TOP TEN REAL PROPERTY CASES OF 2023

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Each year, we grapple with how to select the top ten real estate cases for our annual overview. The impact of COVID-19 and the pandemic on the courts appears to continue, with fewer real estate cases overall than in past years, and therefore fewer that might be deemed truly significant. Thus, while narrowing the list down to 10 cases was still difficult, we have fewer "related cases" and "honorable mentions" again this year.

The cases in 2023 represented a slightly narrower offering of real estate issues than in years past, with housing—both in the land use and CEQA contexts—figuring even more prominently. These cases involved compliance with the housing element, historic preservation, general plan consistency, and an application that had lapsed under the Permit Streamlining Act. Certainly, the most significant case was a Clean Water Act case decided by the U.S. Supreme Court, which is likely to significantly change the way wetlands are regulated.

This article also includes cases involving development impact fees and a city's police power, exemptions from rent control for certificates of occupancy under the Costa-Hawkins Act, whether a letter of credit constitutes a tenant's property in an attachment proceeding, and a lease provision that ignored the Rule Against Perpetuities. Several pandemic-era force majeure cases round out the state court offerings. As always, we have included some "honorable mentions," one of which involves reliance on a subsequently invalidated quiet title judgment, while the other addresses an inverse condemnation claim relating to decades-old developer improvements.

While selecting cases for inclusion is inevitably subjective, the cases addressed below, including the "related cases" and "honorable mentions," 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 2023.[01]

1. *SACKETT V. ENVIRONMENTAL PROTECTION AGENCY*[02]

This Clean Water Act ("CWA") case sees the United States Supreme Court replacing the "significant nexus" rule governing the regulation of wetlands that resulted from the plurality opinion in *Rapanos v. United States*.[03]

Michael and Chantel Sackett wanted to build a home on their small lot near Priest Lake in Bonner County, Idaho. While backfilling the property in preparation, the Environmental Protection Agency ("EPA") ordered them to restore the site, with $40,000 per day penalties for noncompliance. Interpreting "the waters of the United States" under the CWA, the EPA included "wetlands adjacent to those waters,"[04] and it defined "adjacent" to mean neighboring as well as contiguous. The EPA also asserted jurisdiction over wetlands adjacent to non-navigable tributaries if they

had "a significant nexus to a traditional navigable water."[05] A 30-foot road separated the Sackett's lot from an unnamed tributary that fed into a non-navigable creek, which, in turn, fed into Priest Lake, an intrastate body of water designated as traditionally navigable.

The Sacketts filed suit alleging that the EPA lacked jurisdiction over their property because any wetlands on it were not "waters of the United States."[06] The Ninth Circuit ultimately upheld a judgment in the EPA's favor, finding that "the CWA covers adjacent wetlands with a significant nexus to traditional navigable waters and that the Sacketts' lot satisfied that standard."[07] The Supreme Court granted certiorari "to decide the proper test for determining whether wetlands are 'waters of the United States.'"[08]

While applauding the success of the CWA, the Court lamented the uncertainty associated with the term "waters of the United States," questioning whether its broad definition could encompass "ditches, swimming pools, and puddles."[09] The Court also cautioned that the CWA imposed '"crushing' consequences 'even for inadvertent violations.'"[10] Consequently, "regulated parties have focused particular attention on the Act's geographic scope."[11] At the time the Sacketts received the compliance order, the EPA and the Army Corps of Engineers both defined "waters of the United States" as "[a]ll … waters" that "could affect interstate or foreign commerce,"[12] asserting jurisdiction over wetlands "adjacent" to covered waters, which included those "bordering, contiguous, or neighboring" as well as those separated from covered waters "by man-made dikes or barriers, natural river berms, beach dunes and the like."[13]

The Court first upheld regulation of wetlands in *United States v. Riverside Bayview Homes, Inc.*,[14] where it reasoned that "the transition from water to solid ground is not necessarily or even typically an abrupt one."[15] In *Rapanos*, four justices found that the CWA should apply to wetlands only where they were "as a practical matter indistinguishable from waters of the United States," while four justices would have deferred to the government's determination that the wetlands at issue were covered under the CWA. The ninth, Justice Kennedy, introduced the "significant nexus" test whereby a significant nexus must exist between wetlands and covered waters, with a nexus being established where "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of those waters."[16]

The *Rapanos* plurality decision resulted in an expansion of agency jurisdiction over wetlands based on "a lengthy list of hydrological and ecological factors,"[17] such that "almost all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination…."[18]

Although a more sweeping rule was repealed in 2019, the proposed replacement codified the *Rapanos* test by extending jurisdiction to wetlands "that either have a continuous surface connect to categorically included waters or have a significant nexus to interstate or traditional navigable waters."[19] The Court here expressed concern that agency jurisdiction now covered "'270-to-300 million acres' of wetlands and 'virtually any parcel of land containing a channel or conduit … through which rain water or drainage may occasionally or intermittently flow,'"[20] subjecting "'the vast majority of the nation's water features' to a case-by-case jurisdictional analysis."[21] The Court speculated that the difficult, time consuming, and expensive process would lead many landowners to simply choose to not build anything.

Analyzing the text of the CWA, which defines "navigable waters" as "the waters of the United States,"[22] the Court found only the term "navigable waters" to have had a well-established meaning when the CWA was enacted, but not "the waters of the United States," which the Court stated was "decidedly not a well-known term of art."[23] While trying to navigate what it deemed "frustrating drafting," the Court found the deliberate use of the plural term "waters" to mean a "body of water," which is why traditionally "waters of the United States" meant "navigable waters." The Court acknowledged that the CWA now extends beyond "navigable waters," but "refused to read 'navigable' out of the statute." The Court also noted that it requires a clear statement from Congress regarding the scope of "waters of the United States."[24] Finding case law and other provisions of the CWA[25] to support its interpretation, the Court held that "the *Rapanos* plurality was correct: the CWA's use of "waters" encompasses "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[26]

The Court disagreed with the EPA's argument that "water" is "naturally read to encompass wetlands" because the "presence of water is 'universally regarded as the most basic feature of wetlands,'"[27] finding this argument "proves too much"[28] in that it could include puddles and isolated ponds, which have been held not to be covered by the CWA.[29] The Court acknowledged its interpretation would foreclose coverage of all wetlands but found it must harmonize § 1344(g)(1), which defines "navigable waters" as including "wetlands adjacent thereto"[30] and thus "presumes that certain wetlands constitute 'waters of the United States,'"[31] with § 1362(7), which defines "navigable waters" as "waters of the United States." The Court found it to be an improper expansion of the definition of "navigable waters" for § 1362(7) to mean "waters of the United States *and adjacent wetlands*." Thus, it concluded that wetlands "must qualify as 'waters of the United States' in their own right," meaning

"they must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA."

The Court found this interpretation to be consistent with § 1344's use of the term "adjacent," even though it conceded that dictionaries include both "contiguous" and "near" in the definition of "adjacent." The Court explained its exclusion of the latter portion of the definition from its interpretation by stating that "considering statutory language is not merely an exercise and ascertaining 'the outer limits of a word's definitional possibilities.'"[32] The Court's holding requires a party asserting jurisdiction over adjacent wetlands to establish two things: first, that the adjacent body of water constitutes "waters of the United States," which the Court defined as "a relatively permanent body of water connected to traditional interstate navigable waters," and second, "that the wetland has a continuous surface connection with the water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[33]

Justice Thomas's concurrence, in which Justice Gorsuch joined, opined that the majority opinion did not go far enough because it did not determine the extent to which the terms "navigable" and "of the United States" limit the reach of the statute. To that end, he argued that Congress's authority over navigable waters should be limited to the "purpose of regulating and improving navigation" only.[34]

Justice Kagan, with whom Justices Sotomayor and Jackson joined, concurred only in the judgment, stating simply that the majority should have "st[uck] to the text." Because the definition of "adjacent" includes both "adjoining" and "neighboring," she argued that "the majority's 'continuous surface connection' test disregards the ordinary meaning of 'adjacent.'" She also observed that "a broad term is not the same thing as a vague one," and that the majority's invocation of the clear-statement rule in this case amounted to a "get-out-of-text-free card."

Justice Kavanaugh concurred in the judgment only, joined by Justices Sotomayor, Kagan, and Jackson. He disagreed with the new "continuous surface connection" test proposed by the majority because he found that it improperly narrowed the meaning of the term "adjacent" to mean only "adjoining," even though "adjacent" has a separate and distinct definition from "adjoining" that is "unambiguously broader." He also expressed concern that requiring a continuous surface connection would have grave real-world consequences in places such as the Mississippi floodplain, where dikes and levees have, by design and necessity, rendered nearby wetlands "physically discontiguous" with neighboring waters that are inarguably "waters of the United States."

Comment: The majority's opinion appears to be driven primarily by concern over the extent of agency authority resulting from an arguably ambiguous or uncertain "significant nexus" definition and the burden that places on property owners. It repeatedly returns to the concept of how vast agency jurisdiction had become when adjacent wetlands can potentially include those that are not contiguous on the surface. This concern, however, leads them to change definitions and ignore text, as both Justice Kagan's and Justice Kavanaugh's opinions point out. The most obvious example is the majority's decision to exclude the terms "nearby" or "neighboring" from the definition of "adjacent." The majority devotes only one sentence addressing why it interprets the term "adjacent," which is defined in the dictionary as meaning either "contiguous" or "near" (Random House Dictionary 25) or "adjoining" and "neighboring" (Oxford American Dictionary and Thesaurus 16 (2d ed. 2009)), as excluding wetlands that are separate from traditional navigable waters "even if they are located nearby."[35] This hardly explains how half of the definition of "adjacent," which has been used by the EPA and Army Corps of Engineers for decades, is suddenly no longer applicable.

Further, the majority states that "navigable waters" cannot mean "waters of the United States and adjacent wetlands" because "adjacent wetlands" are merely part of "waters of the United States." However, it does not explain how wetlands that are "part of waters of the United States" cannot also be characterized as "waters of the United States," and results in what might be termed an intellectual cartwheel—the majority acknowledges that § 1344(g) presumes that certain wetlands constitute waters of the United States, yet concludes that § 1362(7) (which does not even mention wetlands) requires that such wetlands be indistinguishably part of the body of water that itself constitutes waters under the CWA. In any case, the Court's new test may prove nearly as difficult to administer in practice as the previous "significant nexus" test, and it seems unlikely that this case will be the final word on the extent of jurisdictional waters under the CWA.

2. *MARTINEZ V. CITY OF CLOVIS*[36]

One of several housing cases again this year, this case highlights the changing treatment of compliance with the housing element. What was once deemed discretionary has now become mandatory, and failure to provide a fair share of housing for all income levels constitutes a breach of duty, in addition to opening the door to disparate impact discrimination claims.

After the city of Clovis adopted a revised housing element for its general plan and obtained approval from the State Department of Housing and Community Development

("HCD"), a local resident, Desiree Martinez, filed a mandamus action alleging that the city had violated several state and federal laws housing laws by failing to plan sufficient sites for housing affordable to lower income residents. The trial court granted a peremptory writ of mandate as to the adequacy of the city's housing element under Government Code Section 65583.2 to the extent it did not include sufficient sites to meet the city's unmet share of the Regional Housing Needs Assessment ("RHNA"). However, the trial court granted the city's demurrer as to all of the disparate impact discrimination claims and denied the "duty to affirmatively plan" claim, finding that the city had not discriminated against lower income housing in violation of Section 65008.

After tracing the history of the often-amended Housing Element Law, which now requires the housing element to quantify the local agency's assessment of housing needs based on the RHNA broken down by income levels,[37] and to include an inventory of specific sites sufficient to accommodate its RHNA for all income levels,[38] the court of appeal noted that the housing element must also include any unaccommodated portion of the RHNA from the prior planning period. Sites designated for very low and low-income households and the carryover portion must be zoned to allow development "as of right" without a requirement for a conditional use permit or other discretionary local government review or approval.[39] Significantly, there is a mandatory duty to affirmatively further fair housing.[40]

With this backdrop, the court of appeal rejected the city's arguments that an overlay district could be used to satisfy the required minimum density of 20 units per acre to accommodate a shortfall of lower income housing in accordance with Government Code Section 65583.2(h), or that HCD's certification of the Housing Element Law insulated the city from the claim of invalidity. Instead, the court of appeal held that the HCD certification only created a *rebuttable presumption* that the use of an overlay to accommodate the shortfall from a prior planning period was proper under Government Code Section 65589.3. This presumption was rebutted by Martinez's interpretation of Section 65583.2(h) to require a minimum density of 20 units per acre, which the court of appeal adopted, finding Section 65583.2(h) is unambiguous in this regard.

Having determined that the city had failed to meet its obligations under the Housing Element Law, the court assessed the disparate impact claims under the Federal Housing Administration ("FHA") and Fair Employment and Housing Act ("FEHA"), which involves a "three-step burden-shifting approach": the plaintiff must establish that a governmental action has a discriminatory effect,[41] at which point the burden shifts to the government to show that it had a legitimate non-discriminatory purpose for the action taken,[42] and if that showing is made, the burden shifts back to the plaintiff to prove the reasons justifying the practice could be served by other practices with a less discriminatory effect.[43] The court concluded that Martinez, by showing that the city failed to implement its required accommodation of low and moderate income housing in accordance with the requirements of the Housing Element Law, had adequately pleaded that the city had committed an unlawful act, and further that Martinez had adequately pleaded the lack of a sufficient justification for this unlawful act because the city's conduct was illegal. Similarly, under the FEHA, Martinez had adequately pleaded a land use practice that constituted an act or failure to act under Government Code Sections 12955(l) and 12955.8(b), by adequately alleging a disparate impact and segregative effect under the FHA. Further, because she sought only injunctive relief, not monetary relief, under the FEHA, there was no legislative immunity to shield the city from the FEHA cause of action.

The court of appeal also applied the disparate impact analysis to the cause of action alleging discrimination against lower income housing under Government Code Section 65008, concluding that

> an 'enactment or administration of ordinances'—such as the City's adoption of the ordinances included in its amended housing element—can be shown to 'discriminate against a[ ] residential development' intended to be occupied by lower income persons if it had discriminatory effect on the development of affordable housing. (§ 65008, subd. (b)(1)(C).) Thus, proving a discriminatory effect that violates section 65008 can be accomplished by establishing a disparate impact.[44]

However, the court did not find the city's conduct to amount to discrimination as a matter of law, instead remanding for further proceedings on this issue.[45]

Finally, the court of appeal addressed the "failure to affirmatively further fair housing" claims, which Martinez had pleaded under Government Code Section 8899.50. Section 8899.50 requires public agencies to affirmatively further fair housing and mandates compliance with the rule on Affirmatively Furthering Fair Housing ("AFFH").[46] Thus, cities must do more than merely refrain from housing discrimination and must instead affirmatively act to further fair housing. Accordingly, the court of appeal held that the trial court erred in refusing to order the city to comply with its obligations under Section 8899.50, which it had failed to do as a matter of law by violating the Housing Element Law. The court of appeal directed that judgment be

ordered in Martinez's favor on this issue but remanded the discrimination claim.

Comment: What is noteworthy about this decision is that the failure of the city to meet its obligations under the statutory requirements of the Housing Element Law ultimately serves as the basis for all the other causes of action alleged by the litigant challenging the city's decision—including the federal and state antidiscrimination claims. Also, because the city's alleged failures to comply with its mandatory and non-discretionary duties under the Housing Element Law in turn constituted discriminatory conduct under the other state and federal statutes, the court of appeal's opinion gives almost no attention to the typical questions of municipal law involved in land use planning and zoning, including legislative discretion, judicial deference, substantial evidence, and local home-rule powers, among others. Many—if not most—local agencies have yet to obtain HCD certification of their housing elements in light of recent amendments to the Housing Element Law pertaining to the RHNA and the duty to inventory available sites, plan for sufficient affordable housing, and actually report compliance and undergo audits by the HCD—as has been reported, but that failure is almost beside the point.

The court's determination that HCD certification of a local housing element creates only a rebuttable presumption of compliance with the Housing Element Law (and one that is fairly easy for a litigant to rebut by pleading noncompliance with the technical requirements of the statute) indicates that almost any local government's compliance with the statutory affordable housing requirements is subject to challenges for disparate impact discrimination even after certification, so long as a colorable argument exists that the housing element is deficient based on a court's own interpretation of the statute—and under the three-step burden-shifting approach applicable in fair housing cases under the FHA, the usual grounds for sustaining governmental policy decisions based on judicial deference to local legislatures and administrative decisionmakers essentially have no place in such cases.[47]

3. PRESERVATION ACTION COUNCIL OF SAN JOSE V. CITY OF SAN JOSE[48]

As California Environmental Quality Act ("CEQA")-based attacks on development are slowly being whittled away by the Legislature, as-yet unamended portions of the statute come to the forefront. The strategy in this case was to invoke historic preservation concerns in an attempt to stop an "historic" 1971 bank from being demolished to make way for a commercial development in downtown San Jose.

City View Plaza in San Jose contained a 1971 Bank of California building (the "Bank") which, like several other buildings on the site, was a candidate city landmark, and which was also identified as eligible for listing on both the California Register of Historic Resources and the National Register of Historic Places. A developer proposed a project that would require demolition of all structures at City View Plaza and construct three new 19-story office towers with 65,000 square feet of ground floor retail and five levels of underground parking at the site. The draft supplemental environmental impact report ("SEIR") identified the proposed demolition of the historic City View Plaza buildings as a significant unavoidable impact, presented pre-demolition mitigation measures (including extensive documentation, making the structures available for relocation and salvage, and commemoration measures), and evaluated a total of 11 project alternatives (including six historic preservation alternatives which entailed preserving different combinations of the historic buildings). Comments criticized the historic mitigation measures as inadequate and proposed "compensatory" mitigation including financial support for preserving off-site historic resources.

The city council voted to certify the final supplemental environmental impact report ("FSEIR"), reject all the project alternatives of the draft supplemental environmental impact report ("DSEIR") as infeasible, approve the project with a statement of overriding considerations addressing the significant and unavoidable historic resources impacts, and not to designate the Bank as a city landmark. A CEQA action brought by Preservation Action Council of San Jose alleged the approved project would needlessly demolish significant historical resources despite feasible mitigation measures and alternatives that could accomplish fundamental project objectives. After the trial court denied the writ petition, the Bank was immediately demolished, which the parties agreed mooted consideration of project alternatives. Thus, the questions on appeal were whether the FSEIR was inadequate for (1) failing to identify, analyze, and impose "compensatory" mitigation for the project's significant impacts to historic resources, and (2) failing to adequately respond to comments requesting compensatory mitigation.

The court of appeal recognized that CEQA expressly protects historic resources and requires environmental impact reports ("EIRs") to discuss (and lead agencies to consider and adopt, if feasible) mitigation measures and project alternatives, while pointing out that "feasible" means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors."[49] Mitigation measures must also meet applicable constitutional requirements, having an "essential nexus" and being "roughly proportional."[50] Here, the DSEIR recognized the project would result in loss of historic structures, but stated that "the City cannot require a project

to provide financial contributions to support preservation of other buildings within the City."[51] The court of appeal agreed, rejecting the plaintiff's analogy to cases endorsing compensatory mitigation for projects impacting biological resources and agricultural lands[52] because there was no evidence that such mitigation could substantially lessen the project's significant impacts, and because such mitigation lacked the required nexus to the project's impacts. The court further noted that "[h]istorical places and structures are rarely, if ever, fungible items of equivalent historical significance and value…."[53] "On the contrary, mitigation 'by replacing or providing substitute resources' (Guidelines, § 15370, subd. (e)) appears to be infeasible given the specific architectural and historic resources impacted here."[54]

After concluding that the plaintiff had exhausted its administrative remedies with respect to its comments on the SEIR, the court assessed whether the city's responses to comments were sufficient. After reviewing both comments and responses in detail, the court found the city's responses to be lacking in detail, but ultimately sufficient when read in conjunction with the draft SEIR. Accordingly, the judgment was affirmed.

Comment: As some practitioners ponder whether historic preservation will play a more prominent role in future CEQA challenges, it is notable that review has been granted[55] in *Make UC a Good Neighbor v. Regents of University of California*,[56] in which the court of appeal held, among other things, that failure to analyze sites as alternatives to development of a historically designated park violated CEQA. By contrast, the plaintiff in *Preservation Action Council* failed to obtain an injunction that would have prevented the bank from being demolished while it appealed, which mooted its project alternatives argument. Thus, the plaintiff was left to argue about compensatory mitigation. However, as the court of appeal emphasized, compensatory mitigation does not apply in the context of historic preservation because historic resources are not "fungible"—the uniqueness of architecture means there are no "substitute resources" to create or preserve.

The remaining issue—assessing whether the city had included adequate "reasoned analysis in response" (Guidelines, § 15088(c)) to comments, including commenting "'in detail giving reasons why' the comment was 'not accepted'"[57]—comprised a smaller portion of the opinion, but its importance to agencies complying with CEQA should not be underestimated. The court emphasized that it is critical to include detailed responses regarding both the purpose of the mitigation measures and their rough proportionality to alleged impacts to historic resources. Keeping in mind that a statement of overriding considerations is a legitimate response to significant environmental impacts, a key takeaway from *Preservation Action Council* is to create a strong basis for that statement by providing a detailed and evidence-based response to EIR comments. The response should acknowledge significant and unavoidable impacts on historic resources and clearly explain any lack of nexus between measures proposed in comments and the specific impact of the project.

4. UNITED NEIGHBORHOODS FOR LOS ANGELES V. CITY OF LOS ANGELES[58]

The CEQA in-fill exemption and a city's housing element collide in this case, which examines the municipality's attempt to utilize the exemption to sidestep its obligation to preserve affordable rental housing, as well as what it means for a city to exercise discretion.

This case involved a proposal to demolish 40 rent-stabilized apartments on a half-acre North Hollywood property owned by Whitley Apartments, LLC and replace them with a 156-room hotel. The City of Los Angeles Planning Director found the project to be exempt from CEQA under its in-fill exemption, and therefore concluded that no environmental review needed to be undertaken. For the in-fill exemption to apply, the project must be "consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations."[59] United Neighborhoods for Los Angeles ("UNFLA") appealed the Planning Director's determination to the Planning Commission, alleging that the determination was based on an incomplete and inaccurate reading of the Framework Element and that it ignored the Housing Element of the Hollywood Community Plan.

The Los Angeles Housing Element includes preservation of affordable rental housing as a goal, and the city's policy to promote that goal is to ensure "that demolitions and conversions do not result in the net loss of the city's stock of decent, safe, healthy or affordable housing"[60] and that a one-to-one replacement of demolished units occurs.[61] However, the Planning Department responded to UNFLA's appeal by stating that the project need not "be in conformance with *all* purposes, intent and provisions of the general plan,"[62] but rather only in substantial conformance, and that because the project was not a housing project, the removal of 40 housing units did not conflict with the city's ability to provide housing to all economic segments of the community.

UNFLA filed a petition for writ of mandate arguing that the city abused its discretion in approving the project under the in-fill exemption because doing so "'blatantly and impermissibly ignore[d]' the applicable Housing Element policies,"[63] among other things. The trial court observed that the issue was not "*how* the City exercised its discretion and

balanced competing policies and concerns," but '*whether* the City even considered the … Housing Element and how those policies might be balanced against other General Plan policies.'"[64] Finding that the city failed to do so, the trial court granted UNFLA's petition, and the city appealed.

The city began by arguing that the city council impliedly found that the Housing Element policies did not apply to the project for two reasons. The first was because "construction of a hotel does not bear on housing production."[65] In rejecting this argument, the court of appeal found it to mischaracterize both the project and the applicable Housing Element policies:

> To say that the Project, which requires the demolition of 40 RSO units, is not a housing "project" says nothing about its impact on housing. And the suggestion that the Housing Element is only concerned with the production of new housing is contrary to the Housing Element's first goal ("production and preservation," emphasis added), objective 1.2 ("[p]reserve quality rental and ownership housing"), and policy 1.2.2 ("[e] ncourage and incentivize the preservation of affordable housing"). Housing Element programs also underscore the emphasis on preservation.[66]

The court also rejected the city's second argument, that Rent Stabilization Ordinance ("RSO") housing is not "affordable housing," noting that "nothing in the Housing Element suggests its use of the phrase diverges from the ordinary meaning."[67]

Next, the court disagreed that the city's decision was nonetheless entitled to deference. While it agreed that deference is required with respect to a city's determination regarding consistency with the general plan, deference does not extend to a "determination of which policies apply" in the first place.[68] The court pointed out that "there must be some indication [in the record] that the agency actually considered applicable policies."[69] It found no such indication here with regard to the city's consideration of its Housing Element's affordable housing preservation policies.

> However, while the court of appeal affirmed the trial court's decision, it cautioned that we do not suggest that the City was necessarily required to make formal findings that Housing Element policies are outweighed by competing policies favoring the Project. Nor do we hold that such a decision would necessarily conflict with the General Plan. Rather, we affirm the trial court's judgment because we cannot defer to the City's 'weigh[ing] and balanc[ing] [of] the [General] [P]lan's policies' where there is no indication the City weighed and balanced all applicable policies.

Comment: With increasing attention on cities' compliance with their RHNA, the Legislature's continuing restriction of cities' discretion in land use decisions and courts' decreasing deference to cities' decisions in the context of the Housing Accountability Act, it is not surprising that the court here immediately rejected the city's arguments that the project was not a housing project or that housing subject to the RSO was not "affordable housing." Of course, the city's arguments were more than a stretch, given its own Housing Element's emphasis on preservation of affordable rental housing and the city's policy that demolitions not result in a net loss of affordable housing. Thus, it was also not surprising that the court was entirely unsympathetic to the city's contention that the Housing Element was concerned only with production, not demolition, of housing.

The most consequential aspect of this decision, however, is the court's rejection of the city's contention that it had properly considered the policies of the Housing Element in the first place, and to then defer to the city's interpretations. For example, while the city portrayed itself as engaging in a "weighing of competing interests enshrined in the General Plan,"[70] the court interpreted the city's actions as inappropriately deciding "which policies are to be placed on the scales."[71] Although the court acknowledged a consistency finding need not be express, "there must be some indication that the agency actually considered applicable policies."[72] This case reminds municipalities making housing decisions to make clear on the record whether they considered specific policies or concluded that they were not applicable, and not to "conflate[] judicial review of what policies are applicable and the weight to be given various policies."[73]

5. *SAVE LAFAYETTE V. CITY OF LAFAYETTE*[74]

Two zoning cases with very different outcomes highlight the increasing importance of the Housing Accountability Act as well as its limitations. *Save Lafayette* and *Snowball Investments West* both involved the issue of compliance with zoning density and each city's attempts to use zoning to quash housing developments.

In 2011, O'Brien Land Company, LLC ("O'Brien"), proposed to build a 315-unit residential development on land zoned Administrative/Professional/Multi-Family in the city of Lafayette. Although the city certified an EIR in 2013, the city's Design Review Commission recommended denying the land use permit. O'Brien and city staff then began negotiating a lower-density project, entering into an "Alternative Process Agreement" that "suspended"

the apartment project until project alternatives had been considered. It also meant that the city had not failed to approve or disapprove the project or that the project would be deemed approved under the Permit Streamlining Act ("PSA"). In 2015, the city approved an alternative project known as the "Homes at Deer Hill" and changed the zoning of the property to Low Density Single Family Residential (SFR-LD), which reduced allowable density from 35 units per acre to two units per acre. Save Lafayette filed a petition for writ of administrative mandamus challenging approval of the project based on alleged CEQA violations. The parties entered into a settlement agreement and Save Lafayette dismissed the action with prejudice.

Residents then filed a referendum petition challenging the ordinance that changed the zoning, but the city declined to either repeal the ordinance or submit it to a vote. Save Lafayette filed a petition for writ of mandate to compel submission of the referendum to a vote, and the voters rejected the rezoning ordinance. The city then adopted a new ordinance requiring a lot size three times that which the voters just rejected, at which point O'Brien notified the city it was terminating the Alternative Process Agreement, withdrawing the project alternative applications, and resuming the original 315-unit project. In 2020, the city certified an addendum prepared by O'Brien and approved the project, finding that it qualified as a '"housing development project' for very low, low-, or moderate-income households under the Housing Accountability Act" ("HAA"),[75] which meant it had to be approved if consistent with existing zoning under the HAA.

Save Lafayette once again filed a petition for writ of mandate alleging that the EIR had not adequately analyzed certain environmental impacts. The trial court denied the petition on the merits and also found that, despite the detour to explore the smaller Homes at Deer Hill project, O'Brien was "entitled under the HAA to the benefit of the zoning in place when the application for the apartment project was deemed complete in 2011."[76] Save Lafayette appealed, contending that the project was inconsistent with the current general plan land use designation and with its zoning and that the 2018 standards applied. The court of appeal remarked that this challenge involved "the interplay among the laws governing general plans and zoning, the HAA, and the PSA.[77]

> The court pointed out that
>
> [t]he HAA provides that when a proposed housing development complies with objective general-plan, zoning, and subdivision standards and criteria in effect at the time the application is deemed complete, the local agency may disapprove the project or require lower density only if it finds the development would have specific adverse effects on public health or safety that cannot feasibly be mitigated.[78]

Thus, a project containing specific affordable housing components may only be disapproved (or approved in a manner that renders it infeasible) if not consistent with the general plan and land use plan in place *at the time the application was deemed complete*.[79] Similarly, the PSA establishes deadlines for approval or disapproval of projects, which vary depending on the extent of environmental review.[80] These time limits may not be waived, and failure to comply may result in a project being deemed approved.[81]

Because the PSA "includes no provision for 'suspend[ing]' consideration of a project, as contemplated by the [Alternative] [P]rocess [A]greement,"[82] the court found that agreement to have violated the PSA. However, it disagreed with Save Lafayette that the city's "substantially complete" determination regarding O'Brien's application therefore lapsed under the PSA, or that the city lost power to act on the application, because under that interpretation a violation of the PSA would result in an application being deemed *disapproved* by operation of law. Rather, the court found the result to be that the application was *approved* by operation of law.[83] Further, it found Save Lafayette's argument to "restart" the clock in 2018 to be implausible: "in the context of the statute, a 'resubmittal of the application' refers to a resubmittal in response to a notice that an application is incomplete…,"[84] while here the application was already found to be complete.

Finally, the court refused to apply the PSA in a vacuum as opposed to in relation to the HAA. From that perspective, it was compelled to "afford the fullest possible weight to the interest of, and the approval and provision of, housing."[85] Thus, the court rejected that, in failing to comply with the PSA's time limits, the city lost the power to act on O'Brien's application entirely. Rather, it found "the default rule is that unless the Legislature clearly expresses a contrary intent, an agency does not lose jurisdiction to act even after a statutory deadline passes."[86]

Related case: *Snowball West Investments v. City of Los Angeles*[87]

A different result occurred in this case, where a developer sought to develop 58 acres of land that was formerly a golf course with 215 single-family homes. The site was in a "very high fire hazard severity zone"[88] with zoning designations of A1 and RA, which allow for a maximum density of 19 single-family homes. The city denied the developer's zoning change request for higher density based on potential health and safety risks posed by the increased density due to fire

hazards. The developer responded that no rezoning of the site was required under the HAA,[89] which limits the ability of a local agency to require a zoning change where the "proposed housing development is not inconsistent with the applicable zoning standards and criteria ... *but the zoning for the project site is inconsistent with the general plan*."[90] The developer contended the zoning was inconsistent with the general plan because RA and A1 were not specifically listed in the community plan. The city countered that they were incorporated into the community plan in a footnote, which stated that "each land use category includes the zones expressly listed, as well as any 'more restrictive' zones not listed."[91]

The trial court agreed with the city, and the court of appeal affirmed, finding no support for the proposition that "inconsistent" means "any zoning other than maximum density."[92] If that were the case, even the zones expressly listed in the community plan would be inconsistent if they allowed less density than the general plan. With respect to the HAA, the court of appeal noted that "compliance with the HAA does not mean that every proposed project must be approved or that the maximum allowable density must be allowed at every site,"[93] and it emphasized that "local control has not been abrogated by the HAA."[94]

Comment: While earlier cases have noted that both the PSA and HAA sought "to prevent local governments from circumventing the requirements of that Act through the adoption of interim ordinances,"[95] *Save Lafayette* appears to be the first case to address the interplay between the two statutes. It is also the first case addressing both statutes since the recent whirlwind of legislative amendments to the HAA. Thus, it is significant that the court here interpreted the PSA so as not to conflict with the intent of the HAA, which is "to significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects."[96]

Equally significant is the court's rejection of Save Lafayette's argument that the city lost the power to act on the application because the developer failed to notify the city that the project would be deemed approved under the PSA if the permitting agency did not act within 60 days of the notice.[97] Such an interpretation would turn on its head the Legislature's policy that an agency's failure to act on a permit application results in the application being deemed approved.[98] The court emphasized that "Save Lafayette points us toward no statutory or case authority for the proposition that, by failing to comply with the time limits of the PSA, the City loses the power to act on a project application entirely."[99] This makes sense, because to find otherwise would not only deprive an agency of the power to act, it would deprive the applicant of the benefit intended by Section 65589.5, which is to incentivize the agency to act in a timely way or risk an application being deemed approved.

This "power to act" came into play in the *Snowball* court's decision, which deferred to the city's interpretation of its zoning code in the context of a general plan that included a community plan, which in turn incorporated various types of zoning by way of footnotes. However, facts are everything and the context—high fire risk as well as creatively amended general plan documents—was critical in this case. Thus, even though the *Snowball* court rejected a housing development, it probably does not signal a course-correction to courts' increasing deference to the Legislature's housing mandates.

6. *DISCOVERY BUILDERS V. CITY OF OAKLAND*[100]

Projecting and limiting costs are critical in real estate development, where the cost of labor and materials, among things, can rise unexpectedly. So, it is no surprise the developer in this case entered into a cost allocation agreement with the city of Oakland to cap the fees that would be due to the city. This case explores the parameters and limits of such a cap.

The Monte Vista Villas is a large residential development project in Oakland that began and has been ongoing since 2005. Due to the scope of the project, the developers entered into a cost allocation agreement with the city of Oakland whereby the developers agreed to pay the cost of the city's project oversight. According to the agreement, it encompassed "all of the Developer's obligations for fees due to the City for the project."[101] After issuing numerous building permits for the project, the city in 2016 adopted ordinances imposing new impact fees on development projects, including an affordable housing impact fee, transportation impact fee, and a capital improvements impact fee.[102] Two building permits had been issued before the new impact ordinance was adopted, and for unknown reasons, building permits for five more permits were issued after the ordinance without assessing the new fees. However, the city assessed a total of $432,000 for all three impact fees for the final three building permit applications.

The property seller and the developer ("Respondents") sent notices of protest to the city and paid a portion of the fees in order to secure the building permits. When the city did not rescind the fees, Respondents filed a petition for a writ of mandate asserting that the agreement barred the imposition of the impact fees and that they had a "statutory vested right to pay only the 'impact fees in effect at that time.'"[103] The trial court found the impact fees to be

"building permit fees" under the agreement, and therefore found the new impact fees to be unauthorized. The court rejected the city's argument that its interpretation infringed upon the city's police power, and it also found the city to be estopped from challenging the contract's enforceability after 16 years of both parties relying upon and performing under the contract.

On appeal, the city argued that the 2005 agreement was never intended to cover later-enacted impact fees, only the costs of oversight and consultant fees relating to the project. Respondents countered that the plain language of the agreement precluded the imposition of the new impact fees. The court of appeal immediately stated that "even if Respondents' interpretation of the Agreement were correct, any provisions in the Agreement that bar the City from imposing its new impact fees on the Project ... would be an invalid infringement on the City's police power...."[104] The California Constitution gives cities the power to make and enforce "all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[105] Further, "the government may not contract away its right to exercise the police power in the future."[106] Thus, "[a]ny agreement that contracts away these functions is invalid and unenforceable as contrary to public policy."[107]

Here, there was no dispute that the new impact fees constituted an exercise of the city's police power; rather, the parties disagreed about whether enforcement of the agreement infringed on that power. The court reviewed two cases that illuminated the issues. *Avco Community Developers, Inc. v. South Coast Regional Commission*[108] involved a developer that had performed pre-permit construction work, while *Alameda County Land Use Assn. v. City of Hayward*[109] involved three governmental entities that collaborated on open space policies and agreed that none of the three could amend those policies unless the other two enacted parallel amendments to their general plans. The California Supreme Court in *Avco* found that the state's police power "over[rode] any obligation of the state to perform the contract."[110] Similarly, the *Alameda County* court found the agreement in that case to be invalid because it divested each entity of its sole and independent land use authority. Accordingly, the court here found provisions of the agreement preventing the city from imposing new impact fees to infringe on its police power and to be unenforceable.[111]

Comment: Although the trial court held that the 2016 impact fees adopted by the city were "building permit fees" under the 2005 agreement, this case is not really about contractual definitions. Rather, it is an examination of the tension between the quest for contractual certainty, on the one hand, and a municipality's police power on the other.

The court of appeal confirmed as much in noting that even if Discovery's interpretation of the agreement was correct, such an interpretation would infringe on "the City's inherent authority to exercise its police power."[112] The court of appeal relied on *Avco Community Developers* for its analysis of a municipality's police powers, yet it curiously did not mention the Development Agreement Law[113] at all. *Avco Community Developers* held that a city's police power overrode any contractual obligation it owed to a developer. In response, the Legislature passed the Development Agreement Law, which sought to address the "lack of certainty in the approval of development projects"[114] by restricting the rules, regulations, and official policies applicable to the project to those in force at the time of execution of the agreement.[115]

The phrase "rules, regulations, and official policies applicable to the project" is not defined, but courts have interpreted it as pertaining to those governing "permitted uses, density, design, improvement, and construction."[116] Accordingly, it is considered well established that when a local agency "enters into a development agreement (sections 65865, 65866), the builder is entitled to proceed on the project under the local rules, regulations, and ordinances in effect at the time of approval."[117] While a land use action such as freezing zoning has been held not to be a surrender of a municipality's police power,[118] this appears to be the first case addressing the same question in the context of impact fees, and it does so definitively.[119] It is important because it illuminates the limitations on a development agreement's ability to curb a municipality's police powers.

7. NCR PROPERTIES V. CITY OF BERKELEY[120]

This case again tests—and possibly cements—the parameters of the Costa Hawkins Act's "new construction" rent control exemption, which was fleshed out almost a decade ago in *Burien, LLC v. Wiley*.[121]

Two corporate entities (collectively, "Landlords") purchased two single-family homes in Berkeley to upgrade them and rent them out. Both the Dana Street property and the Warring Street property had operated in the past as unpermitted rooming houses, with 11 rooms in each home being rented to individual tenants. Each home was converted into a triplex, with the existing rental areas divided into two units in each house, and an additional unit in each added to formerly unoccupied space. Although the city originally agreed that all six units were exempt from rent control as "new construction" under the Costa Hawkins Act ("Costa-Hawkins"),[122] it reversed course two years after certificates of occupancy were issued. The city instead found that all three units on Dana Street and two units on Waring Street had previously been put to residential use and were therefore still subject to the rent ordinance under

Burien, LLC v. Wiley,[123] which held that the Costa-Hawkins "new construction" exemption did not apply where a certificate of occupancy was issued for a conversion after previous residential use.

One month later the Rent Board enacted resolution 17-13, which provides: '"A rental unit with a certificate of occupancy issued after residential use of the unit began shall not qualify as exempt' from rent control under the 'new construction' exemption in the rent ordinance,"[124] with the purpose of the resolution being to ensure compliance with *Burien*. The Landlords filed petitions contesting the Rent Board's determination, which were denied, although on appeal the attic unit on Dana Street was found to be exempt. The Landlords then filed petitions for administrative mandamus alleging that resolution 17-13 conflicted with the Costa-Hawkins' exemption for new construction. The trial court denied the petitions, finding that resolution 17-13 and the Rent Board's decisions "accurately reflect the *Burien* holding."[125]

On the Landlords' appeal, the court considered whether the four challenged units were exempt from local rent control under Costa-Hawkins and whether Costa-Hawkins preempted resolution 17-13's construction of Berkeley's rent ordinance. Under Costa-Hawkins, a dwelling or unit is exempt from rent control if 1) "it has a certificate of occupancy issued after February 1, 1995," 2) it was exempt from rent control before February 1, 1995, or 3) "it is alienable separate from the title to any other dwelling unit."[126] Noting that the *Burien* court found that Civil Code Section 1954.52 "refers to certificates of occupancy issued prior to residential use of the unit,"[127] the court of appeal then considered how broadly to construe *Burien*. The Landlords argued that a "plain reading" of Section 1954.52(a) unambiguously exempts properties receiving a certificate of occupancy after 1995. The court rejected this interpretation, noting that the *Burien* court also rejected that statutory construction. The court also declined to construe *Burien's* holding as an exception because it interpreted the exact same statutory exemption at issue here. In addition, the court disagreed that *Burien* erred in rejecting a bright line distinction between properties having a certificate of occupancy before February 1, 1995, and those that do not, regardless of history of residential use, finding instead that the legislative history confirmed that the exemption in Costa-Hawkins was only intended to apply to new construction in cities that did not previously exempt new construction for rent control. Finally, the court found no inconsistency between resolution 17-13 and Costa-Hawkins, and thus rejected the Landlords' argument that resolution 17-13 was preempted by state law.

Assessing next whether the Landlords had created residential space that had not previously existed, the court found that although more living space was created, the two contested units in each building could not hold more tenants than before the conversion. Thus, the rent board rightly determined that only one unit in each building could be construed as new construction and therefore be exempt. The court rejected the argument that because the properties were derelict at the time of conversion, they had somehow become beyond the reach of local rent control. Besides finding no legal support for this contention, the court found that such an interpretation would perversely reward landlords for allowing buildings to become derelict in order to obtain such an exemption.

Comment: In 2002, the Legislature amended § 1954.52(a)(3)—the "new construction" exemption for a unit that is alienable separate from the title to any other dwelling unit, such as a condominium—to clarify that the exemption did not apply if the landlord terminated a prior tenancy. This amendment was made in response to apartment building owners obtaining a permit to convert the apartments to condominiums, but never completing the process, to avoid rent control laws. The Legislature's intent was to keep landlords from removing rental units from rent control without actually producing condominiums.

In *Burien*, the court relied on that 2002 amendment in extending the same logic to the first exemption—for a unit issued a certificate of occupancy after February 1, 1995—to exclude the circumstance in which a certificate of occupancy was issued for a condominium that had been converted from an apartment that had previously been rented. The court used the logic of the 2002 amendment to determine that the Legislature meant the first exemption to be interpreted to apply to *buildings*, not individual units, for which a certificate of occupancy was issued after 1995. It did so because the court concluded that the Legislature had not meant to exclude from the exemption units that had merely been converted from one residential form to another. While no case to date has rejected the *Burien* holding, *NCR Properties* is the first published case to follow it. Thus, it could be helpful if the Legislature clarified the first exemption, just as it clarified the third exemption in 2002.

8. *RREEF AMERICA REIT II CORP. YYYY V. SAMSARA INC.*[128]

This case examines letters of credit in the landlord-tenant context, addressing whether a letter of credit given as security for the tenant's obligations is taken into account as security or as reducing the unsecured debt for purposes of the attachment statute.

Samsara Inc. ("Samsara") leased space in an office building in San Francisco owned by a RREEF entity ("Rreef"). The lease required Rreef to provide the premises in "delivery condition" by November 1, 2019, and required Samsara to provide Rreef with a letter of credit, issued by Samsara's bank, in the amount of $11,384,368.00, which was to serve as "collateral for the full performance by Tenant of all of its obligations under this lease and for all losses and damages Landlord may suffer"[129] if the tenant failed to comply with the lease. However, instead of accepting the premises, Samsara hired environmental consultants who found asbestos- and lead-containing materials and paint in the premises, and almost two years of disputes between the parties ensued. Samsara notified Rreef it was terminating the lease and seeking abatement of rent at the rate of $56,222.78 per day for each day after July 15, 2019. Samsara also filed an environmental action for damages against Rreef, which Rreef countered with an unlawful detainer action asserting that claims of contamination were pretextual. The trial court granted Rreef's request for a prejudgment right to attach order pending trial of the underlying causes of action, which Samsara appealed.

To grant an attachment order, the court must find 1) the claim on which attachment is sought must be one upon which an attachment may issue, 2) the applicant has established "probable validity" of that claim, 3) the attachment is not sought for a purpose other than recovery on that claim, and 4) the amount to be secured by the attachment is greater than zero.[130] The claimant bears the burden of establishing the probable validity of the claim.[131] The trial court rejected Samsara's argument that its letter of credit exceeded the amount of the attachment, so that either the claim was not an unsecured claim for money or the amount of the attachment order should be reduced to zero. Thus, the primary issue addressed in the published portions of the court of appeal's opinion involved whether a letter of credit given as security for the tenant's obligations is taken into account as security or as reducing the unsecured debt for purposes of the attachment statute.

The court of appeal explained that the Code of Civil Procedure Section 483.015(b)(4) governs how the letter of credit should be treated under the attachment law. That section requires the amount the applicant seeks to secure by the order of attachment "to be reduced by … [t]he value of any security interest in the property of the defendant held by the plaintiff to secure the defendant's indebtedness claimed by the plaintiff, together with the amount by which the value of the security interest has decreased due to the act of the plaintiff or a prior holder of the security interest."[132] Thus, the question was whether the letter of credit was the "property of the defendant" and must be applied to reduce the claim. Samsara argued that the letter of credit secured Rreef's claim, and that therefore the claim either was not an unsecured claim for money or else the amount granted in the right to attach order should be reduced to zero due to the greater amount of the security. Rreef argued that a letter of credit is an asset provided by a third party and therefore was neither the "property of the debtor" securing the creditor's claim, nor "security" for the debt under the usual meaning of "secured."

To determine whether the letter of credit was collateral for Samsara's obligations under the lease, the court relied on Division Five of the Commercial Code, which defines a letter of credit as "an undertaking … by an issuer to a beneficiary at the request or for the account of an applicant … to honor a documentary presentation by payment or delivery of an item of value."[133] Section 5108(a) requires the issuer of a letter of credit to honor a "presentation" that "appears on its face to strictly comply with the terms and conditions of the letter of credit,"[134] and Section 5102(a)(12) defines "presentation" as "delivery of a document to an issuer or nominated person for honor or giving of value under a letter of credit."[135] This embodies the "independence principle," which is "the primary characteristic of a letter of credit."[136]

While there is no previous California case law specifically addressing whether a beneficiary's interest in a letter of credit constitutes security under the Commercial Code, or if it is one, whether it is a security interest in the *customer's (i.e., account party's) property* under the code, Samsara relied on analogous authority under the California anti-deficiency statutes, including *Western Security Bank, N.A. v. Superior Court*,[137] in which the California Supreme Court has acknowledged that a standby letter of credit given by the borrower is "a security device created at the request of the customer/debtor that is an obligation owed independently by the issuing bank to the beneficiary/creditor."[138] This, argued Samsara, means the letter of credit is a form of security or collateral for the debt, i.e., a form of security for assuring another's performance. The court here disagreed, finding both *Western Security Bank* and *San Diego Gas & Electric Co. v. Bank Leumi*,[139] a case that followed *Western Security Bank*'s reasoning, to emphasize the independence of the issuer's obligation from that of the customer or account party, making it clear that it is the issuer's property, rather than the customer's, that "secures" the debt.[140] Thus, the property of the customer is not security for the debt, and the letter of credit is not "property of the customer" to be deducted from the amount to be secured by the attachment order.

The court also rejected that the ultimate reimbursement obligation embodied in the letter of credit transaction meant that the "customer's property" actually secured the debt, noting that "[n]othing in the statutory scheme

governing letters of credit provides the beneficiary of a letter of credit any rights or remedies with respect to the customer's property similar to the rights and remedies a secured party has under Division 9 of the Commercial Code, and thus this is not a situation where the debtor's property serves as collateral for obligations it owes to the creditor."[141] However, while the court of appeal affirmed the trial court order granting the right to attach in the full amount without deduction for any portion of the letter of credit, it clarified that it was not deciding whether a letter of credit given by a tenant under a commercial lease is a "security deposit" for purposes of the landlord-tenant statutes.

Comment: Samsara's argument that its letter of credit constituted security for Rreef's claim under the attachment law was creative but missed the mark primarily because it conflicted with the independence principle. The independence principle "reflects the concept that the letter of credit is independent from the underlying [ ] contract."[142] The court in this case was careful to distinguish a bank's obligation to pay on the letter of credit from Samsara's actual property, analogizing to the bankruptcy context in which courts have held "that a payment made by the issuer to a beneficiary pursuant to a letter of credit constitutes a transfer of the issuer's property, and not a transfer of the debtor's interest in property."[143] The *Western Security* court similarly rejected the lower court's analogy between letters of credit and guaranties on the basis that "suretyship involves no counterpart to the independence principle essential to letters of credit."[144] Thus, it is hard to see how the court in this case could conclude otherwise than that the letter of credit was not part of Samsara's property.

9. TUFELD V. BEVERLY HILLS GATEWAY, L.P.[145]

Parties to a commercial lease who agreed to a long extension of the lease to warrant vast expenditures by the lessee that were necessary to renovate an office building ended up receiving an expensive reminder of the Rule Against Perpetuities.

Tufeld Corporation ("Tufeld") owned commercial property in Beverly Hills. In 1960, it entered into a ground lease with a rental rate of six percent of the appraised property value (subject to periodic reappraisals), and a lease term of 98 years ending in 2058. The tenant then constructed an office building on the property. In 2003, Beverly Hills Gateway, L.P. I ("BHG") purchased the then-current owner's interest in the ground lease. In 2007, BHG sought to renovate the building and extend the lease term to warrant the expenditure. Thus, BHG and Tufeld executed a lease amendment extending the term to December 31, 2123, and increasing the rent to 6.5 percent of the appraised property value. To facilitate the transaction, BHG borrowed $96 million between 2007 and 2017 and invested $8.8 million in building renovations. During this period, Tufeld increased the monthly rent from $30,500 to $200,000 based on reappraisals, and it twice signed estoppel certificates confirming that the term of the lease would expire on December 31, 2123.

At some point in 2017 or 2018, Tufeld's president learned that leases longer than 99 years are not valid under Civil Code Section 718, and Tufeld filed a complaint against BHG seeking to either cancel the ground lease or cancel the 2007 lease amendment. BHG cross-complained for declaratory relief, unjust enrichment, and reformation. The trial court found that BHG's acquisition of the lease in 2003 constituted a novation, but that the lease was void to the extent it exceeded 99 years, so the term would end in 2102. The court also concluded that "if estoppel, laches, and waiver are available, then the facts of this case compel their application, requiring full enforcement of the ground lease term through 2123."[146] Both parties appealed.

The court of appeal first noted that Section 718 does not use the terms "void" or "voidable," but rather states that "no lease with a term in excess of 99 years 'shall be valid,'" which is not the same as "void."[147] After reviewing historical context and legislative history of Section 718 as well as public policy, the court concluded that commercial leases are exempt from the Uniform Statutory Rule Against Perpetuities,[148] *except* to the extent they exceed 99 years. Noting that case law has not "squarely address[ed] the issue of whether the lease is void or voidable"[149] if it violates Section 718,[150] the court stated that "[a] void contract is without legal effect (Restatement (Second) of Contracts § 7, cmt. a.) 'It binds no one and is a mere nullity.'"[151]

By contrast, the parties to a voidable transaction may avoid the obligations of the contract or ratify the contract and extinguish the power of avoidance.[152] Equitable defenses such as estoppel, laches, and waiver do not apply to a void contract, only a voidable contract.[153] The court also observed that a contract or contractual provision that is prohibited by statute is void.[154] But the purpose of the statute is key: the terms "void" and "invalid" in the context of a statute that is not for the benefit of the public at large are generally interpreted to mean "voidable," while "a law established for a public reason cannot be contravened by a private agreement."[155] Here the court found Section 718 to benefit the public at large, and therefore found a lease term exceeding 99 years to be void because it contravenes the public policy underlying Section 718.

As to whether the 2003 assignment constituted a novation that reset the 99-year limit, the court found that "a new tenant [was] substituted for an old one and the parties intend[ed] to release the old tenant of all obligations."[156]

Because the ground lease was nullified, the assignment created a new lease between Tufeld and BHG,[157] but the substantive terms of the lease, including its 2058 expiration, remained because a lessee and assignee have no power to change the terms of a lease without the landlord's consent. However, the novation "reset the clock on the 99-year limit of section 718,"[158] so the lease under the novation would expire in 2102. The court rejected Tufeld's contention that the 2007 amendment invalidated the entire lease, finding instead that only the period of the lease in excess of 99 years was void because the invalid lease term did not "taint" the entire contract with illegality and could be severed from the contract.[159] As a result, BHG was due damages equal to the consideration it had paid for the invalid portion of the lease term, plus interest.

Comment: This case appears to be the first to, as the court put it, "squarely address the issue of whether the lease [violating section 718] is void or voidable."[160] "A void contract is without legal effect,"[161] while a voidable transaction is "subject to ratification by the parties."[162] An illegal contract is void, not voidable.[163] The court gave a remarkably concise history of the rule against perpetuities in its analysis of whether Section 718 is void or voidable, culminating in its recognition of the legislative conclusion that "[r]eal property is a basic resource of the people of the state and should be made freely alienable and marketable to the extent practicable in order to enable and encourage full use and development of the real property...."[164]

Section 718 embodies this principle because it benefits both landlords and tenants, and is not, as the court concluded, an "incidental benefit."[165] For that reason, even though a violation of Section 718 is malum prohibitum (illegal by statute) rather than malum in se (inherently immoral), a violation of Section 718 contravenes an important public policy so that a violation of that section makes a contract void, rather than merely voidable. This case is particularly significant for its conclusion that only the portion of the lease term that exceeds the 99-year limit is void, and not the entire term, which has been argued in this and other cases.

10. SVAP III POWAY CROSSINGS, LLC V. FITNESS INTERNATIONAL, LLC[166]

Cases addressing the obligations of a commercial lessee during the COVID-19 pandemic continue to be decided. A trio in the past year contribute to the rapidly expanding case law, joining numerous cases that appear to have settled the question.

SVAP III Poway Crossings, LLC owned a shopping center, and leased space to Fitness International, LLC ("Fitness"), which used the premises to operate a health club and fitness center. The original lease was dated June 12, 2002, and had been extended to October 31, 2025. In March 2020, due to the global COVID-19 pandemic, the governor issued an executive order limiting both residential and commercial evictions for nonpayment of rent. However, the order "did not relieve a tenant of the obligation to pay rent, nor restrict a landlord's ability to recover rent due."[167] Fitness was intermittently unable to operate from March 2020 through March 2021 due to the closure orders.

Although Fitness retained possession of the premises, and SVAP did not terminate the lease, SVAP sued Fitness in May 2020 for breach of contract based on failure to pay rent. Fitness claimed frustration of purpose, impossibility, and impracticability as defenses, and cross-complained against SVAP for breach of contract, among other things, arguing that "the essential purpose of the lease was for Fitness to operate a full-service health club and fitness facility" but that it was impossible due to the closure orders. SVAP moved for summary judgment on the basis that Fitness' failure to pay rent was not due to lack of funds and therefore constituted a breach of the lease. Fitness countered that its obligation to pay was excused under Civil Code Section 1511, the force majeure provision of the lease, and equitable doctrines of impossibility, impracticability, and frustration of purpose. It argued SVAP had breached the lease because Fitness was not able to operate a health club, as warranted by SVAP. The trial court granted SVAP's motion, finding the purpose of the lease was to pay rent, not to operate a health club, and that SVAP was merely obligated to provide possession of the premises. The court found that "Covid did not prevent performance of the obligation to pay rent,"[168] and found no breach by SVAP because it had provided possession of the premises. The court further found that Section 1511 was not applicable because performance had not been prevented or delayed by operation of law, and that "the doctrines of frustration of purpose, impossibility, and impracticability did not apply because Fitness' obligation to pay rent had not been rendered impossible or impracticable."[169]

The court noted "(1) the existence of a valid and binding contract between the parties for the lease of retail premises; (2) SVAP permitted Fitness to occupy the premises for the term of the lease; (3) beginning in April 2020, after the start of the COVID-19 pandemic and resulting closure orders, Fitness intermittently failed to pay rent to SVAP for several months; and (4) as of October 2021, Fitness owed $520,361.29 to SVAP in unpaid rent."[170] Thus, the question was whether Fitness' obligation to pay rent was excused. The court found that to answer in the affirmative, it would have to accept Fitness' premise that "SVAP promised that Fitness would have the right to operate a health club and fitness facility at the property throughout the term of the lease." Unfortunately for Fitness, the court disagreed with that premise and therefore rejected its arguments.

First, the court found that the lease expressly permitted "*any* lawful use of the premises,"[171] meaning that it did not obligate SVAP to guarantee that Fitness would be legally permitted to operate a fitness facility throughout the term of the lease, but rather to simply provide the premises. Because Fitness did not dispute that SVAP provided possession of the premises throughout the lease term, the court found that SVAP fulfilled its obligations and did not breach the lease. Next the court considered whether the government closure orders stemming from the COVID-19 pandemic constituted a force majeure event. The force majeure provision of the lease stated that

> if either party is delayed or hindered in or prevented from the performance of any act required hereunder because of … restrictive Laws … or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed, financial inability excepted [], performance of such act shall be excused for the period of the Force Majeure Event.[172]

While the court agreed with Fitness that the closure orders constituted "restrictive laws," it did not agree that those laws delayed, hindered, or prevented Fitness from performing under the contract because its only obligation was to pay rent. Moreover the force majeure provision explicitly excluded from its definition "failures to perform resulting from lack of funds or which can be cured by the payment of money."[173] Thus, the court found the provision to be inapplicable here.

The court found similar issues with the remainder of Fitness' claims. As to impossibility and impracticability, impossibility is defined "as not only strict impossibility but [also] impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved."[174] While the defense of impossibility may apply where a government order makes it unlawful for a party to perform its contractual obligations,[175] impossibility did not apply because Fitness' contractual obligation was not to operate a fitness facility, but to pay rent. The government closure orders did not make it illegal for Fitness to pay rent; to the contrary, they made clear that tenants were still obliged to pay rent. The court came to the same conclusion regarding Civil Code Section 1511(1), which excuses performance of a contractual obligation where performance is prevented or delayed by operation of law, because the orders did not prevent Fitness from paying rent. Regarding Section 1511(2), which excuses performance where prevented or delayed by an "irresistible, superhuman cause" and where the parties have not "expressly agreed to the contrary,"[176] the court found that by including a force majeure provision, the parties expressly agreed to the contrary, making Section 1511(2) inapplicable as well.

Finally, frustration of purpose excuses contractual obligations where "[p]erformance remains entirely possible, but the whole value of the performance to one of the parties at least, and the basic reason recognized as such by *both* parties, for entering into the contract has been destroyed by a supervening and unforeseen event."[177] Fitness would need to show that

> (1) the purpose of the contract that has been frustrated was contemplated by *both* parties entering the contract; (2) the risk of the event was not reasonably foreseeable and the party claiming frustration did not assume the risk under the contract; and (3) the value of the counter-performance is totally or nearly totally destroyed. Acts of government that make a performance unprofitable or more expensive do not constitute frustration of purpose.[178]

The court found that even if the purpose of the contract had been for Fitness to operate a health club and fitness center, the court found it to have done so for many years, and resumed doing so after the COVID-19 pandemic.[179] Because the government orders were temporary, the court found a commercial frustration defense to be precluded.

Related cases: *West Pueblo Partners LLC v. Stone Brewing LLC*;[180] *Fitness International v. KB Salt Lake III*;[181] *Iten v. County of Los Angeles*[182]

West Pueblo Partners and *KB Salt Lake* both focused on the force majeure provisions in leases for a brewery and health club and fitness facility, respectively. In both cases, the court concluded that the COVID-19 pandemic did not excuse the tenants' failure to pay rent because the *West Pueblo Partners* force majeure clause only provided relief where a party was prevented from performing, and the *KB Salt Lake* provision excluded "failures to perform … which can be cured by the payment of money."[183] In both cases, like the original *Fitness International* case, the tenants conceded they had the ability to pay rent. Thus, even if the closure orders constituted a force majeure event, they were not prevented from paying rent. Both courts also joined SVAP in rejecting frustration of purpose and impossibility as defenses, observing that increased difficulty or expense does not excuse a contractual obligation.

Iten was a very different kind of COVID-19 pandemic case, involving a landlord's contracts clause challenge to a COVID-19 moratorium on the basis that the moratorium impaired his contract with his tenant because it altered the

obligation of that contract. The district court dismissed on the basis that the landlord lacked Article III standing because he could not demonstrate that it would have been entitled to evict the tenant but for the moratorium. The court of appeal disagreed, finding standing because the moratorium clearly was applicable to a commercial landlord. The court acknowledged that "a merits question may look similar to the standing question of whether there is an injury in fact traceable to the relevant law under which the plaintiff has brought suit, confusing the two 'conflates standing with the merits.'"[184] After concluding that "it could not be clearer that the Moratorium applied to commercial landlords like Iten and restricted the remedies he thought he could employ,"[185] the court held that Iten had standing to challenge the moratorium, regardless of whether he was actually entitled to evict the tenant.

Comment: Courts continue to reject the COVID-19 pandemic as a basis for invoking a force majeure provision by a lessee, with the vast majority of courts finding that the purpose of the lease, for the lessee, was to pay rent, not to operate a specific business. Thus, it is hard to imagine a circumstance in which the obligation to pay rent could be affected by a suspension of operations. Similarly, in finding payment of rent itself to be the only performance required from the tenant, *SVAP* appears to foreclose the ability of a tenant to claim impossibility of performance under any circumstances (except, perhaps, death), particularly where a force majeure provision excludes financial ability. Commercial tenants may want to take note when crafting obligations under a lease. *Iten*, by contrast, could offer a pathway for landlords to avoid the effect of a moratorium, although the strong concurrence by Justice Gordon cautions against finding standing without injury-in-fact, which it found lacking in this case.

HONORABLE MENTIONS

Ridec LLC v. Hinkle[186]

This case confirms the holding in *Tsasu LLC v. U.S. Bank Trust, N.A.*,[187] based on California's Quiet Title Act,[188] that even where a quiet title judgment has been found to be void, a party that has acquired title to property in reliance on that judgment retains its right in the property as long as it is a "purchaser or encumbrancer for value" who had neither actual nor constructive knowledge of any defects or irregularities in the judgment.

In 2010, which was several years after 89-year-old Ocie Payne Hinkel began a relationship with Roi Wilson, Ocie was hospitalized and, while medicated, Wilson persuaded her to grant him power of attorney over her affairs. Wilson then deeded away much of Ocie's property, including a parcel known as the Buckingham property, which Wilson gave to Edmound Daire, a professional "document preparer." When Ocie's son, Ocy, learned of Wilson's dealings, he placed Ocie in a conservatorship. Daire then signed a grant deed returning the property to Ocie.

When Ocie died in 2014, Ocy inherited the Buckingham property. However, shortly thereafter, Daire filed a complaint to quiet title to the Buckingham property in his name, alleging that the grant deed he signed returning the property to Ocie had been forged. He then recorded a lis pendens regarding his pending quiet title suit and filed a forged proof of service with the court indicating that Ocie had been personally served with the complaint. Daire then requested and was granted a default against Ocie. In November 2015, the trial court entered judgment quieting title to the Buckingham property in Daire and expunged the November 2010 grant deed, on the basis that Ocie had been personally served.

Daire immediately recorded the quiet title judgment, and then obtained two loans (for $650,000 from Ridec LLC ("Ridec"), and $400,000 from PSG Capital Partners) secured by the Buckingham property. Although the title report prepared by Ridec's title insurer noted the conservatorship action and the two grant deeds from 2010, it also noted the 2015 judgment quieting title to the Buckingham property in Daire. Once the time to appeal the quiet title judgment expired and title vested in Daire, escrow on the loan closed. Because a small refund from the Ridec loan was mailed to the Buckingham property, Ocy discovered this second fraud by Daire and moved to vacate the quiet title judgment based on lack of personal service to Ocie or her estate. The trial court then set aside the quiet title judgment, at which point, "the litigation frenzy began."[189]

After Ridec filed a complaint in intervention in the underlying quiet title action, the trial court held a one-day trial and issued an order quieting title to the Buckingham property in Ocy and declaring that Daire had no valid interest in the property. Although the trial court acknowledged that "even if a quiet title judgment is completely void due to a failure to give notice to the owner, a [bona fide encumbrance or who makes a loan in reliance on that judgment] will be entitled to prevail,"[190] it chose instead to rely on the pre-Act, common law rule that "any rights in property deriving from a void judgment [are] invalid, even if the party acquiring those rights had acted in good faith and without knowledge of any defect in the judgment."[191] The court based its decision on public policy by favoring original owners of property over subsequent lenders, "incompatible and irreconcilable standards" that would be applied to nearly identical claims depending on whether there was a quiet title action, and a way to not violate due process by enforcing "rights pursuant

to judgments that were themselves obtained in violation of due process."[192]

The court of appeal began by stating that compliance with the stringent requirements of the Quiet Title Act results in a quiet title judgment that is "more resilient to subsequent challenges."[193] The court explained that for persons who had claims to the property at the time the quiet title judgment was rendered, the validity of the judgment turned on "whether those persons were a party to the quiet title action."[194] If they were, the judgment is "binding and conclusive";[195] if they were not, whether the judgment is binding depends on when a lis pendens was filed, or whether the plaintiff had actual knowledge of the non-party's claim. For persons who were not party to the quiet title action and who instead relied on the judgment when subsequently acquiring rights in the property (even if the quiet title judgment was later invalidated), those persons retain their rights as long as they were a "purchaser or encumbrancer for value … without" actual or constructive "knowledge of any defects or irregularities in the [quiet title] judgment or the proceedings."[196]

Here, the trial court's conclusion that Ridec had constructive knowledge was incorrect because documents must be properly indexed in the chain of title in order to impart constructive knowledge.[197] Rather, the court of appeal found it "undisputed Ridec was an encumbrancer for value," and that, as a matter of law, Ridec "acted 'without knowledge of any defects or irregularities' in the quiet title judgment or the proceedings that produced it."[198] First, there was no evidence Ridec had actual knowledge of the defect in the quiet title judgment or the validity of Daire's title at the time of the loan. Second, nothing in the chain of title called the validity of the quiet title judgment into question. Thus, under Section 764.060 and *Tsasu*, Ridec's "'rights' could not be 'impair[ed]' and its deed of trust remained valid."[199] Further, the court of appeal found that "nothing in section 760.040 empowers courts to ignore the plain text of other sections of the Act in the name of 'equity' and public policy."[200] The court acknowledged that the common law rule balances the equities between the original owner and the encumbrancer, but noted that the Act "strikes a different balance of the equities that favors the encumbrancer, at least as to quiet title judgments that comply with the Act's more stringent requirements and when the encumbrancer acts without knowledge of any defects in the judgment,"[201] and it found this different balance to rationally further the goal of increasing marketability of title.

Comment: The facts of this case, with the blatant fraud committed by Daire, make the trial court's decision understandable from a gut level right-or-wrong perspective. This is especially so since *Tsasu* (one of our top ten "related" cases in 2021) did not involve the type of intentional fraud committed in *Ridec*. Nevertheless, the Legislature has weighed in on the policy aspect of whether a later-in-time recorded deed of trust should have priority, establishing that it is an objective analysis that depends on whether the holder of the later-recorded document had notice of defects or irregularities of a quiet title judgment under Section 764.060. Further, *Tsasu* established that such notice must be both actual *and* constructive. In that case, the court found ample evidence of constructive knowledge of title defects. In *Ridec*, by contrast, and due to no fault of innocent party Ocy, there was no evidence that Ridec had either type of knowledge, making Ridec indisputably a bona fide encumbrancer for value.

The court of appeal was pointed in its criticism of the trial court's reasoning, particularly insofar as it refused to apply Section 764.060 and *Tsasu*, noting that the trial court never cited or applied *Tsasu*, and even "affirmatively disclaimed the very existence of *Tsasu* when the court stated that 'no Second District case … has discussed the[] holdings [of *OC Interior* and *Deutsche Bank*] in connection with the matters now in issue, much less distinguished them or declined to follow them'—even though that is precisely what *Tsasu* did."[202] In following its gut, so to speak, the trial court impermissibly "anointed itself a super-legislature imbued with the power to second-guess the public policy determinations of our Legislature"[203] by essentially rewriting Section 764.060.

Shenson v. County of Contra Costa[204]

Where stormwater runoff overwhelmed a drainage system constructed by a private developer and caused damage to neighboring properties, the resulting inverse condemnation action turned on whether the county had implicitly accepted the developer's offer of dedication of the drainage system.

This case involved plaintiffs who owned residential properties in two neighboring subdivisions in Contra Costa County, both of which were adjacent to a creek. The creek had historically functioned as the main receptacle for stormwater runoff emanating from the watershed upstream of these subdivisions. Thus, when approving the applications for the subdivision maps, the county imposed certain conditions relating to drainage, including that the subdivision developer "construct, install and complete… tract drainage,"[205] and direct surface waters flowing from the subdivision to the nearest natural watercourse. The developer also constructed and installed other drainage improvements, and the county then requested the developer obtain an easement to install a drain line to benefit a neighboring subdivision. The county accepted the improvements as completed but did not accept the offer

to dedicate the easements (other than for recreation), and the county never performed maintenance or repair of the drainage improvements.

Decades later, the spillway failed and collapsed into the creek bed, and the uncontrolled discharge of water caused erosion and subsidence damage to the plaintiffs' properties. The plaintiffs sued the county for inverse condemnation, alleging that the county and the Flood Control District were liable for the damage because they had failed to maintain the creek bed and banks and refused to replace the spillway after it failed. The plaintiffs reasoned that because the county approved the subdivisions, required the developer to construct the drainage improvements, and required the developer to offer to dedicate an easement containing those improvements to the county, that it was responsible for the damage. Further, because the county had used the drainage improvements for public purposes, they now owned and controlled the land within the drainage easement. The trial court granted the county a district summary judgment motion, holding that under *Locklin v. City of Lafayette*,[206] "requiring the dedication of drainage easement as a condition precedent to a subdivision approval 'does not demonstrate [defendants'] control over a natural watercourse.'"[207]

The court of appeal reviewed the Subdivision Map Act,[208] which requires subdividers to install streets and drains according to the act, as well as inverse condemnation law, under which a public entity may be liable if it makes alterations or improvements to its upstream property that result in discharges that cause damage to a downstream property.[209] An existing water course becomes a public work if a governmental entity exerts control over and assumes responsibility for maintenance of that water course. However, where "there is no acceptance of the street or the drainage system within it, there is no public improvement, public work or public use and therefore there can be no public liability for inverse condemnation."[210] Mere issuance of permits and approval of a subdivision map are an insufficient basis for inverse condemnation liability of a public entity.[211]

The court of appeal first rejected that the county's requirement that a subdivider construct a drainage system as a condition of approval transformed it into public property, noting that the county never expressly accepted the offers. Further, the subdivision approval process alone is insufficient; a government entity "must exert control over and assume responsibility for maintenance of the water course if it is to be liable for damage caused by the streamflow on a theory that the water course has become a public work."[212] This is especially true where there has been no acceptance of the dedication.[213] The court also rejected that requiring artificial drainage facilities and conveying water across properties over which it might not otherwise have flowed does not convert those improvements into public works, since the design of subdivisions is for the benefit of adjacent landowners as well as prospective purchasers and the public in general.[214]

Finally, the court disagreed that the county's refusal to either accept or reject the drainage easement constituted effective acceptance, pointing to "the well-established rule that an acceptance of an offer to dedicate must be unqualified and unequivocal."[215] Here there was certainly no express acceptance, nor any evidence of an implied acceptance.[216] With respect to the developer's agreement to maintain the work and repair any defects for a one-year period, the court found this to be "essentially a warranty that the improvements will work and, that if they fail during the warranty period, the developer will repair any defect."[217] Such a warranty did not support that the government agreed to accept long-term responsibility for the improvements warranted.

The court next found the creek had not been incorporated into the public drainage system based on lack of "affirmative action by the public entity to assume ownership or responsibility of the water course,"[218] lack of evidence that the county and district had provided any storm drainage services to those properties, and the fact that drainage fees collected to date were for a project that had not yet been implemented. The court also found that not requiring upstream property owners to install mitigation measures to offset downstream runoff was not an affirmative act demonstrating public control or dominion over the creek.[219] In fact, there was no public improvement in this case.[220] Thus, the judgment was affirmed.

Comment: The concepts of inverse condemnation and dedication are somewhat intertwined in this case because whether an offer of dedication has been accepted by a public entity is necessary to establish inverse condemnation liability. Generally speaking, acceptance of an offer of dedication must be unconditional and unqualified, otherwise there is no public interest in the property.[221] The court repeatedly cited *Ruiz v. County of San Diego*[222] (one of our top ten cases in 2020) as establishing the standard for determining when an agency has implicitly accepted a dedication, as was argued in that case and in this case.

With acceptance typically being either a formal resolution by a governing body or exertion of control by way of maintenance or improvements by the governmental entity, the plaintiffs in this case were left with very little and

could only point to the requirement by the county that the developer dedicate the drainage improvements. But merely requiring an *offer* to dedicate is insufficient without evidence of actual *acceptance* by the county. Thus, this case continues the reasoning of *Ruiz* that concrete evidence of control in the maintenance or improvement of property is required for the government to be liable for damages under a theory of inverse condemnation.

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02 *Sackett v. Environmental Prot. Agency*, 598 U.S. 651 (2023).

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

04 *Id.* at 662 (citing 40 C.F.R. §§ 230.3(s)(3), (7)).

05 *Id.*

06 40 C.F.R. § 230.3(b).

07 *Sackett v. U.S. Environmental Prot. Agency*, 8 F.4th 1075, 1091-93 (9th Cir. 2021).

08 *Sackett v. Environmental Prot. Agency*, 598 U.S. at 663.

09 *Id.* at 657. Puddles and swimming pools have actually been excluded from regulation as wetlands. See 80 Fed. Reg. 37116-37117 (2015), 85 Fed. Reg. 22340 (2020).

10 *Id.* at 660 (quoting *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 602 (2016) (Kennedy, J., concurring)).

11 *Id.* at 661.

12 40 C.F.R. § 230.3(s)(3).

13 *Sackett v. Environmental Prot. Agency*, 598 U.S. at 664.

14 *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

15 *Id.* at 132-33.

16 *Rapanos v. United States*, 547 U.S. at 779-780 (Kennedy, J. concurring in judgment).

17 *Sackett v. Environmental Prot. Agency*, 598 U.S. at 667.

18 *Id.* (citing 80 Fed. Reg. 37056 (2015)); *see, e.g., Army Corp of Engineers v. Hawkes Co.*, 578 U.S. 590, 596 (2016) (citing a significant nexus between wetlands and a river 120 miles away).

19 *Id.* at 669 (citing 88 Fed. Reg. 3143).

20 *Rapanos v. United States*, 547 U.S. at 722.

21 *Sackett v. Environmental Prot. Agency*, 598 U.S. at 668.

22 33 U.S.C. § 1362(7).

23 *Sackett v. Environmental Prot. Agency*, 598 U.S. at 671.

24 *Id.* at 680 (citing *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 174 (2001)).

25 *See e.g.*, 33 U.S.C. §§ 1267(i)(2)(D), 1268(a)(3)(I), 1330(g)(4)(C).

26 *Sackett v. Environmental Prot. Agency*, 598 U.S. at 671 (citing *Rapanos v. United States*, 547 U.S. at 739 (quoting Webster's New Int'l Dictionary 2882 (2d ed. 1954) (Webster's Second), original alterations omitted).

27 *Id.* at 674.

28 *Id.*

29 *Id.* (citing *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. at 159).

30 33 U.S.C. § 1344(g).

31 *Sackett v. Environmental Prot. Agency*, 598 U.S. at 676.

32 *FCC v. AT&T Inc.*, 562 U.S. 397, 407 (2011).

33 *Rapanos v. United States*, 547 U.S. at 742.

34 *Gibson v. United States*, 166 U.S. 269, 271-272 (1897).

35 *Sackett v. Environmental Prot. Agency*, 598 U.S. at 676.

36 *Martinez v. City of Clovis*, 90 Cal. App. 5th 193 (5th Dist. 2023).

37 Gov't Code § 65584(f).

38 § 65583.2.

39 § 65583.2(h)-(i).

40 § 8899.50.

41 *Texas Dept. of Housing and Cmty. Affairs v. Inclusive Communities Project Inc.*, 576 U.S. 519, 527 (2015).

42 78 Fed. Reg. 11460-01-11482 (Feb. 15, 2013); 24 C.F.R. former § 100.500(c)(2).

43 78 Fed. Reg. 11460-01-11482; 24 C.F.R. former § 100.500(c)(3).

44 *Martinez v. City of Clovis*, 90 Cal. App. 5th at 281.

45 *Id.*

46 *Id.* at 283.

47 Comment by Karl E. Geier.

48 *Preservation Action Council of San Jose v. City of San Jose*, 91 Cal. App. 5th 517 (6th Dist. 2023).

49 Guidelines § 15364.

50 *See, e.g., Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996). Guidelines § 15126.4(a)(4).

51 *Preservation Action Council of San Jose v. City of San Jose*, 91 Cal. App. 5th at 536 (quoting Final SEIR).

52 *See*, *e.g.*, *Save the Hill Group v. City of Livermore* (2022) 76 Cal. App. 5th 1092, 1116; *Preserve Wild Santee v. City of Santee*, 210 Cal. App. 4th 260, 274 (2012).

53 *Make UC a Good Neighbor v. Regents of Univ. of Cal.* (2023) 88 Cal. App. 5th 656, 681.

54 *Preservation Action Council of San Jose v. City of San Jose*, 91 Cal. App. 5th at 225.

55 *See Make UC a Good Neighbor v. Regents of the Univ. of Cal.*, 528 P.3d 872 (2023).

56 *Make UC a Good Neighbor v. Regents of Univ. of Cal.*, 88 Cal. App. 5th 656 (1st Dist. 2023).

57 *Preservation Action Council of San Jose v. City of San Jose*, 91 Cal. App. 5th at 228 (citing *The Flanders Foundation v. City of Carmel-by-the-Sea*, 202 Cal. App. 4th 603, 615 (2012)).

58 *United Neighborhoods for L.A. v. City of L.A.*, 93 Cal. App. 5th 1074 (2d Dist. 2023).

59 Guidelines, § 15332(a).

60 Policy 1.2.2.

61 Policy 1.2.8.

62 *United Neighborhoods for L.A. v. City of L.A.*, 93 Cal. App. 5th at 1085.

63 *Id.* at 1087.

64 *Id.*

65 *Id.* at 1093.

66 *Id.* at 1095.

67 *Id.*

68 *Id.* at 1096 (citing *Holden v. City of San Diego*, 43 Cal. App. 5th 404, 412 (2019)).

69 *Id.* at 1097 (citing *Holden v. City of San Diego*, 43 Cal. App. 5th at 412).

70 *Id.* at 1095.

71 *Id.* at 1096.

72 *Id.* at 1097 (citing *Holden v. City of San Diego*, 43 Cal. App. 5th at 412, 416-417).

73 *Id.* at 1096.

74 *Save Lafayette v. City of Lafayette*, 85 Cal. App. 5th 842 (1st Dist. 2022). Note, Miller Starr Regalia represented Real Party in Interest O'Brien Land Company, LLC in this case.

75 Gov't Code § 65589.5.

76 *Save Lafayette v. City of Lafayette*, 85 Cal. App. 5th at 849.

77 Gov't Code § 65920 et seq.

78 *California Renters Legal Advocacy & Educ. Fund v. City of San Mateo*, 68 Cal. App. 5th 820, 835 (2021).

79 Gov't Code § 65589.5(d)(5) (emphasis added).

80 § 65950(a).

81 § 65957.

82 *Save Lafayette v. City of Lafayette*, 85 Cal. App. 5th at 853.

83 Gov't Code §§ 65956(b), 65957.

84 *Save Lafayette v. City of Lafayette*, 85 Cal. App. 5th at 854.

85 *Id.* at 855 (citing Gov't Code § 65589.5(2)(L)).

86 *Id.* at 856 (citing LT-WR, L.L.C. v. *California Coastal Comm'n*, 152 Cal. App. 4th 770, 788 (2007)).

87 *Snowball West Invs. v. City of L.A.*, 96 Cal. App. 5th 1054 (2d Dist. 2023).

88 *Id.* at 1061.

89 Gov't Code § 65589.5(j)(4).

90 *Snowball West Invs. v. City of L.A.*, 96 Cal. App. 5th at 1075 (citing § 65589.5(j)(4) (emphasis by the court).

91 *Id.* at 1066.

92 *Id.* at 1082.

93 *Id.* at 1085.

94 *Id.*

95 *Hoffman Street, LLC v. City of West Hollywood*, 179 Cal.App.4th 754, 768 (2009) (citing Sen. Rules Com., Off. Of Sen. Floor Analyses, analysis of Sen. Bill No. 1098 (2001-2002 Reg. Sess.) as amended Aug. 28, 2001, pp. 2, 4.).

96 Gov't Code § 65589.5(a)(2)(K).

97 § 65956(b).

98 §§ 65969(b), 65957.

99 *Save Lafayette v. City of Lafayette*, 85 Cal. App. 5th at 855-856.

100 *Discovery Builders v. City of Oakland*, 92 Cal. App. 5th 799.

101 *Id.* at 803.

102 Oakland Mun. Code, §§ 15.72 et seq., 15.74 et seq.

103 *Discovery Builders v. City of Oakland*, 92 Cal. App. 5th at 809.

104 *Id.* at 810.

105 Cal. Const., art. XI, § 7.

106 *Summit Media LLC v. City of L.A.*, 211 Cal. App. 4th 921, 934 (2012).

107 *Cty. Mobilehome Positive Action Comm. v. Cty. of San Diego*, 62 Cal. App. 4th 727, 736 (1998).

108 *Avco Cmty. Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 800 (1976).

109 *Alameda County Land Use Ass'n v. City of Hayward*, 38 Cal. App. 4th 1716, 1724 (1995).

110 *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 800 (1976).

111 *See Delucchi v. County of Santa Cruz*, 179 Cal. App. 3d 814, 823 (1986) ("any agreement that functions to divest a municipality of its ability to exercise its police power with respect to land use laws is invalid").

112 *Discovery Builders v. City of Oakland*, 92 Cal. App. 5th at 810.

113 Gov't Code §§ 65864-65869.5, Stats. 1979, Ch. 934.

114 § 86564(a).

115 § 65866.

116 *City of West Hollywood v. Beverly Towers, Inc.*, 52 Cal. 3d 1184, 1200, fn. 6 (1991); *Santa Margarita Area Residents Together v. San Luis Obispo Cnty.*, 84 Cal. App. 4th 221, 226-27 ("In essence, the statute allows a city or county to freeze zoning and other land use regulation applicable to specified property to guarantee that a developer will not be affected by changes in the standards for government approval during the period of development").

117 *1901 First Street Owner, LLC v. Tustin Unified Sch. Dist.*, 21 Cal. App. 5th 1186, 1195 (4th Dist. 2018).

118 *Santa Margarita Area Residents Together v. San Luis Obispo Cty.*, 84 Cal. App. 4th at 233.

119 *North Murrieta Cmty., LLC v. City of Murrieta*, 50 Cal. App. 5th 31 (4th Dist. 2020) addressed impact fees in the context of a development agreement that stipulated such fees could be increased under certain circumstances but did not address the city's police power.

120 *NCR Properties v. City of Berkeley*, 89 Cal. App. 5th 39 (1st. Dist. 2023).

121 *Burien, LLC v. Wiley*, 230 Cal. App. 4th 1039 (2014).

122 Civ. Code § 1954.52(a)(1).

123 *Burien, LLC v. Wiley*, 230 Cal. App. 4th 1039 (2014).

124 *Id.* at 46.

125 *Id.*

126 Civ. Code § 1954.52.

127 *Burien, LLC v. Wiley*, 230 Cal. App. 4th at 1042. *See Da Vinci Grp. v. San Francisco Residential Rent etc. Bd.* 5 Cal. App. 4th 24, 28 (1992) (construing similar provision in San Francisco rent ordinance and concluding certificate of occupancy exemption did not apply to units that were not newly constructed).

128 *RREEF America REIT II Corp. YYYY v. Samsara Inc.*, 91 Cal. App. 5th 609 (1st Dist. 2023).

129 *Id.* at 614.

130 Cal. Civ. Proc. § 484.090.

131 *Goldstein v Barak Constr.*, 164 Cal. App. 4th 845, 852 (2008).

132 Cal. Civ. Proc. § 483.015(b)(4).

133 Cal. Com. Code, § 5102(a)(10).

134 *RREEF America REIT II Corp. YYY v. Samsara Inc.*, 91 Cal. App. 5th at 619.

135 Cal. Com. Code §§ 5108(a), 5102(a)(12).

136 *San Diego Gas & Electric Co. v. Bank. Leumi*, 42 Cal. App. 4th 928, 933-934 (1996) ("Absent fraud, the issuer must pay upon proper presentment regardless of any defenses the applicant for the letter of credit may have against the beneficiary arising from the underlying transaction").

137 *Western Security Bank, N.A. v. Superior Court*, 15 Cal. 4th 232 (1997).

138 *Id.* at 252.

139 *San Diego Gas & Electric Co. v. Bank Leumi*, 42 Cal. App. 4th 928, 933 (1996).

140 *See also Crocker Nat. Bank v. Superior Court*, 68 Cal. App.3 d 863, 870, 872 (1977); *Kupetz v. Continental Ill. Nat'l Bank & Tr. Co. of Chi.*, 77 B.R. 754, 765 (1987); *Berman v. Le Beau Inter-America, Inc.*, 509 F. Supp. 156, 160-61 (1981).

141 *RREEF America REIT II Corp. YYY v. Samsara Inc.*, 91 Cal. App. 5th at 623.

142 *San Diego Gas & Elec. Co. v. Bank Leumi*, 42 Cal. App. 4th at 934.

143 *RREEF America REIT II Corp. YYY v. Samsara Inc.*, 91 Cal. App. 5th at 622.

144 *Western Security Bank, N.A. v. Superior Court*, 15 Cal. 4th at 250-51.

145 *Tufeld v. Beverly Hills Gateway*, L.P., 86 Cal. App. 5th 12 (2d Dist. 2022).

146 *Id.* at 20.

147 *Safarian v. Govgassian*, 47 Cal. App. 5th 1053, 1067 (2020).

148 Cal. Civ. Code, § 21200 et seq.

149 *Tufeld v. Beverly Hills Gateway*, L.P., 86 Cal. App. 5th at 27.

150 *See, e.g., Harter v. San Jose*, 141 Cal. 659, 667 (1904); *Kendall v. Southward*, 149 Cal. App. 2d 827, 828 (1957).

151 *Tufeld v. Beverly Hills Gateway, L.P.*, 86 Cal. App. 5th at 27 (quoting *Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919, 929 (2016)).

152 *Yvanova v. New Century Mortg. Corp.* 62 Cal. 4th at 930 (2016).

153 *Colby v. Title Ins. & Tr.* Co.,160 Cal. 632, 644 (1911).

154 *Asdourian v. Araj*, 38 Cal. 3d 276, 291 (1985).

155 Cal. Civ. Code § 3513.

156 *Tufeld v. Beverly Hills Gateway, L.P.*, 86 Cal. App. 5th at 29 (quoting *Wells Fargo Bank v. Bank of America*, 32 Cal. App. 4th 424, 431 (1995)).

157 *Alexander v. Angel*, 37 Cal. 2d 856, 862 (1951).

158 *Tufeld v. Beverly Hills Gateway, L.P.*, 86 Cal. App. 5th at 30.

159 *See Armendariz v. Found. Health Psychcare Servs., Inc.*, Cal. 4th 83, 124 (2000).

160 *Tufeld v. Beverly Hills Gateway, L.P.*, 86 Cal. App. 5th at 27.

161 Restatement (Second) of Contracts § 7 cmt. a.

162 *Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919, 929-30 (2016).

163 1 Witkin, Summary of Cal. Law (11th ed. 2023).

164 **Tufeld,** 86 Cal. App. 5th at 23 (quoting § 880.020(a)(1), italics added). *See City of Oceanside v. McKenna*, 215 Cal. App. 3d 1420, 1426, fn. 4 (1989) ("The traditional rule against restraints on alienation is based on the public policy notion that the free alienability of property fosters economic and commercial development").

165 *Tufeld*, 86 Cal. App. 5th at 28.

166 *SVAP III Poway Crossings, LLC v. Fitness Int'l, LLC*, 87 Cal. App. 5th 882 (4th Dist. 2023).

167 *Id.* at 886.

168 *Id.* at 888.

169 *Id.* at 889.

170 *Id.* at 890 (citing *Property Cal. SCJLW One Corp. v. Leamy*, 25 Cal. App. 5th 1155, 1162 (2018)).

171 *Id.*

172 *Id.* at 892.

173 *Id.* at 893.

174 *Autry v. Republic Prods.*, 30 Cal. 2d 144, 149 (1947).

175 *County of Yuba v. Mattoon*, 160 Cal. App. 2d 456, 458-59 (1958).

176 *SVAP III Poway Crossings, LLC v. Fitness Int'l, LLC*, 87 Cal. App. 5th at 894 (quoting Cal. Civ. Code § 1511(2)).

177 *Dorn v. Goetz*, 85 Cal. App. 2d 407, 410 (1948).

178 *Lloyd v. Murphy*, 25 Cal. 2d 48, 53-54 (1944).

179 *See 20th Century Lites, Inc. v. Goodman*, 64 Cal. App. 2d Supp. 938, 945 (1944).

180 *West Pueblo Partners LLC v. Stone Brewing LLC*, 90 Cal. App. 5th 1179 (1st Dist. 2023).

181 *Fitness Int'l v. KB Salt Lake III*, 95 Cal. App. 5th 1032 (2nd Dist. 2023).

182 *Iten v. Cty. of L.A.*, 81 F.4th 979 (9th Cir. 2023).

183 *Fitness Int'l v. KB Salt Lake III*, 95 Cal. App. 5th at 1038.

184 *Iten*, 81 F.4th citing *Lazar v. Kroncke*, 862 F.3d 1186, 1198-1199 (9th Cir. 2017).

185 *Id.* at 985.

186 *Ridec LLC v. Hinkle*, 92 Cal. App. 5th 1182 (2nd Dist. 2023).

187 *Tsasu LLC v. U.S. Bank Trust, N.A.*, 62 Cal. App. 5th 704 (2021).

188 Cal. Civ. Proc. Code § 760.010 et seq.

189 *Ridec LLC v. Hinkle*, 92 Cal. App. 5th at 1192.

190 Cal. Civ. Code § 764.060.

191 *Ridec*, 92 Cal. App. 5th at 1193.

192 *Id.* at 1194.

193 *Id.* at 1196 (quoting *Tsasu LLC v. U.S. Bank Trust, N.A.*, 62 Cal. App. 5th at 716).

194 *Id.*

195 Cal. Civ. Code § 764.030(a).

196 *Ridec LLC v. Hinkle*, 92 Cal. App. 5th at 1197 (quoting Cal. Civ. Proc. Code § 764.060); *see Tsasu LLC v. U.S. Bank Trust, N.A.*, 62 Cal. App. 5th at 710).

197 *Stearns v. Title Ins. & Trust Co.*,18 Cal. App. 3d 162, 169 . (1971).

198 Ridec, 92 Cal. App. 5th at 1198.

199 *Id.* at 1199.

200 *Id.* at 1200.

201 *Id.* at 1203.

202 *Id.* at 1199.

203 *Id.* at 1200.

204 *Shenson v. Cty. of Contra Costa*, 89 Cal. App. 5th 1144 (1st Dist. 2023).

205 *Id.* at 1149.

206 *Locklin v. City of Lafayette*, 7 Cal. 4th 327 (1994).

207 *Shenson v. Cty. of Contra Costa*, 89 Cal. App. 5th at 1155 (citing Locklin, 7 Cal. 4th 327).

208 Cal. Gov't Code §§ 66410 et seq.

209 *See Locklin*, 7 Cal. 4th at 337.

210 *Ullery v. Cty, of Contra Costa*, 202 Cal. App. 3d 562, 568-69 (1988)

211 *Id.* at 570.

212 *Locklin*, 7 Cal. 4th at 370.

213 *See Ruiz v. Cty. of San Diego*, 47 Cal. App. 5th 504, 509 (2020).

214 *Gardner v. Cty. of Sonoma*, 29 Cal. 4th 990, 997 (2003). See 7 Miller & Starr, Cal. Real Estate (4th ed. 2022) §§ 20:1, 20:25 ("local authorities have a great deal of latitude to require a subdivider to make adequate arrangements for drainage and sewage disposal both within and outside of the subdivision").

215 *See Mikels v. Rager*, 232 Cal. App. 3d 334, 353-54 (1991).

216 *See Ruiz v. Cty. of San Diego*, 47 Cal. App. 5th at 517 (holding that public water drained through a privately owned pipeline did not constitute an implied acceptance of an offer of dedication).

217 *Shenson v. Ct.. of Contra Costa*, 89 Cal. App. 5th at 1169.

218 *Id.* (citing *Locklin v. City of Lafayette*, 7 Cal. 4th at 370)).

219 *See Locklin*, 7 Cal. 4th at 370.

220 *Ruiz v. Cty. of San Diego*, 47 Cal. App. 5th at 526-57 ("[I]n determining whether [a public entity] acted unreasonably ... 'the critical inquiry' is not whether the public entity acted reasonably with respect to someone else's property, but whether 'the [public entity] acted reasonably in its maintenance and control over those portions of the drainage system *it does own*'").

221 *Baldwin v. City of L.A.*, 70 Cal. App. 4th 819, 837 (2d Dist. 1999).

222 *Ruiz*, 47 Cal. App. 5th at 504.