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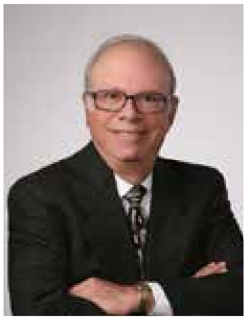
2022 California Real Property Journal

Message from the Editor-in-Chief

Norm Chernin



I am greatly honored to have been selected as the Editor-in-Chief of the California Real Property Journal for 2022. I am deeply appreciative of the efforts of past Editors-in-Chief, Misti Schmidt and Cosmos Eubany, in preparing me for this position as I transitioned from being an Article Editor to an Issue Editor, and then to Managing Editor in 2021. Their long-standing dedication to the success of the Journal has made an immense difference. Likewise, we have a strong Editorial Board whose members' on-going involvement with the process of reviewing articles and working with our production team at Sublime Designs Media, headed by the always engaged T Sahara Meer, have contributed enormously to the complicated and time-consuming coordination of everyone's input to produce the quality of articles that is our hallmark.

This year marks the fortieth volume of our publication. As part of the commemoration of this event, we are hopeful of contacting prior Editors-in-Chief, Managing Editors and others who have previously been associated with the publication of the Journal to share memories of their participation in future issues. If you are one of those people, or know how to contact any of them, please contact us, and we will encourage them to send us their reminiscences.

For regular readers of the Journal (and we hope that all of you are), you are probably aware that Robert McCormick had been a co-author for sometime of the annual Legislative Review published in each year's first Issue. Sadly, Bob passed away unexpectedly last year. Michael Maurer, his co-author for several years, has agreed to continue to put together the summary of new legislation. Bob's firm, DowneyBrand, has agreed this year to sponsor the Issue to honor his memory and his contributions to the firm and the Journal, and we will remember Bob by referring to this feature of the Journal as the Bob McCormick Memorial Legislative Review.

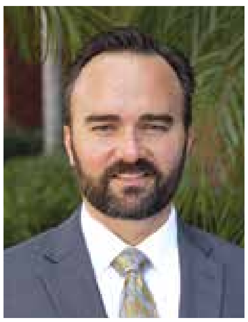
The most important part of the group endeavor required to publish four issues a year of the Journal is the receipt of new articles. The Journal is a well-respected legal publication and offers authors the opportunity to be recognized as knowledgeable practitioners of real property law by such authors' peers. Your article can be a useful sounding board for new ideas. A number of years ago, I wrote an article incorporating my research in support of a relatively novel idea to document a transaction. As I had anticipated, there was a legal challenge to the validity of my idea. Shortly after the complaint and answer were filed, the judge requested the parties and attorneys to meet with him. He explained that this area of law was new to him and requested some help in better understanding it. I pointed out to him that there was an article published in the Journal devoted to this very subject and gave him the citation. The end result was a successful one for my client.

I hope that you enjoy this Issue. If you have any comments, suggestions, ideas for future articles, etc., please feel to contact me or any member of the Editorial Board. Thank you.

MCLE Self-Study Article: Who Pays for Clearing Bogus Mechanics' Liens

Check the end of this article for information on how to access one MCLE self-study ethics credit.

Andrew Adams



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I. INTRODUCTION

Mechanics' liens are an old concept, intended to protect builders[1] from being shorted their fees and material costs by property owners.[2] Some sources trace the mechanics' lien back to Thomas Jefferson, who supposedly saw it as a way to spur construction in Washington, D.C. at the end of the 18th century.[3] The lien itself gives the mechanic or contractor an actual property interest, not just a contract or tort claim that they can seek to recover upon. Protecting those that do the work to improve properties and ensuring property owners cannot simply short those workers has long been an interest legislators wish to protect, particularly in California.

Here in California, "[t]he balance tips in favor of the worker and the materialman."[4] California is one of the few states that enshrines a right to such recovery in its Constitution, a demonstration of the importance and priority given to ensuring such payments are made.[5] Mechanics' liens are intended to protect the contractor or the materialman who is performing or supplying materials for the work, and thus appeals to a desire to protect blue-collar workers and builders from a property owner that is too casual in his or her inclination to pay for the work done: "[s]uch protection was deemed necessary to counterbalance the economic advantage enjoyed by those who benefited from the services rendered and the materials furnished, and to discourage a casual attitude toward payment of the obligations incurred."[6] The counterbalancing protections and lien-removal process for property owners are meant to counter and ensure that the "little guy" contractor does not abuse the protections they are given to collect on their owed payment. This statutory scheme then is a process that is well defined and built into all sides of the construction industry, except possibly then for smaller homeowners.[7]

Larger projects usually benefit from an existing process and an army of consultants and attorneys who have clearly defined rules and roles for any disputes that arise. There is less ambiguity or more clarity among the players involved. The parties on complex, commercial projects are typically sophisticated, which is not common for smaller, residential projects, because the average homeowner does not have any familiarity with the construction or home improvement process. For non-lawyers, a contractor slapping a lien on a home[8] and asserting a claim to a piece of it might be anxiety-producing. The hard part then is ensuring this process used by homeowners and contractors continues to walk the line it was meant to, and not fall into abuse by either side.

There are situations where a contractor improperly records a lien or does so without the required notices. The simple, straightforward process that is meant to clear these improper liens is not always so. "Seasoned attorneys specializing in construction law recognize that California's mechanics lien law is a complex area of law with many intricacies."[9] Even with the prospect of recovering the retained attorney's fees, many homeowners find removing improper liens too burdensome or complicated to pursue the same. Considering this, should the mechanics' lien statutory scheme be updated to make it easier for homeowners? Or is there another way to ensure the purpose of the statutes is carried out? One potential solution is a stricter and more robust award of attorney fees to property owners that successfully remove invalid mechanics' liens from their title.

II. MECHANICS' LIENS AND REMOVAL

Mechanics' liens are a California constitutional right meant to ensure that a contractor is not cheated by a property owner whose relative wealth makes the interaction and transaction unfair. At the same time, the statutory scheme creates a mirror process allowing a property owner to strip off illegal or improper liens from abuse by contractors in an expedited timeline. "The mechanics' lien is the only creditors' remedy stemming from constitutional command and our courts 'have uniformly classified the mechanics' lien laws as remedial legislation, to be liberally construed for the protection of laborers and materialmen."[10] Any doubts or lack of clarity in the statutory scheme are to be read in favor of the contractor.[11] This protection of and affinity for contractors only goes so far, because if the contractors fail to file to enforce the lien within the requisite ninety days, the lien is void.[12] The mechanics' lien is a constitutional right that the contractor holds, that is to be enforced (or defeated) by statute.[13] If the proper process for filing a lien is not followed, and the debt not proven legitimate, then there is a process for the homeowner to have the slander on title removed quickly.

If a property owner believes a recorded lien is improper, then they must give that contractor at least 10 days' notice with a demand to release the lien before they file a petition with the court demanding the release order.[14] This is a type of grace period, where an errant contractor can correct their mistake without any court interaction. Any petitioning homeowner has to affirm that they gave their former contractor this time to correct the matter,[15] a kind of meet and confer requirement with the contractor, to give the requisite notice that the court has been asked to remove said improper lien. And if they do not, then the supposedly expedited process can begin.

This final warning draws a line: the final chance the contractor has to make it all right and save everyone money and headache.

> There are times when the petition procedure to cancel a lien under Civ. Code, § 8480 may be necessary. The easier, less costly, and more reasonable method is to try to convince the claimant to sign a release of lien. In most all circumstances, the nonjudicial approach is less expensive and more effective. Since mechanics liens are governed by strict rules, the claimant whose lien has expired will usually recognize that there is nothing to gain by refusing to release an expired or improper lien. In fact, there is something to lose: payment of attorneys' fees under Civ. Code, § 8488(c). Even if a release of lien is not obtained, the title company can often be persuaded to issue title insurance without listing the expired lien as an exception.[16]

This practice point is correct and details the interests and consequences appropriately, but of course if one were dealing with a rational claimant, the improper lien would not have been applied in the first place. If all parties acted correctly and prudently, then there would be no need for protective statutes, lawsuits, and fascinating articles on what trial courts should do in those mechanics' lien litigations. But this 10-day requirement of section 8482 is just one more last-ditch chance for a contractor to do the right thing and release the lien before a court has to be petitioned.

These requirements and final attempts to force settlement are fitting for a statutory scheme that balances contractor's California constitutional right to payment for work and protects the basic right to your own real property. Contractors are given the benefit of the doubt to the point that they are entitled to lien real property to ensure payment. The burden is on the owner to disprove the lien, which is a huge leg up for contractors, but this is a blessing that comes with a strong counterbalanced responsibility. A contractor has to provide notice to the property owner of the claim, and any contractor that asserts such a claim to another's property has only 90 days to "commence an action to enforce," otherwise that lien "expires and is unenforceable."[17]

But even this simple deadline of 90 days is not definite. If a contractor withdraws a previous lien without noting that it is "fully satisfied," then they can re-record a new lien later for those same amounts.[18] The new lien might also be invalid, but that 90-day deadline is not without exceptions. For example, if a lien has not been perfected in 90 days, the property owner can demand it be withdrawn, but cannot demand that the withdrawal or release state that the lien is "fully satisfied."[19] Requiring a release note that the lien was fully satisfied gets to the constitutional right to record, and not the statutory requirements imposed on how to enforce that right. With the great power that comes with the filing of the lien comes the requirement that a contractor use that power justly. It also makes sense to put some of those procedural and timing burdens on the contractor, who presumably is more familiar with them than a random homeowner.

The process to obtain a court order to clear an improper lien is meant to be an expedited and uncomplicated one. The "Release Order" process is set forth in California Civil Code sections 8480 to 8488. It is intended to be a straightforward or simple process[20] and has to stand alone on the merits of the lien.[21] The shifting burdens are clear—particularly in the situation where a lien claimant misses their 90-day deadline. California Jurisprudence refers to this as a "brief, finite period"[22] where the right to be paid is protected. The claimant's mechanics' lien is assumed valid until the owner's petition shows that it was not perfected. Once that happens, the claimant has the "burden of proof as to the validity of the lien."[23] This is the shifting burden that is meant to be '"more understandable and useable'" for property owners and contractors.[24] In short, whoever first shows they met their deadlines has the presumption, and then if someone can show then on the merits that they complied and are entitled to payment/release, then that solves it. Timing and deadlines are the first round, then merits come after.

The fundamental purpose of the mechanics' lien right, and the statutory means to enforce them, is '"to prevent unjust enrichment of a property owner at the expense of a laborer or material supplier.'"[25] If the opposite situation arises, where a property owner is improperly being burdened and attacked by a "laborer or material supplier," then the process to remove that improper claim on the property's title should be a quick and efficient one.[26] The law trusts the contractor until their deadlines expire, and then the burden shifts to the contractor if a homeowner files the request to remove the lien.

Anyone that has seen a courtroom recently knows that there is no such thing as a quick or brief relief that is granted by a court. Just because a statute requires a hearing date 30 days after filing, and a ruling 60 days after filing, does not mean that these deadlines are met.[27] Statutory timelines in relatively-obscure statutes do not have some sort of self-enforcing method on trial courts, and that is the standard with removing mechanics' liens. In reality, if a party wishes to contest a lien or the removal of same, then such efforts can stretch on for months or even years. Often the disputes are already contentious, and once they reach a courtroom, the clear deadlines and rules set out are not the cure-all that the Legislature expected them to be. The question then is what impact this has on the standard homeowner that is burdened with such a lien. Without that quick resolution, what is the typical homeowner supposed to do? The answer comes at least in part in the award of the attorneys' fees if they win, because the timing problem might be easily solvable. Awarding attorneys' fees to the prevailing party does help square the equities in dealing with an improper lien and do serve to deter the recording of false liens in the first place.

III. ATTORNEY FEES FOR REMOVING LIENS

Generally, in a mechanics' lien action, each party must cover their own attorneys' fees. This is the American Rule, that changes only when attorneys' fees are recoverable under some other legal theory or by operation of statute.[28] In clearing an improper mechanics' lien that burdens one's property, the property owner is afforded the statutory grounds to collect their attorneys' fees from the losing claimant on the mechanics' lien. Civil Code section 8488(c) states: "The prevailing party is entitled to reasonable attorney's fees." This is the entirety of the statutory guidance, that the cost of prevailing either in releasing the lien or in validating the claim is recoverable so long as it is "reasonable." Prior to 2012, the former Civil Code section 3154 limited the recoverable amount to $2,000.[29]

Fee recovery does not work both ways though. Contractors that properly foreclose on valid liens do not recover attorneys' fees for doing so.[30] Presumably, this is to ensure the materialman or laborer can collect what they are owed, but that same coverage need not apply to their attorneys.[31] Most often, there is also an underlying contract claim in conjunction with the lien foreclosure, and nearly all those contracts have attorneys' fees provisions. There is a risk that this would also create the perverse situation in which attorneys' fees could be recovered before secured debt on the property ("even though the third party was a stranger to the contract between the claimant and the owner and therefore never agreed to subordinate its interest to the claimant's claim for attorney's fees"[32]). So in practice, attorney fees are recovered on a contractual basis for a foreclosing contractor (based on the construction contract) and those are not covered by any statutory authority.

This attorneys' fee provision for property owners works only this one way to carry out the original intent of the statute, to protect contractors that do work on properties, while at the same time giving aggrieved property owners a clear, simple, and (potentially) cost-neutral way to undo any wrongdoing. "This will create a stronger incentive for lien claimants that did not foreclose upon their liens to make sure that their liens are formally released."[33] As noted before, this is not always the way it works out as contractors are not always motivated to remove their invalid liens, as those that record improper liens might also be the same as those that take their time to clear the title they clouded.

In practice, many rogue contractors file mechanics' liens improperly and wait for such liens to cause problems upon a homeowner's sale or refinance. The "simple" process to remove the lien is not so simple for many property owners, and the owners simply ignore the lien until they are forced to act. Without courts being willing to enforce the attorneys' fee provisions, and clear consequences for contractors that fail to follow the law, the statute is not serving the purpose it was meant to and does not provide a counterbalance to the protections given to contractors in said statutes.

IV. HOMEOWNERS CLEARING THEIR OWN TITLE

In application, the lien removal process is not as clean as it was envisioned by the Legislature, and so the question is how to improve it. In many cases, homeowners do not need extra protections and generally those that can afford to purchase property in California are not the hard-luck crew that deserves the Legislature's protection or special attention.[34] The process should be available and usable for the standard homeowner, and no matter their wealth or resources, the attorneys' fee provision that allows a homeowner to recover their costs of clearing title is an important mechanism to right the wrong of an improper lien. Fee collection for removal improper liens must be applied as a deterrent for rogue contractors, but also to ensure that homeowners can take advantage of the statutory removal procedures.

Some commentators claim this process is not the right answer to the current needs. "The statute was never intended to apply to modern homeowners undertaking a small-scale home improvement project."[35] Noting that most case law involves large-scale commercial mechanics' liens suits, at least one commentator has highlighted that this supposed expedited process is not a simple one, nor one that most homeowners can undertake for themselves.

Take, for example, a typical small-project dispute that was never resolved in court or negotiated by the parties. If a contractor is not paid the final $10,000 on a $100,000 residential project, and they record a mechanics' lien on that property, the homeowner must decide whether they are going to dispute it or if they will simply pay that lien (a decision that is often postponed until a sale or refinance of the property, when it is made all the more urgent and the choices narrowed for that homeowner). The homeowner must decide if they will pay a lawyer to do this or try and do it themselves. The question then is if the contractor provided their notices and actually did the work. The homeowner must meet their deadlines and complete quite a bit of work before the petition is even conceptualized. Suddenly, the homeowner is faced with (likely) paying an attorney much more than the claim or taking hundreds of hours of their time to engage in a complicated and unfamiliar process.

This should be easily understood for all involved—a homeowner has to evaluate the cost of just paying the lien (or never refinancing or selling) against the cost of hiring an attorney to sue that contractor and remove the lien (a process described supra as a "complex area of law with many intricacies" in footnote 8). Without required recovery of attorneys' fees, "if the cost of hiring an attorney to litigate the case exceeds the amount at stake, the aggrieved party will normally not bring a lawsuit for a redress of grievances, and this result is acceptable in the typical litigation matter."[36] A mechanics' lien petition, where a homeowner is forced to request a court order to strip an improper and invalid lien is exactly the kind of protective suit that many consumer fraud statutes are meant to prevent.[37] And thus, that potential requirement that a defrauding contractor will be forced to pay attorneys' fees is absolutely necessary both to make the defrauded party whole, but also to serve as a deterrent to that business community to act in such a way.[38]

In lieu of any clear or direct process, there have been a few workarounds for the related fields. Some title insurance companies will insure over a mechanics' lien after the underwriter sees that the lien was recorded, but no petition was filed to enforce within the 90 days.[39] Title insurers do seem to be working around these formal requirements and removal standards. In many cases, they will simply see the recorded lien and note the passing of the relevant timelines and disregard the lien. Standard commentators still recommend removing it ("Even if the time to bring suit has expired, it is useful to obtain a formal release of a recorded mechanics lien.").[40] Additionally, there is a thriving mechanics' lien bond practice, meant to enable parties to close transactions and not be held hostage to contractors with claims.

The above alternatives are not the intended resolution, nor is it fair to homeowners. If the example from above is used, why should a homeowner pay a lawyer and seek a court order removing an improperly recorded mechanics' lien? Only those wealthy (or angry) enough would expend their resources to do that. According to a limited survey of Southern California trial court orders, homeowners are obtaining $4,000, $10,000, or even $24,000 of fees against an improper contractor's lien—all of which has to be balanced against the total of the lien itself. Most local lawyers cannot do the work required to remove a lien for that cost. So even if fees are no longer capped at $2,000 like they were, those amounts are often insignificant to cover the legal fees incurred in getting the order that rights the wrong.

There is a separate work-around that title often undergoes with these liens, where title insures around it or excludes it with the understanding that the lien is improper or cannot be enforced. A title company might also miss or ignore an old, invalid mechanics' lien. Regardless, why do these workarounds exist when there is a clear statutory law that requires attorneys' fees be paid when a homeowner prevails? What is really needed here is clear guidance to trial courts that the entirety of the fees and costs must be recovered against improper lien claimants. Until there are fee awards large enough to scare off bad actors from recording improper liens, then these workarounds will have to do for the typical property owner.

Trial courts should feel emboldened to pay the full demand of any attorneys' fees requested now. The cap is now 10 years since repealed, and full 100% recovery of attorneys' fees is appropriate. If a contractor (who presumably understands the law of the field they chose) cannot substantiate its lien, and that lien has must removed by a court's order, then the cost of obtaining that order is the contractor's to bear. Trial courts should be mindful of this and follow the Legislature's direction to square up the costs for a burdened homeowner. The best way to do this is for a $100,000 or $150,000 attorneys' fee award to be levied against an improper mechanics' lien claimant. Even more so, if that claimant drew out or unnecessarily complicated the legal process to remove the lien, courts should approve bold, high value awards to give the statutes some bite to add to the bark. Presumably one big award like that will send reverberations throughout the industry, and the number of liens recorded will likely go down.

V. COURTS SHOULD AWARD THESE FEES

As noted above, courts can be hesitant in awarding attorneys' fees, but they should not be so shy in the mechanics' lien/homeowner context. Courts generally look at attorney fee requests with some skepticism, more so in mechanics' liens, because the statutory scheme limited these attorney fees to $2,000 until the 2010 Senate Bill 189 amendments removed that cap.[41] This hesitancy also comes from the common unspoken and inherent judicial inclination to cut attorneys' fees, no matter what the amount put before the court that can be based in fairness or thrift, but has no basis in the authorizing law.

This hesitancy to award fees has been noted in other contexts, like lemon laws and consumer fraud statutes.[42] The statute here requires the recovery of the requested fees, there is no discretionary language or review, just: "The prevailing party is entitled to reasonable attorney's fees."[43] But even with that requirement to recover "reasonable attorney fees," often these are cut down by courts if for no other reason than just because that is normally how it is done.

This reduction or hesitancy to award attorney fees to the prevailing party removing an improper lien should end because it is not in the statutes and it frustrates the purpose of the statutory scheme. There is no concern of any sort of abuse or unintended consequences here. First, because the statute itself is meant to be a quick and expedited process, any removal of errant or malicious liens will not be in the hundreds of thousands of dollars. If the process is what it was meant to be (fast, efficient, and summary) then there is a natural cap or governor on attorneys using similar cases to enrich themselves.

Second, the simple and straightforward deadlines, in the statutes and other warnings required ensure that such awards are made only when the contractor is provably and indisputably at fault for the added cost of going to court. If a contractor meets the deadlines (set in the very statute they are availing themselves of), and is not out there recording errant liens, then they have no risk of being forced to pay the legal fees of the parties required to clean up their title messes.

Finally, as noted above, when a homeowner is dealing with a contractor that places a lien on their home, the power imbalance that leads to the constitutional protections has flipped. The homeowner is not some wealthy tycoon withholding payment just because they can. Usually, the homeowner is merely a party that contracted for some improvement or remodel and got burned by someone misusing the protections afforded to them. In this case, the traditional power structure has been flipped, and the hesitancy for a court that has already ordered the lien to be removed from title to make that improper claimant pay for their damage does nothing but perpetuate injurious behavior by the contractor who perpetuated it. If attorneys' fees for clearing up these improper liens is the only real corrective action, then those fees need to be awarded regularly in full at market rates.

VI. CONCLUSION

Homeowners now can find themselves with the violative and invasive burden of a mechanics' lien improperly clouding their title, and the current process is not often efficient nor effective to remove the same. To serve the purpose intended, a large award of all the claimed attorneys' fees for removing an invalid lien should be awarded to send the message that courts intend the statutory process to do what it was designed to do. Trial courts should be emboldened to protect homeowners, and the only way to do that is robust attorney fee awards for requiring court intervention to remove improper liens.

Endnotes

1 This article only discusses construction, so the terms "contractor," "materialmen/materialwomen," and "mechanic," are all interchangeable and are most often applied to contractors that are hired to work on real property. In particular, this article focuses only on residential builders, most often applied to single family units of real property.

2 *Burton v. Sosinsky* (1988) 203 Cal.App.3d 562, 568–569.

3 Davidson, *The Mechanic's Lien Law of Illinois: A Lawyer's Brief on the Topic* (1922), The Greenville Ill. Bar 6. More recent White House occupants have demonstrated themselves the need and usage for D.C. mechanic liens rights, as claimed unpaid Trump Organization bills had to be secured through liens. See Northam, *Trump D.C. Hotel Contractors Say They're Owed Millions* (Jan. 11, 2017) <https://www.npr.org/2017/01/11/509168365/trump-d-c-hotel-contractors-say-theyre-owed-millions>. See also O'Connell, *Third Lien on Trump Hotel Brings Alleged Unpaid Bills to Over $5 Million* <https://www.washingtonpost.com/news/digger/wp/2017/01/06/third-lien-on-trump-hotel-brings-alleged-unpaid-bills-to-over-5-million/>.

4 *Connolly Development, Inc. v. Super. Ct.* (1976) 17 Cal.3d 803, 827.

5 Cal. Const., art. XIV, § 3. The right to the lien is protected by the Constitution, and the method of enforcing that right is laid out in the statutory scheme in the Civil Code. *Koudmani v. Ogle Enterprises, Inc.* (1996) 47 Cal.App.4th 1650, 1655; Miller & Starr, 9 Cal. Real Est. (4th ed.) Source and Purpose of the Mechanics Lien, § 32:3.

6 *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 525.

7 "The statute was never intended to apply to modern homeowners undertaking a small-scale home improvement project." Nguyen, *Resolving the Double Liability Problem: A Critique of California's Mechanic's Lien Statute*, 9 U.Mass. L.Rev. 136, 142. The article goes on to point out just how out-of-place the removal process is for single family homeowners and how dangerous even an improperly created or enforced lien can be, all in the discussion of another separate issue with mechanics' liens: the problem of subcontractors forcing a property owner to pay twice for work done.

8 Here, the term "home" will be used to refer to a single family home on its own parcel, but also any sort of condominium, apartment home, or any other fungible real property owned by individuals.

9 Nguyen, *Resolving the Double Liability Problem: A Critique of California's Mechanic's Lien Statute*, *supra*, 9 U.Mass. L.Rev., p. 146.

10 *Solit v. Tokai Bank, Ltd. N.Y. Branch* (1999) 68 Cal.App.4th 1435, 1442 (citations omitted).

11 *Ibid.*

12 Civil Code, §§ 8460, 8480.

13 *Coast Central Credit Union v. Super. Ct.* (1989) 209 Cal. App.3d 703, 711.

14 Civil Code, § 8482.

15 § 8484, subd. (f).

16 *See* Miller & Starr, Cal. Civ. Prac. Real Property Litigation, Procedures for Cancellation of Lien; Title Issues, § 10:61.

17 Civil Code § 8460, subd. (a), § 8480, subd. (a).

18 *Solit v. Tokai Bank, Ltd. N.Y. Branch*, *supra*, 68 Cal.App.4th, 1444.

19 *Ibid.*

20 4 Witkin, Summary 11th Sec Trans–Real (2021) § 27 (citing 37 Cal. L.Rev. Com. Reports, p. 530).

21 Civil Code, § 8480, subd. (c)

22 44 Cal. Jur. 3d, Mechanics' Liens, § 225.

23 Civil Code, § 8488, subd. (a).

24 4 Witkin, Summary 11th Sec Trans–Real, *supra*, § 27 (citing 37 Cal. L.Rev. Com. Reports, p. 530).

25 *Abbett Electric Corp. v. Cal. Fed. Savings & Loan Assn.* (1991) 230 Cal.App.3d 355, 360–361 (citations omitted). The Legislative Analyst noted that "[t]he California Constitution also requires the Legislature to provide, by law, for the speedy and efficient enforcement of those liens" in its August 2010 analysis of Senate Bill 189, the latest update to the mechanics' lien law.

26 *Ibid.*

27 Civil Code, § 8486, subd. (a). This was aspirational before the COVID-19 pandemic, but nearly impossible for most courts after the pandemic hit.

28 Code Civ. Proc., § 1021; 7 Witkin, Cal. Proc. (5th ed. 2020) Judg, § 149, In General.

29 See generally, *Abbett Electric Corp. v. Cal. Fed. Savings & Loan Assn.* (1991) 230 Cal.App.3d 355, 360-361.

30 *Abbett Electric Corp. v. Cal. Fed. Savings & Loan Assn., supra,* 230 Cal.App.3d at p. 359 [citing old Civil Code § 3123, subd. (a)]; Miller & Starr, 9 Cal. Real Est. (4th ed.) Costs and Attorneys' Fees, § 32:63.

31 "A mechanics' lien claimant with a contractual right to attorneys' fees, who prevails in an action against a property owner for breach of contract and foreclosure of the lien, is not entitled to have its attorneys' fees included in the mechanics' lien." 44 Cal. Jur. 3d, Mechanics' Liens, § 202. See also *Wilson's Heating & Air Conditioning v. Wells Fargo Bank* (1988) 202 Cal.App.3d 1326, 1331 (The court goes out of its way to dismiss any right to recovery of fees for enforcing a lien, as well as any contractual right to a contractor being rewarded contractual attorneys' fees). See also *Schmitt v. Tri Counties Bank* (1999) 70 Cal.App.4th 1234, 1248.

32 Miller & Starr, 9 Cal. Real Est., *supra*, Costs and Attorney's Fees, § 32:63.

33 Rodriguez et al., Pillsbury Winthrop Shaw Pittman LLP, *Client Alert* (May 16, 2012) <https://www.pillsburylaw.com/images/content/4/0/v2/4009/Alert20120516RealEstateConstructionCounselingLitigationSignifica.pdf>.

34 With California counties averaging the better part of $1 million for sale prices, homeowners are not the first group that comes to mind as deserving of help. But at the same time, they deserve clarity and efficiency of purpose in the protections that they do have. Without those protections, often the party with the most sophistication or funds wins these disputes, which runs contrary to the legislative intent in drafting the statutes.

35 Nguyen, *Resolving the Double Liability Problem: A Critique of California's Mechanic's Lien Statute*, 9 U.Mass. L.Rev. 136, 142.

36 Pogrund Stark et. al, *Does Fraud Pay—An Empirical Analysis of Attorney's Fees Provisions in Consumer Fraud Statutes*, 56 Clev. St. L.Rev. 483, 494 (2008).

37 *Ibid.* at 496.

38 *Ibid.* at 501.

39 Miller & Starr, Cal. Civ. Prac., Real Property Litigation, § 10:61.

40 *Id.* § 10:24.

41 The June 15, 2010 Assembly Judiciary analysis noted that removing the $2,000 cap and replacing it with "reasonable" was appropriate. "The inclusion in the statute of basic procedural guidelines for these proceedings would assist litigants by reducing ad hoc or inconsistent rulings on procedural issues by different trial courts. The CLRC and author also believe that it makes sense to allow the court to award reasonable attorney's fees."

42 Pogrund Stark et. al, *Does Fraud Pay—An Empirical Analysis of Attorney's Fees Provisions in Consumer Fraud Statutes*, *supra,* 56 Clev. St. L.Rev. 483.

43 Discretionary fees for prevailing in consumer fraud cases could "create serious impediments" to bringing valid cases that serve to protect the public. *Id.* at 500. See generally, Civil Code, § 8488, subd. (c).

Top Ten Real Property Cases of 2021

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Each year, it is a real challenge to select the top ten real estate cases for our annual overview. Although the impact of COVID-19 on courts resulted in fewer real estate cases overall than in past years, narrowing the list down to 10 cases was still difficult. Thus, as is our tradition, several "related cases" as well as "honorable mentions" are included here.

The cases this year continued to represent a broad offering of real estate issues, as opposed to highlighting a concentration in any given area. As a result, the topics covered in this article include such diverse areas as inverse condemnation, land use, California Environmental Quality Act (CEQA), holding title, and adjoining landowners. There were no California Supreme Court cases, and only one United States Supreme Court case made it onto the list this year. It was a critical one though, representing a potential sea change in takings law in terms of what constitutes a "per se" taking by the government.

The state court of appeal still provided many important decisions though, including:

1. A challenge to a city's design review process as violating the Housing Accountability Act's mandate that local agencies approve projects if consistent with specific and objective general plan and zoning criteria.
2. Two cases testing the power of the California Coastal Commission in light of recent amendments to the Coastal Act giving the Commission new discretion to impose administrative fees.
3. An eminent domain case addressing the question of what constitutes having "moved" to be eligible for compensation.
4. Two quiet title cases dealing first, with evidentiary hearings in the context of a default judgment, and second, with what constitutes "knowledge" of defects or irregularities in a quiet title judgment.

Also included is an "honorable mention" case from the Ninth Circuit addressing an eviction moratorium instituted by the City of Los Angeles.

While selecting cases for inclusion is inevitably subjective, the cases addressed below, including the "related cases" and "honorable mention," met our standard for inclusion: widespread significance for the practice of real property law in California. Accordingly, we offer the following as the most significant real estate cases of 2021.[1]

1. *Cedar Point Nursery v. Hassid*[2]

> In perhaps the most significant takings case since *Lingle*,[3] the United States Supreme Court held that a regulation allowing labor organizers limited access to private property to talk to workers did not merely restrict the owners' right to use the property, but rather, appropriated the right to exclude, which constituted a per se taking.

Pursuant to the California Agricultural Labor Relations Act, which recognizes the organizational rights of unions to have access to employees, the California Agricultural Labor Relations Board promulgated regulations allowing two labor organizers per work crew to enter an employer's property for up to one hour before and after work as well as during lunch for the sole purpose of meeting and talking with employees.[4]

Under the regulations, interference with the organizers' right of access could constitute an unfair labor practice.[5]

Two produce growers with hundreds of workers that did not live on-site sued several board members in their official capacity, alleging that the access regulation, as applied to them, effected a taking of their property in violation of the Fifth Amendment and also effected an unlawful seizure of their property under the Fourth Amendment. The court of appeals upheld the district court's dismissal, holding that the regulation was not a per se taking as there was no continuous physical invasion. It also found no unreasonable seizure because there was no meaningful interference in the employers' possession of its property. The Supreme Court granted certiorari to determine whether the regulation constituted a per se physical taking under the Fifth and Fourteenth Amendments.

The Court set the stage by quoting John Adams, who said that "[p]roperty must be secured, or liberty cannot exist."[6] It continued, "[w]hen the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation."[7] The Court acknowledged the category of regulatory takings, whereby "if regulation goes too far it will be recognized as a taking,"[8] and that for such takings, the Court typically applies the flexible test announced in *Penn Central Transportation Co. v. New York City*.[9]

The *Penn Central test* involves the balancing of factors such as "the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action."[10] However, the Court immediately cautioned that the term "regulatory taking" can be misleading, and cited *Horne v. Department of Agriculture*,[11] as a case where it found a regulation resulted in a physical taking. Thus, it framed the "essential question" here not as "whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)," but "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property."[12] Where there is physical appropriation of property, the Court stated, "a *per se* taking has occurred, and *Penn Central* has no place."

The Court then held that the regulation here "appropriates a right to invade the growers' property and therefore constitutes a per se physical taking." The Court found that by allowing union organizers the right to physically enter the growers' properties, regardless of time restrictions, the regulation did not restrain the growers' use of their own property, but rather, "appropriate[d] for the enjoyment of third parties the owners' right to exclude."[13] The Court found support for its position in a number of cases that the Court characterized as involving government-authorized invasions of property that constituted physical takings requiring just compensation.[14] Identifying the current regulation as "appropriat[ing] a right to physically invade the growers' property—to literally 'take access,'" the Court found it to be a per se taking.

The Court rejected the argument that the regulation was not a taking because it did not grant permanent or continuous access, noting that a physical invasion is a taking whether permanent or temporary,[15] and it emphasized that under *Nollan*, continuous access is not required to find a taking. Thus, it disagreed that the limitations of the regulation "transform[ed] it from a physical taking into a use restriction."

The majority also dismissed the dissent's and the board's contention that *PruneYard Shopping Center v. Robins*[16] established that the regulation was not a per se taking. The *PruneYard* court applied the *Penn Central* factors to conclude that no compensable taking occurred when individuals engaged in leafleting at a privately owned shopping center. While the dissent argued that *PruneYard* showed that "limited rights to access to private property should be evaluated as regulatory rather than *per se* takings," the majority disagreed, noting that the property in *PruneYard* was open to the public, unlike the growers' properties here. Specifically, it found that "[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public."[17]

Finally, the majority rejected what it deemed the dissent's "distinctive view of property rights," in which the regulation should be viewed as not appropriating anything, but rather, regulating the owner's right to exclude, and therefore properly assessed under *Penn Central*. The Court dismissed fears of endangering state and federal government activities involving entry onto private property, noting that its decision did "nothing to efface the distinction between trespass and takings."[18] It also noted "longstanding background restrictions on property rights,"[19] as well as the fact that property owners may cede a right of access as a condition of receiving certain benefits.[20] Lastly, the Court commented that, unlike the health and safety regulations in many of the cases cited, "the access regulation is not germane to any benefit provided to agricultural employers or any risk posed to the public." Thus, the judgment was reversed, and the matter remanded.

Justice Breyer's dissent, which Justices Sotomayor and Kagan joined, reiterated the essential disagreement with the majority, which was whether the regulation actually appropriates anything or merely regulates the growers' right to exclude.

For the dissent, the answer came down to whether the taking was permanent or temporary. It posited that the majority was simply wrong in finding an appropriation because here the access was temporary, and that the correct question regarding a temporary taking is whether it goes "too far."[21] Thus, the dissent concluded that precedent demonstrated that "a taking is not inevitably found just because the interference with property can be characterized as a physical invasion by the government, or, in other words, when it affects the right to exclude."[22]

Comment: The majority acknowledged that a temporary right of access is not automatically a taking and appeared to agree that the result in *PruneYard* was based on there being "no other way" to provide access to the nonowners in that case. Together, these stances seem to support the application of a *Penn Central* balancing test. *PruneYard* relied on *Penn Central*, citing factors such as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations, and cited *Pennsylvania Coal Co*. for the principle that "when regulation goes too far it will be recognized as a taking." Typically, those that go "too far" have been held to be those that deny the owner all use of their land or most of its economic value. *PruneYard* involved the exact same right to exclude access that was at issue in this case.

The majority distinguished *PruneYard* on the basis that the public was already allowed on the property there, but *PruneYard* does not actually address that distinction, and public access seems to have simply been a factor to be considered in the balancing test. In fact, the majority opinion in *Horne* distinguished *PruneYard* from other cases involving a physical appropriation.[23] Thus, it is difficult to reconcile how the access regulation here is now considered a per se taking, while that in *PruneYard* is not: does the "appropriation" somehow change based on the existence of public access? The majority here could have engaged in a *Penn Central*-like analysis and come to the conclusion that the access regulation went "too far"; its decision to characterize the regulation instead as a per se taking of a portion of the owner's "bundle of sticks" rather than "mere regulation" likely signals a long-expected manifestation of an ideological shift on the Supreme Court.

2. *California Renters Legal Advocacy and Education Fund v. City of San Mateo*[24]

> As the California Legislature's efforts to address the state-wide housing crisis reach a fever pitch, so too do some cities' attempts to retain local control over development. In this case, the court found that a city's denial of approval under its design review guidelines violated the Housing Accountability Act's mandate that local agencies must approve multifamily projects that are consistent with specific and objective general plan and zoning criteria.

In 2017, the California Legislature strengthened an existing law, the Housing Accountability Act (HAA),[25] to limit the authority of local agencies (cities, counties, and cities and counties) to deny or excessively condition the approval of applications for eligible multi-family residential housing projects that comply with specific and objective pre-existing criteria in their general plan and zoning ordinances.[26] Such projects are now deemed to comply with the general plan and zoning standards if "substantial evidence … would allow a reasonable person to conclude" that it complies.[27]

This case addressed a challenge to a four-story, ten-unit multifamily residential building in San Mateo, in a location designated in the city's general plan and zoned for high-density multifamily dwellings. The city's staff reviewed the application and found it consistent with the city's general plan and multi-family design guidelines, and recommended approval of the project with limited changes. In response to vocal neighborhood opposition to the project, however, the city's planning commission directed staff to draft revised findings to show that the project was not in keeping with the smaller one- and two-story dwellings in the area, and it voted to deny project approval. When the city council upheld the denial, the applicant brought an action seeking a writ of administrative mandate alleging that the denial violated the HAA.

The trial court found that the city's design guidelines were "applicable, objective" standards for purposes of the HAA, and that the project did not satisfy the guidelines. In addition, the court held that the HAA could not lawfully be applied to a charter city such as San Mateo, and therefore, it denied the writ on the basis that the HAA unconstitutionally violated the "home rule" provisions of the California Constitution.[28]

On the applicant's appeal, the court acknowledged that a local agency may disapprove a multifamily housing project if it adopts findings, based on substantial evidence in the record, that the project will cause specific, adverse, and unavoidable impact on public health or safety,[29] however, here the city had made no such findings. Thus, the only issue was whether the application complied with specific objective criteria in the preexisting plans, policies, and ordinances of the city, or whether those plans, policies, and ordinances were themselves too subjective, vague, or unspecific to support a housing project disapproval under the HAA. While the city's design guidelines appeared to be specific as to issues of scale, height, bulk, and compatibility with the neighborhood, the court found that the underlying design standards invoked by the commission were themselves ambiguous or vague, and required the application of "personal interpretation or subjective judgment that may vary from one situation to another."[30]

The court rejected the city's argument that the court should defer to the city's own interpretation of its guidelines, despite case law to that effect outside the specific context of the HAA,[31] because there was no evidence of a "long-standing and consistent interpretation" of the guidelines[32] and, in fact, city staff had initially found the project in compliance with this standard. The court also rejected judicial deference to local interpretations in land use matters[33] because the HAA "cabins the discretion of a local agency to reject proposals for new housing" and therefore commands not deference but "more rigorous independent review . . . in order to prevent the City from circumventing what was intended to be a strict limitation on its authority."[34] Thus, the city had the burden under section 65589.5(a)(2)(L) to show that its decision complied with the standards imposed by the HAA, not the other way around, and the court found it had not met that burden.

Finally, the court rejected the argument that applying the HAA in this manner to a charter city violated the "home rule" provisions of the California constitution, as the trial court had found. The court recited the four-part test for home rule, which includes:

(1) Whether the subject matter at issue is traditionally a municipal concern, rather than one of state law.

(2) Whether the specific local law at issue is actually in conflict with the state law.

(3) Whether the conflicting state law addresses a matter of statewide concern.

(4) Whether the state law, even if addressing a matter of statewide concern, is sufficiently tailored so as to avoid unnecessary interference in local governance.[35]

While the first and second prongs were satisfied, the court found the third was not because the fundamental goal of the HAA is to address the statewide shortage of housing. Likewise, the fourth prong was satisfied because the statute did not "wrest control from local governments" so much as "to require them to proceed by way of clear rules adopted in advance, rather than by ad hoc decisions to accept or reject proposed housing,"[36] and it found the determination to apply this requirement on a statewide basis to be appropriate.

Comment: The amendments to the HAA were designed to address a continuing failure of local governments to approve housing in quantities approximating regional housing needs, and specifically, to assure that the HAA was "interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing."[37] This policy was embraced by the court here, which began its opinion by stating: "California has a housing supply and affordability crisis of historic proportions."[38]

The court also endorsed the Legislature's interpretative gloss on the statute: "It is the policy of the state that [the HAA] should be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing."[39] The court returned to this theme repeatedly, referencing the concept of "reasonable certainty," which the height provisions in this case failed to provide, and reiterating that "the fullest possible weight"[40] must be given to the approval of housing in explaining why the city had the burden to show its decision conformed to the HAA. If *California Renters Legal Advocacy and Education Fund v. City of San Mateo* is any indication, the latest amendment to the HAA may bring the statute closer to fulfilling its nickname as "the Anti-NIMBY law."

Related case: *Ruegg & Ellsworth v. City of Berkeley*[41] dealt with a different housing statute, Senate Bill (SB) 35, which modified Government Code section 65913.4 and requires "'a ministerial approval process' for certain affordable housing projects when a locality has failed to provide its share of 'regional housing needs, by income category'" if a proposed development satisfies "objective planning standards."[42] This case involved a mixed use development that included 135 apartments, including 50 percent allocated for low-income housing, as well as 33,000 square feet of retail space and parking. The site was listed in the California Register of Historical Resources because the Shellmound was constructed over thousands of years from daily debris and artifacts from tribelet communities and also served as a burial site. While nothing remains of the Shellmound above ground, the landmark designation included subsurface artifacts. The city denied the application for ministerial approval on the basis that the project might require demolition of a historic structure.

Considering Ruegg's petition for writ of mandate seeking a declaration that SB 35 is constitutional, the trial court denied the petition on the basis that the possibility of the project requiring destruction of a historic structure was not "entirely without evidentiary support," and because it found that section 65913.4 does not apply to mixed-use developments. The court of appeal disagreed. It acknowledged that the Shellmound is "an important historical and cultural resource," but pointed out that SB 35 is not a historical preservation statute, and that SB 35 protects only a very narrow category of "structures," as opposed to "resources" or "sites." The court found no evidence that any "structure" could be demolished by the project, even if remnants and artifacts might be disturbed. There was also no evidence that the Shellmound was currently present on the site. Thus, the court of appeal reversed the denial of the petition for writ of mandate.

Comment: While the court of appeal found no "structure" was at issue in this case, and the city's petition for review was denied by the California Supreme Court, the statute was recently amended to add that a project is not eligible for the streamlined, ministerial process if "[t]here is a tribal cultural resource that is on a national, state, tribal, or local historic register list located on the site of the project."[43] Thus, whether the Shellmound could be characterized as a "structure" is no longer relevant. As a result, this case would now be decided differently. Nevertheless, *California Renters Legal Advocacy and Education Fund* and *Ruegg* illustrate the willingness of courts to enforce recently-imposed limits on local governmental discretion in considering residential development projects that have been enacted by the Legislature in an effort to address housing shortages.

3. *Pear v. City and County of San Francisco*[44]

> In a case addressing the nuances of permitted uses of a servient property subject to an easement, the court here considered the extent of surface use permitted by a grant deed transferring land to the county for an underground water pipeline that reserved to the grantors the right to use the surface for roads, streets, landscaping, and related uses.

Matt and Mark Pear[45] inherited from their grandparents a larger parcel of property from which an 80-foot strip of land had been deeded in fee to the County of San Francisco in 1951 to construct an underground water pipeline. The 80-foot strip was part of a larger area used for circulation, access, landscaping, and parking to serve a shopping center. The deed reserved to the grantor the right to use the surface for pasturage as well as for roads and streets "over and across" the property as long as they were not in the same direction as the pipeline, but about 75 percent of the property was eventually paved and used for roads, streets, landscaping, circulation, and parking. In 1967, the Pear family "accepted under protest a revocable permit … which allowed use of the pipeline property for 'additional parking and landscaping' in exchange for payment of $50 per month, indemnification, and insurance.'"

When the county notified the Pears in 2012 that it planned to increase the permit fee to between $4,500 and $6,200 per month, the Pears sued to quiet title. The county argued commercial uses of the surface of the property to serve a shopping center were not allowed by the 1951 deed, but only under the revocable permit issued in 1967. The trial court ultimately found that landscaping and roads that were perpendicular to the pipeline were permitted by the 1951 deed, and that the parking on the surface was consistent with the expectation of the parties when the deed was entered into that the property would be commercially developed. The county appealed.

The court of appeal began by observing that "only those interests expressed in the grant and those necessarily incident thereto pass from the owner of the fee," and that where "the scope or intent of an express easement is unclear, its use 'is to be measured rather by such uses as the parties might reasonably have expected from the future uses of the dominant tenement.'"[46] The court further found that the rule of construction stated in Civil Code section 1069, that a reservation in a grant is to be interpreted in favor of the grantor, applied, even though the grantee in this case was a public entity.

After finding landscaping to be permitted as the modern day analogue to "pasturage" and commercial roads to be unambiguously permitted by the express terms of the reservation in the 1951 deed, the court turned to the parking area, pointing out that "whether paving is allowed does not address … whether plaintiff's actual uses of the pipeline property are authorized under the second reservation." While the court found an area used for access to an adjoining tire store to be permitted because cars moved in a generally perpendicular direction over the pipeline property to the service bays, it found parking to be allowed "only to the extent it is incident to the uses which are authorized in the second reservation, because parking is not among the expressly authorized uses." Here the express use was for roads and streets, and the court of appeal concluded that "[a] parking lot is not necessary to the enjoyment of a road, nor does it represent the 'occasional or temporary parking that normally accompanies the movement of vehicles in and out of, or over, a location.'"[47] Moreover, while the court agreed that some incidental parking may be allowed, the current parking configuration on the 80-foot strip violated the express directional limitation.

The court then acknowledged the trial court's calculation that "development could have resulted in up to 40 percent of the pipeline property being paved by driveways over and across it," distinguishing driveways—which it found to be "authorized as incidental to the roads or streets expressly referenced in the second reservation"—from parking lots, which it found not to be so authorized. Finally, the court found irrelevant plaintiffs' contention that their use of the property did not interfere with the pipelines, noting that that limitation applied to *any* use of the pipeline property and therefore did not bring a use within the second reservation. The court concluded by observing that the extent to which incidental parking is authorized was beyond the scope of the current action, and it expressed no opinion other than to note that any use must comply with the deed's express language, including the directional limitation.

Comment: Despite allowing uses of the servient tenement that the court described as "expansive," allowing roads and streets rather than more traditional right-of-way cases,[48] the court remarked that "the second reservation ultimately remains only an easement rather than fee title."[49] The court had to engage in an extensive analysis of what the parties intended when creating the easement, and whether parking was "incident" to some other use because it was not one of the many express uses detailed in the easement. The court acknowledged that "some incidental parking may be allowed as ancillary to authorized roads and streets," but not to the extent currently utilized by plaintiffs: "While driveways may be authorized as incidental to the roads or streets expressly referenced in the second reservation, the same cannot be said of a parking lot."

This case underscores the importance of clarity in the drafting of easement language, since rights not expressly described in this case parking— are permitted only to the extent incidental to permitted uses. It also illustrates the rule that easements are to be construed to contemplate reasonable future development and changes, in this case the "pasturage" of 1950's agricultural land becoming the "landscaping" of modern day suburbs.

Related case: *Husain v. California Pacific Bank*[50] involved two adjacent properties, the Willow property and the El Dorado property, which were jointly owned for a period of at least 50 years. Like the past property owners, the most recent owner allowed tenants of the apartment building located on the El Dorado property to use the back portion of the Willow property for "access, parking, storage of garbage, and recreational purposes" (in fact, the only way to access the El Dorado underground parking garage was via a driveway on the Willow property). After the properties were sold in foreclosure, they had separate owners, and the Willow owner purchased with full knowledge of a prescriptive easement claimed by the El Dorado owner.

In the Willow owner's quiet title action, the court rejected the argument that use of the Willow property was permissive, finding that "[b]ecause a person cannot have an easement on his or her own property, the time period during which the servient and dominant tenements are held in common ownership is not counted in calculating the prescriptive period."[51] The court also found that the El Dorado tenants' use of the Willow property had been pursuant to a license, which license was revoked when the Willow property was conveyed to the new owner.[52] Based on the continuous use of the Willow property by tenants of the El Dorado property where no permission for use was given after the properties became separately owned, and because the new Willow owner had notice of the prescriptive easement issue, the court found a prescriptive easement.

Comment: This decision established that in California, as in Arizona, while uses allowed by the owner on commonly owned properties are deemed to be permissive, the permissive nature of the use does not continue once the properties are no longer jointly owned. Recognizing that this was an equitable case, the court emphasized that any unfairness to Hussain was offset by the fact that he had undisputed notice of the prescriptive easement.

4. *Pearce v. Briggs*[53]

> This case, involving a decedent with an unprobated will and heirs from a previous marriage, highlights the importance of having clear language in a will, particularly where it concerns the disposition of property held in joint tenancy.

This case involves the application of California's title holding and community property principles to two parcels of real property, where one spouse survived the other and later omitted some of the children of the deceased spouse from his estate plan. One property (the Gibson property) was acquired by the spouses, Jack and Ruth, during their marriage, with title taken and held as joint tenants. The other property (the Rosedale property) was acquired and held in a partnership by Jack with his brother. The partnership interest and real property were acquired during the marriage but never held in Ruth's name.

After Ruth died in 1988, Jack filed an affidavit of death of joint tenant and transferred the Gibson property into his inter vivos trust. Then, in 1989, Jack and his brother dissolved the partnership and transferred title to the Rosedale property to themselves as tenants in common, with Jack's interest later being transferred into his trust. The trust and Jack's will then left all Jack's property to his biological descendants ("Briggs Parties"), but not to Ruth's children from prior to her marriage, or their descendants (the "Pearce Parties").

After Jack died in 2010, the Pearce Parties filed suit, contending that a 1983 will by Ruth, which Jack had never probated after her death, effectively severed the joint tenancy and that they inherited a share of her community property interest in the Gibson property, which did not pass solely to Jack and then the Briggs Parties. The Pearce Parties also contended that the dissolution of the partnership in 1989 could not deprive Ruth's estate of her alleged interest in the Rosedale Property, because the partnership formed during the marriage was community property.

The trial court disagreed, finding that Ruth's will was ineffective to sever the joint tenancy, so the Gibson property upon Jack's death was solely his to dispose of. It also found that a partnership interest is personal property only, and not an interest in real property owned by the partnership, and therefore that Ruth's alleged community property interest in the Rosedale partnership and its assets, even if properly belonging to Ruth's estate upon dissolution of the partnership, had effectively been converted (i.e., stolen) by Jack in 1995 when he transferred the Rosedale property to his trust. Further, the three-year statute of limitations for recovery of converted property under Code Civil Procedure section 318, had run by the time of his death.

The court of appeal first addressed the issue of whether Ruth's un-probated will, which she signed in 1983, could have severed the joint tenancy and eliminated Jack's right of survivorship. Generally, a testator cannot, by will, dispose of property held in joint tenancy, because on death the other joint tenant automatically succeeds to the interest of the decedent by right of survivorship.[54] A will does not take effect until death, and does not have operative effect as a contract or declaration before death. Although Civil Code section 683.2(a)(2), allows for termination of a joint tenancy by execution of a written instrument that evidences the intent to do so, the court held that the will in this case did not evince such an intention. First, Ruth's will did not refer to the Gibson property or reflect an unequivocal intention to terminate the joint tenancy sufficient to effect an "immediate and irrevocable severance," nor was there any evidence either spouse was mistaken as to the effect of taking title as joint tenants. Second, after 1985, Civil Code section 683.2(c) has required that an instrument severing a joint tenancy must be recorded. Ruth's 1983 will was not recorded at the time of her death in 1988. Thus, the will prior to Ruth's death did not constitute an instrument sufficient to sever the joint tenancy, and it also could not have that effect after her death.

As to whether the joint tenancy in the Gibson property was severed by "other means" unrelated to Ruth's will, the court noted that while the presumption from the form of the deed by which the spouses take title governs upon death of one spouse under Civil Code section 683.2(a), the party who seeks to rebut the presumption bears the burden to do so.[55] Here there was no evidence that either spouse was mistaken as to having taken the property as joint tenants, or had communicated a contrary intention to do so, nor was there evidence of an agreement to sever the joint tenancy and transmute their interest to community property.[56] Moreover, Jack's 1995 deed of the Gibson property to his trust was recorded, so the presumption of record title arising under Code of Civil Procedure section 321 and Evidence Code section 662 applied.[57] Because the Pearce Parties had not introduced convincing evidence to overcome the presumption that the title belonged to the trust, and it had never been subject to administration in Ruth's estate, the court found the Pearce Parties had no interest in that property. Moreover, the court found the claim time-barred by the five-year statute of limitation for recovery of real property and the rents and properties therefrom.[58]

With respect to the Rosedale property, the court found the partnership interest held by Jack was presumably community property. However, the *assets* held by the partnership are not community property while the partnership exists.[59] The community property interest extends only to the partnership interest, and a partner's interest is solely in the profits and proceeds of the partnership, which is personal property.[60] Thus, Ruth's community property interest was only in the share of the partnership proceeds at the time of dissolution, which Jack received in 1989. Jack's failure to cause distribution of the property constituted the tort of conversion of Ruth's distributive interest in the partnership, but the statute of limitations for a claim of conversion of personal property is three years after the act of conversion[61] and arises immediately upon commission of the acts of conversion.[62] Because the Pearce Parties had not initiated their action until 2011, more than 22 years after Jack's act of conversion with respect to Ruth's share in partnership proceeds, their action was time-barred as to the Rosedale property as well.

Comment: Aside from the fact that Ruth's will was never probated, the more important issue was that a will is insufficient for severing a joint tenancy. This is because to overcome the presumption that the character of real property is as set forth in the deed upon the death of one spouse, there must be evidence of an agreement by *both* parties. As the court remarked, "the presumption may not be overcome by testimony about the hidden intention of one spouse, undisclosed to the other spouse at the time of the conveyance."[63] Moreover, because a will does not become operative before death and can be revoked, the court expressed concern that had Jack predeceased Ruth, she could have revoked her will and its purported severance of joint tenancy, creating an imbalance in the power between the spouses. While it is possible Ruth was trying to have it both ways, the takeaway is that if a person's intent is to sever joint tenancy title, the actual title should be changed through proper documentation before death, and there should be an explicit agreement between the spouses, so as not to have to overcome the strong presumption of Civil Procedure Code section 321.

Related cases: Three related cases offered more insights into properties held in trust, and transmutation of community property, respectively. In *Boshernitsan v. Bach*,[64] tenants in an unlawful detainer suit alleged that the eviction was not being sought by a "landlord"—defined as a "natural person" by a rule enacted by the San Francisco Rent Stabilization and Arbitration Board[65]—because the property was held in a revocable living trust. Finding that that "the law of trusts confirms that the building's title is held by [Landlords] as trustees, because trusts do not themselves as entities hold title to property,"[66] the court held that the trustees of the trust, not the trust itself, held record title to the property, and the trustees, who were both settlors and beneficiaries of the trust, were "natural persons" and therefore qualified as "landlord" for purposes of the city's rent ordinance.

In re the Marriage of Wozniak[67] involved an inter-spousal transfer deed that had been executed by one spouse, but not accepted by the other until six years later on the brink of dissolution proceedings. The court found that transfer of property from one spouse to the other requires acceptance by the transferee spouse under Family Code section 850, which states that "married persons may by agreement or transfer, with or without consideration" transmute their property.[68] The court rejected that such a transfer could be unilateral, as such an interpretation would eliminate the need for acceptance in inter-spousal transfers. Thus, because the deed was not accepted, it did not transmute community property to separate property when recorded years later.

Finally, *Trenk v. Soheili*[69] involved a loan secured by a deed of trust on a community property residence, where only one spouse executed the deed of trust. Citing *In re Brace*, which held that "'titling of a deed' as a joint tenancy is not sufficient to show that the spouses intended that writing to convert community property into separate property,"[70] the *Trenk* court held that a deed of trust on community property residence was voidable where not signed by both spouses.

Comment: The surface appeal of the tenants' creative argument that the trust in the *Boshernitsan* case could not be a landlord because it was not a "natural person" obviously convinced the trial court in that case, but could not overcome the court of appeal's immediate recognition of "the bedrock principle that a trustee holds legal title to property held in trust."[71] *Wozniak* and *Trenk*, on the other hand, serve to reiterate the necessity for spousal agreement when transmuting the title of property—whether the transmutation is from separate property to community property or vice versa.

5. Lent v. California Coastal Commission[72]

> Oceanfront homeowners and the California Coastal Commission have come into increasing conflict in recent years over Commission regulations, including public access and restrictions on new development, particularly seawalls. In this and a related case, flaunting of regulations and interference with public coastal access has resulted in steep fines, while in a second related case, the Commission stepped in to confront a city's ban on short-term vacation rentals.

In 2002, Warren and Henny Lent purchased a beachfront house in Malibu with a five-foot wide vertical easement on one side of the house for public access to the coast, which easement was owned by the California Coastal Conservancy. Despite the easement, a prior owner built a deck and staircase in the easement area along with a gate that blocked public access—additions that were not approved by the California Coastal Commission. The Conservancy notified the prior owners that the public had the right to use the easement, but that the easement would remain closed until it located a management agency for the easement. The prior owners did not remove the gate or seek the Conservancy's permission to keep it until the easement opened.

In 2007, the Commission requested that the Lents remove the structures to facilitate public access, but the Lents refused. The Commission corresponded with the Lents or their attorney over the course of the next several years, culminating in a 2014 letter from the Commission referencing the newly-enacted Public Resources Code section 30821, which authorizes administrative penalties up to $11,250 per day per violation. This was followed by a 2015 notice of intent to issue cease and desist order and impose penalties. The Lents' statement of defense included the contention that the Commission had approved the structures, the doctrine of laches, and that penalties could not be imposed because the Lents had not built the structures. In 2016, a Commission staff report indicated that it could impose up to $8,370,000 in penalties, which was warranted by the "significant blockage of public access" and the Lents' refusal to voluntarily restore that access.

However, staff recommended a conservative penalty of $950,000. At the hearing, the Commission voted unanimously to impose a $4,185,000 penalty. The Lents responded with a petition for writ of mandate that included their previous defenses, that section 30821 was unconstitutional for providing insufficient procedural protections, and that the fine was unconstitutionally excessive. The trial court found "overwhelming evidence" the Lents violated the Coastal Act but did find the Commission violated the Lents' due process rights by increasing the fine from the recommended $950,000 to $4,185,000 at the hearing. Both the Lents and the Commission appealed.

The court of appeal quickly dismissed the Lents' argument that they could not be penalized for structures they did not build. First, "[i]t is well settled that the burdens of permits run with the land once the benefits have been accepted."[73] Thus, "an owner who maintains a development on his or her property 'undertakes activity' that requires a permit for purposes of section 30810, as does an owner who maintains a development inconsistent with a previously issued permit, regardless of whether he or she constructed the development."[74] Were this not the case, developers could easily avoid compliance with the Coastal Act simply by selling before the Commission noticed unpermitted development.[75]

The court then found that substantial evidence supported the cease and desist order, noting first that "'development' goes beyond 'what is commonly regarded as development of real property,'"[76] and includes "any 'change in … access' to water."[77] Here the deck, stairway, and gate were all developments because they denied beach access to all but the property owners, and they were un-permitted because they were not included in documents approved by the Commission. The court rejected the Lents' contention that the Commission's awareness of the developments constituted approval of them.

Considering whether laches barred the enforcement action because the Commission delayed in seeking removal of the structures, the court found no prejudice,[78] and no evidence the Commission had agreed the structures could remain permanently.[79] Assessing the Lents' procedural due process argument, the court agreed with the Commission that "due process does not require an administrative agency to notify an alleged violator of the exact penalty the agency intends to impose, so long as the agency provides adequate notice of the substance of the charge."[80] Here the Lents had been notified they could be fined up to $11,250 per day per violation, and also that the Commission *could* impose a penalty up to $8,370,000.[81] The court rejected that the Lents had no opportunity to present evidence regarding the higher penalty the Commission imposed, noting that they knew of the potential penalties in 2015, and that their statement of defense raised no constitutional objection to the size of the penalty.

Assessing the facial constitutionality of section 30821 under the *Matthews* test for procedural due process,[82] the court stressed that procedural due process does not necessarily require a trial-type hearing,[83] and disagreed that the potentially substantial penalties of section 30821 require a hearing.[84] Considering whether the Lents had shown section 30821 to be unconstitutional as applied to them, the court found they had not carried that burden[85] because mere imposition of a large penalty is not a violation of due process, and the Lents identified no "specific procedural protection they contend was necessary to avoid an erroneous deprivation of their interests."[86] Finally, addressing the constitutional prohibition on excessive fines, the court first reviewed the Lents' culpability.

The court rejected the Lents' declaration that they "believed in 'good-faith … that they were not violating any public access provisions,'" finding to the contrary that the Lents' refusal to remove the structures after repeated requests from the Commission over several years undermined their good faith belief argument.[87] The court also found an adequate relationship between the harm and the penalty based on the evidence, and noted that any difficulty quantifying the harm caused by the obstruction of public access did not show that the penalty was not proportional to the violation. Thus, the judgment was affirmed.

Comment: Cases like the Lents', that had been churning for years, got a jolt when section 30821 of the Public Resources Code was added in 2014. Section 30821 allows for penalties of up to $11,250 per day per violation for violations of the public access provisions of the Coastal Act, and also authorizes the Commission place a lien on the property of any violator who fails to pay.[88] Prior to enactment of section 30821, the Commission had no power to impose penalties; a monetary civil liability could only be imposed by the superior court.[89] In this case, the court was clearly swayed by what it perceived as the Lents' duplicity, as evidenced by its description of the substantial evidence, such as numerous conceptual plans submitted to the Commission that did not depict the encroaching structures, but *did* depict such structures on other parts of the property. *Lent* demonstrates the impact of section 30821 in the context of noncompliant owners who engaged in stalling tactics when dealing with the Coastal Commission and represents a sea change in the consequences such owners now face.

Related cases: Somewhat similar to the *Lent* case, *11 Lagunita, LLC v. California Coastal Commission*[90] involved a beachfront property where the owners obtained a Coastal Development Permit (CDP) for seawall reinforcement and residential remodel. The CPD was approved on several conditions, including that authorization for the seawall would expire on the earlier of three events relating to the existing residence: 1) "redeveloped in a manner that constitutes new development"; 2) "is no longer present or becomes uninhabitable"; or 3) "no longer requires a shoreline protective device." The owners were also required to remove the seawall in anticipation of any of these events.

Another condition was that any future development or redevelopment could not rely on the seawall and would be "sited and designed to be safe without reliance on shoreline protective devices." When new owners engaged in a substantial remodel,[91] obtaining city permits but failing to alert the Commission, the Commission deemed it to be "new development" necessitating the removal of the seawall. The court of appeal, construing the word "development" broadly, found that the Commission acted within the scope of its jurisdiction in issuing a cease and desist order to remove the seawall where a condition of the development permit not to redevelop in a manner that constitutes new development was violated, and did not abuse its discretion in imposing a $1 million administrative fee where the owners did not act in good faith.

A second related case, *Kracke v. City of Santa Barbara*,[92] found a city's ban on short-term vacation rentals (STVRs) in the coastal zone constituted "development" under the Coastal Act, for which a coastal development permit or Local Coastal Program amendment was required. Finding the goal of the Coastal Act to be to "[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal environment and its natural and artificial resources," as well to "maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners,"[93] the court cited *Greenfield v. Mandalay Shores Community Association*[94] in concluding that the coastal STVR ban should not have been accomplished without the Commission's input or approval.

Comment: In the *11 Lagunita case*, the court of appeal focused on the fact that the property owners' architect was evasive about why the owners did not contact the Commission and only pursued city permits. Importantly, the court noted that the Commission determined a maximum penalty of $8.3 million but chose to focus on the injunctive solution and ultimately settled on a $1 million penalty. The court concluded that the Commission made extensive findings, with "no indication the Commission acted in an arbitrary or capricious manner. Quite the opposite,"[95] and it noted the penalty was far less than it could have been.

This was coupled with ample evidence contradicting the Katzes' contention that they "had a good faith belief in the lawfulness of their action," and supporting the Commission's conclusion that "[a] reasonable person would certainly not have thought it prudent to avoid any contact with [a regulatory body imposing a condition] and could not claim innocent ignorance of the rules after having done so."[96] In case it is not abundantly clear from *Lent* and *11 Lagunita*: beachfront homeowners ignore the Coastal Act and interfere with public coastal access at their peril. Similarly, *Kracke* serves as a reminder that municipalities, too, will be held to the goals of the Coastal Act and its prioritization of public access.

6. Southern California School of Theology v. Claremont Graduate University[97]

What happens when a repurchase clause in a purchase agreement requires a buyer to offer property to the seller on terms that would result in a large difference between repurchase price and market value? This question is answered in a case where the owner purchased the property in 1957 and sought to sell it in 2015.

In 1957, Claremont College (now Claremont Graduate University) transferred by way of grant deed land upon which Southern California School of Theology's (SCST) campus is now located. The purchase price was $107,000, and two conditions subsequent were included in the deed: 1) an Educational Use Clause regarding permissible uses of the property; and 2) a First Offer Clause, requiring SCST to offer the property to Claremont on agreed terms, "enforceable by a power of termination and right of reentry." At the time of the sale, "[t]he parties agreed that Claremont's repurchase price under the First Offer Clause would be 'computed as follows: whichever of the following defined amounts be lower, either (1) the fair market value of the land granted, and the improvements and fixtures thereon, as of the date when the notice of offer is given, or (2) the sum of the following amounts: the purchase price of the land granted in the sale from [Claremont] to [SCST] plus taxes and assessments paid by [SCST] thereon since the date of conveyance by [Claremont] to [SCST] plus the original cost of improvements and fixtures thereon but less a reasonable allowance for depreciation and obsolescence of such improvements and fixtures.'"[98]

SCST sought to sell the property in 2015 but could not reach agreement with Claremont. This was because the repurchase price calculation was approximately $3.5 to $4 million, while fair market value (almost 60 years later) was approximately $40 million. Thus, SCST marketed the property and received offers, ultimately filing suit against Claremont to quiet title. The trial court concluded that both clauses had expired in 1988 by operation of the Marketable Record Title Act (MRTA) (Civil Code section 880.020 et seq.). While the court found both clauses to be equitable servitudes that were enforceable by injunction under the MRTA, it also found that doing so "would be inequitable because it would effect a forfeiture on SCST 'of as much as $36 million, being the difference between the purchase price calculation [in 1957] and the current fair market value of the property.'" Thus, the trial court enforced the Educational Use Clause, but interpreted the First Offer Clause as a "First Right of Refusal," and created the terms of the First Right of Refusal by injunction. Claremont appealed.

The court of appeal first addressed SCST's argument that the MRTA gave the trial court the authority to invoke the forfeiture doctrine to rewrite the First Offer Clause, concluding that it "need not decide whether the MRTA applies to the parties' dispute because even if it does apply, the First Offer Clause is an equitable servitude that the MRTA does not extinguish." Turning to the trial court's decision to treat the First Offer Clause as a First Right of Refusal, the court of appeal found that the trial court had expressly based its decision on the forfeiture doctrine, not the doctrine of changed conditions. It also found that the facts did not support application of the doctrine of changed conditions because "[i]ncreases in property value alone do not constitute changed conditions sufficient to invalidate otherwise enforceable equitable servitudes,"[99] noting that if the opposite were true, no equitable servitude on property would be enforceable for long.

Observing that determining whether a forfeiture occurred required an examination of the contract, the court found the parties to have "allocated the risks and responsibilities regarding the inevitability of increased property value in 1957 in the deed and the 1957 Agreement."[100] Rather than effecting a forfeiture against either party, the court found the First Offer Clause to provide each party "that for which they bargained, and that to which they agreed."[101] Moreover, the court found nothing in the fact that six decades had passed or that the land had appreciated dramatically that would "render the terms of the parties' agreement a forfeiture for either party. Rather, the trial court's 'interpretation' of the First Offer Clause as a first right of refusal would materially alter the parties' allocation of their respective risks and contractual rights and responsibilities."[102] Thus, with no forfeiture to be avoided, the court found the forfeiture doctrine to be inapplicable.[103] Accordingly, the judgment was reversed and the matter remanded.

Comment: This case illustrates that getting what you bargained for and getting what you expected are not always the same. It is unlikely that the parties in 1956 expected the kind of appreciation the property eventually experienced. Thus, it is not hard to imagine the trial court sympathizing with SCST, given that the value in 2015 was literally hundreds of times the 1956 value. However, as courts often observe, contracts need not be equitable, as long as the parties are getting what they bargained for.[104] Because SCST bargained to bear the risk of either increased *or* decreased value, the original agreement allowed Claremont to choose the lower of two property valuation methods. Thus, despite the sharp differential between the two valuation methods, the court found SCST to have gotten what it bargained for.

7. *Farmland Protection Alliance v. County of Yolo*[105]

> CEQA compliance can be a long and challenging process. In this case, a trial court's apparent attempt to make the process more streamlined was found to be contrary to the language and intent of the statute.

In considering the proposed operation of "a bed and breakfast and commercial event facility supported by onsite crop production intended to provide visitors with an education in agricultural operations,"[106] on an 80-acre agriculturally-zoned site near the city of Winters, the County of Yolo approved a mitigated negative declaration (MND) under CEQA. Farmland Protection Alliance sued challenging the MND's adequacy. The trial court found that substantial evidence supported a fair argument that the project may have a significant effect on three species of concern identified in the complaint. However, while the court then ordered the county to prepare an environmental impact report (EIR), it allowed the EIR to be limited to addressing only the project's impacts on those species, while allowing the project approval and MND (and its mitigation measures) to remain in effect and also allowing project operations to continue pending compliance with its order. While the county prepared and certified an EIR regarding impacts to the three species, Farmland appealed.

In the published portion of its decision, the court of appeal articulated Farmland's argument as "once evidence is presented that a project might have a substantial impact on the environment—in any area—the lead agency *must* proceed to prepare an environmental impact report '*for the proposed project*.'"[107] The county and real parties, by contrast, argued that Public Resources Code section 21168.9 gave the trial court the discretion to craft the remedy it did. The court of appeal agreed with Farmland, holding that "[t]he remedies under section 21168.9 do not trump the mandatory provisions of the Act. Section 21168.9 is intended to facilitate *compliance* with the Act; it does not provide a means to circumvent the heart of the Act—the preparation of an environmental impact report for the project."[108]

CEQA's three-tier process requires an agency to first decide if CEQA applies to a proposed project, and then, if it does, to conduct an initial study to determine whether there is substantial evidence "that the project or any of its aspects may cause a significant effect on the environment." If there is no such evidence, the agency may prepare a negative declaration.[109] If the study identifies potential significant effects on the environment, the agency must determine whether such effects can be mitigated or whether substantial evidence supports a fair argument that a proposed project may have a significant effect on the environment."[110]

The court found nothing in CEQA (or the case law interpreting it) "suggesting a project's impact analysis may be divided across the second and third tiers of environmental review such that some impacts are analyzed in a mitigated negative declaration and others are analyzed in an environmental impact report."[111] Rather, "if any aspect of the project triggers preparation of an environmental impact report, a full environmental impact report must be prepared in accordance with the definition of [an EIR in Public Resources Code] section 21061."[112] Thus, an agency may adopt a negative declaration or prepare an EIR, not both: "the second and third tiers of environmental review under the Act are mutually exclusive[.]"[113]

While the statute authorizes "flexibility in fashioning remedies," involving consideration of equitable principles to bring agency actions into compliance with CEQA, the court here found that ordering a "limited" EIR to supplement a deficient MND when CEQA requires a full EIR does not achieve compliance. Even where substantial evidence is found to support only a fair argument that a single aspect of the project may have a significant effect, an EIR for the project is still required in accordance with CEQA statute and guidelines. Accordingly, the judgment was reversed.

Comment: The court of appeal in this case repeatedly stated that the flexibility afforded to a trial court in fashioning remedies under CEQA must result in *compliance* with the Act. In finding the trial court's remedy here to result instead in a *circumvention* of the mandatory provisions of the Act, the court emphasized the either-or nature of environmental review under CEQA as it is currently worded: either a negative declaration (or mitigated negative declaration) may be prepared when there is no substantial evidence of a potentially significant effect on the environment, or, if there is such evidence, an environmental impact report *must be* prepared for the *entire* project.

While the trial court was likely trying to temper the expensive and time consuming EIR process by focusing the EIR only on impactful aspects of the project, the court of appeal did not even comment on the trial court's possible motives, reiterating only that the third tier of the environmental review process unambiguously requires a "full EIR" for the whole project. To do otherwise would potentially omit important information about the project as a whole and a discussion of why certain aspects are not anticipated to have significant environmental effects. However, it is worth noting that some cases with limited impacts could potentially benefit from a two-pronged environmental review approach. Whether the Legislature will choose to take up that task remains to be seen.

8. *Russell v. Man*[114]

> Tree disputes between neighbors are common, and this is the second case in as many years to weigh in on the application of a statute that addresses the wrongful cutting of timber in the context of negligence claims by neighbors relating to trees.

The Russells and Mans owned adjacent properties in Big Bear Lake, with an 85 foot Jeffrey pine tree straddling their property line. The tree was 80 percent on the Russells' property and 20 percent on the Mans' property. Cornel Man was a general contractor who purchased the property to develop and sell. It was later discovered that, due to a local ordinance forbidding digging in a tree's "critical root zone" (which in this case was 40 feet), the Mans' property was undevelopable. Nevertheless, the city issued a building permit and construction began. After construction was completed and the Mans sold the house, the tree died. An arborist who inspected the tree during construction opined that the tree died of dehydration due to its roots being cut during construction. The Russells filed suit against the Mans for wrongful cutting of timber,[115] negligence, and trespass. The trial court awarded $222,767.23, representing $73,265.50 as the value of the tree, which the court trebled pursuant to Civil Code section 3346, and $2,968.73 in costs.

The Mans appealed on the ground that section 3346 did not apply here because they were not trespassing on the Russells' property when the tree was injured. Section 3346 provides for "damages three times such sum as would compensate for the actual detriment, except that where the trespass was casual or involuntary, or that [sic] the defendant … had probably cause to believe that the land on which the trespass was committed was his own ..., the measure of damages shall be twice the sum as would compensate for the actual detriment[.]"[116] Section 3346 also requires any action for damages to be commenced "within five years from the date of the trespass." Similarly, section 733 provides that "[a]ny person who … injures any tree or timber on the land of another person … is liable to the owner of such land … for treble the amount of damages."[117] The court noted that these sections must be read together and stressed that each statute employed language seeming to require an actual trespass.

The court then cited *Scholes v. Lambirth Trucking Co.*[118] for its holding that sections 3346 and 733 both require a trespass, pointing out that *Scholes* went further by holding that "not just any common law trespass will do."[119] Rather, these statutes were aimed at "the kind of acts long thought of as 'timber trespass' or 'timber misappropriation'—essentially, intentionally severing or removing timber from another's land without the owner's consent. [Citations]."[120] The purpose of the statutes, according to the *Scholes* court, was to protect the timber from being cut by someone other than the owner. By contrast, the facts here showed no intentional entry, and that the tree died as a result of actions taken by construction workers on the Mans' own land. Two incursions onto the Russells' property by workers were undisputedly not related to the death of the tree.

While the court acknowledged that it is a trespass to cut roots of a tree that have encroached onto one's property if doing so unnecessarily kills or injures the tree, [121] it emphasized that *Scholes* requires more: "a timber trespass, which in turn requires an intentional crossing of boundary lines into the land of another to injure timber."[122] Accordingly, the court here found the Mans could not be held liable for damages (much less treble damages) for wrongful cutting of timber under section 3346. However, it affirmed liability for actual (not treble) damages based on the local ordinance.

Comment: The main issue in this case was not liability for common law trespass, which was fairly well undisputed at this stage of the litigation. Rather, it was the Russells' efforts to obtain treble damages, and their creative attempt to use section 3346 to achieve that goal, that the court of appeal here focused on. Citing *Scholes* heavily, the court emphasized that the purpose of section 3346 is to provide a remedy for *intentional* acts—that is, people intentionally severing or removing timber from another's land without the owner's consent that are considered "timber trespass" or "timber misappropriation." The court agreed with *Scholes* that this means more than mere common law trespass, and that something more simply was not in evidence here. Thus, such unintentional trespasses are not subject to treble damages. Between *Scholes* and *Russell*, section 3346 seems unlikely to continue making appearances in simple trespass cases involving trees.

9. Paterra v. Hansen[123]

> The domino effect of a default judgment in a quiet title action, and that judgment's impact on the ability of a stranger to the action to challenge the judgment, are examined in this factually and procedurally complicated case that began with a reverse mortgage.

This case involved "competing interests in a single residential condominium property."[124] The previous owner, Paterra, conveyed title in 1997 to a third party, Affiliated Financial Professionals (AFP) for a reverse mortgage. AFP was supposed to hold title, obtain a second deed of trust loan, make payments on the first and second deed of trust, and pay property taxes, and eventually convey the property back to Paterra when the second loan was paid off and she paid down certain additional amounts to AFP. However, AFP instead conveyed title to a succession of third parties who obtained a series of loans on the property, each in second position, the last of which was a loan made by Clarion Mortgage Capital, Inc. (Clarion).

Eventually, Paterra, who had remained in possession but had not been involved in or aware of these intervening transactions, filed a series of lawsuits to cancel the "reverse mortgage" transaction with AFP and to quiet title against these various other parties, including against Clarion. She did not name Mortgage Electronic Registration System (MERS), which was named as beneficiary and nominee in the deed of trust that secured the Clarion loan.

After Paterra obtained a default judgment against Clarion, the quiet title action went to trial, resulting in a judgment against a principal of AFP but also purporting to include a judgment of quiet title against Clarion, who had not been served with the second amended complaint in the action because of the default judgment taken against Clarion when it failed to answer the first amended complaint. Although MERS was the named beneficiary and nominee of the lender in the recorded Clarion deed of trust, Paterra not only had failed to join MERS as a party in the action, she also did not seek to have MERS included in the judgment. MERS had recorded an assignment of the Clarion deed of trust to ABS REO Trust II (ABS). When ABS then sought to foreclose on the property under the Clarion deed of trust, Paterra filed yet another lawsuit to stop the foreclosure, and ABS moved to vacate the judgment against Clarion. The trial court denied the motion and ABS appealed.

The court of appeal first rejected Paterra's argument that the order denying the motion to vacate was not appealable, holding that an order denying a motion to vacate a *void* judgment is always appealable.[125] Next addressing standing, the court found that a void judgment may be attacked directly or collaterally either by the parties or by strangers,[126] and while ABS was clearly a stranger to the action, it was a "party aggrieved" by the default judgment against Clarion because it had prevented the foreclosure ABS attempted to initiate.[127] As to the merits, the court first found Paterra's failure to serve Clarion with the second amended complaint rendered the judgment taken by default against it void because it denied Clarion the opportunity to appear and be heard on the substantively and materially different allegations of the second amended complaint.

Second, the failure by the trial court to conduct an evidentiary hearing before entering the default against Clarion also rendered the judgment void. Uniquely, a quiet title action "seek[s] to declare rights against all the world," and therefore *unequivocally* requires an evidentiary hearing.[128] The court here disagreed that Clarion received the equivalent of an evidentiary hearing in the quiet title action, since the trial court had specifically said the evidence had not addressed the Clarion deed of trust. Thus, the court of appeal further found that the judgment was so noncompliant with the requirements of Code of Civil Procedure section 760.010 as to exceed the fundamental powers of the court to enter default judgments in quiet title actions and was therefore *fundamentally* void. Accordingly, the judgment was subject to attack by a stranger or successor in interest, such as ABS, and not solely by the defaulting party (Clarion).[129]

Finally, the failure to name MERS as a party in the quiet title action was an independent basis for finding the judgment void. The Clarion deed of trust identified MERS as a beneficiary and the lender's nominee on the loan, and provided MERS with the full authority to exercise Clarion's rights and interests with regard to initiating foreclosures, enforcing the loan, and transferring the secured interest.[130] Given MERS' authority under the recorded terms of the deed of trust, MERS was "an indisputably known party with a known adverse claim that was integrally related to Clarion's adverse claim in the quiet title action,"[131] and to effectively quiet title against all the world, including the party with a beneficial interest in the Clarion deed of trust, MERS should have been named and served in the action. Thus, the judgment quieting title against Clarion was reversed, with MERS and ABS left to pursue their claims against the property and Paterra, on the merits of which the court of appeal expressed no opinion.

Comment: Code of Civil Procedure section 764.010 states "[t]he court shall not enter judgment by default" in a quiet title action. This language that has been described as "about as straightforward as such language ever gets,"[132] yet a surprising number of appellate court cases continue to address default judgments in the quiet title context. Here the default judgment led to a more complicated question: whether the court exceeded its jurisdiction such that the judgment was void, and not merely voidable, which would give ABS standing to challenge it as a stranger to the action. That question was not addressed in *Harbour* and *Nickell*, cases relied on heavily by the court here, because both of those cases involved challenges by the defaulting parties themselves. While the dominos ultimately fell the way ABS desired here, the disposition of the case was simply to reverse the portion of the judgment quieting title against Clarion, which presumably left Paterra free to contest the validity of the Clarion deed of trust in subsequent litigation involving MERS and ABS, as Clarion's successor in interest.

Related case: *Tsasu LLC v. U.S. Bank Trust, N.A.*[133] involved a property whose owner defaulted on her mortgage, sued her lender but without proper service such that she obtained a default judgment, expunged the lender's deed of trust, and then obtained a new loan from a different lender. Although the new lender recorded its deed of trust after the quiet title judgment was recorded but before it was set aside as void, it was still recorded later than the first lender's deed of trust. Thus, the question was whether the general rule regarding priority was superseded here by either the Quiet Title Act, or by other considerations such as the second lender's lack of notice or involvement in the proceedings to set aside the quiet title judgment, or its reliance on the quiet title judgment.

The court noted that even a later-invalidated judgment remains valid for a "purchaser or encumbrancer for value … without knowledge of any defects or irregularities in the [quiet title] judgment or the proceedings."[134] Thus, it considered whether the "requirement of no 'knowledge' mean[s] no actual knowledge or, instead, no actual and no constructive knowledge?" The court concluded that section 764.060 requires the absence of both actual and constructive knowledge based on the plain meaning of the term "knowledge,"[135] and because a bona fide purchaser at common law "must lack both actual and constructive knowledge of competing rights[.]"[136] Because the second lender undisputedly had constructive knowledge of the "defects and irregularities" with the quiet title judgment relating to the first lender's deed of trust, section 764.060 was inapplicable and the first lender's deed had priority.

Comment: One of the bases for the court finding "knowledge" to include both actual and constructive was public policy,[137] with the court noting that if only actual knowledge was required to render section 746.060 inapplicable, it would dis-incentivize the investigation of "warning signs." The court found that to be contrary to "the entire system of real property law in California, which places upon real estate buyers a duty to inquire into the validity of their prospective ownership claim,[138] and to heed—not ignore—any 'reasonable warning signs.'"[139] Illustrating that exact policy, the court concluded that a reasonable inquiry by Tsasu would have revealed the defect or irregularity because Tsasu treated its insurer as an agent, and the title report revealed the conflicting documents.

10. San Joaquin Regional Transit District v. Superior Court of San Joaquin County[140]

> This case addresses how damages are calculated when an agency begins eminent domain proceedings and then changes its mind—after the company that owned the property had already vacated a portion of it and relocated a substantial portion of its business elsewhere.

Sardee Industries had a plant located in Stockton, California that manufactured specialized equipment, and one in Lisle, Illinois that manufactured more basic equipment. The San Joaquin Regional Transit District began pursuing possible acquisition of Sardee's Stockton property in 2005, sending a notice of decision to appraise in 2008. A stipulated order between the parties granted immediate possession of the rear portion of the property to the district and required Sardee to pay the district rent of $6,500 per month to continue use of the front portion of the property. Accordingly, Sardee moved the vast majority of its Stockton business to its Lisle facility, which needed to be modified to take on the new business.

In April 2012, the district adopted a resolution abandoning the condemnation of the front portion of the Stockton property, and in April 2013 adopted a resolution abandoning the remainder of the Stockton property. The trial court dismissed the condemnation action but retained jurisdiction over Sardee's damage claim.[141] It found Sardee entitled to damages under section 1268.620 because Sardee had taken all the necessary steps to move its operations to Lisle, and "did more than just prepare. Sardee was well into the process of moving, and was almost done." The trial court rejected the district's contention that Sardee needed to be completely "physically dispossessed" to be entitled to compensation, noting that "section 1268.620 does not use the term 'physically dispossessed' and that dispossession logically encompasses legal dispossession based on an order or agreement for possession."[142] Thus, it found physical dispossession unnecessary for an award of damages.

On the district's appeal, the court first assessed whether complete physical dispossession of a property is a prerequisite for an award of damages under section 1268.620. The district relied on *Los Angeles Unified School District v. Trump Wilshire Associates*,[143] arguing that the trial court erred in distinguishing it from the present case. The court of appeal disagreed. In contrast to *Trump*, where "Trump Wilshire's right of possession was never threatened," and all "Trump Wilshire did was put its development plans on hold," the district here took actual possession of the northern portion of the property and continued to pursue its plans to take the entire property.

While the *Trump* court referenced legislative intent that "the remedies available under section 1268.620 be applied only to parties who have been physically dispossessed," the court here found that "*Trump* did not provide an extensive analysis of what constitutes a 'move' sufficient to invoke section 1268.620." Thus, it found that *Trump* did not support the district's contention that "the statute requires a complete move of all items from the property in question."[144]

In fact, section 1268.620 does not even use the term "physically dispossessed." Thus, the question was whether Sardee *moved* from the property, not whether it was *completely physically dispossessed*. The court rejected that Sardee had not moved "because it had exclusive rights to physically occupy the portion of the Property where it operated its Stockton facility" and continuously did so. Rather, the court of appeal found that Sardee "moved" because it was paying rent to the district for the portion of property it continued to use and had physically moved almost all its manufacturing operations from Stockton to Lisle.

Comment: The term "move" in the context of an eminent domain action is obviously not one for which a bright line can be drawn, given that moving the physical operations of a large company like Sardee would likely take months. So, it is not surprising that an exact test cannot be gleaned from this case, other than that more than mere preparation is required. However, the court's analysis here should foreclose further use of the "physically dispossessed" language from the *Trump* case, and the expansion of that term that the district sought here ("*complete* physical dispossession").

Beyond that, we seem to be left with something of a sliding scale between engaging in mere preparations and having fully moved. Future cases will likely note that both the trial court and court of appeal here emphasized that "Sardee did more than just prepare. Sardee was well into the process of moving and was almost done."[145] It is also worth mentioning that the court of appeal cited favorably the trial court's impression of Sardee, which was of "honesty, integrity and professionalism … in the face of [District's] actions." Hopefully this will serve as a warning to agencies that pursue these actions without the requisite commitment.

HONORABLE MENTION:

Apartment Association of Los Angeles County, Inc. v. City of Los Angeles[146]

> Here the Ninth Circuit, considering a challenge under only the Contracts Clause of the Constitution, assessed the viability of a local eviction moratorium, concluding that even if the moratorium substantially impaired contractual relations, it was an appropriate and reasonable way to advance a significant and legitimate public purpose.

The City of Los Angeles enacted an eviction moratorium[147] during the COVID-19 pandemic to address the threat of COVID-19 "to undermine housing security and generate unnecessary displacement of City residents and instability of City businesses."[148] To achieve its goals, the moratorium prohibited landlords from evicting tenants in three scenarios: 1) nonpayment of rent if due to circumstances related to the pandemic; 2) a "no-fault reason," including when moving the owner or owner's family into the property or withdrawal of the property from the rental market; and 3) the presence of unauthorized occupants or pets, or for nuisance related to the pandemic. The moratorium also allowed tenants an additional 12 months to pay their rent obligations. The term of the moratorium was "the period of time from March 4, 2020, to the end of the local emergency as declared by the Mayor." While landlords could continue to seek to evict tenants based on a good faith belief that the tenants are not protected under the moratorium, the moratorium created an affirmative defense for tenants in an unlawful detainer action.

Plaintiff Apartment Association of Los Angeles County, Inc., DBA Apartment Association of Greater Los Angeles (AAGLA), is a trade association of rental owners and managers that challenged the moratorium, with this appeal relating only to the Contracts Clause claim. The district court found that AAGLA was likely to show a substantial impairment of contractual rights, but that it could not show that the eviction moratorium was not "reasonable" and "appropriate." Further, the court found there was not "a likelihood of irreparable harm or that the balance of the equities in the public interest favored granting relief."[149] The court of appeal reviewed the history of the Contracts Clause, including a change in interpretation during the Great Depression, when the Supreme Court "upheld Minnesota's statutory moratorium against home foreclosures, in part, because the legislation was addressed to the 'legitimate end' of protecting 'a basic interest of society.'"[150]

Now the Supreme Court applies a two-step test, asking first if the state law has "operated as a substantial impairment of a contractual relationship," and if so, assessing "whether the law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'"[151] Under this test, the court here concluded "the eviction moratorium must be upheld, even if it is a substantial impairment of contractual relations, if its 'adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption,'"[152] and that AAGLA bore the burden of showing the ordinance was unreasonable. The court found that even if the moratorium in this case imposed a substantial impairment of contractual relations, in light of the pandemic, "the moratorium's provisions constitute an 'appropriate and reasonable way to advance a significant and legitimate public purpose.'"[153]

Thus, the court found that AAGLA was "unlikely to show that the eviction moratorium is an unreasonable fit for the problems identified,"[154] particularly where the city had tied it to its stated goal of preventing displacement from homes, which the court found the city had reasonably explained as potentially exacerbating pandemic-related public health problems. The court disagreed that fair rental compensation was required: "That reasonable rent may have been a relevant consideration in some cases thus does not make it a constitutional floor in all cases,"[155] nor a baseline in a public health situation like the pandemic.

Comment: The court rejected AAGLA's attempts to use pre-*Blaisdell* caselaw to attack the moratorium, focusing instead on the balancing test in the second step of that case. It seemed particularly swayed by the fact that the eviction moratorium was only one of several measures taken, others of which included millions in government funding for rent payments, as well as relief to landlords in the form of payment plans for utilities and penalty waivers for property taxes. These measures, coupled with what the court clearly found to be a compelling governmental goal, undermined AAGLA's Contracts Clause challenge. The court also acknowledged that it was the first circuit court to address a challenge to the constitutionality of a COVID-19-related eviction moratorium under the Contracts Clause, and it emphasized that it was addressing only a

Contracts Clause challenge. In that context, it agreed with district courts that have uniformly rejected such challenges.[156]

However, other cases challenging state and local eviction moratoriums as unconstitutional takings or violations of due process are still pending.[157] In addition, the United States Supreme Court recently lifted the stay of judgment pending appeal of the order striking down the Center For Disease Control's nationwide eviction moratorium.[158] Thus, it is not clear how eviction moratoriums will ultimately fare as against constitutional challenges, although absent injunctive relief by the time the challenges wind their way through the court system to resolution, the moratoriums may have served their purpose.

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 *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

3 *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528 (2005).

4 Cal. Code Regs. tit. 8, § 20900(b)-(c).

5 Cal. Code Regs. tit. 8, § 29099(e)(5)(C).

6 *Discourses on Davila, in* 6 Works of John Adams 280 (C. Adams ed. 1851).

7 *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002); *see Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (physical appropriations constitute the "clearest sot of taking").

8 *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

9 *Penn Central Transp. Co. v. N.Y. City*, 438 U.S. 104 (1978).

10 *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

11 *Horne v. Dep't of Agriculture*, 576 U.S. 350 (2015).

12 *Cedar Point Nursery*, 141 S. Ct. at 2072.

13 *See Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435 (right to exclude is "one of the most treasured" rights of property ownership).

14 *See, e.g., United States v. Causby*, 328 U.S. 256 (1946); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419; *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Horne*, 576 U.S. 350.

15 *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002).

16 *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

17 *Cedar Point Nursery v. Hassid*, 141 S. Ct. at 2077 (citing *Horne*, 576 U.S. at 357 (distinguishing *PruneYard* as involving "an already publicly accessible" business)).

18 *See, e.g., Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330 (1922)*; Ark. Game and Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Hendler v. United States*, 952 F.2d 1364 (CA Fed. 1991).

19 *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-29.

20 See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 (1987).

21 *See, e.g., Ark. Game and Fish Comm'n*, 568 U.S. at 36 (temporary invasions "are subject to a more complex balancing process to determine whether they are a taking"); *PruneYard Shopping Ctr.*, 447 U.S. 74 (analyzing regulation that gave nonowners the right to enter privately-owned property as a temporary taking).

22 *Cedar Point Nursery*, 141 S. Ct. at 2080.

23 *Horne v. Department of Agriculture*, 576 U.S. 350, 364 (2015) (distinguishing *PruneYard* from *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 747-48, which it identified as involving a physical appropriation).

24 *Cal. Renters Legal Advocacy and Educ. Fund v. City of San Mateo*, 68 Cal. App. 5th 820 (1st Dist. 2021).

25 Cal. Gov't Code § 65589.5.

26 § 65589.5(j)(1).

27 § 65589.5(f)(4)).

28 Cal. Const, art. XI, § 11(a).

29 Cal. Gov't Code § 65589.5(j)(1); *Honchariew v. Cty. of Stanislaus*, 200 Cal. App. 4th 1066, 1074-75 (2011).

30 *Cal. Renters Legal Advocacy and Educ. Fund v. City of San Mateo*, 68 Cal. App. 5th 820, 840 (1st Dist. 2021). The court cited as an example the requirement for a "transition or step in height" as being too subjective.

31 *See, e.g., Harrington v. City of Davis*, 16 Cal. App. 5th 420, 434 (2017); *Anderson First Coalition v. City of Anderson*, 130 Cal. App. 4th 1173, 1193 (2005).

32 *Mason v. Retirement Bd.,* 111 Cal. App. 4th 1221,28 (2003).

33 See, e.g., *J. Arthur Props., II, LLC v. City of San Jose,* 21 Cal. App. 5th 480, 486 (2018).

34 *Cal. Renters Legal Advocacy and Educ. Fund*, 68 Cal. App. 5th at 894 (citing *Ruegg & Ellsworth v. City of Berkeley,* 63 Cal. App. 5th 277, 299 (1st Dist. 2021)).

35 *Id.* at 896.

36 *Id*. at 851.

37 Cal. Gov't Code § 65589.5(a)(2)(L).

38 § 65589.5(a)(2)(A).

39 § 65589.5(a)(2)(L), Stats. 2017, ch. 378, § 1.5.

40 § 65589.5(a)(2)(L).

41 *Ruegg & Ellsworth v. City of Berkeley*, 63 Cal. App. 5th 277 (1st Dist. 2021).

42 Cal. Gov't Code § 65913.4(a)(4)(A).

43 *Id.*

44 *Pear v. City and Cty. of S.F.*, 67 Cal. App. 5th 61 (6th Dist. 2021).

45 Plaintiffs in this case were represented by Miller Starr Regalia.

46 *Camp Meeker Water Sys., Inc. v. Public Utilities Comm'n,* 51 Cal. 3d 845, 866-67 (1990).

47 *See Keeler v. Haky,* 160 Cal. App. 2d 474, 476 (1958).

48 *E.g., Youngstown Steel Products Co. of Cal. v. City of L.A.,* 38 Cal. 2d 407 (1952).

49 *Pear*, 67 Cal. App. 5th at 74.

50 *Husain v. Cal. Pac. Bank*, 61 Cal. App. 5th 717 (1st Dist. 2021).

51 *Id.* at 728-29 (quoting 6 Miller & Starr, Cal. Real Est., Easements § 15:38, 15-157 (4th ed. 2020)); *see* Cal. Civ. Code § 805 ("A servitude thereon cannot be held by the owner of the servient tenement"); *Brown v. Ware,* 129 Ariz. 249, 630 P.2d 545, 546.

52 See *Richardson v. Franc*, 233 Cal. App. 4th 744 (2015) (citing 6 Miller & Starr, Cal. Real Est., Easements § 15:2, 15-10 to 15-11 (3d ed. 2006) ("a conveyance of the property burdened with a license revokes the license").

53 *Pearce v. Briggs*, 68 Cal. App. 5th 466 (5th Dist. 2021).

54 *See Estate of England,* 233 Cal. App. 3d 1, 4 (1991); *Guardianship of Wood,* 193 Cal. App. 2d 260, 267 (1961).

55 *Estate of England*, 233 Cal. App. 3d at 5.

56 *Compare In re Brace,* 9 Cal. 5th 903, 938 (2020) (form of title presumption applicable to properties acquired in joint tenancy prior to 1985); *Socal v. King,* 36 Cal. 2d 342, 345-47 (1950) (property taken by joint tenancy deed may be shown to be actually community property or separate property of one spouse according to the intention, understanding, or agreement of the parties).

57 *See Tobin v. Stevens,* 204 Cal. App. 3d 945, 953 (1988).

58 Cal. Civ. Proc. Code §§ 318, 319.

59 *Kenworthy v. Hadden,* 87 Cal. App. 3d 696, 701 (1978).

60 *See Carmichael v. Carmichael,* 216 Cal. App. 2d 674, 682 (1963); *Kenworthy*, 87 Cal. App. 3d at 700-01.

61 Cal. Civ. Proc. Code § 338.

62 *Rose v. Dunk-Harbison Co.*, 7 Cal. App. 2d 502, 506 (1935).

63 *Estate of Levine*, 125 Cal. App. 3d 701, 705 (1981).

64 *Boshernitsan v. Bach*, 61 Cal. App. 5th 883 (1st Dist. 2021).

65 Rule 12.14(a) defines a "landlord" as a "natural person, or group of natural persons, … who in good faith hold a recorded fee interest in the property."

66 *See Galdjie v. Darwish,* 113 Cal. App. 4th 1331,1343 (2003) ("Unlike a corporation, a trust is not a legal entity").

67 *In re the Marriage of Wozniak*, 59 Cal. App. 5th 120 (4th Dist. 2020).

68 *See Perry v. Wallner,* 206 Cal. App. 2d 218, 222 (1962).

69 *Trenk v. Soheili*, 58 Cal. App. 5th 1033 (2nd Dist. 2020).

70 *In re Brace*, 9 Cal. 5th 903, 937-38 (2020).

71 *Boshernitsan*, 61 Cal. App. 5th at 892.

72 *Lent v. Cal. Coastal Comm'n*, 62 Cal. App. 5th 812 (2nd Dist. 2021).

73 *Ojavan Inv., Inc. v. Cal. Coastal Comm'n,* 26 Cal. App. 4th 516, 526 (1994).

74 *Ojavan Inv., Inc. v. Cal. Coastal Comm'n,* 54 Cal. App. 4th 373, 386 (1997).

75 *See Leslie Salt Co. v. S.F. Bay Conservation & Dev. Comm'n*, 153 Cal. App. 3d 605, 618 (1984).

76 *Surfrider Found. v. Martins Beach 1, LLC,* 14 Cal. App. 5th 238, 252 (2017).

77 Cal. Pub. Res. Code § 30106.

78 *George v. Shams-Shirazi,* 45 Cal. App. 5th 134, 142 (2020).

79 *See Pacific Hills Homeowners Ass'n v. Prun,* 160 Cal. App. 4th 1557, 1565 (2008).

80 *Lent v. Cal. Coastal Comm'n*, 62 Cal. App. 5th 812, 840 (2nd Dist. 2021).

81 *Compare Tafti v. Cty. of Tulare,* 198 Cal. App. 4th 891, 894-95 (2011) (vacating $1,148,200 penalty imposed by administrative law judge where defendant had been ordered by county to pay $138,824).

82 *Matthews v. Eldridge,* 424 U.S. 319, 335 (1976).

83 *Oberholzer v. Comm'n on Judicial Performance,* 20 Cal. 4th 371, 392 (1999).

84 *See People ex rel. Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, 522-23 (2002).

85 *See Associated Homebuilders of Greater East Bay, Inc. v. City of Livermore,* 56 Cal. 2d 847, 854 (1961).

86 *Lent v. Cal. Coastal Comm'n*, 62 Cal. App. 5th 812, 850 (2nd Dist. 2021).

87 *See People v. Braum,* 49 Cal. App. 5th 342, 361 (2020) (permissible to consider a person's unwillingness to comply with the law when determining whether a fine is excessive under Eighth Amendment).

88 Cal. Pub. Res. Code § 30821.

89 §§ 30820, 30821.6.

90 *11 Lagunita, LLC v. Cal. Coastal Comm'n*, 58 Cal. App. 5th 904 (4th Dist. 2020).

91 *Id*. at 915 (noting that all exterior walls had been demolished down to their studs).

92 *Kracke v. City of Santa Barbara*, 63 Cal. App. 5th 1089 (2nd Dist. 2021).

93 Cal. Pub. Res. Code § 30001.5(a), (c); *Fudge v. City of Laguna Beach,* 32 Cal. App. 5th 193, 200 (2019).

94 *Greenfield v. Mandalay Shores Cmty. Ass'n,* 21 Cal. App. 5th 896, 900 (2018).

95 *11 Lagunita, LLC*, 58 Cal. App. 5th at 936.

96 *Id*. at 938.

97 *Southern Cal. Sch. of Theology v. Claremont Graduate U.*, 60 Cal. App. 5th 1 (2nd Dist. 2021).

98 *Id*. at 10.

99 *Robertson v. Nichols,* 92 Cal. App. 2d 201, 208 (1949).

100 *Southern Cal. Sch. of Theology*, 60 Cal. App. 5th at 10.

101 *See Barkis v. Scott,* 34 Cal. 2d 116, 122-23 (1949).

102 *Southern Cal. Sch. of Theology*, 60 Cal. App. 5th at 10.

103 *Hendren v. Yonash,* 243 Cal. App. 2d 672, 677 (1966).

104 *See Barkis v. Scott,* 34 Cal. 2d at 122-23 (1949).

105 *Farmland Protection All. v. Cty. of Yolo*, 71 Cal. App. 5th 300 (3rd Dist. 2021).

106 *Id*. at 304.

107 *Muzzy Ranch Co. v. Solano Cty. Airport Land Use Comm'n,* 41 Cal. 4th 372, 381 (2007).

108 *Farmland Protection All.,* 71 Cal. App. 5th at 309.

109 *Save Our Big Trees v. City of Santa Cruz,* 241 Cal. App. 4th 694, 704-05 (2015).

110 *Gentry v. City of Murrieta,* 36 Cal. App. 4th 1359, 1399-1400 (1995).

111 *Farmland Protection All.*, 71 Cal. App. 5th at 310.

112 *San Bernardino Valley Audubon Soc'y v. Metropolitan Water Dist.*, 71 Cal. App. 4th 382, 402 & fn. 11 (1999).

113 *Farmland Protection All.,* 71 Cal. App. 5th at 310.

114 *Russell v. Man*, 58 Cal. App. 5th 530 (4th Dist. 2020).

115 Cal. Civ. Code § 3346.

116 *Russell*, 58 Cal. App. 5th at 536 (quoting Cal. Civ. Code § 3346).

117 Cal. Civ. Code § 733.

118 *Scholes v. Lambirth Trucking Co*., 8 Cal. 5th 1094 (2020).

119 *Scholes,* 8 Cal. 5th at 1104-05, 1110-12.

120 *Id*. at 1104.

121 *Booska v. Patel,* 24 Cal. App. 4th 1786, 1791-92 (1994).

122 *Russell v. Man*, 58 Cal. App. 5th 530, 537 (4th Dist. 2020).

123 *Paterra v. Hansen*, 64 Cal. App. 5th 507 (4th Dist. 2020).

124 *Id*. at 513.

125 *See Gassner v. Stasa,* 30 Cal. App. 5th 346, 356 (2018); *Carlson v. Eassa,* 54 Cal. App. 4th 684, 691 (1997).

126 *OC Interior Servs., LLC v. Nationstar Mortgage, LLC*, 7 Cal. App. 5th 1318, 1330.

127 *See Plaza Hollister Ltd. P'ship v. Cty. of San Benito,* 72 Cal. App. 4th 1, 15-16 (1999); *Villarruel v. Arreola*, 66 Cal. App. 3d 309, 318 (1977).

128 Cal. Civ. Proc. Code § 764.010. *See Harbour Vista LLC v. HSBC Mortgage Servs., Inc*., 201 Cal. App. 4th 1496, 1499-1501 (2011); *Nickell v. Matlock,* 206 Cal. App. 4th 934, 941-47 (2012).

129 *See Carlson v. Essa,* 54 Cal. App. 4th 684, 696 (1997).

130 *See Calvo. v. HSBC Bank USA, N.A.*, 199 Cal. App. 4th 118, 125 (2011); *Gomes v. Countrywide Home Loans, Inc.,* 192 Cal. App. 4th 1149, 1157-58 (2012).

131 *Paterra v. Hansen*, 64 Cal. App. 5th 507, 539 (4th Dist. 2020).

132 *Harbour Vista, LLC v. HSBC Mortgage Servs. Inc*., 201 Cal. App. 4th 1496, 1499 (2011).

133 *Tsasu LLC v. U.S. Bank Tr., N.A*., 62 Cal. App. 5th 704 (2nd Dist. 2021).

134 Cal. Civ. Code § 764.060.

135 *Ham v. Grapeland Irrigation Dist*., 172 Cal. 611, 617 (1916).

136 *Deutsche Bank Nat'l Tr. Co. v. Pyle,* 13 Cal. App. 5th 513, 521 (2017).

137 *See Union of Med. Marijuana Patients, Inc. v. City of San Diego*, 7 Cal. 5th 1171, 1184 (2019)

138 *Bishop Creek Lodge v. Scira,* 46 Cal. App. 4th 1721, 1735 (1996).

139 *612 South LLC v. Laconic Limited P'ship*, 184 Cal. App. 4th 1270, 1278-79 (2010).

140 *San Joaquin Regional Transit Dist. v. Super. Ct. of San Joaquin Cty.*, 59 Cal. App. 5th 39 (3rd Dist. 2020).

141 *See* Cal. Civ. Proc. Code § 1268.620.

142 *San Joaquin Regional Transit Dist.*, 59 Cal. App. 5th at 46.

143 *L.A. Unified Sch. Dist. v. Trump Wilshire Assocs.,* 42 Cal. App. 4th 1682 (1996).

144 *San Joaquin Regional Transit Dist.*, 59 Cal. App. 5th at 49.

145 *Id*. at 50.

146 *Apartment Ass'n of L.A. Cty., Inc. v. City of L.A.*, 10 F.4th 905 (9th Cir. 2021).

147 L.A., Cal., Ordinance No. 186,585 (Mar. 31, 2020).

148 *Apartment Ass'n of L.A. Cty., Inc.*, 10 F.4th at 909.

149 *Id*. at 911.

150 *Id*. at 912 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 503 (1987) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445 (1934))).

151 *Sveen v. Melin*, 138 S. Ct. 1815, 1821-22 (2018).

152 *Apartment Ass'n of L.A. Cty., Inc.*, 10 F.4th at 913 (citing *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 (1983)).

153 *Id.* (citing *Sveen v. Melin*, 138 S. Ct. at 1822); *see Snake River Valley Elec. Ass'n v. PacifiCorp*, 357 F.3d 1042, 1051 n.9 (9th Cir. 2004).

154 See various caselaw cited by the court, including *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 503 (1987), and *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191-94 (1983), upholding various laws as reasonable despite their effect on private contracts.

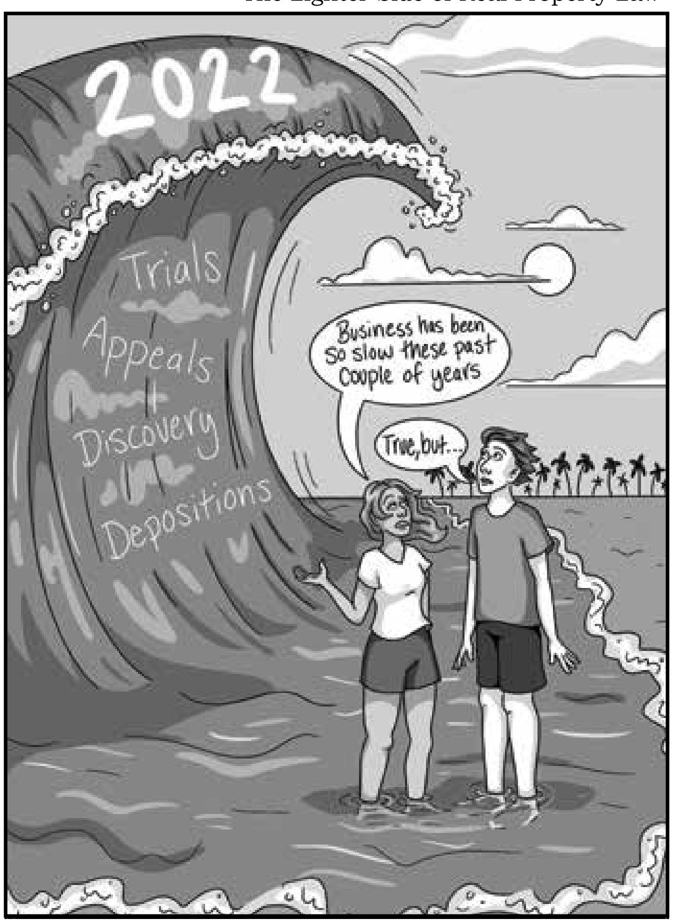
155 *Apartment Ass'n of L.A. Cty., Inc.*, 10 F.4th at 915.

156 *See e.g.*, *Heights Apartments, LLC v. Walz*, 510 F. Supp. 789, 808-10 (D. Minn. 2020), appeal docketed, No. 21-1278 (8th Cir.); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 381-87 (D. Mass. 2020); *El Papel LLC v. Inslee*, No. 2:20-cv-01323-RAJ-JRC, 2020 WL 80243848, at *6-12 (W.D. Wash. Dec. 2, 2020), report and recommendation adopted, 2021 WL 71678, at *3 (Jan. 8, 2021).

157 *See, e.g.*, *GHP Mgmt. Corp. v. City of L.A.*, --- F.R.D. ----, 2021 WL 5480674 (C.D. CA 2021).

158 *Ala. Ass'n of Realtors v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485 (2021).

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.

Legislative Review

Michael Maurer

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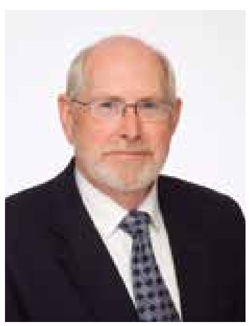
I. INTRODUCTION

I want to start this year's Legislative Update by expressing my sadness at the passing of Bob McCormick, who authored this article for a number of years. I have collaborated with Bob on this project since 2014, and he prepared the annual legislative update for many years before that. Bob was an extremely gracious co-author, who not only dedicated time to preparing this article each year but also served as a mentor to me, helping to identify points of interest from the legislation and consider how to convey the information clearly and thoughtfully. As any attorney knows, a compendium of new legislation can be pretty dry—but also necessary—reading material. Bob put a lot of effort into how this important information could be conveyed to members of the real property section in both a meaningful and interesting way. His dedication to the real property section was apparent, and I am sure many section members were fortunate enough to interact with Bob through the years. He will be missed. This annual update is, and will always be, Bob's article.



Bob McCormick

Turning to the legislation, there was one clear and overwhelming topic this year, which touched nearly every piece of real estate-related legislation: housing. The Legislature adopted, and the Governor signed, a housing package consisting of 31 bills. (And yes, all 31 are discussed below.) Following a pandemic-shortened 2020 legislative session, many expected that 2021 would see a heavy output of new bills. In that regard, the Legislature did not disappoint and certainly made strides to address one of the most significant crises facing our State. However, the Legislature's approach to housing has remained disappointingly myopic, focusing primarily on the demonization of local government land use policies. No bill exemplified this approach more than Senate Bill (SB) 9, the so-called "duplex" bill that officially ends single family zoning in California. The bill requires local governments to approve lot splits and second units ministerially. While SB 9's goal of creating more housing development opportunities is laudable, the bill's one-size-fits-all approach is nonsensical, will have unintended consequences and will be difficult to implement. As one example: SB 9 prohibits cities from requiring owners to dedicate rights-of-way, which might reduce some development costs, but apparently no one considered the concept of *sidewalks*.

Despite the multitude of housing bills, the Legislature still has not addressed the elephant in the room. A decade ago, Legislature ended redevelopment to close short-term budget gaps, taking with it an important tool for encouraging the development of affordable housing and a key source of funds for investing in affordable housing. The closest meaningful replacement was would have been SB 5 from 2019, which would have established a dedicated funding source for local governments to access, but Governor Newsom vetoed that bill because it would have required $2 billion in annual costs. With the combination of a massive budget surplus and a critical housing crisis, the time is overdue for the Legislature to start partnering with local governments to invest in housing, as well as the economic and physical infrastructure to support it.

Finally, there was one other common theme in much of this year's legislation: equity and inclusion. A number of meaningful bills were passed to provide thoughtful support to a broad range of inclusionary interests, from providing expedited real estate licenses for military spouses, to enabling intergenerational housing for youth transitioning from foster care or homelessness, to expediting the removal of virulent and racist restrictive covenants from property titles. A number of bills discussed below will improve California for the better.

II. APPRAISALS

A. Assembly Bill (AB) 948, Holden. Bureau of Real Estate Appraisers: Disclosures: Demographic Information: Reporting: Continuing Education.

Amends sections 11340 and 11360 of, and adds sections 11310.3 and 11424 to, the Business and Professions Code, adds section 1102.6g to the Civil Code, and amends section 12955 of the Government Code, relating to real estate.

AB 948, the Fair Appraisal Act, contains various measures to address explicit and implicit bias in the real estate appraisal process. As to explicit bias, the Fair Appraisal Act makes it unlawful for any appraiser to discriminate in making their services available. It also prohibits appraisers from basing an appraisal of the market value of property on the basis of race or certain other protected classifications (see below). The bill requires that, after July 1, 2022, contracts for sales of single-family residential property must contain a notice stating that the appraisal must be unbiased, objective, and not influenced by improper or illegal considerations.

To address potential violations of the Act, or race-based below market valuations, the Act requires the Bureau of Real Estate Appraisers to receive complaints of below-market valuation opinions and to compile voluntarily-provided demographic information of those making complaints. To address implicit bias, the bill contains educational requirements that licensed appraisers and applicants for licenses must complete. Starting on January 1, 2023, applicants must complete one hour of cultural competency training. Licensed appraisers must then complete another hour of cultural competency training every four years and two hours of elimination of bias training before renewing a license.

The bill's author stated that Fair Appraisal Act is intended to address what he referred to as "redlining 2.0"—the appraisal of homes owned by Black homeowners at a lower value than that of their predominantly White neighbors. The author indicates that the bill is the start of "a much-needed conversation" about ongoing discrimination in the home buying, selling, and refinancing process, where the appraised value plays a key role. The Fair Appraisal Act was supported by the California Association of Realtors.

The anti-discrimination provisions of the Act specifically prohibit discrimination on the basis of race, color, religion, gender, gender expression, age, national origin, disability, marital status, source of income, sexual orientation, familial status, employment status, or military status of either the present or prospective owners or occupants of the subject property, or of the present owners or occupants of the properties in the vicinity of the subject property, or on any other basis prohibited by the federal Fair Housing Act.

III. BROKERS

A. AB 263, Rubio. Real Estate Applicants and Licensees: Education Requirements: Fair Housing and Implicit Bias Training.

Amends, repeals, and adds sections 10151, 10153.2, and 10170.5 of the Business and Professions Code, relating to real estate.

Beginning on January 1, 2023, AB 263 will require applicants for real estate broker or salesperson licenses, and brokers and salespersons renewing their licenses, to receive training related to implicit bias.

For existing brokers and salespersons, there is a 45-hour continuing education requirement, which must now include a two-hour implicit bias training.

For new applicants, the real estate practice course that must be completed will have to include a component on "implicit bias, including education regarding the impact of implicit bias, explicit bias, and systemic bias on consumers, the historical and social impacts of those biases, and actionable steps students can take to recognize and address their own implicit biases." The legal aspect of real estate course will have to contain a component on fair housing laws. It cannot simply be a lecture; the fair housing component must include an "interactive participatory component, during which the applicant shall role play as both a consumer and real estate professional."

B. AB 830, Flora. Business: Department of Consumer Affairs: Licensed Professions and Vocations.

Amends (in relevant part) section 10140.6 of the Business and Professions Code.

AB 830 is a larger omnibus bill, which in part allows brokers and salespersons who legally change their surnames to continue using their prior name for business purposes. In general, a broker or salesperson must disclose their name and license identification number on all solicitation materials directed to consumers, as well as on purchase and sale agreements. To continue utilizing a former name, the broker or agent must register both names with the Department of Real Estate.

A common theme amongst many of the bills this year is equity and inclusion. While this bill is not limited to name changes due to marriage, it provides an option for married persons who choose to take their partners' names to not have to modify their business brand. This may be particularly beneficial to brokers and salespersons whose brand value may be inextricably tied to their names. AB 830 allows such individuals to make family or lifestyle decisions without sacrificing their business goodwill.

C. SB 800, Archuleta. Real Estate: Licenses & AB 107, Salas. Licensure: Veterans and Military Spouses.

SB 800 amends sections 10050, 10083.2, 10147, 10148, 10150, 10151, 10151.5, 10153.8, 10159.5, 10162, 10165.1, 10166.07, 10167.3, 10167.9, 10167.95, 10170.8, 10176.1, 10177, 10231.2, 10232.1, 10232.2, 10235.5, 10236.2, 10249.3, 10249.8, 10249.9, 10471, 10471.1, 11003.4, 11010, 11011, 11012, 11013.6, 11225, 11232, 11301, 11302, 11310.1, 11313, 11314, 11315, 11320.5, 11326, 11328, 11328.1, 11343, 11345, 11345.05, 11345.2, 11345.3, 11400, 11401, 11406, 11406.5, 11407, 11408, 11409, and 11422 of, and adds section 10151.2 to, the Business and Professions Code, relating to real estate; AB 107 amends (in relevant part) section 10151.3 of the Business and Professions Code.

SB 800 extends the sunset date of the Department of Real Estate ("DRE") and the Bureau of Real Estate Appraisers until January 1, 2026. With the relatively newly formed DRE set to sunset in 2022, committees in both the Senate and Assembly conducted oversight hearings on the status of DRE. As a result of those hearings, SB 800 sets forth several technical changes to DRE's oversight. Most notably, SB 800 allows DRE to revoke, suspend, deny, or delay an application if a person has been debarred in another jurisdiction, which could mean debarment in another state, from another California agency or the federal government.

Perhaps most notably, the bill enables DRE to expedite license applications for honorably discharged service members and military spouses who are licensed in other jurisdictions. A companion bill, AB 107 requires a number of state licensing agencies, including DRE, to start tracking data related to licenses for military spouses. The legislative history in AB 107 indicates that military spouses are often required to move to California from other states and may face delays in obtaining licenses and resuming their careers. AB 107 will require DRE to track the number of expedited licenses issued to veterans and active-duty spouses, as well as the number of licenses denied and the time from application to approval.

The biggest highlight of SB 800, of course, is the continuance of DRE as the licensing body. But improvements in expediting licenses for qualified active-duty military spouses meets an important need and should not be overlooked.

IV. COMMON INTEREST DEVELOPMENTS

A. AB 502, Davies. Common Interest Developments: Election Requirements.

Amends section 5100 of, and adds section 5103 to, the Civil Code, relating to common interest developments.

AB 502 allows all homeowners associations ("HOAs") to utilize the "election by acclamation" process, meaning that if the number of nominees for board seats does not exceed the number of vacancies, the HOA may deem the nominees elected by acclamation without having to conduct an election. This procedure was already available to HOAs with more than 6,000 units, which constitute less than 1% of the HOAs in the state. AB 502 expands the option to all HOAs regardless of the number of units.

The bill is a response to the challenge that many HOAs face in finding enough qualified candidates to serve on their boards, as well as the costs of performing an election. The Davis-Stirling Act contains requirements for the process of elections, including the hiring of an independent third-party inspector of elections, which costs are ultimately borne by the homeowners even where elections are uncontested.

The California Association of Community Managers, consisting of those that manage HOAs, supported the bill, providing insight into the costs and burdens that uncontested elections may entail. Interestingly, the California Alliance for Retired Americans opposed the bill, stating that it will enable HOA directors to choose the next leaders rather than the homeowner voters. But of course, AB 502 does not prevent more nominees than vacant board seats and thus voters will continue to decide all contested elections.

B. AB 1101, Irwin. Common Interest Developments: Funds: Insurance.

Amends sections 5380, 5502, and 5806 of the Civil Code, relating to common interest developments.

AB 1101 tightens up several financial oversight regulations applicable to HOAs. Because HOAs are governed by homeowners who may be inexperienced in operating an agency and are generally managed by third parties, they can be marks for people looking to defraud or embezzle funds. For this reason, the Davis-Stirling Act contains a number of protections, which AB 1101 seeks to bolster.

The bill requires that HOAs obtain insurance coverage for the dishonest acts of the HOA's managing agent and not just its directors. It also prohibits self-insurance from meeting the requirements of the Davis-Stirling Act. As for financial requirements, it lowers the threshold for fund transfers for HOAs with 50 or less units. Previously, the Act required HOA board approval of all transfers of $10,000 or more or more than 5% of the estimated income in an annual operating budget. For smaller HOAs, the threshold is now $5,000 or 5% of estimated income. Additionally, AB 1101 prohibits managing agents from commingling an HOA's funds with that of another client or of the agent personally. This rule removes some situations in which commingling was previously allowed. Finally, the law expands the ability of HOA's to use credit unions that are not federally insured, provided that the credit union has certain alternative guaranty and insurance measures in place.

Similar to AB 502, the California Alliance for Retired Americans opposed 1101 on the stated basis that it poses financial risks to senior homeowners who may not be able to restore lost HOA funds. But the provisions in AB 1101 are intended to reduce or mitigate against instances of fraud or embezzlement that could result against homeowners, including seniors.

V. COVENANTS

A. AB 721, Bloom. Covenants and Restrictions: Affordable Housing.

Adds section 714.6 to the Civil Code, relating to real property.

AB 721 enables a property owner to strike from an existing restrictive covenant any terms that restrict the number or size of the residences that may be built on a property or that restrict the number of persons that may reside on the property. To strike such terms, the property owner must develop the property for 100% affordable units for at least 55 years. The legislative history appears to indicate that the purpose of the bill is to enable local jurisdictions to upzone to meet their regional housing needs, without property owners finding a loophole by enforcing restrictive covenants.

This bill borrows an existing procedure that enables property owners to strike racial restrictions from restrictive covenants on their properties. (See AB 1466, discussed below.) The owner must submit a modified covenant to the county recorder, which must then go to county counsel to determine if the modified covenant strikes unenforceable terms. The difference between the existing procedure and AB 271 is that racial restrictions are always unenforceable; to strike restrictions on the number of units, owners will have to commit to imposing affordability restrictions.

This is where AB 271 takes a strange twist. It seems like there should be a logical sequence of events: an owner records an affordability covenant and then is eligible to modify the original covenant restricting the number of units. But no, the statute requires submittal of "any documents the owner believes necessary to establish that the property qualifies as an affordable housing development" and then the original restrictions remain enforceable if the owner violates the affordability requirement. Essentially, this means that neighbors that would otherwise enforce the original covenant must now enforce the affordability restrictions, otherwise the property will effectively be bound by neither. A strange twist indeed for owners believing their neighborhoods are subject to restrictions in their CC&Rs.

B. AB 1466, McCarty. Real Property: Discriminatory Restrictions.

Amends sections 12956.1, 12956.2, 27282, and 27388.1 of, and adds sections 12956.3 and 27388.2 to, the Government Code, relating to real property.

AB 1466 is a measure to take more concrete and affirmative steps to rid California's property title records of racially restrictive covenants. Many attorneys reading this article have likely come across title reports showing old covenants restricting neighborhoods to only members of the white race (or similarly virulent language). It is a jarring and real reminder that the Golden State's history is not all golden. But as the Assembly's Floor Analysis points out, for homebuyers of color, this language is a particularly offensive and painful reminder of a history of racial hostility and exclusion. The legislative history indicates that some potential buyers have walked away from purchasing property containing such restrictions, even though the restrictions have no legal effect.

The United States Supreme Court held in 1948 that racially restrictive covenants are unenforceable. While the covenants are among private property owners, the Court opined that state courts would be in violation of the Fourteenth Amendment by enforcing the restrictions. But the Supreme Court's decision did not erase the despicable language from showing up in title reports. The Legislature previously enacted laws to allow property owners to record "restrictive covenant modifications" or "RCMs," but the laws do not contain proactive measures to rid these restrictions from all property titles.

AB 1466 contains three proactive measures. First, the bill allows *anyone*—not just the property owner—to file an RCM. Second, it requires title companies, escrow companies, real estate brokers and agents, and certain others to inform owners of racial restrictions and their right to record an RCM, which may be recorded without charge. Third, it requires all county recorders to implement programs to identify and remove racially restrictive covenants.

Californians should know our history. But that does not mean homebuyers should have to continue to confront racially restrictive covenants when purchasing property. This bill is a measure to expedite the eradication of things that should be long gone.

VI. DENSITY BONUS

A. SB 290, Skinner. Density Bonus Law: Qualifications for Incentives or Concessions: Student Housing for Lower Income Students: Moderate-Income Persons and Families: Local Government Constraints.

Amends sections 65400 and 65915 of the Government Code, relating to housing.

SB 290 makes several minor technical changes to the Density Bonus Law, two of which are particularly notable. In general, the Density Bonus Law allows developers to construct projects at higher densities then would otherwise be allowed under local regulations if the developer restricts a portion of the units as affordable. The law allows a sliding scale for the level of bonus based on the percentage of units that are affordable. It also allows for other development concessions and incentives in exchange for the affordability restrictions.

Under prior law, a developer may receive a density bonus for moderate-income restricted for-sale units in a common interest development. SB 290 removes the common interest development restriction, enabling the density bonus for subdivided property as well.

Additionally, in 2018, the Legislature expanded a density bonus for student housing—meaning all units are exclusively for undergraduate, graduate, or professional students at accredited institutions—where 20% of the units are restricted for low-income students. SB 290 expands this concept to allow qualifying student housing to also receive one development concession or incentive.

B. SB 728, Hertzberg. Density Bonus Law: Purchase of Density Bonus Units by Nonprofit Housing Organizations.

Amends section 65915 of the Government Code, relating to land use.

Under the Density Bonus Law, developers may obtain a density bonus for for-sale housing, not just rental properties, that contains affordability restrictions. Naturally, the buyers of restricted properties cannot be corporate investors—they must be income-qualified individuals. SB 728, however, creates a special exemption for qualified nonprofit housing corporations.

Habitat for Humanity sponsored SB 278 to enable a transaction where a developer does not have to undertake the time and costs to market and find qualified buyers. Essentially, the developer may construct the project with the density bonus and sell a unit or units to Habitat for Humanity or a similar housing organization. The nonprofit can then invest in the property and locate qualified buyers. SB 278 also enables the nonprofit to undertake further improvements, such as the addition of an accessory dwelling unit (see AB 345 in the Housing section VIII below) and recoup its investment before selling the property to qualified purchasers.

One of the challenges of density bonus units for both developers and regulatory agencies is ensuring that the units actually serve their intended purpose. Enabling organizations such as Habitat for Humanity to essentially act as middlemen in assisting and placing future owners seems to be a logical and mutually beneficial extension of the Density Bonus Law.

VII. ENVIRONMENTAL

A. AB 819, Levine. California Environmental Quality Act: Notices and Documents: Electronic Filing and Posting.

Amends sections 21080.4, 21082.1, 21091, 21092, 21092.2, 21092.3, 21108, 21152, and 21161 of the Public Resources Code, relating to environmental quality.

AB 819 requires lead agencies to post certain California Environmental Quality Act ("CEQA") documents online. AB 819 is an example of a pandemic-era policy becoming a permanent law. During the pandemic, the Governor issued Executive Order N-54-20, which allowed—but did not require—certain CEQA notices and postings to be posted online. The Order was necessitated by the physical closure of many governmental offices.

AB 819 goes a step further, mandating that certain posting, filing, and notice requirements include an online posting. In general, the bill will lead agencies to post notices of determination and notices of preparation on their Internet websites and to electronically file notices of exemption, notices of determination, and notices of completion.

B. AB 970, McCarty. Planning and Zoning: Electric Vehicle Charging Stations: Permit Application: Approval.

Amends section 65850.7 of, and adds section 65850.71 to, the Government Code, relating to zoning.

AB 970 seeks to expedite the installation of electrical vehicle charging stations on private property. The bill has two key components: expedited local government review and a reduction in the number of required parking spaces.

Under AB 970, a city or county must deem an application to install an electric vehicle charging station complete within five to ten business days, depending on the number of spaces included in the application. The application is then deemed approved within 20 or 40 business days (again, depending on the number of spaces) after being deemed complete if the city or county did not act to deny the application.

The city or county must reduce the required number of parking spaces at the site to enable installation of the electrical vehicle charging station and related infrastructure. For example, if a property is required to have ten parking spaces, and the owner converts one space to an electric vehicle charging station and must convert another space for the station's infrastructure, the city or county must then allow a reduction to nine total spaces.

AB 970 does not become operative until January 1, 2023, for cities and counties with less than 200,000 residents. The bill does not impact the obligations of electric utilities in providing electric service to the charging stations.

C. SB 44, Allen. California Environmental Quality Act: Streamlined Judicial Review: Environmental Leadership Transit Projects.

Adds and repeals section 21168.6.9 of the Public Resources Code, relating to environmental quality.

Ostensibly, SB 44 is a measure to expedite the development of environmentally sound transit projects in Los Angeles County prior to the 2028 Summer Olympics. The bill establishes an expedited CEQA process for "environmental leadership transit projects," which are fixed guideway projects that are zero emission, reduce greenhouse gases by certain stated criteria, and meet other transit planning factors.

The expedited process is limited to the first seven projects and to only projects wholly within Los Angeles County or projects that connect to a project located wholly within Los Angeles County. In addition to some expedited Environmental Impact Report procedures, the bill requires the Judicial Council to establish procedures to resolve any challenges to an EIR within 365 days of receiving the certified record. To qualify, projects must utilize a "skilled and trained workforce," as defined in the statute, and pay prevailing wages for the work performed.

SB 44 has the feel of a pilot project that may eventually be extended beyond just Los Angeles County. The bill was initially drafted to not be limited to Los Angeles and received support from agencies and entities throughout the State.

VIII. HOUSING

A. AB 215, Chiu. Planning and Zoning Law: Housing Element: Violations.

Amends section 65585 of the Government Code, relating to housing.

AB 215 contains three provisions: it includes additional public comment requirements for the adoption or amendment of local housing elements, it extends the authority of HCD and the Attorney General to enforce state laws related to housing, and it adds a designated statute of limitation for such enforcement actions.

As part of its general plan, each city and county must adopt a housing element that shows how the city or county will provide its share of regional housing needs. AB 215 establishes a process similar to CEQA review for the adoption or amendment of a housing element. It requires a draft of a proposed housing element revision to be advertised for a period of thirty days, during which time the public and interested entities can submit comments. The local government agency must then take at least 10 business days following the public comment period to consider and address the comments. The local government cannot submit the draft housing element to HCD for review until completing this public comment process.

Effective July 31 of 2019, the Legislature adopted AB 101 as a budget trailer bill, which increased the role of the Attorney General in enforcing local governments' compliance with their housing element obligations. The bill enabled the Attorney General to initiate litigation seeking fines and other penalties, including the appointment of a receiver, against jurisdictions that did not timely adopt compliant housing elements. Later that year, the Legislature adopted the Housing Crisis Act of 2019 (SB 330), which contained streamlining requirements for government review of housing applications. Under the Housing Crisis Act of 2019, applicants may submit "pre-applications" that vest development rights for housing developments, local governments must determine whether an application is complete within 30 days, and local governments may only impose objective design standards on such applications. AB 215 extends the Attorney General's enforcement powers from AB 101 to these provisions in the Housing Crisis Act of 2019. It also expressly applies the three-year statute of limitations in Code of Civil Procedure section 338 to the Attorney General's initiation of litigation.

How AB 215 will work in practice is anyone's guess. The Housing Crisis Act of 2019 contains rights that would generally be enforced by developers themselves, not third-party regulatory agencies. It will be interesting to see if the Attorney General institutes litigation to, for example, compel a city to determine that an application is complete. As the City of Agoura Hills commented to the bill's author, the increase of housing-related prosecution is more likely to add costs and delay to the production of housing. Most likely, AB 215 will not be utilized much and will be more of a scare tactic against local governments.

B. AB 345, Quirk-Silva. Accessory Dwelling Units: Separate Conveyance.

Amends sections 65852.2 and 65852.26 of the Government Code, relating to land use.

AB 345 requires cities and counties to allow separate conveyance of accessory dwelling units ("ADUs") from the primary residence in certain instances. In 2019, the Legislature passed AB 587 (Friedman), which gave cities and counties the option to adopt an ordinance allowing the separate conveyance of ADUs but only where the house and ADU were built by a nonprofit and then sold to, and income-restricted for, low-income families.

To qualify, the property must be developed by a qualified nonprofit, such as Habitat for Humanity, and must be conveyed pursuant to a tenancy-in-common agreement that delineates the areas of the property for exclusive use of a co-tenant, as well as the relative responsibility for the costs of taxes, insurance, utilities, general maintenance and repair, and improvements associated with the property. The tenancy-in-common agreement must contain a dispute resolution procedure for resolving disputes among co-tenants. Only low- or moderate-income persons can then purchase the ADUs.

The Legislative history indicates Habitat for Humanity expressed concern that AB 587 was ineffective because local jurisdictions were not passing enabling ordinances. As with many recent housing-related bills, AB 345 removes this small measure of local land use control.

C. AB 447, Grayson. California Debt Limit Allocation Committee: Income Taxes: Low-Income Housing Tax Credits.

Amends section 8869.80 of the Government Code, and amends sections 12206, 17058, and 23610.5 of the Revenue and Taxation Code.

AB 447 makes technical changes to the Low Income Housing Tax Credit or "LIHTC" program, which is one of the most important tools for development of affordable housing, both nationally and in California. The LIHTC is federal program that allocates tax credits that are distributed to developers within the state by the California Tax Credit Allocation Committee or "CTCAC." The credits are awarded to affordable housing developers through a competitive process, and developers sell the credits to investors to raise funding for affordable housing projects.

In general, affordability-restricted housing has an expiration date; there is a covenant or regulatory agreement that restricts the units for a period of time. CTCAC will provide credits to existing projects that are "at-risk of conversion," meaning they will no longer be restricted to affordable uses. However, projects that extend their affordability period are then ineligible for tax credits. For example, an affordable owner seeking to purchase a project and extend its affordability period might obtain financing from an HCD program as well as seeking tax credit financing. AB 447 closes this gap, enabling "at-risk of conversion" projects to still receive tax credit allocations even if the project has received other funds and extended the affordability period. The bill also allows for projects restricted through certain other programs to be eligible for "at-risk of conversion" status, as well as allowing for allocation of tax credits to adaptive reuse projects.

As California struggles to create more affordable housing, the loss of existing affordable housing stock is a problem that is easily overlooked. AB 447 is a sensible approach to prevent the loss of this critical housing stock.

D. AB 602, Grayson. Development Fees: Impact Fee Nexus Study.

Amends sections 65940.1 and 66019 of, and adds section 66016.5 to, the Government Code, and adds section 50466.5 to the Health and Safety Code, relating to land use.

In general, local governments may impose fees on developers to compensate for the impacts of the development, provided that there is a nexus between the nature and scope of the impact and the need for, and amount of, the fee. Such fees are governed by the Mitigation Fee Act, set forth at Government Code sections 66000 et seq. AB 602 provides new prospective requirements for conducting and approving nexus fee studies related to residential development.

The bill requires that a local government adopt a nexus study before adopting the fee itself. The nexus study must identify the existing level of service, the proposed new level of service, and an explanation of why the new level of service is appropriate. Fees imposed on housing development projects must be based on the square footage of the proposed units of development, unless the agency makes findings that square footage is not an appropriate metric, that alternative method bears a reasonable relationship between the fee and the burden on government, and that the fee structure supports smaller developments or does not charge disproportionate fees on smaller developments. AB 602 also requires cities and counties to update their fee studies every eight years and to give 30 days' notice before adopting fee studies.

AB 602 presents a conundrum. The purpose of a nexus study is to determine the relative impact of a development to the costs need to offset the impact, which includes determining how best to calculate the fee. But AB 602 presumes that calculations based on square footage contain a nexus. However, in many situations square footage may not be a suitable determinant—is the traffic caused by a unit really proportional to the unit's square footage? Perhaps to some extent, but studies are likely to show that the anticipated number of cars tends to be mostly fixed.

Notably, AB 602 only applies to nexus studies performed after January 1, 2022. It will not invalidate or cause modification to existing development impact fees. Large jurisdictions—counties with population over 250,000 and any cities within them, no matter how small—will have to prepare a capital improvement plan with any nexus study. Essentially, the result of AB 602 is that local governments are going to have to expend more costs, and take on more risks, to prepare and approve nexus studies, which costs will be passed on to developers in the form of higher fees. Basically, everybody loses.

E. AB 1174, Grayson. Planning and Zoning: Housing: Development Application Modifications, Approvals, and Subsequent Permits.

Amends section 65913.4 of the Government Code, relating to housing.

In many ways, Senator Scott Weiner's SB 35, passed in 2017, set the stage for numerous housing bills in the years since. SB 35 was the first significant measure to remove local governments' discretionary authority over housing development approvals if there was insufficient housing construction in the jurisdiction to meet the jurisdiction's share of regional housing needs. SB 35 contains a streamlined ministerial approval process for multifamily housing developments within residential or mixed-use zones. AB 1174 provides a number of technical updates to SB 35.

Under SB 35, a ministerial approval may last indefinitely if certain public investment and affordability standards are met but otherwise expires in three years unless vertical construction has begun. AB 1174 modifies the statute so that the three-year window will not expire if permitted demolition or grading have begun. Additionally, since its passage, developers and cities have clashed over the application of SB 35, resulting in litigation on numerous projects. AB 1174 tolls the three-year window while a project is in litigation.

The legislative history of AB 1174 indicates no letters of opposition on record, where SB 35 was opposed by numerous cities throughout the state. Perhaps SB 35 no longer seems as drastic in light of SB 9, discussed below.

F. AB 1297, Holden. California Infrastructure and Economic Development Bank: Public and Economic Development Facilities: Housing.

Amends sections 63010, 63045, and 63047 of, and adds Article 5.5 (commencing with section 63047.1) to chapter 2 of Division 1 of title 6.7 of, the Government Code.

The California Infrastructure and Economic Development Bank, known as the "IBank" was formed in 1994 to finance public improvements, economic development activities, and private job creation strategies. The IBank has a number of financial tools at its disposal, including the ability to issue bonds. It has been used to fund a broad array of infrastructure projects, including water and wastewater facilities, airport facilities, and street upgrades. (See ibank.ca.gov for additional examples.) However, the IBank was statutorily prohibited from funding housing, until the passage of AB 1297.

AB 1297 does not transform the IBank into a housing finance agency or attempt to divert infrastructure funding to housing. In fact, it specifically excludes the provision of tax-exempt bond financing specifically so that the IBank will not be competing against the California Housing and Finance Agency and other tax-exempt bond revenue issuers. AB 1297 is instead intended to fill a gap, enabling funding of projects that would otherwise qualify for IBank financing but contain a small housing component. The legislative history contains two such examples—one involved a school remodel project that included some on-site teacher housing, another a park expansion that required temporary leasing of houses that were to be ultimately demolished. In both instances, the housing components precluded IBank financing. To keep the housing component small, AB 1297 requires that no more than 20% of the IBank financing go to housing.

For a bill that is ostensibly *not* intended to divert infrastructure funds to housing, it is interesting that AB 1297 is included as part of a housing package. The arguments in support of the bill were provided by the California Apartment Owner's Association. At the end of the day, infrastructure and housing will likely go hand-in-hand, and AB 1297 may provide opportunities for public-private partnerships in the future.

G. SB 8, Skinner. Housing Crisis Act of 2019.

Amends sections 65589.5, 65905.5, 65913.10, 65940, 65941.1, 65943, 65950, 66300, and 66301 of the Government Code.

The Housing Crisis Act of 2019 (SB 330) was originally scheduled to sunset on January 1, 2025. SB 8 extends the sunset date to January 1, 2030, and clarifies a number of the Housing Crisis Act's provisions.

The Housing Crisis Act generally requires local governments to streamline their review of housing development projects, with the most notable features being a pre-application that vests development rights as of the time of submittal, expedited review of housing development applications, and limiting design review to only the application of objective design standards. But the Housing Crisis Act also gave rise to a number of questions as to how to interpret its terms.

For one, the Housing Crisis Act applies to "housing development projects," which is defined as development projects consisting of "residential ***units*** only" or mixed-use with two-thirds of the square footage dedicated to residential uses. The use of the plural "units" created ambiguity as to whether it only applied to development of two or more units or whether it also applied to a single-unit project. SB 8 clarifies that it will apply to development of a single residential unit.

The Housing Crisis Act also prohibits cities and counties from downzoning residential property unless the city or county makes a "concurrent" change to ensure that there is no net loss of housing capacity within the jurisdiction. Under SB 8, a concurrent change may either be at the same local government meeting or within 180 days. However, if the downzoning is by a citizen's initiative measure, then the action ensuring that there will be no net loss must be effective at the same time as the reduction in residential capacity. That is, a citizen's initiative cannot downzone one property and force the local government to up-zone elsewhere in the jurisdiction to compensate for the loss; the initiative must comprehensively contain the "no net loss" provisions.

It was always unlikely that the Housing Crisis Act would actually sunset before 2025, and given that it will last through the decade, resolving ambiguities through legislation is preferable to resolving them through litigation.

H. SB 9 (Atkins) Housing Development: Approvals.

Amends section 66452.6 of, and adds sections 65852.21 and 66411.7 to, the Government Code, relating to land use.

No bill from this session garnered as much attention—or controversy—as SB 9, which is California's formal undoing of single-family zoning. The bill requires cities and counties to approve, as a matter of right, the construction of two residential units on a single-family lot and the splitting of a single-family lot into two separate lots. While often referred to as the "duplex" bill, SB 9 actually allows the creation of four units on existing single-family lots. This can be done either by splitting the lot and constructing two units on each new lot or by constructing two units and two accessory dwelling units on a single lot.

SB 9 does contain some limits, which property owners and local government agencies are likely to test over the coming year. The bill only allows for a one-time split; a property owner cannot continuously subdivide a property. And the resulting lots must be roughly equal in size, with neither being more than 60 percent nor less than 40 percent of the initial lot. Cities and counties can pass ordinances to implement SB 9, provided that they allow for lots as small as 1200 square feet and units at least as big as 800 square feet. To prevent displacement, applicants for a ministerial lot split must submit a sworn affidavit that they intend to live in one of the units for a period of three years.

SB 9 might create some modest opportunities for construction of additional housing, but it is guaranteed to create an administrative nightmare for local governments and property owners alike. Cities and counties are going to have to track which properties are subject to SB 9 rules and somehow enforce owner affidavits, while property owners will have to navigate local limitations and restrictions that are specific to SB 9. The most likely result is that property owners who are considering a lot split or addition of a second unit, will simply be more inclined to build an accessory dwelling unit and more easily accomplish the same goal.

The reaction to SB 9 has been swift and critical, on both sides of the aisle. Civic leaders have expressed frustration over the loss of local land use control and the side effects that it may have on communities. It also imposes a one-size-fits-all approach that will not make sense in many places. Most alarmingly, SB 9 actually allows property owners to increase density in very high fire hazard severity zones and other areas along the wildland-urban interface. Unfortunately, many reputable news agencies had misreported that SB 9 would not apply in these dangerous areas. The bill does contain an exception for fire hazard zones, but it is actually just a clever misdirection: The exception does not apply if construction is performed to current building standards. Civic leaders are understandably concerned about being forced to add people and homes in areas where unprecedented fire risk exists. On the other end of the aisle, some legislators and housing advocates have been quick to criticize the efforts of local governments to adopt implementing ordinances, arguing that the ordinances effectively restrict or prevent SB 9 developments.

The various positions are likely to come to head in 2022. A statewide ballot measure petition is currently out for circulation that would allow voters to decide in November whether to return local land use control to cities, which will effectively be a referendum on SB 9.

I. SB 10, Wiener. Planning and Zoning: Housing Development: Density.

Adds section 65913.5 to the Government Code, relating to land use.

Unlike SB 9, SB 10 does not *require* local governments to grant any specific land use approvals. Instead, it provides an optional model that cities and counties may adopt. The bill enables the adoption of an ordinance that zones for 10 residential units per parcel in "transit-rich" or "urban infill" areas, which essentially includes areas within one-half mile of major transit stops or areas with existing urban uses, respectively.

Of course, cities can already zone areas around transit stops or within urban cores for increased density. The purpose of SB 10 is really twofold. First, SB 10 continues a trend in land use legislation in recent years of exempting projects from the costs and risks of environmental review. The bill contains an express exemption from the California Environmental Quality Act, which enables cities and counties to pass conforming ordinances without going through CEQA. The Legislature is tacitly acknowledging a truth about CEQA; it may be used more for extortion or to block projects than to further environmental disclosure, particularly in already-developed areas. For cities who may be considering increased density in targeted areas, SB 10 creates a means to accomplish this goal without the upfront costs of an environmental impact report or other environmental review and without the back-end risks of CEQA litigation.

Second, SB 10 creates a means to bypass a local initiative. If passed by 2/3 of the members of a city council or board of supervisors, an SB 10 ordinance will supersede any local initiative. Thus, in cities where zoning density has been established by a vote of the people, the elected representatives will be able to nonetheless increase density with a supermajority vote. As local governments grapple with how to zone for their allocations of regional housing need, SB 10 could become a useful tool.

Because it is part of the housing package with SB 9, SB 10 is often lumped in as another state intrusion into local control. Now that it is law, developers and cities may see SB 10 as an opportunity for a city council to partner with a developer to expedite approval of a desired development. It would not be surprising if urban infill developers begin proposing SB 10 ordinances to cities as an alternative to the traditional approval process.

J. SB 478, Wiener. Planning and Zoning Law: Housing Development Projects.

Adds section 4747 to the Civil Code, and amends section 65585 of, and adds section 65913.11 to, the Government Code, relating to housing.

SB 478 prohibits enforcing floor area ratios on certain small multi-family developments or on denying housing development projects on the basis that a legal parcel is below the minimum lot size. SB 478 also amends the Davis-Stirling Act to prohibit restrictive covenants that do not allow for the minimum floor area ratios.

A "floor area ratio" or "FAR" is the ratio of the building's square footage to the overall size of the lot. For example, if the allowable FAR is 1.0, then a 5,000 square foot building can be built on a 5,000 square foot lot. However, the local development standards also likely contain lot coverage, and setback and height restrictions. Meaning, the 5,000 square foot building would not cover the entire lot but rather would be at least two stories. The various development standards together with the FAR would determine the nature of allowable construction.

AB 478 states that for housing development projects containing three to seven units, a local agency cannot impose a FAR of less than 1.0. For a housing development project consisting of 8 to 10 units, a local agency cannot impose a FAR of less than 1.25. A local agency also cannot deny a project on an existing legal parcel solely on the basis that it is nonconforming to the minimum lot size.

The bill was supported by California YIMBY to make it easier to build small multifamily housing. California YIMBY argued that even where local agencies zone for multi-family housing, they may nonetheless make the construction of multi-family housing practically or financially infeasible by imposing a low FAR that makes construction of a single-family residence a more viable option. There were a number of groups opposed to the bill, many of which are homeowner's associations. Because the bill also voids restrictive covenants that impose more restrictive limits on FAR, it forces HOAs to accept bulkier multifamily developments than would otherwise be allowed in their communities.

K. SB 591, Becker. Senior Citizens: Intergenerational Housing Developments.

Amends section 11010.05 of the Business and Professions Code, and adds section 51.3.5 to the Civil Code, relating to civil law.

SB 591 is, at least in the opinion of the author, the most interesting and fascinating bill this year. It specifically authorizes "intergenerational housing," combing senior housing with housing for caregivers and "transition age youth," which are persons aged 18-24 who are current or former foster youth, homeless youth, or wards of the state. The goal of the bill is to reduce the negative effects of social isolation and loneliness in seniors living in senior housing facilities, while at the same time providing housing and positive social effects to transitional youth. The bill makes legislative findings of studies showing the benefits on both groups of being housed together.

In general, state and federal laws prohibit discrimination in the provision of housing but allow exceptions for senior housing. The law was supported by City of Emeryville Mayor Dianne Martinez, whose city proposed that a developer construct 100% affordable intergenerational housing on a city-owned lot. However, the development could not proceed because its tax-credit financing could not finance non-senior units in the same building. This bill addresses that issue, not only allowing intergenerational restrictions in general but also enabling tax credit financing of such projects.

SB 591 is supported by the AARP and a large number of housing organizations. There was no stated opposition. It appears to be a great idea that will hopefully have great impacts.

L. Additional Housing Legislation:

- ***AB 68 (Quirk-Silva)*** Requires the California Department of Housing and Community Development (HCD) to publish an annual report on its website of grant programs that HCD administers. Most notably, the report must indicate the time between issuance of award letters and execution of grant agreements across the various programs.

- ***AB 571 (Mayes)*** Prohibits affordable housing impact fees or inclusionary zoning fees from being imposed on a housing development's affordable units.

- ***AB 634 (Carrillo)*** Clarifies that a city or county may require an affordability period longer than 55 years for any units that qualify a project for density bonus incentives.

- ***AB 787 (Gabriel)*** Credits cities and counties in their annual Regional Housing Need Assessment (RHNA) progress reports for the conversion of above moderate-income properties to properties that are deed-restricted for moderate-income.

- ***AB 1029 (Mullin)*** Allows HCD to consider the extension of existing affordable housing covenants as a factor in whether to designate a local government as "pro-housing." A "pro-housing" determination may lead to additional points or preference in competitive funding programs for housing.

- ***AB 1043 (Bryan)*** Creates a new income category for "acutely low income households," which are those whose incomes do not exceed 15% of area median income. This is lower than the 30% of area median income benchmark for extremely low-income households. The addition of a new statutory definition has no substantive effect, but it might be included in future funding programs.

- ***AB 1095 (Cooley)*** The Affordable Housing Sustainable Communities (AHSC) program reinvests cap-and-trade proceeds in affordable housing, but to date has only invested in a single owner-occupied affordable project. AB 1095 will require the program to adopt guidelines or selection criteria for owner-occupied housing.
- ***AB 1304 (Santiago)*** Local governments are required to inventory the sites identified to meet their regional housing needs and to affirmatively further fair housing; AB 1304 requires the local governments to also show how the inventory affirmatively furthers fair housing.
- ***AB 1398 (Bloom)*** Normally, local governments must re-zone sites to comply with their housing elements within three years of adopting the housing element; AB 1398 requires re-zoning within only one year if an agency failed to update its housing element on time.
- ***SB 791 (Cortese)*** Establishes the Surplus Land Unit within HCD to facilitate the use of surplus local government land for affordable housing purposes.

IX. LANDLORD-TENANT

A. SB 60, Glazer. Residential Short-Term Rental Ordinances: Health or Safety Infractions: Maximum Fines.

Amends sections 25132 and 36900 of the Government Code, relating to local government.

SB 60 increases the potential fines that cities and counties can levy on the owners of short-term rental properties (i.e., vacation rentals). Where previously limited to $100 for a first violation, $200 for a second violation, and $500 for each additional violation, cities and counties may now impose fines of $1,500 for a first violation, $3,000 for a second violation, and $5,000 for each additional violation.

SB 60 was adopted as an urgency measure on the basis that the uses of vacation rentals, and therefore related nuisances from parties at vacation rentals increased substantially during the pandemic. The legislative history indicates that the previous fines were low enough that owners of rental properties could view them as a cost of business. The intent with SB 60 is to make it financially infeasible for owners of short-term rentals to allow their tenants to cause nuisances.

There is a catch in SB 60's wording. It increases the penalty for violations that are *infractions*. There is no similar limit for fines relating to violations that are misdemeanors and most local ordinance violations are misdemeanors. Expect that fines for illegal short-term rentals may exceed even these increased amounts.

B. SB 91/AB 832, Chiu. COVID-19 Relief: Tenancy: Federal Rental Assistance.

Amends sections 789.4, 1788.65, 1788.66, 1942.5, and 3273.1 of the Civil Code, amends sections 116.223, 871.10, 871.11, 871.12, 1161.2.5, 1179.02, 1179.03, 1179.03.5, 1179.04, 1179.05, and 1179.07 of, amends and repeals section 1161.2 of, and adds and repeals chapter 6 (commencing with section 1179.08) of title 3 of Part 3 of, the Code of Civil Procedure, and amends sections 50897, 50897.1, 50897.2, 50897.3, and 50897.4 of, and adds sections 50897.2.1 and 50897.3.1 to, the Health and Safety Code, relating to tenancy.

AB 832 extended COVID-19 eviction protections as an urgency measure, which the Governor approved on June 28, 2021. Many of its provisions expired before the end of the 2021 calendar year and well before publication of this article.

C. AB 838, Friedman. State Housing Law: Enforcement Response to Complaints.

Adds section 17970.5 to the Health and Safety Code, relating to building standards.

AB 838 imposes a mandatory duty on cities and counties to inspect tenants' complaints of lead hazard or substandard conditions in rental properties. The county or city must then document any lead hazards or substandard conditions and provide a copy of the report to tenants. The city or county, as applicable, shall then advise the property owner of the remedial steps. These provisions take effect on July 1, 2022.

According to the author, the purpose of the bill is to address the issue of local government building inspection agencies imposing conditions on tenants to work with their landlords before inspecting rental properties for substandard conditions. The city or county cannot require that the tenant first make a demand or correction to the property owner, be in compliance with a rental agreement or current on rent, or not be in a dispute with a property owner.

The California Rental Housing Association opposed the bill as an "overcorrection." Inarguably, substandard rental housing is a problem that needs to be addressed and local governments have tools to cause remediation. Currency on rent, and similar conditions, is also not within local government's purview. But it appears there may be some unintended consequences here. City and counties may unwittingly become pawns in disputes between landlords and tenants, situations that experienced code enforcement officials may be able to address with more finesse than having to perform mandatory inspections. And crucially, the bill is expressly an unfunded mandate, finding that the State does not have to pay local government's costs because they can be recovered through inspection fees. Which might make sense if the bill did not also prohibit imposing inspection fees where no violation is found.

X. MOBILE HOMES

A. AB 861, Bennett. Mobile Home Parks: Rental Restrictions: Management.

Amends section 798.23 of the Civil Code, relating to mobile home parks.

AB 861 requires that mobile home park rules applicable to residents and their guests are equally applicable to park management. In particular, the bill prohibits management from renting or subleasing mobile homes or mobile home spaces if the residents do not have the same rights. The bill provides a limited exemption for employees of the mobile home park. Management may rent two spaces to onsite employees and may rent an additional space for every 200 mobile home spaces in the park. Additionally, the requirement does not apply to publicly-owned mobile home parks that are subject to an affordability restriction.

The law does not affect tenancies entered into prior to January 1, 2022. However, once the existing tenant moves out, management will not be able to re-rent the space if there is a rental restriction imposed on residents.

XI. PROPERTY TAX

A. SB 219, McGuire. Property Taxation: Delinquent Penalties and Costs: Cancellation: Public Health Orders.

Amends section 4985.2 of the Revenue and Taxation Code, relating to taxation.

SB 219 was an urgency measure authorizing county tax collectors to waive penalties, costs, and other charges resulting from a delinquency if the tax collector determines the delinquency was due to hardship resulting from "shelter-in-place" orders. While the term "shelter-in-place" seems to have been jettisoned in the early days of the pandemic, the bill specifically defines the term to refer to public health-related orders requiring all persons to remain in their residence except for essential activities.

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Recent RPLS eNews Articles of Interest

March Feature Article (in part), by Neil Kalin: In the case of *Greif v. Sanin*, (2022), 74 Cal.App.5th 412, California's Fourth Appellate District decided that in the sale of vacant land a real estate licensee representing the buyer exclusively had no common law duty to inform an unrepresented seller that the purchase price was below fair market value. In and of itself, that holding is not surprising. After all, even prior to this case what real estate attorney would tell a buyer's exclusive agent that the agent has a duty to inform the seller that the buyer is getting a good deal, or even a "steal?" After all, doing so might be a breach of the buyer's exclusive agent's fiduciary duty to the agent's own client. …

In *Greif*, the court easily disposed of the statutory duty issue because the Civil Code section cited, 2079.16, did not apply to vacant land transactions at the time of the sale. However, consider whether the result would be any different if the sale took place presently, now that the Civil Code Section does apply, or if the sale was for residential property rather than vacant land. The Civil Code provides that a buyer's agent has the following affirmative obligations to both buyer and seller. … *(c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of the parties.* The court held that value is not in the exclusive domain of the buyer. Therefore, value is within the diligent attention and observation of the seller and should not change the result. …Thus, by statute, a buyer's agent should not be obligated to reveal to a seller that the property is being sold below market value if by doing so the agent expresses or implies that the buyer may be willing to pay a greater price for the property. And in the *Greif* case, the buyer was searching for property in a certain range, and that would presumably be considered financial information relevant to the buyer. Thus, even if Civil Code 2079.16 did apply, the result would not necessarily be any different.

April Case Summary Update, (in part) by Monty McIntyre: Sheen v. Wells Fargo Bank (2022) _ Cal.5th _ , 2022 WL 664722: The California Supreme Court affirmed the trial court's order sustaining defendant's demurrer to plaintiff's cause of action alleging negligence in defendant's responses to plaintiff's loan modification requests. The California Supreme Court ruled that a lender does not owe the borrower a tort duty sounding in general negligence principles to process, review and respond carefully and completely to a borrower's loan modification application, such that upon a breach of this duty the lender may be liable for the borrower's economic losses — i.e., pecuniary losses unaccompanied by property damage or personal injury. This type of claim is barred by the economic loss doctrine, a judicially created doctrine that bars recovery in negligence for pure economic losses when such claims would disrupt the parties' private ordering, render contracts less reliable as a means of organizing commercial relationships, and stifle the development of contract law. (March 7, 2022.)

Section Calendar of Events

Title	Event	Date
E-signature liability issues	Webinar rerun	**June 7, 2022**
Commercial lease issue spotting	Webinar rerun	**Aug. 2, 2022**
Legal Ethics	Webinar rerun	**Nov. 1, 2022**
►Interested in presenting a real property webinar for RPLS? We are always looking for good ideas. Contact: **Nancy Goldstein – nancy@gr8calilawyer.com**		

Solo/Small Firm Summit	Virtual Program	**June 16-17, 2022**
CLA Annual Meeting	Live! San Diego	**Sept. 15-17, 2022**

What's Up With Us! RPLS attorneys discuss cases, events, statutes, and interview guests.	**Interview Guests:** **June:** CLA CEO; President	Third Wednesday of each month. 1-2 pm. **Free** Zoom meeting.

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 **Kyle Yaege, kyle@hickmanrobinsonlaw.com.**

CALIFORNIA LAWYERS ASSOCIATION

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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.

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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!

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