 831 attempts to clarify three of these issues.

First, the bill essentially provides developers with a vested right to develop in accordance with design standards in place at the time of an initial application, even if the project changes or if the design standards are modified after the time of initial application. Under the general rule that the Supreme Court established in *Avco Community Developers, Inc. v. South Coast Regional Commission*,[1] vested rights do not accrue until a developer has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, and then the developer acquires a vested right to complete construction in accordance with the terms of the permit. However, under AB 831, a developer may continue to apply outdated design standards so long as the project does not increase the square footage or number of units by more than 15% (or 5% if there are specific adverse health or safety impacts).

Second, AB 831 clarifies the requirement that two-thirds of a mixed-use project be for residential use to qualify for streamlining. This clarification is in response to a court case that found that streamlining only applies if the *zoning* for the site designates the site as two-thirds residential. Per AB 831, streamlining applies if the *actual project* is two-thirds residential.

Third, SB 35 streamlining does not exempt developers from constructing off-site improvements needed to support a housing or mixed-use project. In response to allegations that local governments delay approvals of off-site improvements to delay SB 35 projects, AB 831 requires that local governments must approve off-site improvements in a manner that does not inhibit, chill, or preclude the project.

The intent of SB 35 is to circumvent local discretionary land use authority and environmental review, potentially to the detriment of communities. That SB 35 would lead to conflicts between developers and local communities is predictable. It will be a shame if AB 831 simply leads to more litigation over design standards and off-site improvements.

C. Assembly Bill 1561 (Garcia): Planning and Zoning; Housing Element and Entitlement Extensions

Amends Government Code Section 65583. Adds Government Code Section 65914.5.

AB 1561 extends for eighteen months any housing entitlement that was in effect prior to the start of the pandemic (*i.e.*, March 4, 2020) and otherwise set to expire before the end of 2021. The bill is fairly comprehensive and applies to any permit or other entitlement related to a housing development project issued by a state agency or issued by a local agency and subject to the Permit Streamlining Act. The bill does not apply where a local agency has, on its own initiative, extended housing entitlements by at least eighteen months. Unsurprisingly, no one submitted an argument in opposition to AB 1561, and the bill passed unanimously.

D. Assembly Bill 1851 (Wicks): Religious Institution-Affiliated Housing Development Projects; Parking Requirements

Adds Government Code Section 65913.6.

AB 1851 restricts local land use control to enable the construction of housing on property owned by religious institutions. The bill prohibits local jurisdictions from denying housing projects solely on the basis that the project would eliminate religious-use parking spaces.

The idea behind AB 1851 is that religious institutions may be required to have a significant number of parking spaces, but those spaces remain empty most of the week when worship services are not occurring. Religious institutions may instead redevelop parking areas for housing, provided that the total reduction of parking at the place of worship does not exceed 50%. The remaining parking, however, must count toward the parking requirements of the housing development as long as it is sufficient to provide one parking space per unit (except if located within a half-mile walking distance of public transit, in which case the one-space-per-unit rule does not apply and the remaining religious use parking spaces may apply to the housing development's parking requirements). AB 1851 only concerns parking requirements for such projects and does not otherwise require approval of housing on religious sites.

While it makes sense to repurpose seldom-used parking spaces in the abstract, AB 1851 does not address where parishioners (or new housing residents) will park when spaces are needed. It does not take a crystal ball to see that this bill is going to lead to disputes between redeveloping churches and their surrounding neighbors. Litigation as to whether AB 1851 can constitutionally provide special development rights based on religious affiliation unfortunately seems inevitable.

E. Assembly Bill 3308 (Gabriel): School Districts; Employee Housing

Amends Health and Safety Code Sections 53571, 53572, and 53574.

AB 3308 presents an interesting policy question: should government-subsidized housing be constructed for the benefit of distinct and limited groups? In this particular case, AB 3308 allows for government-subsidized housing to be restricted specifically for teachers and other school employees. While this targets housing support to a limited group—and the housing crisis affects many who are not teachers or school district employees—it also leverages opportunities for school districts to construct housing to support their members.

More specifically, AB 3308 enables the use of federal low-income housing tax credits (or "LIHTC") to finance housing that is restricted to school district employees. In general, the LIHTC program requires that housing units constructed with LIHTC financing be made available to the general public, subject only to income restrictions. But the federal program allows for states to establish policies or programs to support housing for specified groups. Thus, by enacting AB 3308, school districts can partner with developers to construct housing for teachers and other school employees that is financed by the sale of low-income housing tax credits.

From a housing policy standpoint, the establishment of a state program supporting housing for teachers potentially creates opportunities to leverage federal funds with local programs designed to address particular housing needs. Even though such housing is not available to the general public, by bringing in new partners in housing creation, the program may result in the construction of more affordable housing.

F. Senate Bill 1030 (Committee on Housing): Housing

Amends Government Code Sections 54221, 54230, 65583.2, 65589.5, 65655, 65852.2, and 65941.1. Amends Health and Safety Code Sections 17980.12 and 34120.5. Amends Welfare and Institutions Code Sections 5849.7, 5849.8, and 5849.9.

SB 1030 is essentially a "clean up" bill that makes minor clarifications to the Housing Accountability Act and other housing laws. The most significant clarification is to the definition of when an application is "deemed complete" for purposes of the Housing Accountability Act.

In 2019, the Legislature adopted SB 330, which established a procedure for housing developers to submit a preliminary application for housing projects, containing certain specified information. Upon the preliminary application being "deemed complete," the developer obtained a right to construct the project in accordance with the local rules and standards in place at the time the preliminary application was submitted. SB 330 still requires that the developer then submit a full application. Without using the term "vested right," SB 330 resulted in a massive change in how development rights vest. However, it left open the question as to whether development rights still vest if a developer only submits a full application without ever submitting a preliminary application. SB 1030 indicates that an application is "deemed complete"—and rights to develop therefore vest—upon submission of either a complete preliminary application or full application.

VIII. LANDLORD/TENANT

A. Assembly Bill 2782 (Mark Stone): Mobile Home Parks; Change of Use; Rent Control

Amends Civil Code Section 798.56. Amends and repeals Civil Code Section 798.17. Amends Government Code Sections 65863.7 and 66427.4.

Mobile homes provide a significant source of affordable housing stock in California. The legislative history of AB 2782 indicates that approximately 700,000 Californians live in mobile homes. In most cases, mobile homes are located within mobile home parks, where the mobile home park owns the underlying land and leases spaces to the residents. The residents own the actual mobile homes but must pay rent to the park for the space. As the Assembly's analysis notes, the term "mobile" home is somewhat of a misnomer; units cannot be easily relocated. This scenario essentially puts the mobile homeowners—who are invested in their units—at the mercy of the mobile home park's ability to increase rent or repurpose the land. For this reason, state law protects mobile homeowners by requiring a process for the conversion of the mobile home park and allowing local rent control over mobile home spaces.

In light of the current housing crisis and increase in real estate value, AB 2782 enhances these protections. First, AB 2782 puts additional restrictions on conversions, most notably by imposing a mandatory duty on local governments to deny a conversion of a mobile home park to a different use if the conversion will result in a shortage of affordable housing in the jurisdiction. Given that the affordable housing crisis affects much of the state, the impact of this law could be far-reaching. Additionally, even where a park owner may proceed with a conversion, AB 2782 will require the park owner to compensate mobile homeowners who are unable to relocate their units.

Second, AB 2782 removes an existing exception to mobile home rent control. Under previous law, mobile home parks were exempt from local rent control for leases that are longer than one year, with certain other conditions. Now, long-term leases are also subject to local rent control.

The housing crisis is commonly framed as a need to *create* more affordable housing units. But perhaps equally, if not more important, is the *preservation* of existing housing stock that is currently providing livable units at affordable levels. AB 2782 aims to preserve one such source from market forces that may incentivize the conversion of mobile home parks to less-affordable housing or other uses.

B. Assembly Bill 3088 (Chiu): Tenancy; Rental Payment Default; Mortgage Forbearance; State of Emergency; COVID-19

Amends Civil Code Sections 1946.2, 1947.12, and 1947.13. Amends, repeals, and adds Civil Code Sections 798.56, 1942.5, and 2924.15. Adds Civil Code Title 19 (commencing with Section 3273.01). Adds and repeals Civil Code Section 789.4. Amends, repeals, and adds Code of Civil Procedure Sections 1161 and 1161.2. Adds Code of Civil Procedure Section 1161.2.5. Adds and repeals Code of Civil Procedure Section 116.223. Adds and repeals Code of Civil Procedure Title 3, Chapter 5 (commencing with Section 1179.01).2

AB 3088, known as the COVID-19 Tenant Relief Act of 2020, is the Legislature's moratorium on evictions that are caused by COVID-19-related hardships. AB 3088 provided a temporary moratorium on evictions until January 31, 2021. However, on January 29, 2021, the Governor signed SB 91, which extended the AB 3088 protections until July 1, 2021. The bill prohibits landlords from evicting residential tenants for failure to pay rent between March 1 and August 31, 2020, so long as the tenant provides the landlord with a written declaration of a COVID-19-related hardship. For the period of September 1, 2020 through January 31, 2021 (now July 1, 2021), landlords cannot evict tenants that pay at least 25 percent of the rent due if the tenant submits a written declaration of hardship. Tenants with a household income of at least $100,000 per year, or 130 percent of the median household income, may be asked to submit additional documentation to support their hardship declaration.

Notably, AB 3088 does ***not*** require that landlords forgive any rent that was otherwise due during the applicable period. The moratorium only prevents landlords from filing unlawful detainer actions to recover possession from their tenants. Unpaid rent must eventually be paid. AB 3088 allowed landlords to begin collecting back rent on March 1, 2021; under SB 91, the date is extended to July 1, 2021. However, to avoid evictions, tenants only need to pay back 25% of the back rent due, with the remaining rent not needing to be paid until 2025. AB 3088 and SB 91 allow for landlords to institute actions in small claims court to recover COVID-19-related rental debts starting on August 1, 2021.

SB 91 also appropriates federal funding for a statewide rental assistance program. Of note, the program will enable qualifying households to have their COVID-19-related rental debts paid off, provided that the landlord agrees to forgive 20% of the debt amount. Neither AB 3088 nor SB 91 restrict evictions or affect debts related to commercial tenancies. However, in light of the economic effects of the pandemic, many local agencies may have enacted their own eviction rules related to residential and/or commercial tenancies. AB 3088 and SB 91 do not preempt such local regulations.

C. Assembly Bill 3182 (Ting): Housing; Governing Documents; Rental or Leasing of Separate Interests; Accessory Dwelling Units

Amends Civil Code Section 4740. Adds Civil Code Section 4741. Amends Government Code Section 65852.2.

AB 3182 prohibits common interest developments ("CIDs") from enforcing restrictions that prohibit the rental of units. In 2011, the Legislature enacted SB 150, which prohibited all newly-formed CIDs from including owner-occupancy restrictions. SB 150, however, did not void pre-existing owner-occupancy restrictions. AB 3182 now makes all such restrictions unenforceable. However, AB 3182 does provide an exception allowing 25% or less of the separate interests of a CID to be subject to owner-occupied restrictions. According to the Assembly analysis, this exception is to enable federal housing programs that require owner-occupancy.

Each CID must update its governing documents to be consistent with AB 3182 by the end of 2021.

The bill also makes some changes to laws relating to accessory dwelling units or "ADUs." Most notably, it requires ministerial approval of an application for an ADU *and*—as opposed to "or"—a junior ADU per lot with an existing, or proposed, single-family dwelling. A "junior ADU" is an accessory dwelling that is no more than 500 square feet and within the footprint of a single-family residence. The law previously required that local governments approve ministerial applications for ADUs and junior ADUs within sixty days. AB 3182 makes such applications "deemed approved" if the local government does not act within this timeframe. While these are fairly minor tweaks to the existing law governing ADUs, AB 3182 represents a continued legislative push away from local governmental control over residential density.

D. Assembly Bill 3364 (Committee on Judiciary): Judiciary Omnibus

Among other things, amends Business and Professions Code Sections 21701, 21703, and 21705. Amends, repeals, and adds Business and Professions Code Section 21712.

AB 3364 enacts numerous non-controversial technical changes to several of the California codes as part of the judiciary omnibus bill, including, among other things, the removal of the January 1, 2012 sunset date for the sending of preliminary lien notices by electronic mail under the California Self-Service Storage Facility Act, which specifies remedies and procedures for self-service storage facility owners when occupants are delinquent in paying rent or other charges. In addition, AB 3364 allows a facility owner to demonstrate actual delivery and receipt of documents by transmitting the document to the occupant through an application on an internet website, rather than an application on a personal electronic device, or by the occupant acknowledging receipt by replying to the electronic mail communication. However, this new method for delivery of documents has a sunset date of January 1, 2023.

E. Senate Bill 1157 (Bradford): Tenancy; Credit Reporting; Lower Income Households

Adds and repeals Civil Code Section 1954.06.

SB 1157 requires landlords to offer credit reporting to tenants in assisted housing developments, defined as multi-family residential rental developments that receive assistance from specified federal housing programs. Landlords must offer credit reporting to tenants at the time of lease agreements entered on and after July 1, 2021. For leases that pre-date July 1, 2021, landlords must offer credit reporting by October 2, 2021. The offer must be made annually thereafter. Landlords may impose a $10 monthly charge for the costs of credit reporting but cannot terminate the tenancy for failure to pay the charge.

The bill contains an exemption for small landlords who own assisted housing developments consisting of ten units or less, provided that the landlord only owns one housing development and is not a corporation, a real estate trust, or a limited liability company with a corporate member.

The purpose of the bill is to provide an opportunity to tenants to build a credit history without having to take on debt. The lack of a credit history can shut many people out of potential economic opportunities, who may turn to high-interest options such as credit cards and payday loans. The bill sunsets July 1, 2025.

F. Senate Bill 1190 (Durazo): Tenancy; Termination

Amends Civil Code Section 1946.7.

SB 1190 allows a tenant who is the victim of certain violent crimes to terminate the tenancy without penalty. Existing law allowed for termination of tenancy where the tenant was the victim of certain crimes, to wit: domestic violence, stalking, human trafficking, or abuse of an elder or dependent adult. This bill expands the termination right to also include any crime that caused bodily injury or death; any crime that included the exhibition, drawing, brandishing, or use of a firearm or other deadly weapon or instrument; and any crime that included the use of force or threat of force against the tenant. SB 1190 also expands the right to terminate if such crimes are committed against an immediate family member. The purpose of the law is clear—victims of such crimes may need to promptly relocate to find safety and avoid further violence, as well as to handle the potential emotional trauma. The financial ramifications of breaking a lease may be a barrier to relocating.

While the bill shifts some economic burdens onto landlords, opposition to the bill focused on the documentation aspects. Under the prior law, tenants had to produce a restraining or protective order, a police report, or other specified documentation along with their termination notice to show proof of a right to terminate. SB 1190 changes this rule to allow for "any other form of documentation that reasonably verifies that the crime or act" occurred. Understandably, this could create some challenges for well-intentioned landlords to determine whether documentation is sufficient.

IX. PROPERTY INSURANCE

A. Assembly Bill 2756 (Limón): Residential Property Insurance

Amends Insurance Code Sections 678, 10102, and 10103. Adds Insurance Code Section 10103.6.

AB 2756 is intended to address certain notice problems that have arisen due to changing practices of insurance companies in response to the increasing losses suffered from wildfire claims. As part of this adjustment to the changing wildfire risk in certain areas of the state, some residential property insurers have reduced their fire risk exposure by issuing what is called a difference in conditions policy that does not protect the home against fire damage. This type of policy is actually a wrap-around policy that when paired with a separate fire policy, such as a FAIR Plan policy, gives the homeowner the equivalent coverage provided under the standard comprehensive homeowners' policy. The problem with this approach is that the notice insurance carriers must provide to policyholders when an insurer offers to renew the policy often does not clearly inform the policyholder of the reduction in coverage and the need for a supplemental policy.

Specifically after July 1, 2021, AB 2756 (i) requires an offer of a new policy or renewal of a homeowners' existing insurance policy that does not cover the peril of fire to prominently disclose that fact in a statement on the declarations page of the insurance policy and include information on the California FAIR Plan and the California Home Insurance Finder; (ii) requires the insurer, in the case of eliminating the peril of fire from a policy, to obtain a signed statement from the policyholder acknowledging that fact; (iii) allows up to sixty days for the insurer to obtain the signed acknowledgment if the policyholder does not sign at policy inception; (iv) requires that any reduction or elimination of coverage or limits be accompanied by a specific description of the reduction or elimination; and (v) requires that a notice of nonrenewal include in the notice the "specific" reason for a nonrenewal. The goal of these enhanced notices is to ensure that policyholders in high-risk wildfire areas of the state who are increasingly facing non-renewals and reductions of coverage are clearly made aware of the actions their insurer is taking.

Also, with respect to policies of residential property insurance issued or renewed after July 1, 2021 that provide replacement cost coverage, AB 2756 requires such coverage include additional building code upgrade coverage of no less than 10% of the dwelling coverage policy limits. AB 2756 also includes various other requirements regarding the scope of the building code upgrade coverage, and it requires a policy of residential property insurance that does not provide building code upgrade coverage to include a statement on the policy declarations page that the policy does not include building code upgrade coverage.

B. Assembly Bill 3012 (Wood): Residential Property Insurance

Amends Insurance Code Sections 678, 1063.1, 1063.5, 1063.14, 2051.5, 2060, 10095, and 10103.7.

AB 3012 is companion legislation to AB 2756 and similarly is part of the continuous evaluation by the Legislature of the homeowners' insurance market that has become stressed by the unprecedented number of catastrophic wildfires in recent years. AB 3012 enacts several improvements to the rules governing homeowners' insurance that address both claims and access to insurance issues. Among other things, AB 3012 requires a notice of nonrenewal for a residential property insurance policy expiring on or after July 1, 2021 to be accompanied by a specified statement that includes an explanation of how the California Home Insurance Finder can help a person find a homeowners' insurance policy and information about FAIR Plan policies. In addition, AB 3012 requires the California FAIR Plan Association to develop a "clearinghouse" to help reduce the number of existing FAIR Plan policies and provide the opportunity for admitted insurers to offer homeowners' insurance policies to FAIR Plan policyholders. With respect to insurance coverages, AB 3012 requires additional living expense coverage be provided in specified circumstances and, in the case of a covered loss relating to a state of emergency, on and after July 1, 2020, AB 3012 prohibits a policy that provides coverage for additional living expenses from limiting the policyholder's right to recovery if the insured home is not destroyed but is rendered uninhabitable by a covered peril, subject to the insurer providing a reasonable alternative remedy to cure the habitability problem. Finally, with respect to recovery of damages, AB 3012 requires the measure of damages available to a policyholder to use to rebuild or replace the insured home at another location to be the amount that would have been recoverable had the insured dwelling been rebuilt at its original location, without deduction for the value of land at the new location.

C. Senate Bill 872 (Dodd): Residential Property Insurance; State of Emergency

Amends Insurance Code Sections 2051.5 and 2060. Adds Insurance Code Sections 2061 and 2062.

SB 872 makes various changes to the Insurance Code to address problems that policy owners have encountered in the wake of the recent rash of wildfires. For example, on or after July 1, 2021, SB 872 prohibits a policy that provides coverage for additional living expenses from limiting the policyholder's right to recovery with respect to a covered loss relating to a state of emergency if the insured home is rendered uninhabitable by a covered peril. This clarification was needed for circumstances where the home is not physically destroyed but has been made uninhabitable due to other consequences resulting from the emergency, such as the disabling of the water supply to the home. As an alternative to paying additional living expenses, SB 872 authorizes an insurer to provide a reasonable alternative remedy that addresses the property condition that precludes reasonable habitation of the insured premises. In addition, SB 872 requires additional living expense coverage to be provided for at least two weeks, with additional two-week extensions in the event of a state of emergency and an order of civil authority restricting access to the home. SB 872 also provides for losses related to a declared state of emergency and for which an insured makes a claim on or after January 1, 2021, that the insurer must provide an advance payment for living expenses and to accept an inventory of contents in any reasonable form.

SB 872 also expands the definition of the measure of damages available to a policyholder to use to rebuild or replace the insured home at another location to be the amount that would have been recoverable had the insured dwelling been rebuilt at its original location, without deduction for the value of land at the new location.

Finally, SB 872 requires an insurer to offer a sixty-day grace period for payments of premiums for policies on property located within an area defined in a declared state of emergency for a period of sixty days after the emergency.

X. PROPERTY TAXES

A. Assembly Bill 2013 (Irwin): Property Taxation; New Construction; Damaged or Destroyed Property

Adds Revenue and Taxation Code Section 70.5.

AB 2013 corrects certain property tax inequities under prior law between owners of property substantially damaged or destroyed by a Governor-declared disaster who rebuild onsite and owners who purchase another property by establishing the same comparability definition for replacement property for all owners.

Specifically, AB 2013 adds a new provision to the existing law that allows owners of property substantially damaged or destroyed in a Governor-declared disaster to reconstruct comparable improvements onsite with a return to the former improvement's base year value that allows a more generous comparability definition that uses the same 120% definition used when a victim of a major disaster decides to purchase a replacement property in the same county. Under this definition, reconstructed improvements will be found comparable to the improvement replaced if similar in size, utility, and function and within 120% of value. This gives property owners parity regardless of which path to recovery they choose. AB 2013 applies these provisions to real property damaged or destroyed by misfortune or calamity on or after January 1, 2017.

B. Assembly Bill 872 (Aguiar-Curry): Property Taxation; Change in Ownership; Parent-to-Child Transfer; Stock

Amends Revenue and Taxation Code Section 62, to take effect immediately.

AB 872 is intended to help protect agricultural open space and the dwindling number of family farm homesteads in the state by rectifying an inequity in California's complicated reassessment laws as applied to children living on small family farms after the death of a parent. Specifically, AB 872 adds to the exclusions from the definition of "change in ownership" any parent-to-child transfer of stock in a qualified corporation, as defined, that results in a change in ownership of the qualified property owned by the qualified corporation, provided that the transfer of stock is due to the death of a parent or parents. Of course, to utilize this new exclusion that permits the avoidance of property tax reassessment of the qualified property to its present market value, it is necessary for the parents to have transferred the ownership of their home into a corporation that they created between Proposition 13's roll back value date of March 1, 1975, and Proposition 58's parent-child change in ownership exclusion effective date of November 6, 1986, and exclusively held only by the parents and their children. To qualify, the home and land must also have an assessed value of one million dollars or less and have continuously served as the home of a child of the parents.

C. Proposition 19[3]

Adds California Constitution article XIII A, Sections 2.1, 2.2, and 2.3.

The most significant change in California property tax law was not new legislation, but rather Proposition 19, the Home Protection for Seniors, Severely Disabled, Families, and Victims of Wildfire or Natural Disasters Act which California voters approved on November 3, 2020. Proposition 19 has two primary components. One provides a significant benefit to certain specified taxpayers and the other severely limits a tax exemption enjoyed by taxpayers, some of whom may also be in the benefited group.

The positive component of Proposition 19 is the expansion of the right of eligible California residents to transfer the base year value of their primary residences for property tax purposes to a new primary residence. Prior to Proposition 19 this right was limited to new residences within a county or to a county with reciprocity. Now, beginning on and after April 1, 2021, section 2.1(b) of article XIII A of the California Constitution provides that an owner of a primary residence who is over 55 years of age, severely disabled, or a victim of a wildfire or natural disaster may transfer the base year value of their primary residence to a replacement primary residence located anywhere in California that is purchased or newly constructed as that person's principal residence within two years of the sale of the original primary residence, regardless of the value of the replacement residence. However, this broadened transfer right is subject to the limitation that if the full cash value of the replacement primary residence is of greater value than the original primary residence, only partial relief is available and the difference in full cash values must be calculated and added to the transferred base year value, thus proportionally increasing the property taxes that will be assessed on the new residence. Proposition 19 also provides that a person who is over 55 years of age or severely disabled may transfer the base year value of a primary residence up to three times.

The second component of Proposition 19 will have a negative impact on many wealthy families which could, until the passage of this proposition, take advantage of the right to transfer the parent's primary residence and one million dollars (per parent) of other property to their children without triggering a reassessment of those properties. After February 15, 2021, this exemption will be severely curtailed. Commencing on February 16, 2021, the transfer of the parents' principal residence to their child will only be exempt from reassessment if the child uses the property as their primary residence immediately after the transfer. No other property transfers between parent and child are exempt, except in the case of a "family farm" which appears to not need to include a residence. This exemption also includes a value limitation. If the fair market value of the family home is less than the sum of the base year value plus $1,000,000, then the base year value need not be adjusted. However, if the fair market value of the family home is equal to or more than the sum of the home's base year value plus $1,000,000, an amount equal to the excess is added to the base year value and subject to taxation.

The foregoing is only a general description of the new law which includes many technical components such as the annual factoring of the base year value for inflation and specific definitions of terms not covered in this simplified explanation. There are also various interpretive issues which have not been discussed and will likely be the subject of future legislation. In the meantime, practitioners can refer to the Letter to Assessors and the Chief Counsel Memorandum provided on the Board of Equalization website.[4]

XI. REAL ESTATE FINANCE AND FORECLOSURE

A. Assembly Bill 1551 (Arambula): Property Assessments; Requirements and Disclosures

Amend Financial Code Section 22684. Amends Streets and Highways Code Sections 5898.17 and 5913.

In 2008, the Legislature granted statutory authority to cities and counties to provide financing to property owners to install renewable energy equipment or energy efficiency improvements that are permanently fixed to their properties. This program, commonly known as the Property Assessed Clean Energy (PACE) program, authorizes public agency officials and property owners, to enter voluntary contractual assessments, known as PACE assessments. Over time, the Legislature has expanded the program to allow residential and commercial property owners to finance not only renewable energy upgrades but also energy and water efficiency retrofits, seismic improvements, and wildfire hardening. According to the author of AB 1551, residential PACE assessments are among the fastest growing types of property-secured financing in California. One of the special aspects of PACE assessments is that they are a super-priority lien that takes priority status over all other claims to the property. The practical effect of this super-priority is that in any sale or refinance of the property, the PACE assessment must be paid off in full which can result in the triggering of pre-payment penalties. AB 1551 addresses this issue by including within the criteria that a PACE assessment contract must meet the requirements that (i) the contract may not contain a pre-payment penalty and (ii) the subject property may not be subject to a reverse mortgage. AB 1551 also makes technical changes to the financing estimate and disclosure document that must be completed and delivered to a property owner under certain circumstances before the property owner consummates PACE assessment: (i) the disclosure must be provided as a printed copy in no smaller than 12-point type, unless the homeowner opts out of receiving a paper copy, and (ii) an electronic copy of the disclosure must be provided to a homeowner who opts out of receiving a paper copy. Finally, AB 1551 provides that the oral confirmation of the key terms of an assessment contract that the program administer is required to record and include in that oral confirmation that the property owner may repay an amount owed pursuant to an assessment contract before the date that amount is due under the contract without early repayment penalty.

B. Assembly Bill 2471 (Maienschein): Senior Citizens; Rescission of Contracts

Amends Business and Professions Code Sections 7150, 7159, and 7159.10. Amends Civil Code Sections 1689.5, 1689.6, 1689.7, 1689.13, 1689.20, 1689.21, and 1689.24. Amends Streets and Highways Code Sections 5898.16 and 5898.17.

AB 2471 is companion legislation to AB 1551 reviewed above and is intended to provide to seniors an added protection from potential financial abuse by giving them more time to review and cancel certain consumer contracts. In particular, AB 2471 extends the period of time to cancel specified consumer contracts or offers from three to five business days if the buyer or property owner is a senior citizen, defined as persons 65 years of age or older. These affected consumer contracts include home improvement contracts, service and repair contracts, home solicitation contracts, seminar sales solicitation contracts, and Property Assessed Clean Energy (PACE) assessment contracts. With respect to PACE assessment contracts, the five business days extend to the latest of (i) the date on which the contract was signed, (ii) the date on which the property owner received a statutorily prescribed financing estimate or disclosure, or (iii) the date on which the property owner received the notice of their right to cancel. AB 2471 also prescribes the form and content of a notice of this right to cancel.

C. Assembly Bill 3364 (Committee on Judiciary): Judiciary Omnibus

Among other things, adds Civil Code Section 2924.8.

AB 3364 enacts numerous non-controversial technical changes to several of the California codes as part of the judiciary omnibus bill including, among other things, the addition of the requirement, in connection with the posting of a notice of sale before any power of sale may be exercised under the power of sale contained in a deed of trust or mortgage, that the resident of property upon which a notice of sale has been posted also be advised that, if the person is renting the property, the new property owner may either give the tenant a new lease or rental agreement or provide the tenant with a ninety-day eviction notice, and that the new property owner is required to honor the lease unless the new owner will occupy the property as a primary residence or under limited circumstances. The additional notice requirement under AB 3364 goes into effect beginning March 1, 2021, and AB 3364 requires the Department of Business Oversight and the Department of Real Estate to make translations of the notice available in specified languages.

D. Senate Bill 1079 (Skinner): Residential Property; Foreclosure

Amends Civil Code Section 2929.3. Amends, repeals, and adds Civil Code Sections 2924f, 2924g, and 2924h. Adds Civil Code Section 2924n. Adds and repeals Civil Code Section 2924m.

SB 1079 anticipates a frightening scenario: a potential looming foreclosure crisis following the economic effects of the pandemic. The bill seeks to preemptively address some potential impacts if California does see an uptick in foreclosures over the next several years.

SB 1079 requires that a trustee who issues a notice of sale provide notice to the tenants at the property in addition to the owner. The trustee must inform tenants of their right to purchase the property at the foreclosure sale. Additionally, if the trustee's sale does not result in the purchase of the property by a bona fide prospective owner-occupant, SB 1079 provides a forty-five-day window in which the tenant or another eligible bidder may submit a bid exceeding the highest bid at the sale. Other eligible bidders include community land trusts, nonprofit affordable housing developers, limited equity housing cooperatives, and public entities. SB 1079 also prohibits trustees from "bundling" properties at foreclosure sales, instead requiring each property to be sold separately unless the deed of trust or mortgage requires otherwise.

Additionally, SB 1079 builds upon enforcement provisions that were enacted during the last foreclosure crisis, where numerous "real estate owned" or REO properties acquired after foreclosure became blighted. Prior law allowed for imposition of $1,000 per day fines for legal owners who fail to maintain REO properties. SB 1079 increases this amount to $2,000 per day for thirty days, and then $5,000 per day thereafter.

Unsurprisingly, the bill was opposed by a coalition of mortgage and banking industry groups who argued that while increasing owner-occupancy is laudable, this bill may not be an effective way to encourage new housing opportunities. Hopefully, California will avoid falling into another foreclosure crisis, and it will be interesting to see whether SB 1079 leads to more post-auction housing purchases by housing advocates or whether it will simply result in more institutional REO properties as potential bidders seek to avoid having their financial resources tied up in properties that might end up being sold to post-auction bidders. The provisions of the bill will remain in effect until January 1, 2026.

XII. WILDFIRES

A. Assembly Bill 38 (Wood): Fire Safety; Low-Cost Retrofits; Regional Capacity Review; Wildfire Mitigation

Adds Civil Code Sections 1102.6f and 1102.19. Adds and repeals Government Code Title 2, Division 1, Chapter 7, Article 16.5 (commencing with Section 8654.2). Adds Public Resources Code Section 4123.7.

Existing law requires a person who owns, leases, controls, operates, or maintains a building or structure in a high or very high fire hazard severity zone to take specified measures to protect the property from wildfires. AB 38 requires, on or after July 1, 2020, that a seller of real property located in such a high or very high fire hazard severity zone provide specified documentation to the buyer that the real property complies with the wildfire protection measures specified by the Director of Forestry and Fire Protection to be taken by homeowners in such locations, or with an applicable local vegetation management ordinance. If that is not the case, then the seller must enter into an agreement with the buyer pursuant to which the buyer will obtain documentation of compliance, as provided therein.

In addition, after January 1, 2021, AB 38 requires the seller of any home located in a high or very high fire hazard severity zone that was constructed before January 1, 2020, to provide to the buyer a prescribed disclosure notice containing a specified statement and information relating to fire hardening improvements on the property. The disclosure must also include a list of specified features that may make the home vulnerable to wildfire and flying embers and a list of those features, if any, that exist on the home of which the seller is aware. Commencing after July 1, 2025, AB 38 also requires that the disclosure notice include a list of low-cost retrofits to be developed by the State Fire Marshall, and a list of those fire hardening retrofits implemented by the seller. Finally, commencing after July 1, 2025, AB 38 requires sellers who have obtained a required final inspection in connection with the new construction or rebuilding of a structure that has been damaged by fire in a high or very high fire hazard severity zone, provide the buyer with a copy thereof or with information on where a copy may be obtained.

B. Assembly Bill 3074 (Friedman): Fire Prevention; Wildfire Risk; Defensible Space; Ember-Resistant Zones

Amends Government Code Sections 51182, 51186, and 51189. Amends Public Resources Code Section 4291.

AB 3074 adds additional requirements on a person who owns, leases, controls, operates, or maintains an occupied dwelling or structure in, upon, or adjoining a mountainous area, forest-covered land, brush-covered land, grass-covered land, or land that is covered with flammable material that is within a very high fire hazard severity zone, that go beyond the existing requirement for the maintenance of a defensible space of 100 feet from each side and from the front and rear of the structure. Specifically, AB 3074 requires such person to use more intense fuel reductions between five and three feet around the structure, and create an ember-resistant zone within five feet of the structure, based on regulations to be promulgated by the State Board of Forestry and Fire Protection. The requirements for the implementation of AB 3074 include in addition to development of the applicable regulations, a funding contingency, and a requirement that the Department of Forestry and Fire Protection make reasonable efforts to provide notice to affected residents of the above requirements before imposing penalties for a violation of those requirements.

Endnotes

1 *Avco Cmty, Developers, Inc. v. S. Coast Reg'l Comm'n*, 17 Cal. 3d 785 (1976).

2 Ed. Note: This part also references a 2021 budget trailer bill that took immediate effect, Senate Bill 91 (Committee on Budget and Fiscal Review).

3 Assembly Constitutional Amendment 11, Stats. 2020, res. ch. 31.

4 https://www.boe.ca.gov/prop19/#Guidance.

Impact of COVID-19 on Construction Contracts in California—A Guide to Project Shutdown and Restart

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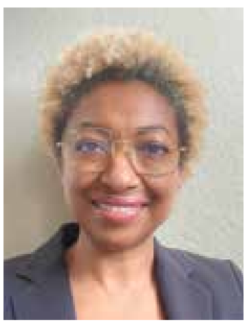

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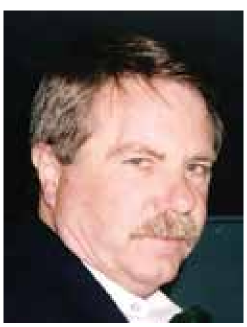

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I. INTRODUCTION

Although California has entered its second COVID-19 shutdown, construction projects throughout the state continue to experience effects of the original shutdown. Those effects have yet to be fully determined and may not be fully appreciated for some time. After all, the construction industry is interconnected with multiple sectors of the economy, like labor, material sourcing, and real property development, where complete effects of the pandemic are still unknown. Still, the industry has been surprisingly resilient. While the construction sector slowed nationwide from January through June 2020, it experienced measurable growth during the summer.[1] This positive trend, however, is not a cure-all, especially for those contractors, project owners, and construction workers who have already experienced project shutdowns.

This article provides a summary of the contractual effects of the project shutdowns and guidance for restart and completion. In particular, the article examines impacts of and potential remedies related to the following three time periods:

1. the pre-COVID-19 period (leading up to the March 2020 shutdowns);
2. the COVID-19 shutdown period (March to May 2020); and
3. the post-shutdown period (May 2020 leading into the second shutdown through the "Regional Stay At Home Order" beginning December 3, 2020).[2]

II. GOVERNMENT-MANDATED SHUTDOWN ORDERS

Restrictions enacted to curb COVID-19 significantly delayed and disrupted the orderly progress of construction work. COVID-19 outbreaks resulted in the following government actions and restrictions:

- March 4, 2020: State of emergency declared in California.[3]

- March 12, 2020: Mass gatherings (over 250 people) and social gatherings (over ten people) banned.[4]

- March 19, 2020: California statewide stay-at-home order issued.[5]

- April 1, 2020: Closure of all public and private schools (K-14 and institutions of higher education) ordered for the remainder of the 2019–2020 academic year.[6]

- May 4, 2020: Statewide stay-at-home order modified[7] to include a four-stage framework, which allowed for conditional reopening.

- August 28, 2020: California released the "Blueprint for a Safer Economy" to permit gradual reopening of certain business activities.[8]

- November 21, 2020: Californians in counties in purple tier, meaning widespread infections, were directed to stop non-essential activities between 1 PM and 5 AM.[9]

- December 3, 2020: Regional stay-at-home order issued.[10]

- December 6, 2020: Supplemental regional stay-at-home order issued.[11]

On March 19, 2020, the U.S. Cybersecurity and Infrastructure Security Agency (CISA), under the oversight of the U.S. Department of Homeland Security, published an "Advisory Memorandum On Ensuring Essential Critical Infrastructure Workers Ability To Work During The COVID-19 Response."[12] On April 28, 2020, California's State Public Health Officer (SPHO) issued similar guidance, entitled "Essential Workforce," to augment Governor Newsom's stay-at-home order:

> On March 19, 2020, Governor Newsom issued Executive Order N-33-20 directing all residents immediately to heed current State public health directives to stay home, except as needed to maintain continuity of operations of essential critical infrastructure sectors and additional sectors as the State Public Health Officer may designate as critical to protect health and well-being of all Californians.
>
> In accordance with this order, the State Public Health Officer has designated the following list of Essential Critical Infrastructure Workers to help state, local, tribal, and industry partners as they work to protect communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security.[13]

SPHO's "Essential Workforce" broadly mirrors the CISA guidance. While neither the CISA nor SPHO guidance designates construction as an essential sector of the national or state economies, both designate construction workers supporting critical infrastructure projects as essential:

> Construction Workers who support the construction, operation, inspection, and maintenance of construction sites and construction projects (including housing, commercial, and mixed-use construction); and workers who support the supply chain of building materials from production through application/installation, including cabinetry, fixtures, doors, cement, hardware, plumbing, electrical, heating/cooling, refrigeration, appliances, paint/coatings, and employees who provide services that enable repair materials and equipment for essential functions.[14]

SPHO's "Essential Workforce" also designates workers in construction-related trades, including warehouse and building material supplier workers, as essential.[15]

However broad the designation of construction workers as essential, the question remained—what constituted an essential project? Many public agencies could designate which of their projects were "essential" versus "non-essential" for purposes of complying with Governor Newsom's stay-at-home order and additional guidance.[16] Others lacked that ability.[17] Private sector construction that fell outside the essential category and public projects designated non-essential were subject to shutdown.

The shutdown orders directly affected construction contracts and had ripple effects on the construction economy as materials production and distribution slowed. Thus, both the direct and indirect effects of the shutdown have prevented contractors from completing work by the intended project completion dates and continue to threaten their ability to do so. In general, these delays were not caused by or attributable to the contractor or the project owner. Accordingly, depending on the express terms of the contract[18] and governing law,[19] a contractor may be entitled to an extension of time. In some circumstances, contractors may be entitled to additional time *and* compensation. This is particularly true where project owners had discretion to determine which of their projects were essential or non-essential and will be discussed further in Section IV, below.

III. THE PRE-SHUTDOWN PERIOD (BEFORE MARCH 19, 2020)

Many projects were encountering delays before the shutdown began on March 19, 2020. Pre-COVID-19 delays should be segregated from those the pandemic caused when parties are considering requests for additional time or monetary compensation on projects that a COVID-19 project shutdown also impacted.

An accurate project schedule (both as-built and forecast) is critical to determining the pandemic's impact on delay. Accordingly, the parties need to know the exact status of the work constructed and the project's schedule when the shutdown occurred. This includes a realistic forecast of how much longer the work was projected to take when the shutdown began. These data points should enable the owner and contractor to segregate pre-COVID-19 issues from schedule impacts that the COVID-19 shutdown caused.

If delays existed before the shutdown that the schedule did not address, those delays should be accounted for. To determine the shutdown's effect, the parties also need to determine how and when work resumed, or when it will resume. Has work resumed? If so, was it resumed entirely or in phases? Or will the project be shutdown beyond the pandemic "all clear?" These questions are discussed further in Section V.A, below.

Various methods of delay analysis can be used to model project delay. Choosing the proper methodology requires consideration of factors, including:

- Contract requirements;
- Complexity of the project;
- Project status;
- Available records and their reliability; and
- Circumstances of the delay events.

Two main methods of delay analysis are as follows:

1. Prospective Analysis: Impacted As-Planned (IAP), or Time Impact Analysis (TIA), is a prospective method of delay analysis used when the project is ongoing. Accordingly, a prospective analysis demonstrates the likely impact of a delay or delays on the future project completion date.[20]
2. Retrospective Analysis: As-Planned v. As-Built, or a "windows" analysis, is a retrospective method of delay analysis used when the project is complete or near completion. As part of this analysis, as-built dates are ascertained typically by interviewing site staff and reviewing progress reports, site diaries, progress photographs, and other records. The as-built dates are then compared with the baseline program to see where critical delays occurred and to assess the extent of those delays.[21]

Parties should check applicable contract provisions before determining which delay analysis methodology to use. If the project is in progress, however, and COVID-19 continues to impact and impede progress, a prospective analysis will likely be the better approach to ascertain the likely delay on remaining activities and project completion forecast dates.

IV. THE SHUTDOWN PERIOD (MARCH 19 TO MAY 2020)

A. Is It Force Majeure or Owner Shutdown?

Governor Newsom's Executive Order N-33-20 ordered all residents to stay home, except as needed to maintain continuity of operations of critical infrastructure sectors.[22] Project participants have interpreted this order differently. Some contractors have viewed it as a change in law that was not in effect at the time of bid or contract. Other contractors have viewed it as a new requirement. Many have deemed it a force majeure event.

Force majeure and the other common law excuses of performance (e.g., impossibility, impracticability, frustration of purpose, etc.) have been the focus of numerous articles this year. In this Journal, Whitney Hodges examined how to keep project development requirements intact by "paus[ing] contractual obligations if such performance would be impracticable at present because it would contravene either the state or local SIP order or would result in excessive and unreasonable difficulty or expense due to breaks in the supply chain."[23] Louis Gonzalez, Josh Escovedo, and Mark Ellinghouse also discussed these options with regard to real property contracts, like leases.[24] Nonetheless, a short review of the doctrine of force majeure as applied to construction contracts is in order.

The Federal Acquisition Regulation (FAR) "is the primary regulation for use by all executive agencies in their acquisition of supplies and services with [congressionally] appropriated funds."[25] Many, if not most, publicly-funded contracts considered essential under Governor Newsom's order (*i.e.*, contracts related to transportation, infrastructure, government facilities, hospitals, etc.)[26] receive federal (congressionally appropriated) funds, and thus FAR applies. Section 52.249-14(a) of title 48 of the Code of Federal Regulations is entitled "Excusable Delays" and lists nine specific examples of force majeure events. They are:

1. Acts of God or of the public enemy;
2. Acts of the Government in either its sovereign or contractual capacity;
3. Fires;
4. Floods;
5. Epidemics;
6. Quarantine restrictions;
7. Strikes;
8. Freight embargoes; and
9. Unusually-severe weather.[27]

Failure to perform must also be "beyond the control and without the fault or negligence of the Contractor" to be deemed force majeure.[28] Contracts that Governor Newsom's Executive Order N-33-20 impact arguably fall under at least two of the nine categories itemized above: 2 and 5. According to FAR's guidance, the contractor's failure to perform in the face of these circumstances is an excusable delay for which the contractor receives additional time but not monetary compensation.

Force majeure events, however, should not be confused with other reasons why work may be delayed or suspended. Most construction contracts contain language that gives owners the "right to suspend" the work for the owner's convenience, with or without cause. Contrary to what many owners and contractors believe, suspension is different than delay and termination. Each has different effects and legal consequences, and treating them the same is a mistake that could cost an owner or a contractor greatly.[29] Unlike delay and termination, suspension is a contractually-allowable delay during the course of a construction project. As such, the modern suspension-of-work clause is "nothing more than a compensable delay authorized and addressed by contract."[30]

The main difference between force majeure and suspension of work is money. Where a force majeure event causes a stoppage of work, the contractor receives additional time to complete the work, but nothing else. If the delay is due to the owner's suspension of work, the contractor may receive both additional time and money for costs incurred by the delay, depending on the terms of the parties' contract. This distinction may cause owners to argue that their decision to shut down projects was in response to a force majeure event rather than a discretionary decision to avoid paying shutdown costs to their contractors.

B. Owner's Suspension of the Work

In California, when construction projects are shut down for more than sixty days, upon restart, owners may face mechanics lien and stop payment notice claims from contractors concerned that the shutdown has triggered project completion under California Civil Code section 8180(a)(3). Under this statute, a work of improvement is considered "completed"[31] when any of the followings occurs:

a) The work of improvement is actually complete;

b) The owner or agent occupies the premises or uses the improvement, and all labor ceases;

c) Labor ceases for sixty continuous days;

d) A notice of cessation is recorded after labor has ceased for thirty days; or

e) A public entity accepts completion of the work (particularly "side work," such as utilities, sidewalks, and street work).[32]

The owner's occupancy or use signals completion only if it does not coincide with the performance of labor. When occupancy coexists with the performance of labor for a period of time, then any cessation of labor that continues for sixty days triggers completion and commences the ninety-day period to file a mechanics lien related to a private work of improvement (assuming no notice of completion is filed).[33] Many projects, while incomplete, may be shut down for more than sixty days as a result of the government mandates. While we have yet to witness how courts would rule as to whether such a shutdown qualifies as a cessation of labor under Civil Code section 8180, in those situations, contractors on private works of improvement may need to record a mechanics lien to preserve their rights.

Further, contractors whose projects are affected by government-mandated shutdowns should consider closely reviewing their contract language regarding the delay, extension of time, and force majeure events. Contractors should be careful with respect to timing and notice requirements of those particular clauses. Contractors and project owners should also consider recording extra costs and scheduling issues the forced shutdowns caused, and mitigating costs when possible.

Parties should also pay attention to contract provisions regarding the contractor's duty or obligation to resume performance if and when the owner chooses to lift the suspension, including the length of time work may be suspended before the termination clause is invoked. A contractor who is ordered to suspend work is not necessarily entitled to terminate the contract. In most cases, the contractor must continue to perform when the project is reinstated and refusal to do so may be deemed a breach of contract. The terms of the contract should be instructive. For instance, many construction contracts have a specified cutoff dictating that a suspension of a certain length of time (e.g., ninety days) automatically acts as termination for convenience by the owner. This is of particular concern for public agency owners who often have boilerplate contracts incorporating such language, and for owners who use common contracts such as AIA or ConsensusDocs.

Finally, parties should look to whether the suspension-of-work clause in the contract excludes the contractor from recovering profits. If there is no such exclusion, the court may award the contractor profits because of the contractor's inability to take on new work in light of the suspension. Conversely, the suspension-of-work provision prevents the contractor from utilizing traditional breach of contract remedies, like claiming "contract abandonment" by the owner.[34]

C. Suspensions Under Federal Contracts

Section 52.242-14 in title 48 of the FAR outlines "Suspension of Work" requirements for government contracts. Section 52.242-14 allows the contracting officer to order the contractor to suspend, delay, or interrupt work for the period of time that the contracting officer determines appropriate for the convenience of the Government.[35] However, if the suspension of any or all of the work is for an unreasonable period of time, "an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit)."[36]

D. Preparing To Restart

After achieving an understanding of the extent and nature of the delays that the pandemic caused and the remaining work left on the project, a contractor can determine how to model the delays into its remaining schedule with an eye towards completing the project as soon as practically possible. To demonstrate how delays related to COVID-19 impact a project, a contractor may want to consider the following before modeling these delays into the schedule:

- <u>Revisiting the base schedule</u>: The base schedule is generally the latest monthly progress update that includes the as-built data right before the delay occurred (*i.e.*, dates and remaining duration for completed and in-progress activities). A contractor can revise this base schedule with its delay analysis to determine the remaining project schedule.
- <u>Determining the purpose of the delay analysis</u>: A contractor should determine whether its purpose is to submit an extension of time claim or merely to re-sequence the remaining work and estimate the time required to complete the project.
- <u>Identifying the delay period</u>: A contractor should identify the unit of time in which the delay analysis will be carried out (*i.e.*, weekly, monthly, quarterly, etc.).
- <u>Identifying the actual period of delay</u>: The contractor should identify the start and finish dates of the delay event.
- <u>Identifying the impacted activities</u>: A contractor should compare site records with the project schedule to identify the specific impacted activities and work. This will ensure that the new schedule is detailed enough to capture the impact of delay.
- <u>Determining the status of the impacted activities</u>: A contractor should determine how much the in-progress work has been delayed and whether work that has not yet begun will be impacted.

After considering these models, a contractor can model delay(s) into the project's remaining schedule using simple scheduling techniques. This may be crucial as an accurate schedule, as-built and forecast, will generally show project progress before the shutdown and provide a realistic forecast for project completion, thus demonstrating the impact of pandemic-related delays.

E. Issues with Dispute Resolution Clauses in Construction Contracts

Finally, project owners and contractors should consider the dispute resolution language in their contracts, especially whether it suits these unusual circumstances. Parties may want to first focus on the pre-shutdown period. Ideally, all changes, costs incurred, and claims related to this time should have been addressed during the shutdown, but some issues may still linger. Still, the contract language should provide necessary guidance for dealing with pre-shutdown issues.

A contractor's claims for costs incurred during the shutdown may not be as easily resolved, and parties may turn to the dispute resolution procedures specified in the contract. Oftentimes, particularly in sophisticated public agency contracts, dispute resolution procedures can be Byzantine, time-consuming, and costly. Accordingly, owners and contractors should consider the delay that resolution of these claims may have on the ability to restart and finish the project. Further, the parties may consider agreeing to a change order or contract amendment to more aptly suit the nature and exigency of current circumstances.

V. THE POST-SHUTDOWN PERIOD (MAY TO DECEMBER 3, 2020)

A. Project Restarts

There is little question that a prolonged shutdown can have an impact on any project. Here, the added uncertainty surrounding the duration of COVID-19-related construction moratoriums, along with the resultant impact on various sectors of the economy, raise additional challenges. Even during suspensions, project owners can take steps to better position their projects and associated teams for restart and project recovery.

B. Schedule Impact

1. Put a Remobilization Plan into Place

Beyond the direct impact of a suspension on the project schedule, allowances should be considered for a remobilization period. This may be as simple as the construction manager reengaging staff or as drastic as a complete reassessment of the underlying business plan. At a minimum, a contractor may require time and resources to:

- Return his or her team to the site;
- Assess any site changes that may have occurred during the shutdown;
- Reengage all subcontractors; and
- Review any supply chain issues.

Putting a flexible yet thoughtful plan in place may help avoid a scramble as restart dates become more clear.

2. Account for Potential Changes to the Delivery Team and Project Phasing

Consideration should be given to potential project team changes. It is possible that certain consultants, contractors, or subcontractors may no longer be able to provide the same level of service due to staffing losses or a lack of access to capital. The need to renegotiate contracts, rebid scopes of work, and replace subcontractors can impact other scopes of work and the overall schedule. For instance, changing the project team may cause additional delays and push work into winter months, potentially requiring later work stoppages or additional staffing, material, or protection costs.

3. Work with the Delivery Team to Take Advantage of Down Time

Keeping design coordination and the shop drawing process in sync with construction can be a challenge. Allowing the project delivery team (*i.e.*, the construction manager, the construction manager as the owner's representative, and the architect or engineer of record) to advance coordination work during shutdowns or scaled back work may prepare the project for a smoother restart. It may also accelerate project delivery once suspensions are lifted, while also minimizing some of the soft costs associated with such an acceleration. Allowing work to advance does carry risks and may increase administrative costs in the short term, but it can also promote consistent staffing with the existing consultant and construction teams.

In addition to coordination, the pause in site work can allow for a review of the project schedule and budget to date, providing for a full alignment of all parties on the exact status of the project before restart.

4. Allow for Team Site Walkthroughs and Site Progress Documentation Reviews During the Remobilization Period

The remobilization process generally begins several weeks before site access. During this period, the project owner and delivery teams should consider reviewing site progress documentation that was available before the work suspension and conduct a joint site walkthrough once access is available. This may help ensure that all parties are starting from the same place and that any site changes and remobilization needs are understood.

C. Budget Impact

1. Understanding Additional Suspension-Related Costs

In addition to site carrying costs, including insurance, utilities, interest, and security, project suspension and resultant remobilization will likely force the project owner to incur additional costs. These costs will likely include additional security to ensure that the worksite is safe and secure during the shutdown and site cleanup once the project is slated to restart. They may also include additional contractor staffing, material storage, and delivery costs. Once the duration of the suspension is fully understood, the project owner can assess whether opportunities for acceleration can reduce the overall impact of the delays.

2. Maintain Communication with the Entire Delivery Team

During project suspension, subconsultants may have experienced staffing losses, which may impact their ability to deliver as promised pre-COVID-19. By maintaining contact with the project team, project owners can get better insight into potential changes across the team plan and plan for scopes of work requiring rebidding and additional coordination. Flexibility in working with subcontractors' financial terms and deposit requirements may also benefit the project in the long term.

In projects where subcontractor scopes of work have not yet been assigned or where subcontractors are in default, owners may be able to negotiate for cost savings. Any negotiations during the shutdown should be approached with caution, given that the actual duration of the site shutdowns and the final impact on the supply chain are still unclear. While some flexibility is likely necessary, uncertainties in any agreements made during the suspension can increase the risk of a later default.

D. Review of Approvals and Permits with Authority Having Jurisdiction (AHJ)

In most markets, construction permits are granted for specific durations, allowing approved work to continue for a fixed duration from the date of approval or for an allotted duration from the inception of a specific scope. Though approvals and permits can often be extended in the absence of material design changes, any required extensions should be considered when assessing impact to schedule and budget. In addition, many municipal governments have shut down all non-essential government offices, which could result in local AHJ backups once offices reopen.

E. Impact on Contracts, Cost Guarantees, Delivery Guarantees, and Force Majeure Claims

As project schedules are updated and personnel and supply issues are better understood, project owners may require modifications to guarantees, which either contractors or the project owner as part of the project financing have provided. Although Material Adverse Event (MAE) provisions included in construction contracts may apply to COVID-19 related suspensions, their treatment may depend on how the contract specifically defined force majeure. Project owners should consider connecting with their attorneys and insurance carriers to better understand any contractual and policy protections, as well as potential opportunities, before the project's remobilization.

F. Remobilization and Site Safety

During COVID-19 shutdowns, it is possible that the site's physical condition and installed or stored materials may change or be damaged. Site conditions and safeguards should be continually monitored during project suspension by measures including site walks by personnel who are experienced and knowledgeable about the particular project. Changes to site safety during a shutdown should, where feasible, be addressed immediately. Left unchecked or uncorrected, site safety conditions can create dangers for the surrounding community and potential delays once the suspension is lifted.

In preparation for remobilization, project owners should consider reviewing existing site conditions with the construction manager. Together, they may identify any conditions requiring repair or replacement, any potential issues of site safety resulting from the extended shutdown, and issues of wear or weather-related conditions.

VI. CONCLUSION

The COVID-19 pandemic will continue to impact the construction industry for some time. It is important for both contractors and project owners to segregate their pre-COVID-19 shutdown delays and costs from those incurred as a result of the shutdowns. This may enable the parties to resolve the pre-COVID-19 changes, delays, and claims separately and more easily than the complicated shutdown claims. Owners should be careful to characterize any decision to shut down a project as complying with government orders rather than as discretionary. Otherwise, owners may be liable for additional costs of delay. Finally, all parties should familiarize themselves with the nuances of their contracts, especially the suspension-of-work and termination clauses as they may find themselves in a situation where the contract has been "terminated" because the project has been shut down for too long.

The interaction between contract timing, the pandemic, and resultant shifting public policy raise complicated questions that necessitate flexibility in this changing landscape. The parties to construction contracts should consider working closely with their attorneys and each other to achieve an optimal and profitable result, rather than allow the pandemic to claim their project as another victim.

Endnotes

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MCLE Self-Study Article: Owning and Occupying Commercial Office Buildings Amidst a Shifting Pandemic Landscape: A Framework to Understand and Mitigate Premises Liability for Owners and Occupiers

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I. INTRODUCTION

A. The Initial COVID-19 Effects

Over the last year, the COVID-19 pandemic has swept the globe, bringing forth a tidal wave of distress and uncertainty. The human toll from the pandemic has been devastating. In just ten months, COVID-19 has been linked to over twenty-four million cases and over 400,000 deaths in the United States alone.[1]

Given the grave threat to human health, California Governor Gavin Newsom proclaimed a State of Emergency on March 4, 2020.[2] A few weeks later, numerous counties throughout California enacted stay-at-home orders,[3] and on March 19, 2020, Governor Newsom issued Executive Order N-33-20, which ordered all individuals to stay at home, except as needed to maintain continuity of operations of certain infrastructure sectors.[4] Over the next ten months as the pandemic evolved, state and local governments tightened restrictions in response to surges in coronavirus cases and eased restrictions when rates of infection fell. In December, after allowing business to briefly reopen in the Fall of 2020,[5] Governor Newsom issued a new stay-at-home order.[6] The new order, which is still in effect as of the date of this writing (December 19, 2020), requires regions of the state to shut down businesses and people to stay at home if the region's intensive care capacity falls below 15%.[7]

While the various stay-at-home orders differed in scope and duration, they generally required "non-essential"[8] businesses to close their physical offices and continue operations remotely.[9] As many of these non-essential businesses occupied office buildings, the stay-at-home order resulted in dramatic reductions in the occupancy of office buildings. According to a company that monitors office use in thousands of buildings across the United States, as of June 2020, the average occupancy in tracked office buildings dropped to 22.7% nationwide and to 10.7% in San Francisco.[10]

B. Moving Forward

Although as of the date of this writing, most non-essential businesses continue to be prohibited from fully occupying office space, there are rays of hope for the office market. Vaccines are slowly rolling out and many tenants are starting to plan for an eventual return to their office space, even if the manner in which they utilize their office space may be different than it was before the pandemic.[11] As part of this planning, office tenants want to understand their potential for liability if someone contracts COVID-19 when visiting their premises. Similarly, landlords want to understand their potential liability for COVID-19 transmission as their office buildings are re-populated by tenants returning to offices where the threat of COVID-19 still lingers.

This article discusses the premises liability risks facing landlords and tenants in commercial office buildings[12] in light of the COVID-19 pandemic, with a focus on the scope of each party's respective duty of care, and outlines measures each party should consider implementing to mitigate such party's risk of liability related to COVID-19.

II. PREMISES LIABILITY RISKS TO LANDLORDS AND TENANTS FROM COVID-19 EXPOSURE IN COMMERCIAL OFFICE BUILDINGS

In California, premises liability is a form of negligence which arises when a party fails to exercise ordinary care in the management of property under its possession and control.[13] The elements of a cause of action for premises liability are the same as a cause of action for negligence.[14] To recover on a premises liability action, a plaintiff must show: (i) a legal duty existed, (ii) that duty was breached, and (iii) the breach of such duty caused plaintiff's injury.[15]

Both landlords and tenants are subject to potential premises liability claims from injuries that occur in office buildings. While these claims are commonly slip and falls or other personal injury claims, given our evolving knowledge of COVID-19 transmission (including the risk of airborne transmission indoors),[16] landlords and tenants may face premises liability claims from the spread of COVID-19 in office buildings. Although the premises liability doctrine is generally well understood, application of the doctrine to the COVID-19 pandemic is untested.

A. Landlords and Tenants Have a Duty of Care Over Property Under Their Control

The general duty of care is codified in California Civil Code section 1714(a), which provides that everyone is responsible for injury to others caused by a lack of ordinary care in the management of their property.[17] This duty is imposed on landlords with respect to property under their ownership and control, and on tenants with respect to property under their possession and control.[18]

Courts have reasoned that once a landlord leases a premises to a tenant, the landlord's duty for injuries within the tenant's premises is "attenuated as compared with the tenant who enjoys possession and control."[19] Thus, a landlord will generally not be liable for a dangerous condition within the tenant's premises, unless the landlord had actual knowledge of the dangerous condition and the right and ability to cure the condition.[20] Even where a lease provides a landlord with a broad right to inspect the premises or to cure defaults by tenants, courts have generally not construed such provisions as imposing an affirmative obligation on a landlord to exercise such rights.[21] Further, even if a landlord has actual knowledge of an unsafe condition within a tenant's premises, a landlord will likely not be required to cure the unsafe condition if it relates to the manner in which the tenant conducts its business, rather than a specific condition of the property for which the landlord is responsible.[22] The reason for this treatment is grounded in public policy to ensure that a tenant may peaceably enjoy its premises without worrying that the landlord will be required to engage in potentially intrusive oversight of the tenant.[23]

Accordingly, a commercial landlord should not be liable for personal injury claims arising from a tenant's failure to comply with required COVID-19 protocols within its leased premises, since such failure relates to tenant's conduct rather than to the specific condition of the property over which the landlord is responsible. Nevertheless, as the property owner, a landlord may still be named in a suit by a plaintiff claiming negligent exposure from visiting the office building. In such event, a landlord will most likely look to the tenant for indemnity, as discussed in Section IV(A) of this article.

B. The Scope of the Duty of Care

While confirming the existence of a duty of care is important, determining the precise *scope* of such duty is the crucial undertaking. The scope of the duty of care will determine the specific actions that a party is required to take under the circumstances to demonstrate that it has satisfied its duty of care.[24] Courts evaluate a number of factors to determine the scope of a party's duty of care. These factors, first enumerated in the seminal case of *Rowland v. Christian*,[25] include:

1. The foreseeability of harm to the plaintiff,
2. The degree of certainty that the plaintiff suffered injury,
3. The closeness of the connection between the defendant's conduct and the injury suffered,
4. The moral blame attached to the defendant's conduct,
5. The policy of preventing future harm,
6. The extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and
7. The availability, cost, and prevalence of insurance for the risk involved.[26]

Though all the *Rowland* factors may be considered when determining the scope of the duty of care, courts engage a "sliding-scale balancing formula,"[27] weighing the foreseeability of the injury to the plaintiff against the burdens placed on the defendant by imposing an obligation to take specific action to reduce the risk of such harm.[28] Applying this formula, where the burden[29] imposed on a party to prevent harm is substantial, a greater degree of foreseeability will be required;[30] and where there are strong policy reasons for preventing the harm, or where the harm can be prevented by simple means, a lesser degree of foreseeability may be required.[31]

In light of the public health risks from COVID-19, the scope of a commercial landlord's duty of care would likely require implementation of reasonable safety measures to minimize the risk of COVID-19 exposure in areas of the building that the landlord controls and manages, such as common area lobbies, elevators, and restrooms. At a minimum, the scope of such duty would include complying with applicable legal requirements,[32] as well as taking into consideration the guidelines and recommendations set forth by the Center for Disease Control and Prevention (CDC)[33] and California's Division of Occupational Safety and Health (Cal/OSHA).[34] The scope of a landlord's duty of care, however, should not require landlord to incur expensive capital expenditures, such as replacing building systems, given the substantial cost; however, it could require implementing reasonable upgrades to reduce the risk of exposure to the virus, especially if the benefits of such measures outweigh the cost and other similarly situated landlords are implementing such upgrades. See Section IV(F) of this article for a more detailed description of the measures a landlord may consider implementing to satisfy its duty of care.

The scope of a tenant's duty of care should largely mirror a landlord's duty of care but should only apply within the tenant's premises and any other areas controlled by the tenant. Accordingly, tenants will need to implement reasonable measures to protect employees, customers, vendors, and guests from the risk of exposure to COVID-19 while in the tenant's premises and other areas controlled by tenant. As discussed in Section IV(C)(2) of this article, given that workers' compensation is generally an employee's exclusive remedy for workplace injury, the workers' compensation system should handle most tort claims for COVID-19 exposure brought by employees against the tenant employer. Thus, a tenant's greatest risk of liability for COVID-19 claims within its premises will come from third-party vendors and invitees, and therefore, some tenants may consider requiring vendors or certain guests to execute a waiver and release, as discussed in Section IV(A)(2) of this article.

C. The Challenge of Causation

Even if a plaintiff can establish that a landlord or tenant had a duty of care, and breached that duty, the plaintiff must then demonstrate that such breach caused his or her injury.[35] To demonstrate causation, a plaintiff must show that the defendant's act or omission was a "substantial factor"[36] in causing the plaintiff's injury.[37] It will not suffice for a plaintiff to demonstrate the "mere possibility"[38] of causation; rather, if causation is speculative or if "the probabilities, are at best evenly balanced,"[39] a court will find in favor of the defendant.[40]

In the context of COVID-19 personal injury claims, plaintiffs are expected to have a difficult time proving causation. As one scholar put it, "meeting the burden of proof on the element of causation will be insurmountable in most cases given the highly contagious nature of the virus, the multiple sources of exposure plaintiffs may experience, and the developing state of the art on effective mitigation measures to prevent viral spread."[41] Another scholar suggests that "proving causation in a business setting may be a plaintiff's highest hurdle to a successful suit."[42] A plaintiff will, however, have an easier time establishing causation if they were exposed to COVID-19 during an "outbreak."[43]

D. The Negligence Per Se Doctrine

If a plaintiff can demonstrate that they were injured due to a landlord's or tenant's violation of law, then under certain circumstances, a landlord or tenant is *presumed* negligent under the negligence per se doctrine. The negligence per se doctrine is not a separate cause of action, but rather, creates a rebuttable presumption that the defendant was negligent if the plaintiff can establish that: (1) the defendant violated a statute, ordinance, or regulation; (2) the violation proximately caused death or injury; (3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the plaintiff was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.[44] In the event that a party is presumed negligent due to violation of a statute, ordinance, or regulation, then the presumption may be rebutted by proof that the "person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law."[45]

Under the negligence per se doctrine, a court does not have to undertake balancing the *Rowland* factors to determine the applicable duty of care; instead, compliance with the applicable law is substituted for the applicable duty of care and thus, violation of such law is deemed a breach of duty.[46] As the California Supreme Court noted in *Harris v. Joffe*, "the proper conduct of a reasonable person in a particular situation may be prescribed by statute or ordinance; conduct that falls below such standard, in the absence of excuse or justification, is negligence as a matter of law."[47]

California courts have held that violations of Cal/OSHA provisions, safety orders contained in administrative codes, and city ordinances will support a finding of negligence per se, while failure to comply with guidelines, manuals, or written recommendations prepared by government agencies will not.[48] Accordingly, a landlord's or tenant's failure to comply with local government orders relating to COVID-19 may support a presumption of negligence under the negligence per se doctrine (provided all other elements are satisfied), but failure to comply with recommendations from government agencies will not likely establish negligence per se (though such failure may be used to establish that the duty of care was not met). Given the novel nature of the COVID-19 pandemic, governmental authorities enacting laws and regulations in response to the pandemic will perhaps set the standard on what is considered to be reasonable under the circumstances of COVID-19.

III. NO CURRENT CALIFORNIA OR FEDERAL SHIELD LAWS PROTECTING OFFICE LANDLORDS OR TENANTS FROM COVID-19 LIABILITY

Several states have enacted COVID-19 liability shield laws[49] or promulgated executive orders[50] with varying scopes of protection for individuals and/or businesses from COVID-19-related liability. Many of these state laws provide time-limited protection to healthcare providers and facilities, insulating them from liability related to COVID-19 care, but do not extend to gross negligence or willful, criminal, or reckless misconduct. Beyond this, the range of COVID-19 liability shield laws varies from state-to-state. For example, the Tennessee COVID-19 Recovery Act[51] is an example of an expansive liability shield law, which protects individuals and entities from liability in actions arising from COVID-19 unless the claimant proves by clear and convincing evidence that the COVID-19-related loss, injury, or death was caused by gross negligence or willful misconduct.[52] Some states have also provided protections for specific industries (such as manufacturers of personal protective equipment, adult care facilities, or restaurants),[53] while other states have provided broader premises liability protections to businesses generally.[54]

In California, two COVID-19 liability shield bills were pending but died in the Senate Judiciary Committee.[55] Assembly Bill 1035 would have exempted businesses with fewer than twenty-five employees from civil liability arising from COVID-19 premises liability claims, and Assembly Bill 1759 would have exempted colleges and institutions of higher education from civil liability arising from COVID-19 personal injury claims.[56] California has no other pending or enacted COVID-19 liability protection and thus, at this time, landlords and tenants in California are not protected from COVID-19-related liability through state shield laws.[57]

At the federal level, certain industries are protected from potential COVID-19 liability under specified circumstances. For example, the "Public Readiness and Emergency Preparedness Act"[58] shields healthcare providers and the manufacturers and distributors of healthcare products, and the "Coronavirus Aid, Relief, and Economic Security Act"[59] limits the liability of volunteers providing COVID-19-related healthcare services. However, there is currently no comprehensive federal law that shields businesses or individuals from COVID-19 liability claims.

IV. MITIGATING THE RISK OF COVID-19 LIABILITY FOR LANDLORDS AND TENANTS

While understanding the scope of its respective duty of care is crucial to reduce a landlord's or tenant's exposure to COVID-19 claims, there are several steps each party can take to mitigate the risk and/or impact of such claims. Mitigation strategies include: (1) allocating risk contractually, (2) obtaining appropriate insurance, (3) complying with laws, (4) complying with guidance and recommendations from government agencies and industry groups, and (5) implementing various operational measures to reduce the risk of harm.

A. Contractual Risk Allocation

1. *Commercial Leases—Indemnity and Exculpatory Clauses*

Landlords and tenants should first look to their leases to determine the contractual allocation of risk between the parties, which is typically addressed by the indemnity and exculpatory clauses.[60] Indemnification clauses shift the economic burden of negligence from one party to another, while exculpation clauses relieve a party from liability for future negligence.[61] Under California law, absent a violation of public policy, statute, or constitutional provision, the parties to a private agreement are generally permitted to allocate risks in any manner they choose.[62]

Although contractual risk allocation will depend on the lease's specific language, the indemnity and exculpatory clauses will likely have allocated most of the exposure to COVID-19-related claims to tenants. For example, a tenant's indemnification of a landlord is usually broader than a landlord's indemnification of a tenant (if one is given at all) and may apply to any and all claims arising from use of the premises, tenant's acts or omissions (including negligence or willful misconduct) at the building or project, and/or tenant's breach of the lease. If a landlord has agreed to provide the tenant with an indemnity, it may be limited to claims arising from a landlord's gross negligence or willful misconduct. An exculpatory clause in a commercial lease may provide that a landlord is not liable for any injury or damage to persons or property occurring at the building or project and may even shield a landlord from "active negligence."[63]

However, with conditions beginning to favor tenants in many markets, tenants may be gaining the bargaining power to re-allocate risk and shift some COVID-19 liability exposure to the landlords. For example, tenants may be able to obtain indemnification agreements from landlords to cover claims occurring in the common areas or arising from a landlord's negligence. Tenants may be able to narrow their indemnity obligations by carving out claims attributable to a landlord's negligence, rather than its gross or active negligence. Tenants may also try to limit the landlord's exculpatory clause so that it specifically excludes anything relating to the landlord's negligence (rather than only landlord's gross negligence or active negligence). Landlords, on the other hand, may want to further mitigate their risk by drafting the exculpatory clause in a manner that clearly and unequivocally applies to landlord's active negligence.[64]

2. *Separate Liability Waivers*

Another means of contractual risk allocation is a liability waiver, which landlords and tenants may each consider obtaining from individuals entering the building or premises (such as vendors and visitors) to mitigate exposure to COVID-19 claims. Such liability waivers can be drafted to release a landlord or tenant from liability for personal injuries or damages that occur while a vendor or visitor is at the building or premises, including injuries or damages related to COVID-19. A landlord may want to require tenants to obtain such waivers from vendors or invitees before entering the building, or a landlord or tenant may want to make a liability waiver part of its standard entry protocol for visitors.

Landlords and tenants should each, however, evaluate the potential impact that liability waivers could have on their business relationships (whether it be between landlord and tenant, or between either party and its vendors or visitors) and the public's perception of their business. For example, it could strain a landlord-tenant relationship if landlord requires tenant's clients to sign liability waivers before entering the building, and a business may face public backlash if it requires visitors to sign liability waivers before entering. In addition, as discussed in Section IV(B) immediately below, there are limits to the efficacy of waivers that must be considered.

B. Limitations on Contractual Risk Allocation

There are a number of limitations and requirements affecting indemnity and exculpatory provisions. While general principles of contract interpretation apply to both,[65] exculpatory provisions are subject to more limitations than indemnification provisions since they are designed to exempt a party from liability as opposed to indemnification provisions, which are designed to shift the risk of payment for such damage.[66]

1. *Waivers and Indemnifications Must be Clear, Explicit, and Unambiguous*

Liability waivers, exculpatory clauses, and indemnity provisions must be clear, explicit, and unambiguous to be effective[67]—any ambiguity in either type of provision will normally be construed against the drafting party.[68] California courts require a high degree of clarity and specificity in waivers and liability releases, which relieve a party from its own negligence.[69] Similarly, provisions which seek to indemnify a party from claims arising from such party's own negligence, must also be clear and explicit and will be strictly construed against the indemnitee.[70]

Accordingly, unless an indemnity or exculpatory clause unequivocally applies to "active" negligence, it will generally only limit liability for passive negligence.[71] Furthermore, any waiver that seeks to release personal injury claims must be drafted in a manner which clearly reflects that the intent of the document is to release personal injury claims caused by the negligence of the party seeking the release.[72] Thus, any liability waiver or exculpatory clause which releases a party from liability for claims related to COVID-19 should be drafted to clearly notify the releasor of the potential risks related to COVID-19 exposure at the premises or building, and explicitly state the rights being waived and the effect of such waiver. Similarly, indemnity provisions which seek to shift the risk of COVID-19-related damages to the indemnitor should explicitly state that the indemnification applies to the indemnitee's negligence.

2. *Waivers Contrary to Public Policy are Unenforceable*

Even if liability waivers are clear, explicit, and unambiguous, they may be void as contrary to public policy. California Civil Code section 1668 states "[a]ll contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."[73] Notably, while California Civil Code section 1668 references "all contracts," courts have held that it does not apply to express indemnification provisions.[74] Accordingly, the foregoing limitations apply to waivers of liability, but not to express indemnification provisions.[75]

The seminal California case on determining whether a release is contrary to public policy is *Tunkl v. Regents of University of California*.[76] In *Tunkl*, a hospital patient's wife brought an action against a hospital for negligence.[77] The California Supreme Court held that the release from liability for future negligence, which was imposed as a condition for admission to a charitable research hospital, was invalid as it violated public policy.[78] In doing so, the court enumerated the following six factors to consider in determining whether a waiver of liability is invalid on public interest grounds:

> (1) It concerns a business of a type generally thought suitable for public regulation. (2) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. (3) The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least any member coming within certain established standards. (4) As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. (5) In exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a purchaser may pay additional fees and obtain protection against negligence. (6) Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.[79]

Importantly, the court noted that the release or waiver need only fulfill some of the factors to be invalidated.[80] With respect to COVID-19 liability waivers, California courts will likely consider the *Tunkl* factors when determining if such waivers are unenforceable on public policy grounds. In turn, a COVID-19 liability waiver required to enter a business for an essential, unique service available to the public may be viewed differently than a COVID-19 liability waiver required to enter a business which is generally not open to the public.[81] Where the public interest is not involved, a court will be less likely to invalidate a liability waiver, as long as it is not unenforceable on other grounds.[82] Given that most commercial office buildings are not occupied by essential businesses of "practical and crucial necessity"[83] like the hospital in *Tunkl*, a waiver to visit the premises of a general business tenant will likely not be invalidated based on this factor.

3. *No Waivers for Violations of Law*

California Civil Code section 1668 and California case law firmly establish that exculpatory provisions which exempt a party from violations of law are void and against public policy.[84] Thus, broad exculpatory provisions cannot shield a party from claims arising from that party's breach of law.[85]

For example, in *Hanna v. Lederman*,[86] several tenants brought an action against their landlord for water damage to personal property caused from the fire sprinkler system, which was installed by landlord in violation of a municipal code.[87] The landlord defended the case on grounds that the tenants' leases included a broad exculpatory provision waiving claims against landlord for "any cause arising at any time."[88] The court disagreed and reasoned, "[s]ince the claim for damages because of negligence … was predicated upon the alleged violation of [law], the exculpatory provision could not be a defense to that cause of action if the evidence showed such violation to be a proximate cause of the tenant's loss."[89] Similarly, in *Capri v.*

L.A. Fitness International, LLC,[90] a court invalidated a broad release and waiver of liability agreement signed by a fitness club member on the grounds that the waiver could not shield the fitness club from personal injury claims caused by the fitness club's violation of a safety statute.[91]

In light of this case law and California Civil Code section 1668, landlords and tenants will not be shielded from liability for violation of laws, even where an exculpatory provision purports to grant them such protection. Thus, landlords and tenants should ensure they comply with all legal obligations to mitigate the risk of liability related to COVID-19 exposure in the building or premises.

4. *Waivers for Gross Negligence Are Unenforceable*

A waiver of liability for a party's prospective *gross* negligence, whether in the form of an exculpatory clause or a separate waiver, is unenforceable as a matter of public policy.[92] "Gross negligence" has long been defined in California and other jurisdictions as either a "want of even scant care" or "an extreme departure from the ordinary standard of conduct."[93] However, gross negligence is a relative term and the line between ordinary negligence and gross negligence may not be drawn with "sharp precision."[94] Thus, it is not clear how a court would draw the line between ordinary negligence and gross negligence in the context of COVID-19, but the outcome of pending COVID-19-related lawsuits in California may provide guidance.[95]

C. Mitigating Risk with Insurance

Insurance is a critical risk management tool for all landlords and tenants and may mitigate the risk of claims arising from alleged COVID-19 exposure within the premises and the building. While the insurance provisions included in a landlord's standard lease form are typically drafted with guidance from the landlord's risk manager, many office tenants view the insurance provisions as a transactional requirement and will obtain the specific insurance required by the lease, without closely scrutinizing the details of such coverage or the exclusions set forth therein. Since the coverage provided by insurance policies will vary widely by the specific language of each policy, landlords and tenants should consult with their insurance advisors to assess whether their existing insurance policies adequately cover risks related to COVID-19 and explore any options to obtain additional coverage, if required.

Additionally, since carriers may start updating future policies to expressly exclude coverage for COVID-19 claims, landlords and tenants should consider starting their policy renewal process earlier than usual to allow enough time to understand the coverage that may be available in the insurance marketplace, negotiate the terms of policy endorsements, and/or determine if supplemental coverage can be obtained. Landlords will also want to consult with their risk managers to determine whether the insurance provisions in their lease forms should be updated.

1. *Commercial General Liability Insurance*

In general, commercial general liability insurance ("CGL insurance") provides comprehensive coverage for third-party claims alleging bodily injury, property damage, or personal injury caused by an occurrence on the insured's premises.[96] Thus, an insured landlord or tenant must first demonstrate that exposure to COVID-19 in the building or premises constitutes an occurrence under the CGL insurance policy.

CGL insurance policies commonly define an "occurrence" as "an accident."[97] In California, *the term "accident" in a liability insurance policy is settled to mean* "an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause."[98] Courts have reasoned that the term "accident" is more comprehensive than the term "negligence" and thus, a liability insurance policy which defines an "occurrence" as "an accident" would provide coverage for liability resulting from the insured's negligent acts.[99]

However, even if an insured can demonstrate that exposure to COVID-19 in the building or premises constituted an occurrence under the CGL insurance policy, the policy may include exclusions which could be the basis for a denial of coverage. Although most CGL insurance policies do not have "virus" exclusions (which are more commonly found in business interruption policies), CGL insurance policies may contain other exclusions,[100] such as a broad pollution exclusion, which may include "organic pathogens," or a communicable diseases exclusion,[101] which will deny coverage for bodily injury "arising out of the actual or alleged transmission of a communicable disease."[102] The communicable disease exclusion will apply even if a claim alleges that the insured party was negligent in failing to prevent the spread of the disease.[103] Although the exclusion does not define communicable disease, its plain meaning suggests that coverage for COVID-19 claims would be excluded.[104]

According to David Weiss, a partner in Reed Smith's insurance recovery group, in the event of a claim, policyholders should provide prompt notice to the insurer to allow the insurer to conduct an investigation and to avoid any argument from the insurer that it was prejudiced by "late notice."[105] If a claim is tendered and denied due to an exclusion, policyholders should consult with an attorney with experience handling insurance matters as there may be arguments to avoid application of the exclusion.[106]

2. Workers' Compensation Insurance

In California, employers are required to carry workers' compensation insurance, which applies to "any injury sustained by … employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death."[107] Subject to certain exclusions (such as where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment), workers' compensation benefits are the exclusive remedy of employees who sustain injuries in the course of employment.[108] Thus, most employees who claim they contracted COVID-19 in the workplace will be barred from filing tort claims against employers. Instead, an employee will be required to file a workers' compensation claim.

To receive workers' compensation benefits, an employee normally has the burden of proving that his or her injury arose out of and in the course of employment. However, on September 17, 2020, Governor Newsom signed Senate Bill 1159,[109] which provides a disputable presumption that certain employees who test positive for COVID-19 and worked at certain places of employment during specified periods of time are presumed to have contracted COVID-19 at the workplace for purposes of awarding workers' compensation benefits.[110] In particular, California Labor Code section 3212.88 (which was part of Senate Bill 1159) applies to employees whose employer has five or more employees,[111] and provides a disputable presumption that such an employee who tests positive for COVID-19 during an "outbreak"[112] at the employer's place of employment (outside of the employee's residence) within fourteen days of performing labor or services at such place of employment from July 6, 2020 through January 1, 2023, has sustained an injury arising out of and in the course of employment for purposes of the workers' compensation system.[113] Pursuant to this section, an "outbreak"[114] exists if within fourteen calendar days one of the following occurs at a specific place of employment: (a) if the employer has 100 employees or fewer at a specific place of employment, four employees test positive for COVID-19; (b) if the employer has more than 100 employees at a specific place of employment, 4 percent of the number of employees who reported to the specific place of employment, test positive for COVID-19; or (c) a specific place of employment is ordered to close by a local public health department, the state department of public health, the division of occupational safety and health, or a school superintendent due to a risk of infection with COVID-19.[115]

Since California Labor Code section 3212.88 applies to employers with five or more employees,[116] it would likely apply to the vast swath of landlords and tenants as employers. Landlords and tenants should therefore ensure that they comply with all local health directives to reduce the chance of an "outbreak" in the workplace.

D. Compliance with Laws

Another vital strategy to mitigate the risk of COVID-19 liability (and shield against negligence per se claims, as discussed in Section II(D) above), is to ensure full compliance with laws. It is critical that landlords and tenants fully understand and comply with all laws applicable to the building or premises (as applicable). However, compliance with laws alone will not entirely shield a party from premises liability.[117] Indeed, given the gravity of the COVID-19 pandemic, the potential risk of serious illness and the public interest involved, landlords and tenants should view adherence to the laws as the *minimum* standard of operating business.

1. Landlords' Compliance with Laws

To mitigate a landlord's risk of liability for COVID-19 claims (and shield against negligence per se claims), landlords should strictly comply with laws applicable to the operation of their building, including any notice requirements for COVID-19 in the workplace[118] and any cleaning or operational protocols required by local health orders. For example, on November 9, 2020, San Francisco enacted the Healthy Buildings Ordinance, which imposes extensive cleaning standards on hotels and commercial office buildings larger than 50,000 square feet.[119] The ordinance requires, among other things, that landlords frequently clean and disinfect high touch areas, such as elevators, stairwells, door handles, and restrooms, and that each floor include a handwashing station.[120] Landlords should also closely monitor local ordinances that may impose requirements on the management and/or operation of their properties, and ensure that any property management company engaged to manage their buildings fully complies with the requirements of law.

2. Tenants' Compliance with Laws

To mitigate a tenant's risk of liability for COVID-19 claims (and shield against negligence per se claims), tenants must also review and comply with applicable laws affecting their premises and business operations, many of which include detailed measures to prevent the spread of COVID-19.

In addition, tenants should closely review employment laws governing how the tenant, as an employer, must handle COVID-19 exposure among its employees.[121] For example, on November 19, 2020, Cal/OSHA adopted emergency temporary standards to reduce COVID-19 exposure in the workplace that will impact most commercial tenants re-occupying their premises.[122] The California Office of Administrative Law approved these emergency temporary standards ("ETS") on November 30, 2020, and they became effective that same day.[123] The ETS applies to all employees and places of employment with few exceptions (such as employees covered by the Aerosol Transmissible Diseases regulation,[124] employees working from home, and places of employment with one employee who does not have contact with other persons).[125] These emergency standards will remain in effect for at least 180 days and are subject to re-adoption.[126]

The ETS also requires that employers develop and implement a comprehensive, written COVID-19 prevention program and specifies employer responsibilities after an "outbreak" of COVID-19 in the workplace.[127] An "outbreak" exists when a local health department identifies a workplace as a location of a COVID-19 outbreak, or three or more COVID-19 cases occur in an exposed workplace within a fourteen-day period.[128] A "major outbreak" exists when twenty or more COVID-19 cases occur in an exposed workplace within a thirty-day period.[129] Employer responsibilities during an outbreak or major outbreak include COVID-19 testing of employees during employees' working hours (at no cost to employees), ensuring employees infected with COVID-19 and employees exposed to COVID-19 are excluded from the workplace, investigating the COVID-19 outbreak and implementing corrective actions, and keeping a record of COVID-19 cases and reporting them to the local health department and other authorities as required.[130]

The ETS also requires that employers with employees excluded from the workplace due to a positive COVID-19 test or COVID-19 exposure at the workplace, who are otherwise able and available to work, "shall continue and maintain an employee's earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed from their job."[131] Furthermore, under the ETS, employers must also provide employees with information regarding COVID-19-related benefits to which the employee may be entitled under applicable laws, including workers' compensation law, the federal Families First Coronavirus Response Act,[132] the California Labor Code, and the employer's own leave policies.[133]

E. Compliance with Guidance and Recommendations from Government Agencies and Industry Groups

To further mitigate potential liability arising from COVID-19, landlords and tenants should also carefully consider and implement, where reasonable and appropriate, the recommendations and guidelines issued by government agencies and relevant industry groups. In particular, the CDC, Occupational Safety and Health Administration (OSHA), and Cal/OSHA, among other government agencies, as well as several industry groups, such as BOMA and American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE), have all issued guidance for the management and occupancy of commercial buildings.

Cal/OSHA has issued guidelines for several industries, including specific guidance for office workspaces, "COVID-19 Industry Guidance: Office Workspaces,"[134] which should be reviewed by tenants re-entering office space. Among other recommendations, the guidance suggests that businesses establish a written COVID-19 prevention plan, worker training, individual control measures and screening, cleaning and disinfecting protocols, and physical distancing guidelines.[135]

BOMA has also developed guidelines for landlords and managers aimed to mitigate the potential health and business impacts of COVID-19.[136] In particular, BOMA assembled a task force group from across North America to publish "Getting Back to Work 2.0: Building Re-Entry Best Practices in a COVID-19 Reality," which provides guidance for preparing commercial buildings for the return of office tenants, and identifies operational and safety protocols that should be considered, including developing and updating a re-entry plan, potential changes to mechanical systems, common areas, and amenity spaces, as well as other considerations.[137] BOMA also published the "Coronavirus (COVID-19) Preparedness Checklist," which includes checklist items for communicating with and preparing tenants and staff, planning for business continuity, best practices for cleaning during an outbreak, supplies to have on-hand, and travel guidance.[138]

We recommend that landlords and tenants regularly review the guidelines of government agencies and industry groups to keep up to date on the evolving responses to COVID-19.

F. Operational and Other Measures

In addition to complying with applicable laws and available guidance, landlords and tenants should closely monitor the COVID-19 mitigation measures being undertaken by others in their industry, as such measures may serve as a barometer for the reasonableness of measures taken by a landlord or tenant. The following recommendations provide an amalgam of mitigation measures applicable to the operation of an office building (or occupancy of an individual premises within an office building, as applicable), which may help to establish a landlord's or tenant's actions as reasonable. While some of the measures referenced below are mandated by law and *must* be implemented, others are recommendations or protocols which the parties should consider implementing. Although landlords and tenants will want to ensure that their conduct does not fall below the level generally maintained by similarly situated landlords and tenants, the specific measures that each landlord and tenant implements should be tailored to such party's particular circumstances.

1. COVID-19 Prevention Plan

A common mitigation measure suggested in guidance documents issued by government agencies and industry groups alike is the development and implementation of a plan to prevent COVID-19 exposure in the workplace or business. For example, Cal/OSHA developed guidelines for office workspace plans in its "COVID-19 Industry Guidance: Office Workspaces,"[139] and its ETS require employers to develop a COVID-19 Prevention Program (CPP).[140] The CPP must include specific information regarding the following eleven topics: (i) a system for communicating with employees; (ii) identification and evaluation of COVID-19 hazards; (iii) investigating and responding to COVID-19 cases in the workplace; (iv) correction of COVID-19 hazards; (v) training and instruction; (vi) physical distancing; (vii) face coverings; (viii) engineering controls, administrative controls, and personal protective equipment; (ix) reporting, recordkeeping, and access; (x) exclusion of COVID-19 cases from the workplace until the return to work criteria is satisfied; and (xi) return to work criteria.[141] Cal/OSHA has also developed a model CPP to assist employers in developing a CPP tailored to their particular workplace.[142] In addition to Cal/OSHA, several California counties have established guidance and models for COVID-19 worksite-specific prevention plans.[143] Given the foregoing, we recommend that landlords and tenants develop COVID-19 prevention plans and diligently implement and enforce such plans as their failure to do so could support a finding of negligence.

2. Communication Strategy

With information on COVID-19 constantly evolving, landlords and tenants should anticipate that parties accessing and/or occupying the building or premises, as applicable, will want to be regularly informed of the implementation of any new safety measures. Moreover, timely and frequent communication by (and among) landlords and tenants will be an extremely effective tool in mitigating COVID-19 liability. In furtherance thereof, landlords and tenants should consider developing a communication strategy that includes, at a minimum, conveying: (1) information regarding governmental directives; (2) the measures and precautions that have been taken to mitigate the spread of COVID-19; and (3) an acknowledgement that despite such precautions taken, there is nonetheless a potential risk of contracting COVID-19. As part of such communication strategy, signage required or recommended by government agencies (such as social distancing and face covering reminders) should be posted by landlords in common areas and by tenants in their premises.

3. Cleaning Protocols

Landlords and tenants should each implement enhanced cleaning protocols in commercial buildings to reduce the spread of COVID-19. In particular, high traffic areas and commonly touched surfaces, such as door handles, handrails, and elevator buttons, should be frequently sanitized, and hand sanitizer stations should be installed at entrances, restrooms, and common areas. Any janitorial service hired to clean a commercial building should also be required to follow cleaning guidance from the CDC.

Landlords are generally responsible for cleaning common areas, while cleaning within a tenant's premises will depend on the terms of the lease. If the tenant is responsible for cleaning (or above-standard cleaning) within its premises, the tenant should review its lease to determine if it imposes any requirements on tenant's cleaning (such as landlord approval of the vendor). Larger tenants, on the other hand, may negotiate for the right to approve the landlord's cleaning vendor (as well as janitorial specifications), or the right to use its own preferred vendor so that tenant has the flexibility to perform enhanced cleaning.

4. Alterations or Improvements

Landlords and tenants may also consider making physical alterations or improvements to mitigate liability arising from COVID-19. For example, to accommodate physical distancing requirements, tenants may elect to reconfigure their premises by demising separate office spaces, adjusting workspaces to accommodate social distancing, and/or installing plexiglass partitions. Landlords may consider making changes to the biophilic design of the building, improving air quality and ventilation, and installing touchless technology and equipment. Some landlords may also consider obtaining third party certifications to demonstrate that their buildings meet certain health and wellness standards, such as the Well Building Standard.[144]

Pursuant to the BOMA International COVID-19 Commercial Real Estate Impact Study, which provides insight from a nationwide survey of over 3,000 office space decision-makers and high-level influencers, the greatest percentage of those surveyed recognized maximization of fresh air in HVAC systems as the most important new measure for property owners/operators to adopt, with almost half of those surveyed willing to pay a rent premium or extra fee for it.[145] Additionally, as tenants are changing how they utilize office space and placing more focus on health and safety issues, landlords who adjust their buildings to meet the changing expectations of tenants may also have a competitive advantage in leasing their commercial space.

V. CONCLUSION

While meaningful differences exist between the potential COVID-19 premises liability of a landlord versus a tenant, the interests of both parties, in terms of implementing reasonable and appropriate measures to ensure the safety of building occupants, are largely aligned. These measures should, at a minimum, meet the level generally maintained by similarly situated landlords and tenants and comply with laws appliable to the operation of the building or premises. Landlords and tenants should also take into consideration recommendations of government agencies and industry groups to ensure the safety of building occupants. These measures are even more critical since insurance, which is a commonly employed risk management tool, may not provide adequate coverage for COVID-19 claims, and there are no existing statutory shield laws protecting California office landlords and tenants from COVID-19 liability.

Moreover, the steps undertaken by each party will not only mitigate such party's short-term risk, but may also have a positive, long-lasting impact on that party's business and relationships. The manner in which landlords manage and operate their buildings following the COVID-19 pandemic provides a unique opportunity to build trust with tenants and the surrounding community. The measures implemented by office tenants to make employees and guests feel safe in their premises will prove crucial to the success of any return-to-work plan and ultimately, the tenant's business itself.

Endnotes

1 *See Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html (last visited Jan. 19, 2021).

2 Exec. Dep't State of Cal., Proclamation of State of Emergency (Mar. 4, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf.

3 Erin Allday, *Bay Area Orders 'Shelter in Place,' Only Essential Businesses Open in 6 Counties*, S.F. Chron. (Mar. 19, 2020, 3:33 P.M.), https://www.sfchronicle.com/local-politics/article/Bay-Area-must-shelter-in-place-Only-15135014.php; L.A. Cty. Dep't of Pub. Health, *Safer at Home Order for Control of COVID-19: Temporary Prohibition of Events and Gatherings of 10 Persons or More; Closure of Non-Essential Businesses and Areas* (Mar. 19, 2020), http://file.lacounty.gov/SDSInter/lac/1070029_COVID-19_SaferAtHome_HealthOfficerOrder_20200319_Signed.pdf.

4 Exec. Dep't State of Cal., Cal. Exec. Order No. N-33-20 (Mar. 19, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf.

5 Lauren Hepler, *Indoor Haircuts Are Back as California Tries Reopening Again*, Cal Matters (Aug. 28, 2020), https://calmatters.org/economy/2020/08/california-reopen-hair-salons-indoor-haircuts/?.

6 Cal. Dep't of Pub. Health, Regional Stay at Home Order (Dec. 3, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/12/12.3.20-Stay-at-Home-Order-ICU-Scenario.pdf.

7 *Id.*

8 Businesses and operations are presumed to be "non-essential" unless they fall into one of "Essential Critical Workforce" sectors. *See* Cal. for All, Essential Workforce, Cal. Gov. Office (Jan. 7, 2021, 9:07 AM), https://covid19.ca.gov/essential-workforce/.

9 Ross Boughton, et al., *California Counties' "Shelter in Place" Orders Severely Restrict Business Activities*, Ford Harrison (Mar. 19, 2020), https://www.jdsupra.com/legalnews/california-counties-shelter-in-place-13087/ (Non-essential businesses must cease all operations, except for remote work and minimum basic operations, which consist of minimum necessary activities to maintain the value of the business's inventory, ensure security, process payroll and employee benefits, or for related functions and to facilitate employees of the business being able to continue to work remotely

from their residences.). *See also* City & Cty. of S.F. Dep't of Pub. Health, Order of the Health Officer No. C19-07, 10(g)(ii) (Mar. 16, 2020), https://www.fordharrison.com/webfiles/SF%20HealthOrderC19-07-%20Shelter-in-Place.pdf.

10 Scott Baltic, *Office Occupancy Varies Widely as Workers Trickle Back: Report*, Com. Prop. Exec. (June 25, 2020), https://www.cpexecutive.com/post/as-offices-reopen-report-finds-few-employees-returning/.

11 In response to the pandemic, many companies announced that they would continue to embrace remote work arrangements, hybrid work arrangements, and/or hub-and-spoke workplace models for the foreseeable future, even when the office was re-opened. *See* The Information Staff, *The Information's Return to the Office Tracker*, The Info. (Jan. 14, 2021, 6:00 AM PST), https://www.theinformation.com/articles/the-informations-return-to-the-office-tracker.

12 While this article focuses on the liability of a landlord and tenant from the lens of operating and occupying office buildings, the general framework for liability, as well as many of the mitigation measures, should largely apply to other types of commercial properties.

13 *Brooks v. Eugene Burger Mgmt. Corp.*, 215 Cal. App. 3d 1611, 1619 (1989); *Alcaraz v. Vece*, 14 Cal. 4th 1149, 1162 (1997) ("[T]he phrase 'own, possess, or control' is stated in the alternative.") (internal citations omitted).

14 *Castellon v. U.S. Bancorp*, 220 Cal. App. 4th 994, 998 (2013).

15 *Ladd v. Cty. of San Mateo*, 12 Cal. 4th 913, 917 (1996).

16 U.S. Env't Prot. Agency, *Indoor Air and Coronavirus (COVID-19)*, https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19#:~:text=In%20addition%20to%20close%20contact,by%20some%20social%20distancing%20recommendations (last visited Jan. 13, 2021).

17 Cal. Civ. Code § 1714(a).

18 *Alcaraz*, 14 Cal. 4th at 1162 (In determining duty, "the phrase 'own, possess, or control' is stated in the alternative."); *see also Preston v. Goldman*, 42 Cal. 3d 108, 119 (1986) (noting that courts place "major importance on the existence of possession and control as a basis of tortious liability" for conditions on property).

19 *Stone v. Ctr. Tr. Retail Properties, Inc.*, 163 Cal. App. 4th 608, 612 (2008) (citing *Mata v. Mata*, 105 Cal. App. 4th 1121, 1131–1132 (2003), *as modified* (Feb. 6, 2003), disapproved in part on other grounds in *Delgado v. Trax Bar & Grill*, 36 Cal. 4th 224, 247-250 (2005)).

20 *Mata*, 105 Cal. App. 4th at 1131-32.

21 *See, e.g., Uccello v. Laudenslayer*, 44 Cal. App. 3d 504, 514 (1975) (stating generally that a landlord is under no duty to inspect the premises for the purpose of discovering the existence of a dangerous condition caused by tenant; only when the landlord has actual knowledge with a right to cure the conduct, does the duty of care arise).

22 *Mata*, 105 Cal. App. 4th at 1131-32. (Affirming summary judgment for a landlord where the dangerous condition "had nothing to do with the land itself." Rather, it had to do with the manner in which the [tenant] ran his business. The court remarked that the landlord was "a landlord, not a manager or supervisor" of the tenant.).

23 *Stone*, 163 Cal. App. 4th at 612 (citing *Mata*, 105 Cal. App. 4th at 1131–32 ("Limiting a landlord's obligations releases it from needing to engage in potentially intrusive oversight of the property, thus permitting the tenant to enjoy its tenancy unmolested.")).

24 *Vasquez v. Residential Inv., Inc.,* 118 Cal. App. 4th 269, 280 (2004) (in evaluating a landlord's duty of care, the court stated: "the question of a landlord's duty is not whether a duty exists at all, but rather what is the scope of the landlord's duty given the particular facts of the case?" The court further stated that, "[o]nly after the scope of the duty under consideration is defined may a court meaningfully undertake the balancing analysis of the risks and burdens present in a given case to determine whether the specific obligations should or should not be imposed on the landlord.").

25 *Rowland v. Christian*, 69 Cal. 2d 108, 113 (1968), partially superseded by statute on other grounds as stated in *Calvillo-Silva v. Home Grocery*, 19 Cal. 4th 714 (1998).

26 *Morales v. Fansler*, 209 Cal. App. 3d 1581, 1585 (1989) (citing *Rowland*, 69 Cal. 2d at 113).

27 *Castaneda v. Olsher*, 41 Cal. 4th 1205, 1213 (2007).

28 *Id.*; *see also Tan v. Arnel Mgmt. Co.*, 170 Cal. App. 4th 1087, 1098 (2009) ("[T]he balance of burdens and foreseeability is generally primary to the analysis.").

29 In evaluating the burden on a defendant, courts will consider among other things, the financial burden. *See, e.g.*, *Vasquez*, 118 Cal. App. 4th at 285.

30 *Castaneda*, 41 Cal. 4th at 1213.

31 *Id.*

32 *See, e.g.*, S.F. Health Code, art. 11B (2020); City & Cty. of S.F. Dep't of Pub. Health, Stay Safer at Home Health Order (Dec. 30, 2020), https://www.sfdph.org/dph/alerts/files/C19-07-Shelter-in-Place-Health-Order.pdf; L.A. Cty. Dep't

of Pub. Health, Revised Temporary Targeted Safer at Home Health Officer Order for Control of COVID-19-Tier 1 Substantial Surge Updated Response (Dec. 30, 2020), http://publichealth.lacounty.gov/media/Coronavirus/docs/HOO/HOO_SaferatHome_SurgeResponse.pdf.

33 *See* Ctr. for Disease Control & Prevention, Guidance for Bus. & Empl'r, https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html. (last visited Jan. 13, 2021).

34 *See* Cal. Dep't of Pub. Health & Cal. OSHA, COVID-19 Industry Guidance: Office Workspaces, https://files.covid19.ca.gov/pdf/guidance-office-workspaces.pdf (last visited Jan. 13, 2021).

35 *Coyle v. Historic Mission Inn Corp.*, 24 Cal. App. 5th 627, 645 (2018).

36 *Saelzler v. Advanced Grp. 400*, 25 Cal. 4th 763, 778 (2001).

37 *Id.*

38 *Leyva v. Garcia*, 20 Cal. App. 5th 1095, 1104 (2018).

39 *Id.*

40 *Id.*

41 Betsy J. Grey, *Causal Proof in the Pandemic*, 10 Wake Forest L. Rev. Online 124 (2020).

42 Betsy J. Grey & Samantha Orwoll, *Tort Immunity in the Pandemic*, 96 Ind. L.J. Supplement 66, 69 (2020).

43 *See* Section IV(C)(2) of this article for a discussion of an employer's responsibility in the event of "outbreaks" in the workplace.

44 Cal. Evid. Code § 669. *See also Spates v. Dameron Hosp. Ass'n*, 114 Cal. App. 4th 208, 218 (2003).

45 Cal. Evid. Code § 669.

46 *See Elsner v. Uveges*, 34 Cal. 4th 915, 927 (2004).

47 *Harris v. Joffe*, 28 Cal. 2d 418, 424 (1946).

48 *See Strouse v. Webcor Constr., L.P.,* 34 Cal. App. 5th 703, 719 (2019) ("Cal-OSHA provisions are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care."); *Vallas v. City of Chula Vista*, 56 Cal. App. 3d 382, 469 (1976). *See also Schonfeldt v. State of Cal.*, 61 Cal. App. 4th 1462, 1467-68 (1998) (rejecting negligence per se based on violation of state maintenance manual guidelines); *McDaniel v. Sunset Manor Co.*, 220 Cal. App. 3d 1 (1990) (declining to elevate HUD guidelines to the level of a law, statute, or ordinance for purposes of a negligence per se claim).

49 *See, e.g.*, Tenn. Code Ann. § 29-34-801; Ga. Code Ann. § 51-16-3; Utah Code Ann. § 78B-4 517.

50 *See, e.g.*, Ark. Exec. Order No. 20-33 (June 15, 2020).

51 Tenn. Code Ann. § 29-34-801.

52 *Id.*

53 *See* Iowa Code § 147.136A; N.C. Gen. Stat. § 99E; La. R.S. 29:773; Ga. Code Ann. § 51-16-3; Tenn. Code Ann. § 29-34-801.

54 *E.g.*, Ga. Code Ann. § 51-16-3.

55 *See* Cal. Legislative Info., AB-1035 COVID-19 Emergency: Small Businesses: Immunity from Civil Liability, https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201920200AB1035 (last visited Jan. 13, 2021); Cal. Legislative Info., AB-1759, Institutions of Higher Education: Liability for COVID-19-Related Injuries, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1759 (last visited Jan. 13, 2021).

56 *Id.*

57 While not specific to COVID-19, California does have a few laws specific to hospitals and healthcare providers that provide immunity for certain services performed during an emergency. *See, e.g.*, Cal. Gov't Code § 8659; Cal. Health & Safety Code §1317; Cal. Civ. Code § 1714.5; Cal. Bus. & Prof. Code §§ 2727.5, 2861.5, 3503.5.

58 42 U.S.C.A. § 247d (2020).

59 15 U.S.C.A. § 9001 (2020).

60 The insurance clauses in commercial leases also address the allocation of risk between landlords and tenants, which is discussed in further detail in Section IV(C) of this article.

61 2 Cal. Affirmative Def. § 42:1 (2d ed.).

62 *See United Guar. Mortg. Indem. Co. v. Countrywide Fin. Corp.*, 660 F. Supp. 2d 1163, 1185 (C.D. Cal. 2009); *Reserve Ins. Co. v. Pisciotta,* 30 Cal. 3d 800, 814 (1982). *See also Philippine Airlines, Inc. v. McDonnell Douglas Corp.*, 189 Cal. App. 3d 234, 237 (1987) (commercial parties to a contract are free to "limit the liability of one to the other, or otherwise allocate the risk of doing business").

63 *Fields v. City of Oakland*, 137 Cal. App. 2d 602, 608–09 (1955) (stating that "while exculpatory provisions, exempting the lessor from liability even for active negligence, are valid and enforceable" such provisions are to be strictly construed "and particularly in the case of active negligence are not to be extended to cover such negligence unless the intention to do so is clearly expressed.").

64 *See Barkett v. Brucato*, 122 Cal. App. 2d 264 (1953), overruled on other grounds in *Pelletier v Alameda Yacht Harbor*, 188 Cal. App. 3d 1551 (1986). *See also Salton Bay Marina, Inc. v. Imperial Irr. Dist.*, 172 Cal. App. 3d 914 (1985).

65 *See Maryland Cas. Co. v. Bailey & Sons, Inc.*, 35 Cal. App. 4th 856, 864 (1995) ("Courts interpret contractual indemnity provisions under the same rules governing other contracts, with a view to determining the actual intent of the parties."); *Burnett v. Chimney Sweep*, 123 Cal. App. 4th 1057, 1066 (2004) ("Whether an exculpatory clause covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control.") (internal citations omitted). *See also Crawford v. Weather Shield Mfg., Inc.*, 44 Cal. 4th 541, 553 (2008) (Indemnification provisions are also subject to default rules of construction set forth in Civil Code section 2778, unless the provision is drafted to expressly provide otherwise.).

66 *Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co*., 234 Cal. App. 3d 1724, 1735, (1991) ("Indemnity, involving an obligation to an injured third party, is distinct from an exculpatory clause or 'exemption' from liability obtained from the injured party.").

67 *See Huverserian v Catalina Scuba Luv, Inc.*, 184 Cal. App. 4th 1462, 1467 (2010). *See also Frittelli, Inc. v. 350 N. Canon Drive, LP*, 202 Cal. App. 4th 35, 50 (2011) ("[T] o be effective, an agreement which purports to release, indemnify or exculpate the party who prepared it from liability for that party's own negligence or tortious conduct must be clear, explicit and comprehensible in each of its essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement.") (quoting *Ferrell v. S. Nevada Off-Rd. Enthusiasts, Ltd.*, 147 Cal. App. 3d 309, 318 (1983)).

68 *See* Cal. Civ. Code § 1654. *See also Delta Air Lines, Inc. v. Douglas Aircraft Co.*, 238 Cal. App. 2d 95, 100 (1965).

69 *Cohen v. Five Brooks Stable*, 159 Cal. App. 4th 1476, 1488-89 (2008) (quoting *Ferrell*, 147 Cal. App. 3d at 319; *Scroggs v. Coast Cmty. Coll. Dist.*, 193 Cal. App. 3d 1399, 1404 (1987) ("The presence of a clear and unequivocal waiver with specific reference to a defendant's negligence is a distinct requirement where the defendant seeks to use the agreement to escape responsibility for the consequences of his negligence.")).

70 *City of Bell v. Super. Ct.*, 220 Cal. App. 4th 236 (2013), *as modified* (Oct. 9, 2013), *as modified on denial of reh'g* (Oct. 25, 2013).

71 *Salton Bay Marina*, 172 Cal. App. 3d at 933. *See also Frittelli*, 202 Cal. App. 4th at 48 ("Whereas passive negligence involves 'mere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty imposed by law,' active negligence involves 'an affirmative act,' knowledge of or acquiescence in negligent conduct, or failure to perform specific duties.") (quoting *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 13 Cal. 3d 622, 629 (1975)).

72 *Cohen*, 159 Cal. App. 4th at 1488-89.

73 Cal. Civ. Code § 1668.

74 *Farnham v. Super. Ct.*, 60 Cal. App. 4th 69, 74 (1997) ("[Despite] its purported application to [a]ll contracts, section 1668 does not bar either contractual indemnity or insurance, notwithstanding that (aside from semantics) the practice effect of both is an 'exempt[ion]" from liability for negligence."). *But see Tomerlin v. Canadian Indem. Co.*, 61 Cal. 2d 638, 648 (1964) (citing section 1668, the court noted that "an insurer may not indemnify against liability caused by the insured's willful wrong.").

75 *Farnham*, 60 Cal. App. 4th at 74.

76 *Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92 (1963).

77 *Id.* at 94.

78 *Id.* at 98.

79 *Id.* at 98-101.

80 *Id.* at 101.

81 Liability waivers from employees are also likely to be unenforceable as California disfavors employee waivers as a general matter due to the unequal bargaining power between an employer and employee. Additionally, Labor Code section 2800 requires that "[a]n employer shall in all cases indemnify his employee for losses caused by the employer's want of ordinary care" and California Labor Code section 2804 provides that "[a]ny contract or agreement, express or implied, made by any employee to waive the benefits of this article or any part thereof [including employer's indemnity in Section 2800], is null and void."

82 *See Madison v. Super. Ct.*, 203 Cal. App. 3d, 589, 599 (1988) (Cal. Civ. Code § 1668 "will not invalidate contracts which seek to exempt one for liability for simple negligence or strict liability.").

83 *Tunkl,* 60 Cal. 2d at 101.

84 Cal. Civ. Code § 1668.

85 *See, e.g.*, *Tunkl*, 60 Cal. 2d at 96. *See also Capri v. L.A. Fitness Int'l, LLC*, 136 Cal. App. 4th 1078, 1085 (2006).

86 223 Cal. App. 2d 786 (1963).

87 *Id.*

88 *Id.* at 788.

89 *Id.* at 792.

90 *Capri*, 136 Cal. App. 4th 1078.

91 *Id.* at 1087.

92 *City of Santa Barbara v. Super. Ct.*, 41 Cal. 4th 747, 751 (2007).

93 *Id.* at 754 (internal citations omitted).

94 *See id.* at 777.

95 *E.g.*, *Zuniga v. Safeway, Inc.*, No. 4:2020-cv-04440 (N.D. Cal. filed July 2, 2020) (the widow of a longtime employee at Safeway's distribution center in Tracy, who died of COVID-19, filed a lawsuit for negligence, gross negligence, and wrongful death).

96 *See* Julia Kagan, *Commercial General Liability (CGL)*, Investopedia (Oct. 24, 2020), https://www.investopedia.com/terms/c/commercial-general-liability-cgl.asp#:~:text=Commercial%20general%20liability%20(CGL)%20is,occur%20on%20the%20business's%20premises.

97 *See* North Star Mutual, Commercial General Liability Coverage Form 15, https://www.northstarmutual.com/UserFiles/Documents/forms/policyforms/Current/CG%2000%2001%2004%2013.pdf (last accessed Jan. 14, 2021) (defining an "occurrence" as an accident, including continuous or repeated exposure to substantially the same general harmful conditions).

98 *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co.*, 5 Cal. 5th 216, 221–22 (2018), as modified (July 25, 2018).

99 *Id.* (citations omitted).

100 *See* Scott C. Turner, Insurance Coverage of Construction Disputes § 2:63 (2d ed. 2020).

101 Spiro Bantis & Jonathan Kranz, *ISO Communicable Disease Exclusion – Drafting History*, London Fischer, LLP, https://www.londonfischer.com/covid-19-response/coverage-for-business-interruption-from-covid-19/05.06.20-ISO-Communicable-Disease-Exclusion-Drafting-History.pdf (last visited Jan. 14, 2021). This exclusion was introduced in 2008 to address insurers' concerns regarding the effect of communicable diseases such as SARS and avian flu on general liability insurance.

102 *See* Ins. Servs. Office, Inc., Communicable Disease Exclusion (CG 21 32 05 09) (2008), https://public2.capspecialty.com/capfiles/716325.pdf.

103 Craig F. Stanovich, *The Coronavirus and the CGL Policy*, IRMI (June 2020), https://www.irmi.com/articles/expert-commentary/coronavirus-and-the-cgl-policy.

104 *Id.*

105 Telephone Interview with David Weiss, Partner, Reed Smith (Jan. 18, 2021). *See also Pitzer Coll. v. Indian Harbor Ins. Co.*, 8 Cal. 5th 93 (2019); *Campbell v. Allstate Ins. Co.*, 60 Cal. 2d 303 (1963).

106 Telephone Interview with David Weiss, Partner, Reed Smith (Jan. 18, 2021).

107 Cal. Lab. Code § 3600(a).

108 *Id.* § 3602.

109 *See* Cal. Legislative Info., SB-1159 Workers' Compensation: COVID-19: Critical Workers, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB1159 (last visited Jan. 19, 2021). Senate Bill 1151 was adopted as the new sections 3212.86, 3212.87, and 3212.88 of the California Labor Code.

110 Cal. Lab. Code § 3212.86.

111 *Id.* § 3212.88(a).

112 *Id.* § 3212.88.

113 *Id.* § 3212.88(e).

114 *Id.* § 3212.88(m)(4).

115 *Id.*

116 Cal. Lab. Code § 3212.88(a).

117 *Myrick v. Mastagni*, 185 Cal. App. 4th 1082, 1087 (2010) ("[A] statute, ordinance or regulation ordinarily defines a minimum standard of conduct. A minimum standard of conduct does not preclude a finding that a reasonable person would have taken additional precautions under the circumstances.") (internal citations omitted).

118 *See, e.g.*, Cal. Legislative Info., AB-685: Imminent Hazard to Employees: Exposure: Notification: Serious Violations, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB685 (last visited Jan. 19, 2021) (requiring employers to report certain instances of COVID-19 in the workplace); Assembly Bill 685 was adopted as the new sections 6325 and 6432 of, and to add and repeal Section 6409.6, of the California Labor Code. Assemb. B. 685; Cal. Lab. Code § 6409.6.

119 S.F. Health Code, art. 11B (2020).

120 *Id.*

121 Landlords who have employees working at the building should also closely review employment laws to address how the landlord, as an employer, must handle COVID-19 exposure among its employees.

122 Cal. OSHA, COVID-19 Emergency Temporary Standards – What Employers Need to Know, https://www.dir.ca.gov/dosh/dosh_publications/COVIDOnePageFS.pdf (last accessed Jan. 13, 2021).

123 ETS was adopted as the new sections 3205, 3205.1, 3205.2, 3205.3, and 3205.4 under the California Code of Regulations, title 8, division 1, chapter 4, of the General Industry Safety Orders.

124 The Aerosol Transmissible Diseases regulation is California Code of Regulations, title 8, section 5199.

125 Cal. Code Regs., tit. 8, § 3205(a).

126 *Id.* § 3205 n.1.

127 *Id.* § 3205(c).

128 *Id.*§ 3205.1(a).

129 *Id.* § 3205.2(a).

130 *Id.* § 3205(c)(3).

131 *Id.* § 3205(c)(10)(C).

132 *See* U.S. Dep't of Labor, Families First Coronavirus Response Act: Employee Paid Leave Rights https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave (last visited Jan. 13, 2021)

133 Cal. Code Regs., tit. 8, § 3205(c)(5)(B).

134 *See* Cal. Dep't of Pub. Health & Cal. OSHA, COVID-19 Industry Guidance: Office Workspaces, https://files.covid19.ca.gov/pdf/guidance-office-workspaces.pdf (last visited Dec. 18, 2020).

135 *Id.*

136 *See* BOMA Int'l, BOMA International's Coronavirus Resource Center, https://www.boma.org/BOMA/Advocacy/Security___Emergency_Preparedness/Coronavirus.aspx (last visited Dec. 18, 2020).

137 BOMA Int'l, *Getting Back to Work 2.0: Building Re-Entry Best Practices in a COVID-19 Reality* (Oct. 23, 2020).

138 BOMA Int'l, *Coronavirus (COVID-19) Preparedness Checklist* (Mar. 4, 2020).

139 *See* Cal. Dep't of Pub. Health & Cal. OSHA, COVID-19 Industry Guidance: Office Workspaces, https://files.covid19.ca.gov/pdf/guidance-office-workspaces.pdf (last visited Dec. 18, 2020).

140 *See* Cal. Code Regs., tit. 8, § 3205(c).

141 Cal. Code Regs., tit. 8, § 3205.

142 State of Cal. Dep't of Indus. Relations, COVID-19 Prevention Emergency Temporary Standards – Facts Sheet, Model Written Program and Other Resources, https://www.dir.ca.gov/dosh/coronavirus/ETS.html (last visited Jan. 18, 2021).

143 *See, e.g.,* City & Cty. of S.F., Health Officer Directive No. 2020-18b: Health and Safety Plan (Oct. 27, 2020), https://www.sfdph.org/dph/alerts/covid-guidance/2020-18-HSP-Offices.pdf; Cnty. of Los Angeles Dep't of Pub. Health Order of the Health Officer, Protocols for Office Worksites: Appendix D (Dec. 24, 2020), http://publichealth.lacounty.gov/media/Coronavirus/docs/protocols/Reopening_OfficeBasedWorksites.pdf.

144 *See* Int'l Well Bldg. Inst., *Strategies from the WELL Building Standard to Support in the Fight Against COVID-19: Prevention and Preparedness, Resilience and Recovery*, https://a.storyblok.com/f/52232/x/f12ca80093/strategiesfromwell-covid19-v2.pdf (last visited Jan. 13, 2021).

145 BOMA Int'l, *BOMA International COVID-19 Commercial Real Estate Impact Study*, https://www.boma.org/covidimpact (last visited Jan. 18, 2021).

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Recent RPLS eNews Articles of Interest

March

Dealing with Emergency Preparedness in California HOAs: In most associations, disaster insurance is usually inadequate or non-existent, and there is often little reserve funding that can be tapped to rebuild the development. Regardless of whether you are dealing with landslides, mudslides, fire, flood, earthquake, civil unrest or a pandemic, every community association should have a plan in place that is unique to its common interest community during a time of crisis. In our experience, most community associations lack the most basic level of response – a written emergency plan.

Will A Folding Or Foldable Bike Help You With Your 2021 Fitness Goals?: On the Real Property Law Section's newly formed Health & Wellness Committee, we pride ourselves in offering suggestions that could benefit the physical and mental health of all RPLS members. So, what does a "folding" or "foldable" bike have to do with this?

Section Deadlines

Deadline for RPLS eNews

The 10th of each month

Inviting case summaries, practice tips, short articles of interest to the real estate community

Want to be interviewed for a future eNews, the monthly RPLS electronic newsletter?

Contact **Shawn S. Dhillon, dhillon916@gmail.com**

Deadlines for Future RPLS Journals

Issue	Looking for articles related to:	Deadline
Issue 2, 2021	Housing	Full
Issue 3, 2021	General Real Property	Full
Issue 4, 2021	Diversity	August 2021

Send your article ideas to **Cosmos Eubany, ceubany@realtyincome.com**.

Two issues already completely full. Make sure your idea gets into print.

Section Calendar of Events

Missed it live? Check out the online catalog (calawywers.org/education/).

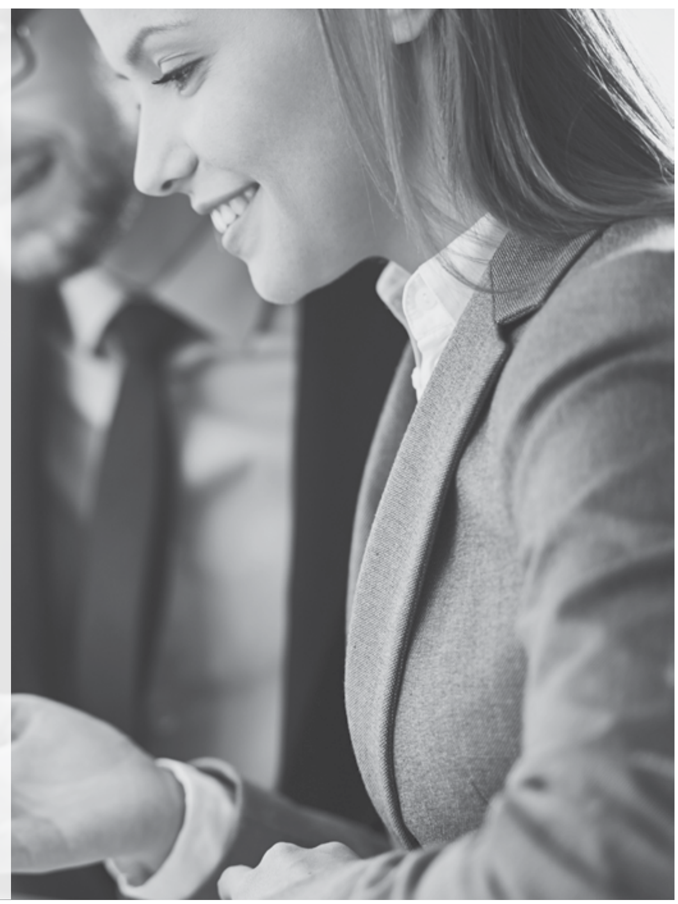
Title	Event	Date
Lease Workouts in the Age of Covid	Webinar - RPLS (1.00 MCLE)	June 1, 2021
Assignment/Subletting – Top Tip for Protecting Your Client's Interests	Webinar - RPLS (1.00 MCLE)	June 8, 2021
Commercial Lease Guarantees by Foreign Entities	Webinar - RPLS (1.25 MCLE)	June 10, 2021

► Interested in presenting a real property webinar for RPLS? We are always looking for good ideas.
Contact: **Nancy Goldstein – nancy@gr8calilawyer.com**

Solo and Small Firm Summit	Online – CLA https://pheedloop.com/ssfs2021/site/home/	June 24-25, 2021
	Summer Cannabis Series	
• **Cannabis Licensing and Regulatory Activity**	Webinar – RPLS (1.25 MCLE)	June 3, 2021
• **Cannabis in Workplace**	Webinar – RPLS (1.25 MCLE)	June 3, 2021
• **Cannabis and Environmental Laws**	Webinar – RPLS (1.25 MCLE)	July 1, 2021
• **Sale/Lease of Cannabis Use Property**	Webinar – RPLS (1.25 MCLE)	July 1, 2021
• **Cannabis IP**	Webinar – RPLS (1.25 MCLE)	August 5, 2021
• **Tax, Banking & Insolvency for Cannabis Businesses**	Webinar – RPLS (1.25 MCLE)	August 5, 2021
	Women in Leasing symposium Virtual education and networking	June 1, 8 and 10
What's Up With Us! RPLS attorneys discuss hot topics, cases, events, and interviews	Your home, office, anywhere via Zoom. **Free.** But the knowledge is priceless.	Third Thursday of each month at 12:30 pm. **WUWU**

THE NEW ETHICS COMMITTEE OF THE CALIFORNIA LAWYERS ASSOCIATION

The California Lawyers Association has created a new Ethics Committee to help ensure CLA members stay up-to-date with their ethical obligations. This new advisory group will create educational content, comment on proposed rule changes, write advisory opinions on emerging ethical issues, and issue ethics alerts and reminders to CLA members.



CALIFORNIA
LAWYERS
ASSOCIATION

CLA IS MORE THAN JUST THE

Real Property Law Section

If you're a member of the Real Property Law Section, you're a member of the California Lawyers Association (CLA) and if you're not a member yet, we hope you'll join us! Didn't know you were a member? Don't know what that means? Keep reading.

What is CLA?

The California Lawyers Association is the statewide, voluntary bar association for *all* California lawyers. CLA is a 501(c)(6) professional association that launched in January of 2018. CLA offers unparalleled continuing legal education, the chance to develop an incredible statewide network of relationships, advocacy on matters critically important to the profession, and opportunities for statewide professional visibility and leadership. Our mission is to promote excellence, diversity and inclusion in the legal profession, and fairness in access to justice and the rule of law.

How did CLA originate?

In 2017, the California Legislature decided it was important for the State Bar of California to focus on its regulatory duties—licensure, admissions, and discipline. It enacted S.B. 36, which provided for the creation of the California Lawyers Association with the 16 substantive efforts law Sections and CYLA as its inaugural members. CLA also took on those roles that are traditionally associated with professional associations.

Beyond my Section, what does CLA do?

We do what statewide bar associations typically do, including advocating on behalf of our members and the profession, giving awards to stellar members of the profession, serving as a communications hub among various stakeholders in the state, and representing the state's attorneys on the national and international stage. CLA does all of these things and more!

How can I get more involved?

CLA has a variety of organization-wide committees, many of whom are often looking for members. In particular, our Programs Committee, our Awards Committee, our Membership Committee, and our Diversity Advisory Council are great opportunities to get more engaged across the organization. Go to our website, CALawyers.org to learn more!

2020–2021 Executive Committee of the Real Property Law Section

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Chair

Jonathan F. Golding
Los Angeles
Vice-Chair

Ashley M. Peterson
San Diego
Secretary

Steven W. DeLateur
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Norman Chernin
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REAL PROPERTY LAW

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