Three Lessons for Lawyers

Roger Bernhardt

Christine Tour-Sarkissian

Introduction

The decision in *Wood v Jamison* (2008) 167 CA4th 156, 83 CR3d 877, is based on mistakes that attorneys might easily make. So we'll use that case as an object lesson for these cautions.

From the court's sketchy summary of the facts, it appears that McComb, a smooth talker, persuaded Peterson, a little old lady, into financing and joint venturing a nightclub operation with him. After she depleted her own bank accounts for him, he took her to the office of attorney EBJ for her to get $250,000 by putting a mortgage on her house. EBJ, who appears to have already been representing McComb on some aspects of the nightclub project, discussed the mortgage loan with both McComb and Peterson and then subsequently did all the paperwork on that loan. (More facts will be mentioned as they become relevant.) EBJ ultimately ended up being held liable to Peterson for malpractice, breach of fiduciary duty, and elder abuse.

I. The Attorney-Client Relationship

EBJ's first mistake started when an existing client came into his office bringing a stranger along with him. EBJ should have immediately seen red flags waving. Any time two people come to an attorney, he or she has to be concerned about the potential of conflict of interest—whether the two visitors be brother and sister worrying about an ailing parent or one person just coming along to give the other moral support. Once both McComb and Peterson were in the same room with EBJ, he had to be concerned about whether he was creating a relationship with each of them—and, if so, what kind. If McComb was already his client (perhaps on this same matter), he was on dangerous ground in talking to Peterson.

That does not mean that EBJ had to ask Peterson to leave at once. Two laypersons make a joint visit generally to economize on attorney fees; a complete refusal to speak to the second one is a good reason for people to dislike lawyers. But before letting them go too far in telling their story—and certainly before rendering any opinions—EBJ should have given them a preliminary lecture about what it would mean to be the lawyer for them both, including the impossible predicament he would be in if they were both his clients and later had a falling out. For his own safety, EBJ should also have invited questions from them, which would not only have given him further opportunities to explain the situation, but also enabled him to perceive how well they understood the situation and made him better able to judge how likely it was that a real conflict could arise (if that was not already inherent from the start). Agreeing, instead, to help Peterson get a loan was not a wise way to begin.

If McComb and Peterson were both going to be clients, getting written conflict-of-interest waivers from both of them would have been the proper next step, although it bears remembering that such waivers will work only if the foundational and previous discussion of them was full and fair. EBJ did produce a waiver in court, and while it was easily rejected as coming in too late (five months after the trial) and too suspicious (mail from an anonymous source), the appellate court also rejected it on the ground that it had not been preceded by legal advice to Peterson on the issue of conflict of interest before she (allegedly) signed it. (Nor had EBJ—as is generally prudent—documented that her execution of the waiver had not been rushed and had been with knowledge of her right to consult someone else about it.) Merely having a waiver in the file does not do too much to help an attorney accused of conflict of interest.

This particular waiver also failed, according to the court, because of the way it was worded. It referred only to Peterson's joint venture with McComb, and not to EBJ's services in getting the mortgage loan on her house, which were the activities that constituted EBJ's malpractice. The court's reasoning may tempt attorneys to draft broader waivers for clients to sign (since future requests for services are never completely foreseeable), but attempting to obtain a blanket waiver covering anything and everything may put the attorney no less at risk in the other direction. (It could well be that this court was not going to buy this waiver claim under any circumstances, and any statement about scope in the opinion was just a throwaway extra reason.)

If one of the parties refuses to sign the waiver, the attorney thereafter has to deal with her on a clearly adversarial basis and constantly make sure that he never lulls her into thinking that he is doing anything as her lawyer. Given the services EBJ subsequently performed for Peterson, that would probably have been impossible. So our analysis of the case continues, on the assumption that a valid conflict waiver might have been, or was in fact, executed. But that only leads to the next ground of liability that was asserted against EBJ.

II. Malpractice

EBJ was guilty of malpractice, according to the court, not only because he failed to advise Peterson about his conflict of interest—covered above—but also because:

- He put her into a bad loan.
- He made a secret profit on that loan.

a. The Loan Terms

EBJ was held guilty of malpractice for obtaining an unsuitable loan, *i.e.*, one that was certain to lead to foreclosure. His liability arose because he agreed to find a lender but then also took care of all of the paperwork involved in getting the loan. For the court, that loan work alone was "sufficient to support a finding that an attorney-client relationship existed." That assistance also became the basis for imposing extra duties on EBJ to inquire into Peterson's financial situation, the propriety of the loan terms, and, apparently, the wisdom of the investment being made with the loan funds. According to the court, EBJ should have sent Peterson to an independent investment advisor if he himself was not going to advise her about it. Sending a client to any other professional—loan broker, CPA, or financial advisor—would not only have reduced EBJ's documentary tasks, but should have shifted the advisory responsibilities off his and onto other shoulders; that potential consequence should admonish attorneys not to lightly volunteer to be extra helpful. However, how much EBJ's legal and ethical responsibilities (he was guilty of both malpractice and breach of fiduciary duty) would have been reduced had he limited his services to less than the everything that he did is unclear; it is always difficult to predict safe stopping places along the slippery slope of doing more and more for the client.

EBJ was also guilty of not advising Peterson that a nightclub venture was an inappropriate investment for her (although this sounds almost like an afterthought in the opinion). On that feature, attorneys are in notorious disagreement over the wisdom of making themselves into the financial advisors of their clients; it is not self-evident that assisting a client in obtaining a loan imposes on counsel a companion obligation to see that the loan proceeds are well spent. But if this part of the opinion is taken seriously, it represents a new risk for attorneys to consider.

b. The Secret Profits

EBJ was also held liable because he received a $4000 "referral fee" from Peterson's lender and used her mortgage proceeds to get himself repaid for a $10,000 loan that he had earlier made to McComb.

The court did not discuss whether EBJ could have legitimately taken this money had he not been acting as her attorney. There is no indication that EBJ charged Peterson any kind of attorney fee. Perhaps such fees were paid by McComb, or perhaps EBJ thought of the funds he got from the loan as a substitute for attorney fees. Perhaps he believed that he was only acting as a kind of loan broker or loan finder for a nonclient, but since he was being treated as her attorney, nondisclosure of these two items was held to be malpractice. Boyd Lemon, Peterson's expert witness, opined that his conduct ran afoul of both Cal Rules of Prof Cond 3–310 (because he was rendering legal services to Peterson without disclosing the conflict) and 3–300 (because he was receiving a nonattorney's fee out of a business transaction with a client that was disadvantageous to her).

Those opinions make it unlikely that EBJ would have avoided liability if he had simply disclosed his receipts to Peterson. The fact that he was also held guilty of breaching fiduciary duties makes the relevance of her knowledge and consent even more problematic. But surely an attorney who discloses all sources of income to anyone affected by a transaction—whether or not he is attorney or the hearer is client—is less endangered than one who conceals that information.

III. Elder Abuse

EBJ was also held liable under the Elder Abuse Act (Welf & I C §15600) because Peterson was 78 years old and EBJ "took the undisclosed finder's fee," "knowingly aided and abetted McComb's abusive scheme to take the $250,000," and "knew what the loan proceeds would be used for," under circumstances in which "[a]ny attorney would know it was an inappropriate use of Peterson's funds."

This highlights another hazard that attorneys must be alert to in handling real estate transactions for America's growing elderly population. The Elder Abuse Act is so broad that EBJ could have been held liable under it even if he had properly avoided all of the attorney-client, malpractice, and fiduciary duty pitfalls discussed above. EBJ clearly came within the Act if he was representing the elderly Peterson, but also even if he was representing only the younger McComb in McComb's deal with Peterson. EBJ had to do more; for his own protection, he needed either a videotape of his consultation with her, or a statement from a health care professional that she was of sound mind at all critical stages of the deal, even if it was embarrassing to tell her he had to take those steps.

Financial elder abuse does not require an attorney-client relationship. Nothing in §15610.30 limits the definition of elder abuse to attorney-client relationships or makes full disclosure a defense against it. EBJ was held to have aided and abetted McComb in committing elder abuse by knowing that he was taking Peterson's property for a wrongful purpose.

Indeed, under the facts as described in the opinion, EBJ may have needed to affirmatively stop the deal once he knew Peterson was 78. That might have put him in trouble with his client McComb, but he should not have ignored the fact that Welf & I C §15657.5(a) provides for costs and attorney fees to a plaintiff who prevails in an elder abuse claim. Such fees are one-way, rather than bilateral, meaning that an attorney can end up owing them if he

loses, but unable to recover them if he wins. See *Wood v Jamison* (2008) 167 CA4th 156, 83 CR3d 877.

Professor Bernhardt gratefully acknowledges the contributions of his colleague Christine Tour-Sarkissian to this portion of this issue's Midcourse Corrections column. Ms. Tour-Sarkissian practices law in San Francisco and is Adjunct Professor of Law at Golden Gate University, teaching Real Estate Transactions and Real Estate Litigation.

A Useful Book for Starting Lawyers

I received a new book from the Real Property Trust & Estate Law Section of the ABA, entitled *From Handshake to Closing: The Role of the Commercial Real Estate Lawyer*, by Sidney Saltz (a well-known Chicago attorney).

Now that I know of it, I will recommend this book to two kinds of people in the future. First, I will recommend it to students who tell me that they have just gotten a job doing real estate work for a law firm—I will tell them that this book is what they should read before they start work there, so that they will not have to risk embarrassing themselves asking too many questions that reveal how little they know. Second, I will recommend it to the lawyers I know at real estate firms when they complain that they spend too much time explaining the simple facts of law life to their new hires—I will advise them to just give those beginners a copy of this book and save themselves all that work.

This book is filled with many of the tips and anecdotes that an acolyte needs in order to fit in more smoothly with the rest of the firm—*e.g.*, when to draft a document herself or when to trust someone else to do it, or when to use a form instead. (Incidentally, there are some very useful form clauses with some excellent commentary accompanying them, although all of that is in the context of commercial leases.)

What I would not recommend the book for is as a deskbook for reference to particular problems. Saltz's informal style and organization make his text almost impossible to pick up and search for treatment of any individual item. It is really too bad that there is no index. (I had to use a lot of post-it notes so that I could get back to points I wanted to remember.) I will advise my students: "Read this *before* you show up for the first day of work; after that you won't have the time to go through it looking for an answer; and then store it in your bookshelf under commercial leases."

Acquisitions

Brokers and Salespersons

Under CAR buyer-broker standard form contract, earned commissions must be paid to real estate broker when buyer defaults.

Schaffter v Creative Capital Leasing Group, LLC (Aug. 11, 2008, D047364; not certified for publication) 2008 Cal App Unpub Lexis 6622

After a bench trial, Brett Schaffter was awarded damages from Creative Capital Leasing Group, LLC (CCLG) in the amount of commissions earned but not paid because the buyer never closed escrow. CCLG appealed, contending that there was no default because it negotiated cancellations without litigation with the sellers, that the buyer-broker contracts were void for lack of a definite termination date, and an assignment by Prudential was void because prematurely made. The court of appeal rejected CCLG's arguments and affirmed the decision of the trial court.

CCLG, a real estate investment company owned by Jack Winick, corporate counsel, and his two sons, engaged in a practice of purchasing condominiums before construction, on speculation that appreciation by the closing date would be sufficient for a profitable resale. In March 2001, CCLG hired Schaffter to find desirable properties. CCLG entered into the California Association of Realtors (CAR) standard form buyer-broker contract with Prudential, where Schaffter worked. The contract provided that Schaffter earned his commission when a buyer entered a purchase agreement, but the commission was not payable until the close of escrow or the buyer's default. Schaffter represented CCLG in the purchase of several units at Park Place in April 2001 before leaving Prudential in June 2001 to work at RE/Max, which was the broker for Park Place. In January 2002, CCLG entered into a contract with Re/Max for Schaffter's representation in the purchase of units in the Renaissance and Pacific Terrace developments. In February 2002, CCLG purchased units at Renaissance. In September 2002, CCLG purchased units at Pacific Terrace.

In December 2002, Park Place informed Schaffter that Winick was seeking to cancel CCLG's purchases. Winick then informed Schaffter that he would not complete the Pacific Terrace purchases, and perhaps not the Renaissance purchases, because the units were not appreciating enough to make resales profitable. CCLG did not close escrow on the Pacific Terrace and Renaissance units and was able to negotiate cancellations. CCLG did close on the Park Place units, after an initial default and months of delay. Nevertheless, CCLG paid none of the

commissions due Schaffter. Winick refused to mediate as required by the contracts. Schaffter, as Prudential's assignee, and RE/Max sued CCLG for breach of contract. The trial court found that the sellers were "ready, willing and able to sell." The fact that Winick was able to negotiate cancellations did not change the fact that CCLG had defaulted.

The court of appeal reiterated that the purchase agreements did not permit cancellation due to insufficient appreciation. As explained in the CAR amicus brief, the "default" provision recognizes that it would be unfair to deny the broker payment for services when a buyer defaults. Nonpayment is still unfair whether the seller seeks damages from the defaulting buyer or not. The consequence of CCLG's breach is payment of the earned commissions on the cancelled purchases. CCLG's argument based on alleged violation of Bus & P C §10176(f), requiring a fixed termination date in the buyer-broker contract, was not raised in the trial court and consequently was deemed waived. CCLG also contended that the assignment by Prudential was void because it occurred before the close of escrow in breach of Prudential's duty to oversee Schaffter's conduct. However, Prudential assigned its rights to Schaffter based on its belief that CCLG would default on the Park Place units, as CCLG did initially. Moreover, under the buyer-broker contract, Prudential assigned to Schaffter only the rights to commissions that he had already earned. There was no violation of the public policy that brokers supervise agents. The assignment was effective. Finally, the court of appeal remanded to the trial court the issue of the amount of attorney fees to be awarded Schaffter as the prevailing party on appeal.

Options

Review granted by California Supreme Court.

Steiner v Thexton (review granted Sept. 17, 2008, S164928; superseded opinion at 163 CA4th 359, 77 CR3d 632)

This case (reported at 31 RPLR 117 (July 2008)) involved a purchase agreement that the court recharacterized as a disguised option agreement, based on the unilateral nature of the obligations. Although the agreement provided that the buyer would obtain all necessary government approvals, it did not obligate the buyer to do so. As a result, the court of appeal held that the agreement lacked consideration—even though the buyer had successfully proceeded to obtain the necessary approvals. The court said the agreement was no more than a continuing offer to sell that could be revoked at any time.

Bankruptcy

Chapter 11

Payment of oversecured claim through sale of assets outside Chapter 11 plan does not per se preclude application of contract default rate of interest.

General Elec. Capital Corp. v Future Media Prods., Inc. (9th Cir 2008) 530 F3d 1178

The Ninth Circuit reversed and remanded the trial court's per se application of the rule that an oversecured creditor is not entitled to interest at the default rate when its claim is paid in full under a Chapter 11 plan. Future Media Productions (Future Media) defaulted on a loan and security agreement with General Electric Capital Corporation (GECC), triggering additional interest at a default rate under the agreement. To facilitate Future Media's preparation for liquidation, GECC agreed that Future Media could use GECC's cash collateral, provided that GECC would be paid in full from the proceeds of an asset auction to be conducted by Future Media. The unsecured creditors objected. A stalemate was avoided by paying GECC the full amount claimed with the question of default contract interest reserved. The bankruptcy court ruled that GECC was not entitled to the default rate differential, citing *In re Entz-White Lumber & Supply, Inc.* (9th Cir 1988) 850 F2d 1338. Moreover, GECC was not entitled to attorney fees or costs because it had not prevailed.

The Ninth Circuit reversed and remanded on the ground that state law controlled. *Entz-White* was not controlling because the asset sale occurred outside the Chapter 11 plan. In addition, the Ninth Circuit paid notice to the majority rule that a bankruptcy court should apply a presumption of allowability for the contracted-for default rate, as long as it is not unenforceable under applicable nonbankruptcy law. On remand, the bankruptcy court is to apply such a presumption. The attorney fees and costs issue was also remanded because GECC might prevail on the merits on remand.

> ***COMMENT:*** *After reading this decision, I naturally turned to Steven Bender, the James and Ilene Hershner Professor of Law at the University of Oregon, who is an ACREL member and the co-author of a new article on enforcing default interest rates in the Summer 2008 issue of the ABA's Real Property, Trust & Estate Law Journal. Here is our exchange.—RB*
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> *RB: Given the name of the debtor—Future Media Productions, Inc.—no doubt the collateral for this loan was an assortment of intellectual property-related rights and UCC accounts. Would the same rules apply to a real estate secured loan?*

SB: Sure, and many of the reported decisions challenging default interest rates in and out of bankruptcy occur in the context of realty foreclosures. When compared with a UCC sale, a real estate foreclosure tends to drag on longer and necessarily results in significant oversight costs to the lender. Of course, one of the losses that default interest intends to compensate for is the administrative cost that the mortgage lender must incur to monitor and otherwise deal with a defaulted loan. At the same time, the longer timeframe to collect on most realty-secured loans can pile up considerable default interest and spark a high-stakes battle over its allowance.

The *Entz-White* case that the Ninth Circuit had to sidestep in *Future Media* also appears to involve a loan with personal property collateral such as corporate securities. But its holding, denying any default interest when the loan is paid in full under a Chapter 11 plan, would extend to real estate loans.

RB: Is the Entz-White *rule in the Ninth Circuit invulnerable?*

SB: At least one federal court elsewhere has rejected that outcome. See *In re Liberty Warehouse Assocs. Ltd. Partnership* (Bankr SD NY 1998) 220 BR 546 (when loan matured by its own terms pre-petition, creditor was entitled to interest at default rate, rejecting Chapter 11 plan proposal to pay creditor at nondefault rate). Moreover, the BAP questioned the *Entz-White* rule, decided in 1988, in a 2000 decision. *In re Hassen Imports Partnership* (BAP 9th Cir 2000) 256 BR 916 (questioning continued validity of *Entz-White* in light of 1994 amendments to 11 USC §1123 providing amount necessary to cure default "shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law"). Although it arose in the context of an attorney fee dispute, the Supreme Court decision in *Travelers Cas. & Sur. Co. v PG&E* (2007) 549 US 443, 167 L Ed 2d 178, 127 S Ct 1199, generally should support enforcement of loan terms unless inconsistent with the substantive law governing the loan agreement. The Supreme Court in *Travelers* had just reversed the Ninth Circuit, so perhaps the appeals court was hesitant to construe the Bankruptcy Code to nullify any default interest, particularly when, as here, the oversecured claim was paid through asset sales rather than by a Chapter 11 plan.

The *Entz-White* debtor back in 1988, by the way, was represented by then-practitioner Randolph Haines, now a respected bankruptcy judge in Arizona. Although I was at the same law firm (Lewis & Roca) in 1988 and worked on several matters with Randy, that case proceeded without my help or hindrance.

RB: What about outside of bankruptcy, when the loan is cured under state law that allows cure before the foreclosure sale by paying the amount in arrears plus the reasonable costs of foreclosure?

SB: There's a fair argument to be made under these state arrearage laws, applicable primarily to deeds of trust, that the policy of the law would be frustrated if the borrower were saddled with a higher interest rate going forward despite curing the default. But a strong practical argument supports the allowance of default interest even here. Noted real estate practitioner Harris Ominsky has pointed out a "car wreck factor" justifying enhanced compensation to the lender in the event that the borrower cures the default and restores the loan. He likens the mortgage loan, once subject to a default, to a once-wrecked automobile. Although the car is repaired, it is "forever blemished in the marketplace." Similarly, even if a borrower cures the default, "the loan may be worth less on resale [in the secondary or securitization markets] because the borrower has demonstrated its unreliability." Ominsky, Real Estate Lore: Modern Techniques and Everyday Tips for the Practitioner (2006). UCC lenders need not worry about reinstatement laws—the drafters of the Article 9 revision came close to adopting, but ultimately rejected, any statutory right of reinstatement, allowing only a full redemption before the UCC disposition.

RB: How does this case get resolved on remand—will the default rate stand?

SB: It should, as the default rate was quite restrained. Although courts may tolerate some mild forms of overreaching, they tend to eat hogs. But this creditor was no hog. Courts have not settled on any clear rules for articulating the applicable standards for recovery of default interest both in and out of bankruptcy proceedings. But most courts that strike down default interest—whether using a standard of unconscionability or reasonableness, or even by a balancing of the equities in bankruptcy—do so when the default rate is more than double the base contract rate. A 2-percent differential, however, is modest, and differentials of 5 percent or more are quite common in the marketplace. Outside of secured credit, try defaulting on a credit card debt—fasten your seatbelt before the eye-popping default rate kicks in.

RB: If the Bankruptcy Code calls for payment of interest to the oversecured lender, as well as any reasonable fees, then what are the bankruptcy courts doing subjecting contractual default interest rates to case-by-case equitable scrutiny as they would for late fees? Shouldn't they simply enforce the default rate as written?

SB: A few do, but the overwhelming approach in bankruptcy is to review the equities of the default rate. The outcome turns on such hard-to-predict factors as the degree of prejudice to other parties, the prevailing industry standard, and the amount of loss the particular lender can point to as a result of the default, such as internal costs of overseeing collection, or the impact of the nonperforming loan on the lender's balance sheet that could cause regulatory problems and affect the lender's ability to obtain funding in the credit markets.

RB: Although the bankruptcy arose in California, the parties' loan agreement was governed by New York law. Will that imperil the recovery of default interest?

SB: Fortunately, New Jersey law wasn't at stake, as courts there articulate the least desirable standard for lenders (one of reasonableness), but in practice so far,

they have deferred to customary default rates. The federal courts in New York, as well as a New Jersey bankruptcy court applying New York law, have all shown considerable deference to agreed-upon default rates, so the skies look clear for the creditor here despite the specter of equity. See, *e.g., Citibank, N.A. v Nyland, Ltd.* (2d Cir 1989) 878 F2d 620 (default rate was "simply part of ... [the] bargain" included to offset "increased risk of non-collection" and opining that were creditors not allowed to impose such variable rates based on performance, it would be worse for debtors overall, who would likely see increased rates over life of loan in order to reallocate risk of default); *In re Liberty Warehouse Assocs. Ltd. Partnership* (Bankr SD NY 1998) 220 BR 546, 552 (observing that 8-percent spread between nondefault and default rates of interest was smaller than differential present in most cases when courts found default rate to constitute penalty, citing spreads of 9 to 10, 14.5, 18, 24, and even 35 percent); *In re Route One W. Windsor Ltd. Partnership* (D NJ 1998) 225 BR 76 (applying New York law to uphold default rate of approximately 15 percent).

RB: What impact, if any, will the subprime mortgage meltdown have in this area?

SB: The current crisis will tend to eliminate the possibility of an oversecured creditor. But more importantly, whenever possible, the courts should encourage lenders to allocate the risk of default to those borrowers who prove, as Harris Ominsky might put it, to be bad drivers. Default interest makes this possible by allowing the lender to offer a lower initial contract rate for those borrowers who prove creditworthy over the life of the loan. But we have seen so far, in recent foreclosure litigation, that some courts are sympathetic to borrowers and won't be swayed by arguments about the realities and workings of mortgage lending, particularly when those arguments revolve around the securitization markets. In the current climate, we are also likely to see more statutory and administrative regulation addressing default rates and other loan charges. Regulators are targeting default rates in residential loans, especially high-cost mortgage loans, but so far, commercial loans in this area are governed mostly by freedom of contract, subject to some judicial constraints for real abuses. I don't see any here.

Chapter 7

California bona fide purchaser statute is not preempted by U.S. Bankruptcy Code.

Burkart v Coleman (In re Tippett) (9th Cir 2008) 542 F3d 684

After filing a joint Chapter 7 petition in bankruptcy in May 2001, the Tippetts sold their homestead to Seitu Coleman, a bona fide purchaser without notice of the bankruptcy proceeding, in April 2003. The deed and first and second deeds of trust securing Coleman's purchase money notes were recorded. The trustee had not recorded the earlier Chapter 7 petition. The trustee brought an adversary proceeding seeking to quiet title, recover the proceeds, and avoid the liens. The bankruptcy court ruled in favor of the trustee but was reversed by the Bankruptcy Appellate Panel (BAP). The trustee appealed and the Ninth Circuit, reviewing de novo the decision of the BAP, affirmed.

The trustee argued that the Tippetts' postpetition deed was void and had no effect because the Tippetts' property was vested in the bankruptcy estate under 11 USC §541. The Ninth Circuit ruled that the California bona fide purchaser statute, CC §1214, renders an unrecorded conveyance void as to the prior recording bona fide purchaser. Thus, the transfer of the Tippetts' property to the bankruptcy estate was void as to Coleman. Moreover, the Bankruptcy Code did not preempt the California statute protecting bona fide purchasers. The California statute is consistent with the essential goals and purposes of federal bankruptcy law: to give the debtor a fresh start and to equitably distribute the debtor's assets among the creditors. First, the proceeds of the sale become part of the estate. Second, under 11 USC §549(a), a trustee may avoid unauthorized transfers, but federal law also provides a defense to bona fide purchasers under 11 USC §549(c). Finally, the trustee can protect the bankruptcy estate and its creditors by recording the Chapter 7 petition or a notice of bankruptcy. This outcome does not conflict with the automatic stay because "[11 USC s]ection 362's automatic stay does not apply to sales or transfers of property initiated by the debtor." *Schwartz v U.S. (In re Schwartz)* (9th Cir 1992) 954 F2d 569, 573.

Commercial Leasing

Agricultural Leases

Equal Protection

Allegations that Idaho officials discriminated against bidder for grazing land lease, based on bidder's perceived ties to conservationists and newcomer status, stated claim for violation of equal protection clause. Officials did not have qualified immunity because government officials may not make arbitrary classifications.

Lazy Y Ranch Ltd. v Behrens (9th Cir, Sept. 26, 2008, No. 07–35315) 2008 US App Lexis 20335

In August 2006, the Lazy Y Ranch Ltd., a Washington corporation, was the high bidder on grazing land leases in an auction begun in early 2005 by the Idaho State Board of Land Commissioners (Land Board) under Idaho C §58–307(1). The Land Board awarded the leases to the next highest bidder. In its first amended complaint, filed in September 2006, Lazy Y alleged violation of the equal protection clause by state officials in their rejection of its bids. Lazy Y supported its claims with allegations of its

perceived ties to conservationists, its status as a Washington corporation attempting to enter the Idaho grazing market, and the disparate treatment by defendants. Defendants moved to dismiss under Fed R Civ P 12(b)(6), contending that they had qualified immunity and that they legitimately rejected Lazy Y's bid because it would have involved additional administrative costs due to unfenced land and the risk of wandering cattle. The district court struck most of the defendants' documentary evidence as extraneous and denied the motion. Defendants appealed, using the collateral order doctrine as a basis for appellate jurisdiction. The Ninth Circuit affirmed and remanded for further proceedings.

Lazy Y alleged unfair treatment throughout the auction process. Tracy Behrens, the Idaho Department of Lands (IDL) Range Program Manager, notified applicants to submit management proposals addressing environmental concerns. Lazy Y obtained a "resource assessment" from the IDL to ensure that the IDL's concerns were addressed and submitted a timely proposal. Lazy Y contended that its proposals were superior to others in that they avoided land damage that others did not. Although Lazy Y's proposals were eventually accepted as complete, the IDL singled out Lazy Y's proposals for criticism, required new, more detailed proposals, and suggested that Lazy Y was not familiar with the procedures because it was not from Idaho. In August 2005, Lazy Y was the high bidder on all the auctions held. An agent for prior lessees orchestrated appeals of the auctions. Lazy Y alleged that IDL staff was about to deny the appeal when IDL Director Winston Wiggins unilaterally invalidated the auctions, purportedly because IDL Staff had failed to circulate Lazy Y's proposal to the other competitors. The Land Board eventually approved that decision. New auctions were scheduled for June 2006. Again, Lazy Y was the high bidder. Although the competitors did not appeal, Wiggins put the leases on the Land Board agenda for August 2006 and Behrens recommended that the Land Board not accept Lazy Y's bids because the transfer from prior lessees would increase administrative costs. According to a staff memo, the auctioned leases consisted of unfenced parcels within larger allotments to the prior lessees and would now require additional inspection and monitoring for wayward cattle. Lazy Y attacked the administrative costs memo as pretext on several grounds, including its timing after meetings among Behrens, Wiggins, IDL Assistant Director George Bacon, and representatives of the local livestock industry that excluded Lazy Y. The Land Board awarded the leases to the next highest bidder.

The Ninth Circuit summarily disposed of defendants' challenge to the exclusion of most of their documentary evidence, ruling that the motion to dismiss would still be meritless even if each of the extraneous documents were to be considered. Although defendants offered their administrative costs rationale, they did not offer a rational basis for classifying bidders based on alignment with conservationists, as alleged by Lazy Y. Lazy Y alleged numerous facts that, if proven, would establish its theory. Although the administrative costs rationale might be a valid reason for denying a winning bidder its lease, the rationale offered no basis for treating conservationists differently from other bidders. Lazy Y's allegation of irrational disparate treatment stated an equal protection claim.

The Ninth Circuit also rejected defendants' theory that Lazy Y presented a "class of one" claim not cognizable in a competitive bidding situation. The class of one theory applies when a plaintiff alleges that animus against it, in particular, caused the arbitrary treatment. It is based on unique treatment, not an improper classification. Lazy Y alleged that it was treated differently because it was classified as conservationist. It is well established that government actors may not base decisions on irrational or arbitrary classifications. Thus, defendants were not entitled to qualified immunity.

Condemnation

Just Compensation

Sales after the date of taking may be admissible as evidence of value in condemnation action.

U.S. v 4.85 Acres of Land (9th Cir, Sept. 29, 2008, No. 07–35310) 2008 US App Lexis 20920

At the trial of the compensation issue in a condemnation action, the district court excluded all evidence of post-taking sales per se on the ground that post-taking sales were not relevant to the decision of the willing buyer and seller on the date of the taking. The Ninth Circuit rejected a per se exclusionary rule and reversed and remanded for a new trial.

In September 2000, Jerry Croskrey and his real estate agent, Pamela Flowers, acquired land adjoining the Murray Springs fish hatchery in Libby, Montana. They proceeded with plans for subdivision and the sale of lots and had obtained some preliminary approvals when, in April 2003, the United States filed condemnation actions to acquire land for a buffer zone around the Murray Springs hatchery. The district court bifurcated the issues of necessity and just compensation. In the summer of 2005, the district court awarded judgment for the United States on necessity. Shortly thereafter, Croskrey and Flowers began to develop a subdivision (called Murray Island) on their remaining property. In December 2006, they had obtained final plat approval and sold five lots for

about $75,000 each. At the just compensation trial, Croskrey and Flowers sought to introduce the Murray Island sales into evidence. The district court excluded the evidence per se because the sales occurred after the taking. The landowners valued the condemned lots at about $33,000 per acre. The government expert valued the property at less than half, including improvements, based on pre-taking comparables of less than 1 to more than 5 acres, predating condemnation by as much as 4.8 years. When the jury inquired about Murray Island, the court responded that it had not allowed evidence of market activity post-taking because such sales would not have been within the contemplation of willing buyers and sellers. The jury awarded amounts only slightly above the government expert's valuation. The landowners appealed, contending it was error to exclude the evidence of post-taking sales.

The Ninth Circuit joined the majority of federal circuit courts, which have rejected a per se rule prohibiting the introduction of evidence of post-taking sales. The general rule favoring the admission of evidence of sales is limited by the principle that the government should not have to pay an inflated value that may have been caused by the condemnation itself. The trial court should assess the comparability of proffered sales in terms of similarity of characteristics, geographic proximity, and closeness in time to the date of taking. While condemnation may enhance the value of comparable sales, differences in location, characteristics, and timing usually go to the weight of the evidence, not its admissibility. The government's argument that the trial court did not adopt a per se rule, but found the Murray Island sales occurred too long after the taking, was not supported by the record. The trial court did not make any findings on comparability; it merely excluded the post-taking sales. Whether some of the post-taking sales should have been excluded from evidence in any event is a factual question to be decided at the trial level in the first instance. The jury awards were vacated and the case remanded for a new trial with directions for findings on the admissibility of each proffered comparable sale.

Construction

Construction and Construction Contracts

Indemnity clause applying to third party claims does not support request for attorney fees in action on construction contract.

Carr Bus. Enters., Inc. v City of Chowchilla (2008) 166 CA4th 14, 82 CR3d 128

The City of Chowchilla hired Carr Business Enterprises for street improvement work on city streets and for improvements at the airport under two separate contracts. The work was delayed beyond the contract time frame and Carr incurred additional costs, which the city refused to pay. Litigation ensued. The dispute was tried before a referee who issued a detailed statement, mostly in favor of Carr. On this, the second appeal of that judgment, the court of appeal certified for publication that portion of its decision relating to attorney fees, excepting from publication parts I, IIA, and IIB. Carr and Insurance Company of the West, the issuer of its performance bond, requested attorney fees under §10 of the street-improvement contract and §11 of the airport-improvement contract. The trial court denied that request; the court of appeals affirmed.

Section 10 of the street-improvement contract was under the heading "Insurance Requirements for Contractors," in a provision titled "Hold Harmless and Indemnification Agreement" that provided:

> [Carr] shall indemnify and hold harmless [City] ... from and against all claims, damages, losses and expenses, including attorney fees, arising out of the performance of the work described herein, caused in whole or in party by a negligent act or omission of [Carr] ... except where caused by the active negligence, sole negligence, or willful misconduct of [City].

The street-improvement contract also included an "indemnity agreement" on account of injury or death of persons employed by Carr that also provided for attorney fees and insurance coverage. The airport-improvement contract included essentially identical provisions. After reviewing authorities, the court of appeal concluded that including attorney fees merely as an element of loss in a standard indemnity provision does not support an attorney fee award in an action on the contract. Under CC §1717, the contract must contain express language authorizing the recovery of attorney fees with respect to an action to enforce the contract.

Prejudgment interest is due only if the liquidated damages award exceeds any offsetting claim.

Great W. Drywall, Inc. v Roel Constr. Co. (2008) 166 CA4th 761, 83 CR3d 235

Roel Construction, as general contractor on a condominium project, entered into a subcontract with Great Western Drywall for installation of metal studs, drywall, lath and plaster, and the exterior insulation finish system. Great Western worked on the project for about two years. Roel did not approve numerous change order requests from Great Western and complained of Great Western's damage to the work of other subcontractors. Great Western sued Roel for additional payment and Roel cross-claimed. The amended trial judgment awarded Roel $326,300.75 and awarded Great Western $328,819.69, which included prejudgment interest of $36,961.14 under CC §3287. Great Western moved for penalty prejudgment interest and attorney fees under Bus & P C §7108.5, which penalizes violation of the obligation to timely pay subcontractors. The trial court denied the motion. Both Great Western and Roel appealed. The court of appeal certified for publication only the portion of its opinion on the substantive merits of Roel's appeal with respect to prejudgment interest. The court of appeal reversed the trial court's award of prejudgment interest.

On appeal, Roel contended that Great Western was entitled to no prejudgment interest at all because the amount of its damages award more than offset Great Western's recovery of liquidated damages. Great Western argued that Roel's tort damages may not be offset against the liquidated contract damages. Roel's cross-complaint alleged property damage claims under both breach of contract and tort theories. The contract expressly provided that a breach of contract included damage to the work of another subcontractor and required the repair and replacement of property damaged by a subcontractor at its own expense. In any event, the court of appeal concluded that even if a portion of Roel's judgment was for damages for negligence and not breach of contract, Roel was entitled to set off the entire award. It was undisputed that Roel's damages claims arose from Great Western's deficient performance. The nature of Roel's theory should not impair its setoff rights. Great Western was entitled to interest only on the balance found to be due after deduction of the offset. Such a setoff serves the interest of justice and the purposes of the prejudgment interest statute. In sum, Great Western recovered no prejudgment interest because Roel's award exceeded that of Great Western.

Public Works

If claim is governed by mandatory contractual claims procedure, presentation of statutory claim under Govt C §§905 and 910 is not required before filing a lawsuit unless expressly mandated by the contract.

Arntz Builders v City of Berkeley (2008) 166 CA4th 276, 82 CR3d 605

In April 1999, Arntz entered into a contract with the City of Berkeley to restore and expand the public library. The contract required particular claims procedures to be followed before filing a lawsuit. Throughout his dealings with the city, Arntz had difficulty in complying with the contractual claims procedures. In July 2002, Arntz presented a final claim for $9 million in prime and subcontractor claims that was again rejected as procedurally nonrecognizable. In October 2004, Arntz filed a late claim, a demand for mediation under the contract, and a lawsuit against the city. In November 2004, the city moved for summary judgment, based in part on an alleged failure by Arntz to file a claim under Govt C §910. Interpreting both the contract and the statute, the trial court ruled that Arntz should have presented a statutory claim and complied with the contract procedures and that the October 2004 claim did not suffice. The trial court granted summary judgment for the city; Arntz appealed; and the court of appeal reversed and remanded for further proceedings.

In the part of the opinion certified for publication, the court of appeal discussed the general rule that a local government agency is entitled to written notice of a claim before being sued. The governing statutes provide two types of notice. A statutory procedure is laid out in Govt C §§900–927.12. Under Govt C §930.2, "The governing body of a local public entity may include in any written agreement ... provisions governing the presentation, by or on behalf of any party thereto, of any or all claims arising out or related to the agreement." The court of appeal concluded that the two procedures are not sequential, but parallel. Therefore, the court held that if a claim is governed by a claims procedure prescribed by contract, an additional statutory claim under Govt C §§905 and 910 is not required unless expressly required by the contract.

In the unpublished portion of the opinion, the court of appeal examined the contract between Arntz and the city and found no express requirement that Arntz follow the statutory procedure for submitting claims in addition to the contract procedure.

Development

Exactions and Fees

***Nollan/Dolan* nexus and rough proportionality test does not apply to facial challenge of affordable housing ordinance.**

Action Apartment Ass'n v City of Santa Monica (2008) 166 CA4th 456, 82 CR3d 722

Action Apartment Association (Action) brought a facial challenge to City of Santa Monica Ordinance No. 2191, which modified the ways a developer could meet affordable housing requirements. Absent a waiver, the ordinance requires a developer of a multifamily housing project to construct affordable housing on site or at another location or pay a fee. Action claimed an unlawful taking under both the California and United States Constitutions with three principal claims.

First, Action claimed that *Lingle v Chevron U.S.A. Inc.* (2005) 544 US 528, 161 L Ed 2d 876, 125 S Ct 2074, expanded application of the *Nollan/Dolan* test to include facial challenges of land-use regulations. (The nexus and rough proportionality test of *Dolan v City of Tigard* (1994) 512 US 374, 129 L Ed 2d 304, 114 S Ct 2309, and *Nollan v California Coastal Comm'n* (1987) 483 US 825, 97 L Ed 2d 677, 107 S Ct 3141, applies only to judicial review of individual adjudicative land-use decisions.) Action claimed under the rule of *Nollan* and *Dolan* that there was no nexus between the construction of new housing and the shortage of affordable housing.

Second, Action claimed that there had been no determination of any relationship between the fee and the type of development on which it was imposed, in violation of Govt C §§66000–66022 and takings jurisprudence.

Third, Action claimed that Ordinance 2191 failed because it had not been submitted for prior review and approval by the Department of Housing and Community Development under Govt C §65585.

The city demurred to the complaint; Action opposed, in essence arguing that the three causes of action supported issuance of the court's mandate. Action also argued that the city unfairly put the burden of persuasion for a waiver on the developer and that Ordinance 2191 actually exacerbated the shortage of affordable housing and failed to advance any governmental interest. The trial court sustained the city's demurrer and dismissed Action's case. The court of appeal affirmed.

Action's facial constitutional claims were without merit simply because the *Nollan/Dolan* test was not expanded to permit a facial constitutional challenge, apart from an adjudicative decision. In *Lingle*, the United States Supreme Court emphasized that its ruling "does not require us to disturb any of our prior holdings." 544 US at 545. The statutory claims were equally without merit. The approval requirement simply did not apply to Ordinance 2191 because it was not an amendment to the housing element of the city's plan.

> ***COMMENT:*** *I asked Golden Gate Professor Professor Eric C. Christiansen, a commentator on the constitutional aspects of real property law, about this case.—RB*
>
> *RB: What was the apartment association hoping for?*
>
> *EC:* Their lawyers argued that *Lingle v Chevron U.S.A. Inc.* (2005) 544 US 528, 161 L Ed 2d 876, 125 S Ct 2074, which rejected the unpopular "substantially advances" standard for review of similar regulations, had expanded the applicability of the *Nollan/Dolan* test (requiring a "nexus"/"rough proportionality") beyond the area of exactions. That would have made it far easier to challenge any such requirements. The court (correctly, I think) rejected that argument here.
>
> *RB: Is this an unexpected outcome?*
>
> *EC:* Not really. This was a relatively novel claim. It will come as no surprise to property developers that municipalities have a fairly free hand to enact land-use regulations, even when the rules significantly diminish the development value of their land. (But see the discussion of *Monks v Rancho Palos Verdes*, at p 209 of this issue of the Reporter, for a discussion of when all economic value is restricted.)
>
> *RB: Is there any good news for developers?*
>
> *EC:* Well, the situation is no worse. Takings law still presents an obstacle to excessively onerous regulations, and an as-applied challenge may still succeed when regulations include individualized, discretionary assessments.

First Amendment Restrictions

Restrictions on mall activities held unlawful, variously, as impermissible content-based restrictions on expressive activity and unreasonable as to time, place, or manner.

United Bhd. of Carpenters, Local 848 v Nat'l Labor Relations Bd. (9th Cir 2008) 540 F3d 957

Macerich Management Company and Macerich Property Management Company (collectively, Macerich), as managing agent for two shopping malls, established a list of rules for public use of the common areas of the malls. The rules barred:

1. Identifying the mall owner, manager, or tenants by name;
2. Written material interfering with the "commercial purpose" of the mall;
3. Carrying or wearing signs;
4. Use of the common area without application and presubmission of written materials;

5. Use of exterior areas, including sidewalks; and

6. Expressive activities during "peak traffic days" (including the holiday shopping season).

Union members filed unfair labor practices charges against Macerich. The charges were consolidated into a complaint alleging that by maintaining the six rules, Macerich unlawfully interfered with expressive activity and wrongly ejected union members from mall property for engaging in protected activity.

The administrative law judge concluded that Macerich had committed unfair labor practices by issuing, maintaining, and enforcing the six rules and by ejecting union members from mall property for engaging in protected activity. The NLRB upheld the ALJ only in part, ruling that the signage ban, designated areas rule, and peak traffic rule (Rules 3, 5, and 6) were reasonable. The unions, NLRB, and Macerich all petitioned for review, presenting the question whether the six rules infringed on free speech rights guaranteed by the California Constitution and therefore interfered with protected union activity. The Ninth Circuit held that the six rules, when applied to union picketing and handbilling, impermissibly infringed on free speech rights and unlawfully interfered with protected union activity.

The Ninth Circuit found that the identification ban (Rule 1) and "commercial purpose" rule (Rule 2) were content-based and could not withstand strict scrutiny because the purpose of the rules was to limit critical speech. Concomitantly, Rule 4 was also unlawful to the extent used to enforce the identification ban and the commercial purpose rule by screening for disagreeable content. The court emphasized that examination of the content of a speaker's message is the "hallmark" of a content-based rule. Macerich attempted to justify the signage rule (Rule 3) based on convenience, safety, and esthetics. Although the signage ban is content neutral and may be supported by significant considerations, the Ninth Circuit concluded that it was not narrowly tailored to serve only those interests without burdening speech more than necessary. Similarly, by excluding sidewalks, the designated areas rule (Rule 5) was more restrictive than necessary to address safety or pedestrian and traffic flow concerns. Rules 3 and 5 did not constitute lawful time, place, or manner restrictions because they were not narrowly tailored and failed to provide any alternatives for communication. Rule 6's complete ban on expressive activity for the entire holiday shopping season was overbroad and failed to leave open sufficient means for communication that might be permitted under less restrictive regulations. The unions' petition was granted, the NLRB's petition was granted in part and denied in part, and Macerich's petition was denied.

Takings

Moratorium on building homes in landslide area effected permanent taking not justified by nuisance principles.

Monks v City of Rancho Palos Verdes (2008) 167 CA4th 263, ___ CR3d ___

Plaintiffs were prevented from building homes on their 16 lots by a moratorium enacted by the City of Palos Verdes and a new administrative process for exclusion from the moratorium. The court of appeal concluded that the city's moratorium effected a permanent taking of the properties, reversed the trial court, and remanded for determination of an appropriate remedy.

Part of the City of Rancho Palos Verdes sits on an ancient landslide. Residential development in the area had begun when, in August 1957, the Portuguese Bend landslide occurred east and southeast of plaintiffs' lots. In 1974–76, the area known as the Abalone Cove landslide, south and southwest of plaintiffs lots, began to move. These areas remain active. In 1978, the city imposed a moratorium on building new homes on over 1000 acres identified by a Landslide Moratorium Map, later divided into eight zones of various sizes. Zone 2, about 130 acres, where plaintiffs' lots are located, was unaffected by the land movement and remains quiet.

In June 2002, while the plaintiffs' application for exclusion from the moratorium was pending, the city approved Resolution No. 2002–43, which stated that a consultant's conclusion that there could be development without destabilization was in error and instituted, as a precondition of construction, owner demonstration of a safety factor of no less than 1.5 in a zone, as a whole. All prior consultant reports had concluded that Zone 2 as a whole had a safety factor of less than 1.5. In March 1996, the city geologist had reported the Zone 2 factor as greater than 1.25 and less than 1.5.

Plaintiffs then sued to overturn Resolution No. 2002–43, alleging inverse condemnation in violation of the takings clause (Cal Const art, I §19). The trial court denied the request to submit additional evidence and denied the writ based on the administrative record. The court of appeal reversed and remanded for a trial on the takings claim. The trial court found that the city acted properly in imposing and, in effect, continuing the moratorium and entered judgment for the city. On the second appeal, the court of appeal concluded that "the resolution, by implementing the moratorium and continuing to prevent plaintiffs from building on their properties, deprived plaintiffs' land of all economically beneficial use." See *Lucas v South Carolina Coastal Council* (1992) 505 US 1003, 1027, 120 L Ed 2d 798, 820, 112 S Ct 2886. Therefore, the city had the burden to prove that the moratorium was justified under the state's law of property and nuisance. 505 US at 1029, 120 L Ed 2d at 820.

In its statement of decision, the trial court concluded that "at best there remains uncertainty with respect to the stability of the geology of Zone 2." The trial court expressly noted that litigation, after the Portuguese Bend and Abalone Cove landslides, had required "large sums" for the city to resolve. The trial court stated: "A public entity is not required to risk bankruptcy in order to satisfy the unsubstantiated beliefs of property owners that development is safe in an area with less than geotechnically acceptable measurements." The trial court deemed the risk of land movement, however minor, to be a public nuisance. Therefore, the moratorium did not exceed reasonable regulation in light of its important purpose, negligible effect on permitted uses, and lack of interference with the reasonable expectations of the plaintiffs, who, after all, could seek to be excluded.

The court of appeal found the conclusion regarding exclusion from the moratorium contrary to the law of the case and the conclusion regarding the significance of land movement not supported by substantial evidence. The *Lucas* court established a four-part test:

1. Removal of all economically beneficial use was a taking. 505 US at 1019, 120 L Ed 2d at 815.

2. Such a severe limitation could not be "newly legislated or decreed (without compensation)." 505 US at 1029, 120 L Ed 2d at 821.

3. A use long engaged in by similarly situated owners ordinarily implies lack of any common-law impediment. 505 US at 1030, 120 L Ed 2d at 822.

4. The government bears the burden of proof that the intended use is not allowed under state law of property and nuisance. 505 US at 1031, 120 L Ed 2d at 823.

To constitute a public or private nuisance, the interference must be both substantial and unreasonable by an objective measure. The city did not produce substantial evidence of such an interference. There is nothing inherently harmful about homebuilding, especially in an area zoned for that purpose and provided with the necessary utilities. Moreover, the "uncertainty" found by the trial court was not a sufficient basis on which to deprive the landowner of a home. There must be, instead, a reasonable probability of significant harm. The city's expert witness agreed that there was no need to evacuate existing homes in Zone 2 because there was no significant risk of harm to anyone living there. Rather, the overwhelming evidence was that development, along with dewatering wells, would improve the stability of the land. Further, the city approved so many exemption permits for existing homes as to make application of the moratorium to plaintiffs questionable. Finally, speculation that the city might "risk bankruptcy" does not justify a violation of the California Constitution by depriving plaintiffs of all economical use of their land. The court of appeal reversed and remanded the case for determination of an adequate remedy, warning the city to proceed in good faith and without stalling tactics.

COMMENT: *Since this decision, like* Action Apartment *and* Shanks*, involved more of the same constitutional issues, I asked my Golden Gate colleague Eric C. Christiansen for his thoughts on it. Here is our conversation.—RB*

RB: This seems an exceptional case.

EC: Indeed, this is the first time the California courts have applied the Supreme Court's holding in *Lucas v South Carolina Coastal Council* (1992) 505 US 1003, 120 L Ed 2d 798, 112 S Ct 2886. In *Lucas*, the Court said that a land-use regulation that requires an owner to "sacrifice all economically beneficial uses in the name of the common good" is a taking.

RB: How does it apply in Monks*?*

EC: The suing landowners sued over a near-complete moratorium on development imposed by the city 30 years ago. The city effectively prohibited new buildings in certain areas prone to landslides. This regulation qualified as a *Lucas* per se taking, according to the court of appeals.

RB: So the city must provide compensation?

EC: The tricky element of *Lucas* is that compensation is not required when the new regulation is merely an expression of inherent limits to the owners' use of their land because of "restrictions that background principles of the State's law of property and nuisance already place upon land ownership." However, the city failed its burden to demonstrate that either public or private nuisance law standards were satisfied by the threat of further mudslides as a result of construction on the lots.

RB: What are the city's options now?

EC: None is good. Because there were factual findings at the original trial court, the appellate court remanded only for determination of an appropriate remedy. It is difficult to imagine anything other than removal of the moratorium or compensation to the landowners for a permanent taking.

RB: Are we going to see more such suits against state entities?

EC: Unquestionably. I imagine cities will scramble to lessen land-use regulations that arguably restrict all economically beneficial use.

RB: How does this relate to the two other takings cases discussed in this issue of the Reporter?

EC: Although *Action Apartment* (reported at p 196), *Shanks* (reported at p 198), and *Monks* address claimed regulatory takings, the cases are not directly related to one another. Mostly, they merely highlight that post-*Lingle*, regulatory takings law is very unsettled.

While city deems applications to develop property incomplete and proposed development restrictions remain under review, declaratory relief is premature.

Stonehouse Homes v City of Sierra Madre (2008) 167 CA4th 531, ___ CR3d ___

Stonehouse Homes planned to develop property that it owned and which lay partly within the Hillside Management Zone (HMZ) of the City of Sierra Madre. Under the HMZ provisions, a formula based on the degree of slope of the land determines lot size requirements. In August 2005, the city council passed the "moratorium ordinance," which expanded the HMZ zone and its provisions over additional land, including all of Stonehouse's property. In November 2005, the city council appointed an advisory committee and set a schedule for revising the HMZ provisions. The schedule provided for advisory committee meetings to begin in January 2006, initial recommendations in June, final recommendations presented to the planning commission in November, with an environmental impact report to begin in December 2006, and city council review of proposed revisions in July 2007.

In January 2006, Stonehouse submitted its applications. In April and May, Stonehouse provided additional information requested by the city. Also in April, the city published a newspaper notice of the preparation of an ordinance amending the HMZ provisions, in part with additional density reduction. In May, the city again claimed that Stonehouse's applications were insufficient. The city cited matters upon which it had previously agreed. Stonehouse's appeal to the planning commission was denied. In July, Stonehouse sued for declaratory relief, alleging violation of substantive and procedural due process and equal protection of law, among other things. The city demurred on the basis that it had not yet amended the HMZ provisions and that Stonehouse was seeking an advisory opinion.

The trial court sustained the demurrer with leave to amend. The trial court reasoned that Stonehouse was seeking to invoke a provision of the Subdivision Map Act (Govt C §66474.2(a)) providing that approval decisions must be made based on the law in effect at the date the local agency determines that the application for a tentative map is complete. However, if before an application is complete, the local agency has initiated proceedings to change the law and has published notice of the proposed changes, it may apply the law in effect whenever the tentative map is approved. The trial court also held that Stonehouse was seeking an advisory opinion in a dispute that was not yet ripe for decision. Stonehouse had failed to allege ultimate facts of a takings claim, invalidity of the moratorium ordinance, violation of due process rights or other law, or completion of a subdivision application. Stonehouse declined to amend its complaint and appealed.

The court of appeal affirmed based on the lack of a justiciable controversy—that is to say, lack of ripeness. The court of appeal applied a two-part test: whether the dispute is sufficiently concrete that declaratory relief is appropriate and whether hardship will result if judicial consideration is withheld. Both parts of the test were met. The city council had merely requested recommendations for an ordinance revising the HMZ provisions. What legislation might be adopted and how it would affect Stonehouse's property were mere speculation. The factual context for a finding of hardship had also not been fully developed. The protection that Stonehouse sought was dependent on the city's determination that the subdivision application was complete, which admittedly had not yet occurred.

Zoning

Zoning ordinance is not preempted by Telecommunications Act of 1996 because zoning requirements for wireless facilities do not expressly or in effect prohibit provision of wireless services.

Sprint Telephony PCS, LP v County of San Diego (9th Cir 2008) 543 F3d 571

Sprint Telephony PCS alleged that the San Diego zoning ordinance imposing requirements on wireless facilities (the Ordinance) is preempted by 47 USC §253(a), a provision of the Telecommunications Act of 1996, even if the regulation merely creates a possibility of prohibiting the provision of wireless services. See *City of Auburn v Qwest Corp.* (9th Cir 2001) 260 F3d 1160. In Sprint's lawsuit, the district court permanently enjoined the City of San Diego from enforcing the Ordinance; a three-judge panel of the Ninth Circuit affirmed. The Ninth Circuit granted rehearing en banc and reversed.

The Ordinance imposes standards based on visibility and location of the proposed facility. It requires applicants to submit a visual impact analysis, to describe the technical attributes of the facility, and to locate facilities in "preferred zones." It sets various design requirements based on esthetics. In addition, the general zoning requirements apply and the decision-maker retains discretionary authority to deny a use permit or grant it conditionally. The rulings in the district court and by the three-judge panel relied on *City of Auburn*, in which the Ninth Circuit inaccurately quoted and interpreted 47 USC §253(a) not only to preempt regulations that prohibit outright the ability to provide wireless services, but also to preempt regulations that may have the effect of prohibiting the provision of such services. In this decision, the Ninth Circuit overruled *City of Auburn* based on the unambiguous text of §253(a). A plaintiff must show actual or effective prohibition, not just the mere possibility of prohibition. This interpretation of the statute is consistent with that of the FCC and the Eighth Circuit and with the presumption that "express preemption

statutory provisions should be given a narrow interpretation."*Air Conditioning & Refrigeration Inst. v Energy Res. Conservation & Dev. Comm'n* (9th Cir 2005) 410 F3d 492, 496. This holding harmonizes the interpretations of identical text in §§253(a) and 332(c)(7)(B)(i)(II). See *MetroPCS, Inc. v City of San Francisco* (9th Cir 2005) 400 F3d 715, 730. On its face, the Ordinance is not an outright ban on wireless facilities. None of the requirements, alone or together, expressly prohibits the construction of facilities for wireless services. Moreover, the specific requirements do not effectively prohibit such facilities. The Ordinance sets reasonable and responsible conditions for the construction of wireless facilities and is not preempted by the Telecommunications Act of 1996.

City's failure to enforce zoning ordinance did not violate due process clause of Fourteenth Amendment.

Shanks v Dressel (9th Cir 2008) 540 F3d 1082

Vincent and Janet Dressel develop student residences by remodeling private homes in Spokane, Washington. The city's Mission Avenue Historic District, which is listed on the National Register of Historic Places under the National Historic Preservation Act of 1966 (NHPA), is adjacent to Gonzaga University. The Dressels constructed a duplex addition to a Mission Avenue house with a city permit. They removed a garage and in its place attached a "boxlike dormitory building" to the original house. A group of residents and their representative organizations from the Logan neighborhood (Logan) sued the Dressels, the city, and various of its employees in federal court, alleging that the city's failure to enforce provisions of the Spokane Municipal Code (SMC) intended to preserve historic districts violated the due process clause of the Fourteenth Amendment.

Spokane Municipal Code 17D.040.200 requires owners to obtain a certificate of appropriateness for work affecting the exterior of property or for new development in a historic district. Spokane Municipal Code 11.19.270 applies special development standards to districts listed on the National Register of Historic Places. If special development standards apply, proposed construction requires an administrative special permit from the director of planning services. The Dressels did not seek and were not asked to apply for a certificate of appropriateness or an administrative special permit. (The special development standards have not yet been created.) The complaint also alleged violations of the Spokane Municipal Code and the NHPA. The district court granted the city's motion for summary judgment and the Dressels' motion to dismiss. Logan appealed; the Ninth Circuit affirmed.

Logan's allegations failed to state a viable claim for violation of either substantive or procedural due process. However misguided or erroneous the Spokane permitting process, the alleged conduct was not constitutionally arbitrary. At the very least, Logan had to show that the land-use action failed to advance any legitimate governmental purpose. It is at least arguable that facilitating residential housing in a residential district has a legitimate governmental purpose. Logan failed to state a substantive due process claim. Logan based its procedural due process claim on the inability to be heard before issuance of the permit to the Dressels. Usually, a plaintiff alleges denial of a permit without due process, not the grant of a permit to another without following the proper procedure. In any event, Logan's procedural due process claim failed because the Spokane historic preservation provisions do not contain mandatory language constraining the decision-maker's discretion. Not every state law procedural requirement creates a constitutionally protected due process right. An official's full discretion to approve or deny an application does not create a property right. Absent a substantive property right, Logan did not have a constitutional right to procedural compliance.

Logan's remaining claims were dismissed summarily. First, the NHPA is addressed to federal agencies and the recipients of federal funding. It does not create a private right of action. Nor does it regulate the activities of private owners' use of federally listed property. Second, the claim based on violation of the Spokane Municipal Code failed because it did not "necessarily raise" a disputed federal issue. There was no need for federal expertise or unanimity, and federal jurisdiction would therefore unnecessarily infringe on the province of a state court. In short, the claim was not within the jurisdiction of the federal court. Although under *Lingle v Chevron U.S.A., Inc.* (2005) 544 US 528, 161 L Ed 2d 876, 125 S Ct 2074, due process challenges to governmental regulation of real property are not categorically precluded, the claimant must still state a claim under ordinary due process clause jurisprudence.

COMMENT: *Another conversation with my colleage at Golden Gate, Eric C. Christiansen, about constitutional implications.—RB*

RB: Who won here—independent developers or neighborhood associations?

EC: Neither. Developers would be happy if all substantive due process claims were preempted by the takings clause. (The Ninth Circuit rejected the preemption argument.) The neighborhood associations wanted to affirm a local government duty to consistently follow regulatory procedures and thereby protect property values. (The Ninth Circuit reiterated that there are no affirmative duties on government to protect the property values of affected third parties.)

RB: So, everyone lost?

EC: The only clear winners are municipal governments, which still have authority to pass expansive regulations but seem mostly immune (outside truly egregious behavior) to third-party suits for not complying with them.

RB: Does a property owner have no recourse when government incorrectly grants a permit to a neighbor?

EC: A third party *may* have a cognizable property interest in correct application of zoning law against her neighbors, but did not in these circumstances because the law contained discretionary elements, *i.e.,* it did not mandate denial of these permits. The Ninth Circuit addressed only federal constitutional claims; there may be claims under state law.

RB: What does this tell us about due process claims for violation of property rights?

EC: Nothing definitive. Such rights still exist; we will know more about their scope only when future, post-*Lingle* cases work through the federal courts.

Disputes

Enforcement of Judgments

Acknowledged assignment of judgment from original creditor confers standing to levy on nonhomestead property of debtor.

California Coastal Comm'n v Allen (2008) 167 CA4th 322, 83 CR3d 906

Michael Allen appealed an order for sale granted to the Radoseviches, as assignee of the California Coastal Commission. Allen challenged the standing of the Radoseviches, claimed a homestead exemption, and contended that the writ of execution failed to reflect his discharge in bankruptcy, all to no avail. The court of appeal affirmed the trial court and awarded costs to the respondents, the Radoseviches.

Allen was the owner of a $2.25 million residence in Malibu. The California Coastal Commission obtained a default judgment against him for violation of a cease and desist order and, in June 1999, recorded an abstract of judgment in an amount of nearly $1.5 million. In May 1999, the Radoseviches obtained a judgment against Allen and recorded an abstract of judgment in an amount of almost $68,000 in April 2000. The property was already subject to a first trust deed for $430,000. In April 2002, Allen filed a voluntary petition in bankruptcy and, on July 25, 2002, was granted a discharge. On July 7, 2002, Allen transferred the residence to Trans America Property & Investment, Inc., which he wholly owned. Allen later leased the residence for the period June 1, 2005, to June 30, 2007.

Having assessed the priorities of the encumbrances, the Radoseviches entered into an agreement with the Commission for an assignment of its judgment lien for an initial 2-year term, renewable by mutual agreement. The Radoseviches obtained and filed an acknowledgment of the assignment with the court, obtained a writ of execution in December 2005, and finally obtained an order for sale of the property in January 2007.

Under the Enforcement of Judgments Law (CCP §§680.010–724.260), the Radoseviches properly fulfilled the requirements for becoming an assignee of record and thereby obtained standing as a judgment creditor to enforce the judgment. See CCP §673. Allen submitted no authority that a temporary assignment was insufficient for standing. Allen did not qualify for a homestead exemption, which requires ownership by a natural person and continuous residency. Allen's sale to his wholly owned corporation and the letting of the premises eliminated his eligibility for a homestead, even though he retained the right to occupy an attic room on his visits to Malibu. See CCP §§704.710, 704.740. Finally, Allen claimed that the amounts listed on the writ of execution were wrong because they did not reflect his discharge from bankruptcy. Allen, however, offered no evidence that the liens had been discharged. There was no automatic termination of the liens because they were not created within 90 days of the filing of the bankruptcy petition. See CCP §493.030.

Government Tort Liability

City was immune from liability when failure to repaint crosswalk lines did not create a dangerous condition.

Sun v City of Oakland (2008) 166 CA4th 1177, 83 CR3d 372

Plaintiffs sued the City of Oakland, alleging that the death of Rong Zeng Peng was caused by the dangerous condition of the intersection where Peng was struck by a car and killed. The trial court granted summary judgment to the city on the ground, among others, that the intersection was not in a dangerous condition as a matter of law. Plaintiffs appealed. The court of appeal, finding no triable issue of material fact with respect to the existence of a dangerous condition, affirmed.

Peng was attempting to cross International Boulevard, which had two lanes of traffic in each direction. The city had installed bulb-out sidewalk extensions at the intersection, repaving the street but not repainting the crosswalk lines. As Peng was crossing the street, a driver, approaching the intersection in the left lane, stopped to allow her to pass. Peng was struck when a second driver moved around to the right of the stopped car from behind, striking Peng as she walked past the stopped car into the right lane. (The second driver eventually pled no contest to felony vehicular manslaughter with gross negligence.)

Plaintiffs relied on Veh C §219050.5 to support their claim that the intersection was in a dangerous condition. That statute requires a notice and hearing procedure before an existing marked crosswalk may be removed, but the statute does not provide for liability. Failure to comply with the notice and hearing procedure did not cause the gross negligence of the second driver. That negligence does not absolve the city from liability for a dangerous condition, but it also does not prove that the intersection posed a substantial risk of injury to pedestrians. Although plaintiffs relied on an accident study, the study period occurred before bulb-outs were installed and the crosswalk lines were paved over. The study included no information on the circumstances of the accidents it reported or how they related to the presence or absence of crosswalk lines. The second driver testified that he knew the law required him to stop for pedestrians at unmarked crosswalks. Moreover, the bulb-out sidewalk extensions were installed to increase pedestrian visibility; they did not create a dangerous condition by inviting heavier pedestrian use.

Despite the absence of crosswalk lines, the only risk of harm was from a negligent motorist not complying with Vehicle Code provisions requiring him or her to yield to a pedestrian, even if the crossing was not marked, and to refrain from passing around a vehicle stopped for a pedestrian. In sum, the court of appeal concluded that the intersection did not constitute a dangerous condition as a matter of law. Moreover, under Govt C §830.8, a public entity is immunized from liability for accidents caused by its failure to warn of a dangerous condition with a signal, marking, or sign, unless the condition was not reasonably apparent. Since the absence of crosswalk lines was apparent, the city was immune from liability in any event.

Landowner/Premises Liability

Homeowner owed duty of care to contractor's employee to prevent injury from gardeners' pit bull dogs.

Salinas v Martin (2008) 166 CA4th 404, 82 CR3d 735, modified and rehearing denied (Sept. 22, 2008, A119733) 2008 Cal App Lexis 1449

The trial court granted summary judgment in favor of a homeowner whose contractor's employee was injured by the homeowner's gardeners' pit bull dog that was loose in the backyard. The court of appeal reversed and remanded for further proceedings.

Paolo Martin hired Burle Southard as general contractor for remodeling Martin's home. Southard hired Stephen Salinas as his employee. Southard and Salinas stored equipment and materials in Martin's backyard. Salinas had Martin's permission to enter the backyard at any time to retrieve equipment and materials. During the same time period, Martin hired Armand and Greg Sanchez to perform garden work on the premises. They had a pit bull terrier and a smaller pit bull/Labrador mix, which Martin agreed they could allow loose in the fenced backyard and in their van, also on Martin's property. Southard told Martin that Southard was afraid of the dogs and that Martin should not have the dogs on the property. One day, while Martin was away for a few hours, Salinas attempted to retrieve materials from Martin's backyard. As Salinas entered the backyard, the smaller dog growled and the pit bull attacked. The pit bull pursued Salinas as he fled and bit Salinas repeatedly until he was able to get to safety on top of Martin's car.

On appeal, Salinas contended that the trial court used the wrong standard of care—one that applied to a residential landlord, which requires actual knowledge of the dangerous propensity of another's dog. Salinas also contended that Martin failed to meet his burden to prove he did not actually know the dogs were dangerous. Further, Salinas contended that he had established a triable issue of fact as to Martin's knowledge of the danger. The court of appeal noted that "[f]oreseeability and the extent of the burden to the defendant are ordinarily the crucial considerations" in analyzing the duty of care. The court of appeal pointed out the differences between a residential landlord, who had relinquished control of his property and had no duty to inspect, and Martin, who continued to control his premises. The dog owners were temporary invitees, not tenants. Unlike a landlord, Martin was not restricted in his right to engage in oversight or control of the property. In general, there is a duty to take steps to prevent the harm caused by a third party's animal if the defendant possesses the means to control the animal or the relevant property.

Although Martin had been warned about the animals by Southard, Martin gave permission for the animals to be loose in the yard. Even though Martin had no actual knowledge of prior violent incidents, he was charged with awareness of the risk. The foreseeability of harm was high. Martin had permitted the gardeners to keep the dogs in the yard and had permitted Southard and Salinas to enter the yard at their convenience. Martin had the ability to prevent the harm and actually participated in creation of a dangerous condition by his acts. He bore a measure of moral blame. Moreover, the burden of due care was minimal. He needed only to instruct the gardeners to restrain their animals or at least to advise Salinas that the dogs might be loose in the backyard. The dog owners may have primary responsibility for the attack, but Martin's conduct was closely connected to the injury that resulted. Finally, insurance is available to homeowners to cover the risk that occurred. Therefore, the court of appeal concluded that Martin owed a duty of care to Salinas as a matter of law.

Quiet Title

Statutes of Limitation

Under federal Quiet Title Act of 1972, 12-year limitations period begins when party knew or should have known of United States' claim. Running of the limitations period deprives federal court of subject matter jurisdiction.

Kingman Reef Atoll Inv. LLC v U.S. (9th Cir 2008) 541 F3d 1189

Kingman Reef Atoll Investments, LLC (KRAI) brought an action under the Quiet Title Act of 1972 (28 USC §2409a). In 1922, an employee of the Island of Palmyra Copra Company claimed Kingman Reef in the name of the United States for his employer, which in turn gave its rights to the Fullard-Leo family. In 1932, a member of the family inquired whether the United States wished to purchase Kingman Reef, which led to an investigation by the Navy and State Department. In 1934, President Roosevelt issued an executive order under the Pickett Act, reserving Kingman Reef and placing it under the jurisdiction of the Navy. In 1937, the Fullard-Leos sought compensation for the Reef and asserted ownership. Their claim of ownership was rejected by the Judge-Advocate General of the Navy by letter dated April 26, 1938. In February 1941, President Roosevelt established a Kingman Reef Naval Defensive Sea Area. For the next 50 years, both the Fullard-Leos and the Navy purported to grant requests to visit the Reef to third parties. In the 1990s, the Fish and Wildlife Service considered Kingman Reef and Palmyra Atoll for a wildlife refuge. An internal memo referenced the Fullard-Leo claim, and Service employees obtained written permission to visit the reef. A later memorandum noted that their claim was disputed. The Service acquired the Reef by transfer from the Navy and purchased Palmyra Atoll without disclosing any dispute over Kingman Reef.

In March 2005, KRAI brought an action to quiet title to Kingman Reef under 28 USC §2409a. The United States' motions to dismiss and for summary judgment were granted by the district court because the action was barred by the 12-year limitations period set by 23 USC §2409a(g) and the federal court was thereby deprived of subject matter jurisdiction. KRAI appealed; the Ninth Circuit affirmed.

Under the specific language of 23 USC §2409a, the federal court loses subject matter jurisdiction, even to inquire into the merits of an action, upon the running of the 12-year limitations period. See *Fidelity Exploration & Prod. Co. v U.S.* (9th Cir 2007) 506 F3d 1182, 1186; *Block v North Dakota* (1983) 461 US 273, 292, 75 L Ed 2d 840, 857, 103 S Ct 1811. Moreover, the timeliness question is not inextricably intertwined with the ownership issue. When subject matter jurisdiction is challenged, it is the plaintiff's burden to prove jurisdiction in order to survive the motion. Here, the evidence overwhelmingly established that the statute of limitations had run many years ago. The Navy expressly rejected the Fullard-Leo claim by letter in April 1938. Despite KRAI's attack on the United States' claim, whether a timely claim would have been meritorious was irrelevant to the statute of limitations query. KRAI argued futilely that the United States abandoned its interest in the Reef between 1938 and the founding of the wildlife refuge. KRAI relied on evidence that the United States did not restrict access to the Reef and that government employees conceded Fullard-Leo ownership. Neither type of evidence was availing. The United States cannot abandon its claims to public lands by inaction (see *U.S. v California* (1947) 332 US 19, 91 L Ed 1889, 67 S Ct 1658) or adverse possession (see *U.S. v Pappas* (9th Cir 1987) 814 F2d 1342). United States property can be abandoned only through clear and unequivocal action evidenced by documentation from a government official with authority to make such a decision. Finally, negotiating the purchase of Palmyra Atoll with the Fullard-Leos, without disclosing the Kingman Reef dispute, was not so outrageous as to create an equitable estoppel.

Easements and Licenses

Federal Lands

Landowner had no common law easement over national park; denial of special use permit for year-round access was neither arbitrary nor capricious.

McFarland v Kempthorne (9th Cir, Oct. 2, 2008, No. 06–36106) 2008 US App Lexis 20811

John McFarland owned land within Glacier National Park. When the Park Service announced that it would close his access route to snowmobiles during the winter season, McFarland applied for a special use permit for year-round permission for his family and guests to drive vehicles, including a snowmobile, on Glacier Route 7 as needed. The Park Service denied the permit because the road closure during the winter was "made to protect wildlife concerns and public recreation values." The Park Service also referred to the 1995 Environmental Assessment finding that snowmobiles are "an incompatible public use," which was reaffirmed in the park's 1999 General Management Plan. McFarland's administrative appeal was also denied.

McFarland then sued in federal district court, seeking to quiet title to an easement by necessity, an easement implied from the Homestead Act and an express easement under the terms of the land patent by which his predecessor acquired the property. Initially, the district

court dismissed the action as barred by the Quiet Title Act's 12-year statute of limitations. The Ninth Circuit reversed (*McFarland v Norton* (9th Cir 2005) 425 F3d 724, reported at 29 RPLR 220 (Jan. 2006)). On remand, the district court granted summary judgment to defendants; McFarland timely appealed.

The Ninth Circuit rejected McFarland's claim of an easement by necessity on the ground that the availability of nonmotorized access during the winter was sufficient to defeat such a claim. McFarland based his claim of express easement on the conveyance of "appurtenances" to the land. Although appurtenances carry an existing easement forward, they cannot create one that did not exist before. *Fitzgerald Living Trust v U.S.* (9th Cir 2006) 460 F3d 1259 (*Fitzgerald II*). As McFarland conceded his predecessor had no express easement, none could have been conveyed by him. Moreover, the Homestead Act merely permitted long-standing use by settlers. A public grant does not transfer rights by implication. McFarland's access rights were no more than a license. Finally, though McFarland did not question the Park Service's authority to regulate use of federal park land, he contended that the denial of his special use permit was arbitrary and capricious. This last argument failed as well because the Park Service's decision was consistent with its prior decision that snowmobile use would disturb other visitors and wildlife habitat.

Merger

Merger of dominant and servient tenements extinguishes view easement.

Zanelli v McGrath (2008) 166 CA4th 615, 82 CR3d 835

Zanelli, purchaser of 66 Clarendon Avenue, claimed to have a specifically described easement for light, air, and view, burdening and restricting construction on 60 Clarendon Avenue, owned by McGrath. The trial court found, and the court of appeal affirmed, that the easement had been extinguished under the doctrine of merger by prior joint ownership of the two parcels by predecessors in interest. See CC §§805 and 811.

In 1981, 60 Clarendon, which was vacant land, and 66 Clarendon were owned by Horsely and Sunderhaus. They sold 66 Clarendon to Mr. and Mrs. Soffer, granting an easement for light, air, and view over, and restricting construction on, 60 Clarendon Avenue (the 1981 easement). In 1992, Dunham and Sommer acquired 66 Clarendon, with the easement from the Soffers, and in 1994 they purchased 60 Clarendon, as well, from Horsely. Dunham and Sommer owned 60 and 66 Clarendon together until 1998, when Dunham transferred his interest in 66 Clarendon to Sommer by grant deed. This deed referenced the easement for light, air, and view, but did not specify the precise description and restrictions of the 1981 easement. In 2002, Dunham and Sommer sold 60 Clarendon to McGrath without disclosure of an easement. After making his offer, McGrath learned of the possibility of an easement but, after a year of negotiations, purchased the property. Although the deed did not reference an easement, the 1981 easement was excluded from insurance coverage. In 2003, Sommer sold 66 Clarendon to Zanelli with full disclosure of the dispute over the easement. Zanelli purchased the property at a discount in recognition of the risk and burden to enforce the easement if it existed.

In 2005, Zanelli sued for declaratory and injunctive relief and McGrath cross-claimed to quiet title. The trial by private reference resulted in judgment for McGrath. The trial court found that, as a matter of law, the common ownership of 60 and 66 Clarendon by Dunham and Sommer merged the interests in the easement affecting the two parcels, extinguishing it. The trial court inferred an intent to extinguish the easement, reasoning that Dunham and Sommer, by not developing 60 Clarendon, obtained the benefit of the easement while preserving the ability to sell the property later without restrictions. The trial court resolved any equitable argument in favor of McGrath, who had been unaware of the easement until after he made his offer for the property. Alternatively, the trial court ruled that the grant deed expressly conveying all interest that Sommer held in 60 Clarendon, without reserving the easement for 66 Clarendon, also would have eliminated the easement.

The court of appeal found it unnecessary to reach the alternative ruling, finding merger as a matter of law. The court of appeal analyzed each of the issues raised by Zanelli:

- Whether the doctrine of merger applied when the dominant and servient parcels are vested not in a single person, but in the same joint owners;
- Whether the right of survivorship as to the joint tenancy in 66 Clarendon and the fact that Dunham held his interest in 60 Clarendon in his inter vivos trust precluded equality of ownership and thereby precluded merger and extinguishment;
- Whether the 1981 easement, once extinguished, could be revived by severance of the dominant and servient properties; and
- Whether there was sufficient evidence to support the finding of intent and balancing of equities.

The court found none of them availing. The 1981 easement was extinguished when the rights to the dominant and servient tenements came under the same fee simple ownership and was not revived upon the sale of 60 Clarendon to McGrath. There was substantial evidence for the finding as to intent; the balancing of equities was within the discretion of the trial court.

COMMENT: Because of the length of this decision (over 10,000 words), there is a temptation to think that it deals with a provocative or weighty matter. But that is not the case, there being really nothing new or important here (although I will file and save the opinion because of its thorough coverage of so many issues).

If Lot 1 has an easement of view over Lot 2, that easement will be terminated by a merger when X acquires title to both of the parcels. That will also be true if X and Y, as co-owners, acquire both parcels, and it will not matter whether they take as joint tenants or tenants in common (nor, probably, as community property—assuming that they are married to one another). Nor, as this case adds, will it matter that they hold title to one of the lots in one form (joint tenancy) and title to the other in a different form (tenancy in common), or that one of them holds his interest as trustee for himself. The two concurrent owners had equal ownership interests in this case, but that probably did not matter either; the result would have been the same even if they had been 70/30 rather than 50/50. The former dominant tenant made many intriguing arguments concerning distinctions as to the form of title, but all of them were swept away by the court. Only if a different third party had had some part of the title in one or the other of the parcels would a merger have been avoided.

Had the easement been only temporarily suspended by the common ownership, it might have been revived when one of the parcels was conveyed to a third party. But since merger had completely terminated the easement, it needed a complete re-creation to come back to life. The grantors could have provided in their deed for the express reservation of an easement, but they did not do so. Their only hope thereafter was for an easement by implied reservation, which really is impossible when the easement is a negative easement (of view), as this one was. Even if they had a house standing on their retained parcel with windows overlooking the lot they had conveyed, no court would be likely to put the purchaser on notice that his new parcel was subject to a height limit that had not been mentioned in his deed.—*Roger Bernhardt*

Environment

Administrative Agencies

Wetlands

Jurisdictional determination of Army Corps of Engineers is not final agency action.

Fairbanks N. Star Borough v U.S. Army Corps of Eng'rs (9th Cir 2008) 543 F3d 586

In October 2005, in preparation for the development of a residential recreation area, Fairbanks asked the Army Corps of Engineers to determine that fill material could be placed on the property. In response, the Corps issued preliminary and approved determinations of its regulatory jurisdiction, based on its finding that the designated area contained wetlands. Fairbanks unsuccessfully took an administrative appeal. In August 2006, Fairbanks brought suit in federal court to set aside the Corps's determination on the ground that the area lacked wetlands hydrology because it was not periodically inundated and did not have saturated soils during the growing season. The area did not meet the soil temperature test for the growing season, as defined in the Corps's 1987 Wetlands Delineation Manual, because it was underlain by shallow permafrost. The district court granted the Corps judgment on the pleadings.

Neither the district court nor the court of appeals reached the substantive issue of the wetlands determination. Instead, the case turned on the definition of "final agency action" under the Administrative Procedure Act. Under *Bennett v Spear* (1997) 520 US 154, 177, 137 L Ed 2d 281, 305, 117 S Ct 1154, final agency action is defined by two requirements:

- The action must represent the culmination of the agency decision-making process.
- The action must be one determining rights and obligations; the decision must have legal consequences.

The Ninth Circuit reasoned that the second requirement had not been met.

Although the Corps had issued its final determination that the Fairbanks property was wetlands, the Corps had not thereby changed Fairbanks's rights and obligations. The determination did not demand that Fairbanks apply for a permit or forbear on its construction plans. Although the Corps pointedly reminded Fairbanks that under the Clean Water Act, a permit for the placement of fill was required, that admonition was no more than the Corps's expression of its understanding of the statute. Even if the determination may have a practical effect, the determination did not cause a certain change in Fairbanks's legal obligations. The Ninth Circuit maintained that only federal courts have the "final say" on the scope of the Clean Water Act. Although the Corps's determination required Fairbanks to choose between risking a good faith defense in an enforcement action and submitting to the Corps's permitting regime, that is a practical effect, not a legal consequence. Thus, the agency determination of jurisdiction is not "final action" for purposes of judicial review.

Endangered Species

Rejection of petition to consider listing California tiger salamander as endangered or threatened species was not supported by substantial evidence.

Center for Biological Diversity v California Fish & Game Comm'n (2008) 166 CA4th 597, 82 CR3d 855

The Center for Biological Diversity (CBD) petitioned the California Fish and Game Commission to add the California tiger salamander to the list of endangered species under the California Endangered Species Act (CESA) (Fish & G C §§2050–2115.5). In 2004, the Commission rejected the petition on the ground that there existed insufficient data on tiger salamander population trends, as well as the degree and immediacy of threat "to indicate that a listing may be warranted." In 2005, CBD petitioned for writ of mandate, which the trial court granted in 2006. The peremptory writ directed the Commission to grant the petition to list the tiger salamander as a candidate species. The Commission then appealed. The court of appeal affirmed the trial court.

When a petition for listing a species is made to the Commission, it first refers the petition to the Department of Fish and Game for evaluation. The Department submits a written evaluation and recommendation to the Commission. Under CESA, if a petition for listing is supported by sufficient information for a reasonable conclusion of a substantial possibility of listing, it must be accepted for consideration. CBD's petition and the administrative record showed that the tiger salamander does not breed prolifically, has lost most of its original habitat, has already been displaced by a hybrid to a significant degree, and is vulnerable to the threats of habitat isolation and human population growth. The Commission's finding that a reasonable person would not conclude that there is a substantial possibility that a listing could occur was simply not supported by its criticism that the showing was insufficient.

Both the trial court and the court of appeal are governed by the substantial evidence test in the review of the Commission's decision. The Commission essentially decided that there was insufficient evidence for *consideration* of the tiger salamander for listing. The decision was not whether the species should be listed but whether it met the "candidate species" standard. Assessing the information produced as a whole, the court of appeal concluded that there was no substantial evidence to support the Commission's decision. Rather, the record clearly showed that there was a substantial possibility that listing the tiger salamander as threatened or endangered may be warranted. As a matter of law, the record required a grant of candidate species status. No purpose would be served by remand. The trial court did not err in directing the Commission to grant the petition.

NEPA

In light of prior genetic contamination, future planting of genetically engineered herbicide-resistent alfalfa was properly enjoined pending preparation of environmental impact statement.

Geertson Seed Farms v Johanns (9th Cir 2008) 541 F3d 938

The Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture initially approved Monsanto's genetically modified "Roundup Ready alfalfa" as a "regulated article." Monsanto then petitioned for nonregulated status. APHIS prepared an Environmental Assessment (EA) that explained that alfalfa is pollinated by insects and that insect pollination could occur as far as two miles from the source. The EA concluded that the use of buffer zones to be agreed upon by the growers of the Roundup Ready and the traditional alfalfa, respectively, made significant impact on farming unlikely. Following Federal Register notification, 78 percent of the comments cited fear of contamination and market rejection and urged further evaluation through preparation of an environmental impact statement (EIS). Nevertheless, APHIS found no significant impact and unconditionally deregulated Roundup Ready alfalfa. Geertson Seed Farms and others sued in federal court and obtained an injunction. The dispute on appeal was whether the scope of the injunction was too broad and whether an additional evidentiary hearing was required.

In district court, the plaintiffs requested an injunction against all future planting, as well as harvesting, of Roundup Ready alfalfa seed. Monsanto and its licensee intervened and claimed that growers who had already purchased the seed would be harmed because they would not be able to replace it in time to plant a spring crop. The preliminary injunction, issued March 12, 2007, enjoined the sale and planting of Roundup Ready alfalfa seed after March 30, 2007, pending issuance of the permanent injunction, which allowed already purchased seed to be planted, harvested, and sold without restriction. At the permanent injunction stage, APHIS agreed that some planting and harvesting conditions should be imposed. The parties, however, continued to disagree as to almost every factual issue. The court received documentary evidence, expert and lay declarations, and some live testimony. As a permanent injunction, the court adopted the terms of the preliminary injunction, extending the injunction until completion of an EIS and reconsideration of the deregulation petition.

Monsanto and others appealed the district court's injunction. They did not dispute that there had been a violation of the National Environmental Policy Act (NEPA). Rather, they contended that the district court should have held an additional evidentiary hearing and

that the scope of the injunction was excessive. The Ninth Circuit affirmed the decision of the district court.

The Ninth Circuit concluded that the district court had correctly applied the four-factor balancing test for issuance of a permanent injunction as mandated by *eBay v Merc Exchange, LLC* (2006) 547 US 388, 164 L Ed 2d 64, 126 S Ct 18371. The Ninth Circuit found that the record demonstrated that the district court applied a balancing of harms analysis of the four factors shown by the plaintiffs:

- Irreparable injury;
- Inadequacy of monetary damages to compensate for the injury;
- That the balance of hardships to each side warranted an equitable remedy; and
- That the public interest would not be disserved by a permanent injunction.

Genetic contamination had already occurred under conditions similar to the proposed mitigation. That contamination was irreparable because it was irreversible. Moreover, unsold seed could be stored in case planting is allowed in future years. Thus, the remedy accounted for the hardship on each side. Finally, the public interest would be served by preventing further use of Roundup Ready alfalfa before its impact was studied.

The Ninth Circuit also ruled that a further evidentiary hearing was not necessary because the injunction was an interim measure to ensure compliance with NEPA. It was not the court's job to perform the environmental analysis that the agency had circumvented. Circuit Judge N. Randy Smith dissented on the ground that under Fed R Civ P 65, an evidentiary hearing is required unless the facts are undisputed or the adverse party has waived its right to an evidentiary hearing. He viewed the majority as having created a new third exception to the rule requiring an evidentiary hearing.

Financing

Housing

Seller's disguised direct payment of buyer/borrower's downpayment, required by HUD for FHA mortgage insurance, was material misrepresentation violating federal law.

U.S. v Peterson (9th Cir 2008) 538 F3d 1064

The defendants in this case were convicted under federal statutes prohibiting false material statements within the jurisdiction of a federal agency. Defendants were homebuilders who subsidized downpayments to home buyers and then submitted misleading gift letters, which falsely stated that someone else had provided money for the downpayments, to HUD. Under the regulations for obtaining FHA mortgage insurance, the borrower must have the ability to make a 3-percent minimum cash downpayment. The regulations permit a friend, relative, or nonprofit housing assistance organization to donate the downpayment. Sellers are not permitted to make a direct gift of the downpayment to buyers. (Until October 2007, the seller was permitted to subsidize the downpayment by donating money to a nonprofit organization. However, the downpayment would be paid out of the organization's own funds. After closing, the seller would pay the nonprofit a service fee in the amount of downpayment from the proceeds of the sale. The nonprofit could use the fee to subsidize a future purchaser.)

HUD enforced its regulations by requiring borrowers using a gift as the downpayment to submit a "gift letter" confirming the source of the gift, the relationship of the donor to the donee, and the nature of the downpayment. The gift letter became part of the loan documentation. The defendants simply provided the downpayment themselves by procuring a cashier's check in the name of the buyer's nominee and a false or forged gift letter. Defendants engaged in numerous transactions in this manner between 1993 and 1998. Several of the buyers defaulted. On foreclosure, HUD assumed repayment of the loans.

The case was tried to a jury, which found the defendants guilty. The defendants were ordered to pay restitution in the full amount of the government's loss and received prison sentences. The appeal concerned a jury instruction on "materiality" and the amount of restitution. The Ninth Circuit affirmed the sentences and the restitution order.

COMMENT: These defendants really got slammed. From reviewing the briefs, I see that they were each sentenced to 18 months in prison as well as ordered to pay fines of $50,000 and restitution of nearly $1.3 million (for the 43 downpayments they had gifted to their buyers). The briefs do not mention how much the downpayments totaled—it was probably around $400,000, if these were each 3 percent and the purchase prices were at $300,000. However, the defendants were not ordered to pay the amounts they had illicitly given away (not illicitly received), but rather the entire loss that the government suffered when the mortgages later went into default (against properties whose values probably also had declined?).

The crimes themselves appear merely to have skirted the law. HUD had been permitting purchasers to receive gifts of downpayments and permitting sellers to pay ipso facto service fees to nonprofit organizations to cover those preceding gifts they had just made to buyers, which makes the offense look like mainly one of misreporting.

Given these considerations, attorneys should certainly make sure that their developer clients do not

forget to cross all of the "t's" and dot all of the "i's" in complying with government regulations.—*Roger Bernhardt*

Mortgages and Deeds of Trust

If interest in deed of trust is inadvertently reconveyed, cause of action is mistake (unjust enrichment) and not breach of contract.

Federal Deposit Ins. Corp. v Dintino (2008) 167 CA4th 333, ___ CR3d ___

In June 1999, Dintino borrowed money from a mortgage company to fund the purchase of a home. He executed a note, which was secured by a deed of trust and recorded with the San Diego County Recorder. Within days, the mortgage company assigned the deed of trust (and presumably the note) to a predecessor of Bank, but the assignment was not recorded until December 9, 1999. In July 1999, Bank transferred all of its interest in the note to WAMU Mortgage Securities Corp. (WAMU). On December 6, pursuant to Bank's erroneous request, T.D. Service Company, successor trustee, executed a full reconveyance of its interest in the deed of trust, which was recorded on December 9, 1999. In August 2000, Dintino sold the property to another by grant deed, but none of the sale proceeds was used to pay the unpaid principal balance of the note. All of the proceeds were paid to Dintino. Dintino failed to pay the September 1, 2000, installment on the note. In October, Dintino informed WAMU of the sale of the property. In May 2003, Bank repurchased the note from WAMU in response to WAMU's demand based on the absence of a first deed of trust and brought an action to recover from Dintino.

Bank was denied summary judgment as to an action on the note, based on the one-action rule, and its unjust enrichment claim was denied summary adjudication because the facts were disputed on damages. Dintino's motion for summary judgment was denied for lack of any affirmative defense to Bank's equitable claims. The defense of unclean hands was not available because Dintino admittedly had not repaid the loan. The trial judge (incorrectly, as it turns out) applied the 4-year statute of limitations applicable to contract actions and denied Dintino's defense on that basis. Further, the trial court found that Bank did not discover the fraud or mistake causing the unjust enrichment until after Dintino failed to make the September 1, 2000, payment. After a bench trial on the briefs, by stipulation, the trial court granted judgment in favor of Bank in the amount of outstanding principal and prejudgment interest as damages for unjust enrichment and denied Dintino's request for attorney fees on the contract action. Dintino appealed.

The court of appeal reversed only as to the denial of attorney fees to Dintino and remanded for a determination of the fees for the contract action only. First, the court of appeal applied the statute of limitations for a cause of action on the ground of mistake (not breach of contract), which "is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." CCP §338(d). Although the mistake occurred in December 1999, the cause of action for mistake did not accrue until Bank had reason to suspect the mistake—when Dintino failed to make the regular September payment of principal and interest before September 15, when a late charge would have applied. Second, the court of appeal reversed the denial of attorney fees. The award of attorney fees is determined only by who prevails on the contract. CC §1717. The trial judge erred in denying fees to Dintino on the basis that Bank's overall objective had been achieved. Bank's recovery of unjust enrichment damages for mistake, for noncontract damages, could not be considered. However, remand was necessary to apportion Dintino's fees and costs between the defense of the contract and noncontract causes of action.

COMMENT: When a client has inadvertently released the deed of trust it held as security for a loan, there is now some obvious advice to give:

1. Don't wait too long to act. The statute of limitations is the 3-year limit for unjust enrichment, rather than the 4-year period for suit on a note. The clock starts running from the date the lender should have realized the mistake. Although that can be later than the date on which the mistake was made (here, reconveying the deed of trust), it could also be deemed to have occurred sooner than the date on which there was actual knowledge of the mistake. In this case, WAMU (apparently) actually learned only on October 24, 2000, when it received Dintino's letter, but the clock had begun ticking against it a month sooner, on September 15, when a late charge could have been imposed. The suit it filed on September 6, 2003, was hardly an example of diligent action.

2. Don't attempt to recover on the note. Even though the note itself may be technically valid (*i.e.,* not having been marked as paid), recovery under it is probably unenforceable due to CCP §726, in light of the fact that the lender has lost the security through its own fault. That converts the attorney fee clause in the note into a sword pointed against the lender if its complaint has been mispleaded. Had the lender relied on an unjust enrichment theory, its recovery of $268,000 of principal and $147,000 of interest would not have been reduced by the $41,000 attorney fee and $7000 in costs that the borrower was able to set off against it because of the misguided cause of action on the note.—*Roger Bernhardt*

Land Use

Administrative Agencies

Absent prejudice, substantial compliance with notice requirements was sufficient for valid action by the California Coastal Commission.

North Pacifica LLC v California Coastal Comm'n (2008) 166 CA4th 1416, 83 CR3d 636

The City of Pacifica granted a coastal development permit to North Pacifica LLC, but a local resident appealed to the California Coastal Commission. The Commission issued a notice of appeal on December 20, 2005, posted the meeting agenda and the staff report on its website on December 30, and mailed an "Important Public Hearing Notice New Appeal" on January 3, 2006, all regarding a January 11, 2006, public hearing on whether a substantial issue existed regarding North Pacifica's permit application. Although North Pacifica claimed the notices were sent to the wrong address, it conceded receiving actual notice on January 5, 2006, six days before the hearing. At the January 11, 2006, hearing, there was no public debate or discussion. The substantial issue was accepted and a de novo hearing on the permit application set for May 2006. However, North Pacifica declined to appear. The Commission noted North Pacifica's objections but found sufficient compliance with notice requirements. North Pacifica's project, however, was found to be inconsistent with the city's Local Coastal Program and required revisions beyond the scope of Commission-imposed conditions. The permit application was denied. North Pacifica made no attempt to redesign its project, choosing instead to proceed with a civil action.

Both the trial court and the court of appeal found the attempt to give notice of the substantial issue hearing sufficient for compliance with the Bagley-Keene Act's notice requirements. In any event, North Pacifica could show no prejudice from what was merely a technical error in notice. The staff recommendation on the substantial issue was accepted without public comment because none of the commissioners requested a hearing. Additional notice would not have affected North Pacifica's ability to address the Commission. Absent prejudice, the actions taken were not invalidated.

North Pacifica also contended that the notice was inadequate under the Commission's own regulations and that the violation nullified the Commission's acts and divested the Commission of jurisdiction. However, the Coastal Act does not provide a nullification remedy for violation of notice requirements; in any event, the notice substantially complied with the requirements. The court of appeal did not reach North Pacifica's other contentions because they all were based on the unsustainable position that the Commission's acts were nullified and the Commission was divested of jurisdiction following a mere technical error in notice that caused no prejudice. Based on the conclusions as to substantial compliance and lack of prejudice, the Commission was authorized to act at the de novo hearing. The trial court's ruling upholding the permit denial was affirmed.

Code Enforcement

Neither FEMA nor Fish and Game Code requirements preempt county grading code.

Martin v Riverside County Dep't of Code Enforcement (2008) 166 CA4th 1406, 83 CR3d 624

John Martin obtained a grant from FEMA to repair a spillway with fill and grading after flood damage. During the course of the repair, the Department of Building and Safety, Code Enforcement Division, issued citations and assessed fines for grading without a permit in violation of a county ordinance. Martin challenged the citations and fines on the ground that emergency repairs did not require a permit, that he had the approval of FEMA and the state Department of Fish and Game, and that the excavation was minimal. The hearing officer ruled that Martin was obligated to comply with county requirements as well as those of FEMA and the Department of Fish and Game. The superior court, after conducting a hearing on the matter as a writ petition and as a de novo appeal of the administrative ruling, ruled in favor of the county and denied the writ petition.

The court of appeal first determined that under Govt C §53069.4, Martin's challenge to the code violation could be heard by limited de novo appeal or by petition for writ of mandate under CCP §§1094.5 and 1094.6 and then addressed the merits of the superior court's denial of Martin's writ petition. The grading ordinance originates from the state housing law, including the Uniform Building Code, which requires counties to adopt minimum building standards, including grading requirements. As an extension of the state housing code, the county grading code is of equal dignity and authority with the Fish and Game Code. In any event, both Fish & G C §1602(a)(1)(E) and FEMA regulations (44 CFR §206.117(b)(2)(v)) require applicants to comply with all applicable local, state, and federal permits. The local code is not preempted. Moreover, there was no emergency because Martin did not repair the spillway for seven months, and the exception for minimum excavation did not apply because Martin was engaged in fill, not excavation. The court of appeal affirmed the judgment of the superior court.

Nuisance

Zoning

Operation of medical marijuana dispensary constitutes nuisance per se because the use is not permitted under zoning regulations.

City of Corona v Naulls (2008) 166 CA4th 418, 83 CR3d 1

In May 2006, Ronald Naulls applied for and obtained a temporary business license for a proposed business activity described as "Misc. Retail." In June, Naulls informed the City Planning Director that the business was a medical marijuana dispensary with a license predating a recently enacted moratorium. The city took the position that the business license was invalid because of Naulls's false application, that the dispensary was not a permitted use under the city's Municipal Code (CMC) and Specific Plan, and that no attempt had been made to establish a "similar use" zoning designation. Naulls was directed to cease and desist. The city sued for an injunction. The city submitted a declaration that the dispensary was not a permitted use in any of the zoning areas in the Specific Plan. Naulls's options were to apply to amend the Specific Plan to include his requested use or to request a "similar use finding," neither of which Naulls had attempted. Naulls argued that he had substantially complied with the business license procedure, there was no requirement that he specify the activity of the business, he should have been "grandfathered in" despite the moratorium, and under the Compassionate Use Act (CUA) and Medical Marijuana Program Act (MMPA), the dispensary could not be a nuisance per se. The trial court granted the preliminary injunction because in the absence of authority otherwise, a nonenumerated use is presumptively prohibited under the CMC. Naulls's business was classified as "commercial retail" for zoning purposes, but the dispensary was not among the uses listed for the applicable Specific Plan. Naulls's failure to disclose the dispensary business prevented the city from implementing its zoning procedures and from making a determination based on the actual activity. The dispensary was a nuisance per se because it was not permitted by law.

The court of appeal affirmed the validity of the preliminary injunction, refraining from consideration of any arguments based on the CUA or MMPA. Under CMC §5.02.040(A), Naulls failed to specify "[t]he exact nature or kind of business" to be conducted. Under CMC §5.02.370(B), the issuance of a business license does not authorize the operation of a business in violation of any provision of the CMC, including the zoning regulations. It was undisputed that the dispensary was opened in a commercial retail zone. It was Naulls's obligation to initiate "similar use" or other proceedings to obtain approval for the dispensary. Moreover, the record supported the trial court's conclusion that a use not expressly permitted is a nonpermitted, nonconforming use. There was substantial evidence that Naulls created a nuisance per se and that issuance of the preliminary injunction was within the trial court's discretion.

Public Trust Doctrine

Claim for violation of public trust may be brought by private party, but must be brought against responsible public agency.

Center for Biological Diversity Inc. v FPL Group Inc. (2008) 166 CA4th 1349, 83 CR3d 588

The Center for Biological Diversity (CBD) brought an action in state court against private windmill operators for destruction of wildlife in violation of state statutes and in violation of the public trust. At about the same time, Californians for Renewable Energy and chapters of the National Audubon Society separately filed superior court actions for writ of mandate. They sought to set aside Alameda County's extension of conditional use permits to the windmill companies based on CEQA and other state and local statutes. CBD's case was transferred to the same department as the CEQA actions. Defendants moved for judgment on the pleadings, which was granted on the ground that there was no private action for violation of the public trust doctrine arising from the destruction of wildlife. CBD appealed. The court of appeal affirmed on a different ground—that the proper manner in which to enforce the public trust doctrine is by petition for writ of mandate or other action for relief against the responsible public agency or agencies. (The CEQA actions were settled by agreement to more stringent conditions on the extended permits.)

Although the public trust doctrine evolved from public rights to tidelands and navigable waters, the doctrine is not so limited. The public trust doctrine reflects the state's mandate and duty to protect the public's interest in natural resources. The doctrine covers the protection of wild birds, such as those injured by the windmills. Moreover, the public interest in the protection of wildlife is now recognized in both federal and state statutes. See, *e.g.*, Fish & G C §§711.7(a), 1600, and 1801 and 16 USC §§668 and 703. The California Supreme Court has often repeated that "any member of the general public has standing to raise a claim of harm to the public trust." *National Audubon Soc'y v Superior Court* (1983) 33 C3d 419, 431 n11, 189 CR 346. Although the interests covered by the public trust doctrine are protected by public agencies, the public retains the right to enforce the trust if the public agencies fail to perform their duty.

CBD erred by suing private parties who were complying with the public agency's permitting procedure. The public trust doctrine places the duty of protecting the public trust on the state. If the state fails to perform its

duty, the public may seek to compel performance. However, neither the public nor the court may seek to assume the state's responsibility. Even if there were a private right of action against the windmill operators, the court appropriately would abstain in deference to the regulatory oversight of the agency. In extending the conditional use permits, Alameda County, a subdivision of the state, was, in effect, discharging its responsibility to administer the public trust. If dissatisfied with the county's performance, CBD's remedy was to challenge it by writ of administrative mandate, not to attempt to engage the courts in superseding the agency's regulatory role.

Takings

Storm pipe size requirement was neither monetary exaction nor unconstitutional taking, but example of land-use regulation promoting general welfare.

McClung v City of Sumner (9th Cir, Sept. 25, 2008, No. 07–35231) 2008 US App Lexis 20314

After several years of flooding in 1990–1992, the City of Sumner adopted Ordinance 1603, which required most new development to provide for storm pipes with a minimum 12-inch diameter. Ordinance 1603 also announced the city's plans to replace certain storm pipes with larger ones and to increase the stormwater general facility charge to property owners. In 1995, Daniel and Andrea McClung learned that the property they planned to develop would require a minimum 12-inch storm pipe. The City Engineer offered to waive certain development fees if the McClungs installed a 24-inch storm pipe to meet the city's plans for that area. The City Engineer wrote: "If you find this acceptable, please proceed with the revisions to the plans." The McClungs did revise their development plan, which was approved in April 1996, and subsequently installed a 24-inch storm pipe. In 1998, the McClungs sued in Washington state court asserting state law violations and, after several years of litigation, filed an amended complaint alleging that the requirement to update the storm pipe was a taking in violation of the Fifth Amendment. The city removed the case to the United States District Court, Western District of Washington, and the parties brought cross-motions for summary judgment. The district court held there had been no unconstitutional taking with respect to the 12-inch pipe requirement based on the ad hoc standards of *Penn Cent. Transp. Co. v City of New York* (1978) 438 US 104, 108, 57 L Ed 2d 631, 638, 98 S Ct 2646, and that the 24-inch pipe was installed under contract in exchange for the waiver of various fees. The McClungs appealed.

The Ninth Circuit framed the issue as a matter of first impression: whether a legislative, generally applicable development condition that does not require the owner to relinquish rights in the property, as opposed to an adjudicative land-use exaction, should be reviewed under the nexus and proportionality standards of *Nollan v California Coastal Comm'n* (1987) 483 US 825, 97 L Ed 2d 677, 107 S Ct 3141, and *Dolan v City of Tigard* (1994) 512 US 374, 129 L Ed 2d 304, 114 S Ct 2309, or by the ad hoc standards of *Penn Cent*. Noting that the facts of *Nollan* and *Dolan* involved individual adjudicative determinations that conditioned permit approval on granting property rights to the public, the Ninth Circuit found the generally applicable storm pipe requirements to be subject to review under the ad hoc standards of *Penn Cent*. Ordinance 1603 was not an individual monetary exaction but an across-the-board requirement for new developments. In addition, the McClungs were not compelled to install the 24-inch pipe, but voluntarily contracted with the city to do so in exchange for the waiver of otherwise applicable fees. The Ninth Circuit affirmed the judgment of the district court.

Sales

Housing Discrimination

Prospective home buyer failed to establish prima facie case of discrimination by listing agents because she failed to meet seller's terms.

McDonald v Coldwell Banker (9th Cir 2008) 543 F3d 498

Pamela McDonald sued real estate listing agents for housing discrimination on the basis of race and disability under the Fair Employment and Housing Act (FEHA), the Unruh Act, and the federal Fair Housing Act (FHA). McDonald's real estate agent sued the listing agents under Bus & P C §17200 for the commission on the lost sale. The district court granted summary judgment and the Ninth Circuit affirmed.

In August 2002, McDonald, an African American, was looking for a house to buy in the Shasta/Redding. Her real estate agent, Kanya Coleman, also African American, contacted First Shasta Real Estate, a franchisee of Coldwell Banker Real Estate. After its agent, Tom Gallagher, who is Caucasian, talked with Coleman on the phone, the three of them met to look at listings. McDonald was qualified for a real estate loan of up to $162,000, subject to appraisal, had available cash of $20,000 and a monthly income of about $3000. McDonald and Coleman believed that Gallagher was less enthusiastic than he had been over the phone. After looking at several listings, Gallagher offered to show them additional properties that might be more "suitable," but which were less upscale. McDonald was interested in 2075 Galaxy Way, which had been on the market for over six weeks at a price of $139,000. McDonald tendered a

$1000 good faith deposit. While the offer was being prepared by Coleman, Gallagher noted McDonald's use of a cane and inquired about her disability and where she lived. Coleman informed Gallagher and his broker, Richard Mattioli, that McDonald needed to finance 100 percent of the purchase price, but was willing to offer more than the asking price. McDonald offered $153,389, of which $138,501 would be paid in cash (funded by a preapproved loan and the deposit), with $15,389 carried by the seller, who would also provide buyer a $4500 credit at closing. Gallagher and Mattioli discussed the offer with David Woodfill, the seller's agent, who said that the seller wanted all cash and was not interested in carrying paper. Gallagher and Mattioli did not think a carryback was necessary in the market; Woodfill and the seller were concerned that the offer would not close because they doubted the property would appraise at 10 percent over the listing price. Woodfill told Gallagher and Mattioli that the offer was not acceptable and they did not present it. Nevertheless, Coleman submitted the offer, without modification, to Woodfill. A few days later, the seller accepted another offer, with no carryback and no refund of closing costs, from a Caucasian buyer.

McDonald filed claims against Gallagher, Mattioli, First Shasta, and Coldwell Banker (listing agents), but not against the seller or his agent, with the DFEH, which found no evidence of discrimination and determined that there was no reasonable cause to believe discrimination had occurred. HUD adopted the DFEH decision and notified McDonald of her right to sue.

The Ninth Circuit agreed with the district court that McDonald and Coleman failed to present a prima facie case of discrimination based on race or disability under the FEHA because they did not attempt to meet the seller's terms. McDonald could not be considered "qualified," nor was she "similarly situated" to the eventual buyer for purposes of a prima facie case. Moreover, neither McDonald nor Coleman presented evidence of disparagement, disparate treatment, or discriminatory motive. Under the FHA, the standard of proof and analysis are the same and that claim likewise failed to establish a prima facie case. The Unruh Act claim also failed for lack of any evidence of discrimination. Similarly, Coleman's claim under §17200 for unlawful, unfair, or fraudulent business practices was based on alleged discrimination, for which no substantial evidence was shown. Finally, Coldwell Banker could not be held vicariously liable because no illegal conduct had been shown.

Shared Use and Ownership

Common Interest Developments

Amendment to CC&Rs imposing 30-day minimum term on leases was reasonable; requirements for reduction in percentage of affirmative votes for amendment were satisfied.

Mission Shores Ass'n v Pheil (2008) 166 CA4th 789, 83 CR3d 108

In 2004, when David Pheil and his wife purchased a vacation home in the Mission Shores development, the CC&Rs permitted owners to rent their homes provided the rentals were to a single family, subject to a written agreement, and subject to the CC&Rs. The developer's agent represented that they could rent their home with no other restrictions. Occasionally, Pheil did rent the home to others. In May 2005, the board of directors for the Mission Shores Association, having become concerned about some of the homeowner rentals, voted unanimously to adopt a proposed rule: "No short-term rentals or leases of less than 30 days are allowed." Pheil challenged the rule. After an unsuccessful mediation in July 2006, Pheil, through his attorney, formally demanded internal dispute resolution. The board then put an amendment to the CC&Rs with the same effect to a vote in November 2006. To pass, the amendment needed the affirmative vote of 67 percent of each of the two classes of association members. The developer was entitled to 3 class B votes for each of 11 unsold homes of the 168 homes in the development. Although the developer cast its votes 100 percent for the amendment, the homeowner class gave the amendment only 59 percent of its votes. Thirty-six homeowners did not return ballots. As a result, the amendment failed.

The Association, through the board of directors, petitioned the trial court in March 2007 to reduce the percentage of votes needed for an amendment and to approve the amendment based on the November 2006 election, under CC §1356. Pheil unsuccessfully opposed the petition and then appealed the trial court's decision.

Pheil's burden was to show that granting the petition was an abuse of discretion. He contended that the amendment was not reasonable because the developer that controlled the Board was acting for its own self-interest, not the interest of the homeowners; this was not a case of homeowner apathy or stalemate; and the board was not representative of homeowners. The Association supported the amendment as necessary to prevent the property from becoming a hotel in a residential district. On the record, the court of appeal found that the amendment was not arbitrary or capricious, violative of law or public policy, or an unfair burden on property. As required by CC

§1356(c), notice of the court hearing was properly given, balloting on the proposed amendment was conducted in accordance with the governing documents, efforts to obtain votes were reasonably diligent, more than 50 percent of each class of voters was in favor of the amendment, and the amendment was reasonable. Moreover, the amendment would not eliminate any special rights in the CC&Rs or impair the security interest of any mortgagee or beneficiary of a deed of trust. In sum, the court of appeal concluded that the trial court did not abuse its discretion in granting the petition.

Covenants and Servitudes

Declaration of CC&Rs does not constitute contract for purpose of waiving right to jury trial against developer.

Treo @ Kettner Homeowners Ass'n v Superior Court (Intergulf Constr. Corp.) (2008) 166 CA4th 1055, 83 CR3d 318

The Treo at Kettner Homeowners Association (Association) brought a construction defect action against Intergulf Construction Corporation (Intergulf), the developer of the condominium project. Intergulf moved for an Order of General Reference under CCP §638 and Article 17 of the Association's CC&Rs, which provided for general judicial reference if other methods of dispute resolution were unsuccessful. The Association opposed the motion, arguing that the CC&Rs, which were drafted by Intergulf before any purchase agreements were signed and before an independent board of directors was formed, were not a contractual waiver of the right to jury trial as required by §638. The Association also argued that Intergulf had retained no enforcement rights under the CC&Rs; that claims were alleged against other entities not subject to the CC&Rs; and that the reference provision was substantively and procedurally unconscionable and therefore unenforceable.

After the trial court rejected these arguments and granted Intergulf's motion, the Association petitioned for a writ of mandate. The court of appeal issued an order to show cause and a stay. By this decision, the court of appeal issued a peremptory writ of mandate directing the superior court to vacate the order granting general reference and to enter an order denying Intergulf's motion. The court of appeal vacated the stay and awarded costs to the Association.

The court of appeal discussed the language of §638, the nature and creation of the CC&Rs, and the quality of CC&Rs as equitable servitudes under CC §1354, by way of background to the guidance supplied by *Grafton Partners v Superior Court* (2005) 36 C4th 944, 32 CR3d 5, and *Villa Milano Homeowners Ass'n v Il Davorge* (2000) 84 CA4th 819, 102 CR2d 1. In *Grafton*, the California Supreme Court ruled that the right to jury trial is so fundamental that it cannot be waived predispute, except as prescribed by the legislature. Moreover, any ambiguity in the statute or doubts interpreting the waiver must be resolved in favor of a litigant's right to jury trial. In *Villa Milano*, the court of appeal held that while in the abstract an arbitration clause might be a sufficient agreement to require a construction defect claim to be submitted to arbitration, the arbitration clause in the CC&Rs before it was unconscionable and unenforceable.

The *Treo* court of appeal agreed with the *Villa Milano* court that CC&Rs reasonably may be construed as a contract when the issue involved is the management or day-to-day governance of the association or its relationship with owners or controversies between owners. However, CC&Rs do not suffice as a contract for purposes of the waiver of the right to jury trial under §638. In providing for a contractual waiver of the right to jury trial, the legislature was concerned with the process and mutuality of agreement. Purchasers and their successors in a condominium project have no effective choice but to accept the CC&Rs as prepared by the developer. Treating CC&Rs as a contract sufficient to waive the right to a jury trial does not comport with the importance of that right. CC&Rs are at best contracts of adhesion. Treating them as equitable servitudes makes common interest communities possible by providing for continuity of governance. However, a developer-written waiver of the right to jury trial in disputes between the developer and the owners or their association is not the written contract that the legislature contemplated under §638. Having concluded that the trial court erred, the court of appeal did not address the Association's other arguments.

Homeowners and Common Interest Community Associations

There is no inconsistency between verdict against homeowners association and special findings in favor of individual directors.

Ritter & Ritter, Inc. v Churchill Condominium Ass'n (2008) 166 CA4th 103, 82 CR3d 389

The Churchill, built in 1960 as a 13-story, 110-unit apartment complex, was converted into condominiums in 1976. The building was built with "slab penetrations" for plumbing and other pipes that, according to the plans, should have been fireproofed but were not. Nevertheless, the Churchill passed inspection. Under the current building code, the unfilled floor penetrations were allowed as an existing, nonconforming condition. Over 30 years later, the Ritters in 1998, and their tenant in 2003, complained of cigarette smoke odor. Repeated demands for repair, investigation by engineers and ventilation system experts, discovery that the slab penetrations were the path for cigarette odors infiltrating the units and a fire hazard, and a hearing before the Board of The Churchill

culminated in litigation. The Ritters sued The Churchill and each of its directors, individually, in several causes of action over the duty, if any, of The Churchill to repair and fireproof the slab penetrations. The Churchill cross-claimed to require the Ritters to fix the penetrations adjacent to their units and for daily fines imposed at the Board hearing. The jury trial and posttrial proceedings resulted in a judgment requiring The Churchill and its directors to firestop and seal the penetrations adjacent to the Ritters' units and to give written notice, hold an informational meeting, and obtain input from other owners on what to do about the fire safety hazard, at The Churchill's expense. (The directors, individually, had been found not liable by the jury.) The Churchill complied and, by a vote of 78 to 3, the homeowners decided not to incur the cost of filling the slab penetrations. Both The Churchill and its directors appealed.

The court of appeal first summarized principles applicable to a condominium project as a common interest development managed by a nonprofit homeowners association under the governing documents of the association. Regarding duty of care, the association has a duty to maintain and control its property in a reasonably safe condition, to comply with statutory and administrative standards, and to exercise due care for residents' safety in the areas under its control. An association may be liable to an individual member for negligence, for other torts, or for breach of contract by failure to comply with safety provisions in its governing documents. Individual directors are jointly liable with the association and may be joined as defendants if personally involved in the alleged tort or breach. However, a greater degree of fault is required to find an individual director liable for an action on behalf of the association. In *Lamden v La Jolla Shores Clubdominium Homeowner's Ass'n* (1992) 21 C4th 249, 87 CR2d 237, the California Supreme Court adopted a rule of judicial deference, analogous to the business judgment rule, as to the ordinary managerial decisions of directors acting within the scope of their authority. See Corp C §7231. The presumption that a director's decision is based on sound business judgment is rebuttable only by a showing of fraud, bad faith, or gross overreaching.

Here, the evidence in the record of the deviation from building plans, current building requirements, and fire hazard were substantial evidence to support the jury findings and the injunctive relief ordered by the trial court. The naming of the directors in the court's order was not inconsistent with the finding that they were not liable; it merely reflected that the association only acts through its board of directors. The Churchill and its directors also appealed the more than $500,000 in attorney fees awarded to the Ritters and the denial of over $775,000 in The Churchill's defense fees. The court of appeal concluded that the Ritters prevailed on their equitable claims, were awarded some monetary damages, and defeated the cross-complaint. The Ritters were the prevailing parties. The trial court's decision on attorney fees is an exercise of judicial discretion that will not be overturned absent a clear showing of abuse, which was not apparent in this case.

Public Use and Necessity

State and local governments are prohibited from acquiring owner-occupied residences by eminent domain for conveyance to a private person.

Proposition 99, the Homeowners and Private Property Protection Act

Amends Cal Const art I, §19.

Proposition 99 was approved by the voters on June 3, 2008. It amends the California Constitution in response to the decision of the United States Supreme Court in *Kelo v City of New London* (2005) 546 US 807, 163 L Ed 2d 40, 126 S Ct 326, and the November 2006 rejection by the voters of Proposition 90, which contained measures unrelated to eminent domain. Article I, §19 of the California Constitution provides that private property may be taken for public use only when just compensation is paid. Proposition 99 adds a prohibition against acquiring an owner-occupied residence by eminent domain in order to convey it to a private person. The prohibition does not apply when eminent domain is exercised to protect public health and safety, prevent serious repeated criminal activity, respond to an emergency, remedy environmental contamination that threatens public health and safety, or for the purpose of a public work or improvement.

Architects and Engineers

Establishes program for certification of disability access inspectors; sets educational requirements for inspectors, architects, and engineers; provides for early evaluation of construction-related accessibility claims; and for damages, requires plaintiff to have been denied access on particular occasion.

Stats 2008, ch 549 (SB 1608—Corbett)

Amends Bus & P C §5600; adds CC §§55.3 and 55.51–55.57; amends Govt C §§4450 and 4459.5; adds Govt C §§8299–8299.11; and amends Health & S C §18949.

Revising several aspects of the state law relating to disability access, this law:

- Makes completion of specified coursework regarding disability access requirements a condition of license renewal for architects;
- Provides for a new Judicial Council form for a specified written advisory to a building owner or tenant regarding claims for construction-related accessibility claims;

- Regarding existing law providing a program for voluntary certification of access specialists, enacts the Construction-Related Accessibility Standards Compliance Act to provide for site inspections by certified access specialists, employment by local agencies of building inspectors who are certified access specialists, inspection fees, continuing education requirements for construction inspectors and plan examiners, early evaluation procedures for construction-related accessibility claims in court, and restriction of damages recoverable in a construction-related accessibility claim against a place of public accommodation to violations that denied the plaintiff full and equal access on a particular occasion; and
- Establishes the California Commission on Disability Access, including a funding appropriation.

Building Standards

California Building Standards Commission authorized to develop green standards for types of occupancy not within the jurisdiction of another state agency.

Stats 2008, ch 719 (SB 1473—Calderon)

Adds Health & S C §§18930.5, 18931.6, 18931.7, and 18938.3.

Under the existing California Building Standards Law, state agencies submit proposed building standards to the California Building Standards Commission for approval or adoption. This law requires the California Building Standards Commission to adopt, approve, codify, update, and publish "green" building standards for any type of occupancy not within the authority or expertise of another state agency. The law requires local governments to collect a specified fee to be deposited in the Building Standards Administration Special Revolving Fund in the State Treasury. Local governments are authorized to retain 10 percent of the fees for administrative costs and code enforcement education, including the voluntary construction inspector certification program. On appropriation, the funds deposited in the Special Revolving Fund are available to the Commission for carrying out existing law, with emphasis on the development, adoption, publication, updating, and educational efforts associated with green building standards.

Construction and Construction Contracts

Requirements for education about and collection, recycling, and disposal of mercury-added thermostats.

Stats 2008, ch 572 (AB 2347—Ruskin)

Adds Health & S C §§25214.8.10–25214.8.20.

The Mercury Thermostat Collection Act of 2008 requires a manufacturer that owns or owned a name brand of mercury-added thermostat sold in California before January 1, 2008, to establish and maintain a collection, transportation, recycling, and disposal program for out-of-service mercury-added thermostats. There are requirements for the program, including education and outreach efforts and annual reporting. Wholesalers with a physical location in the state are required to act as a collection location. Distributors by mail to buyers in the state are required to provide an Internet website address, toll-free telephone number, and instructions for a prepaid mail label with a new thermostat.

In addition, a contractor who installs heating, ventilation, and air-conditioning components and who removes an out-of-service mercury-added thermostat is required to handle and dispose of it in accordance with hazardous waste control laws and regulations. Before demolishing a building, the mercury-added thermostats must be removed from it in the same manner. The Department of Toxic Substances Control is required to adopt regulations establishing performance requirements for the collection and recycling programs by January 1, 2012. A violation of the statute constitutes a crime.

Contractors

Penalties for violating the contractors licensing law apply to contractor named on a revoked license and who is responsible for the revocation.

Stats 2008, ch 33 (SB 797—Ridley-Thomas)Urgency legislation, effective June 23, 2008.

Amends, adds, and repeals many sections of the Business and Professions Code and Government Code (too numerous to detail).

Under existing law, it is a misdemeanor to engage in the business or act in the capacity of a contractor without a license. There are specified fines and imprisonment for violation of the licensing law. This law also applies the specified penalties to a person violating the licensing law who is named on a revoked license and held responsible for the act or omission resulting in the revocation.

Public Works

Threshold expenditure amount for requiring original contractor on public works contract to file payment bond raised from $5000 to $25,000.

Stats 2008, ch 79 (AB 3024—Duvall)

Amends Pub Cont C §7103.

Under existing law, an original contractor awarded a public works contract involving an expenditure in excess of $5000 is required to file a payment bond. The amendment increases the threshold expenditure for this purpose to an amount in excess of $25,000.

Exclusion of work by volunteers or members of California or Community Conservation Corps from prevailing wage requirements extended until January 1, 2012.

Stats 2008, ch 678 (AB 2537—Furutani)

Amends Lab C §1720.4.

This law extends the exclusion from prevailing wage requirements of work by volunteers, their coordinators, or members of California or Community Conservation Corps on public works projects until January 1, 2012. The law also requires the Director of Industrial Relations to submit to the legislature by January 1, 2011, a written report regarding volunteers on public works projects. The cost of the report will be funded by the Environmental License Plate Fund.

Construction Defects

Indemnity and Contribution

Certain agreements entered into after January 1, 2009, by a subcontractor to indemnify others for claims arising from their own negligence, defective design, or other property injury or for claims unrelated to the scope of work are declared void and unenforceable. Provisions relating to contracts entered into after January 1, 2008, are deleted. Provisions relating to contracts after January 1, 2006, are modified. Provisions for the tender and defense of claims and for equitable indemnity are established. Disclosure requirements are imposed on wrap-up insurance policies and programs applicable to residential works of improvement, public works, and other nonresidential construction.

Stats 2008, ch 467 (AB 2738—Jones)

Amends CC §2782 and adds CC §§2782.9, 2782.95 and 2782.96.

Existing law provides that, as to residential construction contracts entered into after January 1, 2008, agreements by a subcontractor that purport to indemnify the general contractor or contractor not affiliated with the builder against liability for claims of construction defects, other property injury, or defects in design arising from the negligence of the general contractor, nonaffiliated contractor, or their agents, or for claims unrelated to the scope of work in the agreement, are unenforceable. A similar provision applies to residential construction contracts by a subcontractor that purport to indemnify the builder against liability for construction defect claims. The law deletes the provisions applying to contracts after January 1, 2008. The law revises the provisions applicable to contracts entered into after 2006 by including the general contractor or contractor not affiliated with the builder as well. The law also provides procedures relating to the tender of claims by a builder or contractor to a subcontractor and entitlement of the subcontractor either to defend the claim or to pay a reasonable allocated share of the fees of the builder or general contractor. The law also provides for equitable indemnity claims for construction defect.

Existing law defines a wrap-up insurance policy. This law imposes specific requirements on wrap-up insurance policies or other consolidated insurance programs for private residential works of improvement that begin after January 1, 2009. The law imposes disclosure requirements with respect to credit or compensation for premiums required from a subcontractor or other participant, as well as other specific information regarding the policy. Similar disclosure requirements are made applicable to wrap-up or other consolidated insurance programs for a public work or nonresidential construction put out for bid after January 1, 2009.

Construction Loan Insurance

Increases maximum amount of loan insurable up to 95 percent of total construction cost to $10 million, under loan insurance program of the California Health Facility Construction Loan Insurance Law.

Stats 2008, ch 204 (SB 1272—Cox)

Amends Health & S C §129050.

The existing California Health Facility Construction Loan Insurance Law provides an insurance program for loans to local governments or nonprofit corporations for health facility construction, improvement, and expansion. Loans made under the program in the amount of $5 million or less may be insured for up to 95 percent of total construction cost. Otherwise, the principal obligation of the loan must not exceed 90 percent of the total construction cost. This chapter increases to $10 million the maximum amount of a loan under the program that is insurable to 95 percent of total construction cost.

CEQA

Housing

Zoning

Program established for achieving greenhouse gas emission reductions through sustainable communities or other strategies, for enforcing statutory requirements addressing housing needs, and providing incentives for transit priority projects.

Stats 2008, ch 728 (SB 375—Steinberg)

Amends Govt C §§65080, 65400, 65583, 65584.01, 65584.02, 65584.04, 6558, and 65588; adds Govt C §§14522.1, 14522.2, and 65080.01; amends Pub Res C §21061.3; and adds Pub Res C §§21159.28 and 21155–21155.3.

This law requires the California Transportation Commission to maintain guidelines for travel demand models used in the development of regional transportation plans by metropolitan planning organizations. Each regional transportation plan is required to adopt a sustainable communities strategy designed to achieve goals for reduction in greenhouse gas emissions from

automobiles and light trucks. By September 30, 2010, the State Air Resources Board is required to set greenhouse gas emission reduction targets for 2020 and 2035. A Regional Targets Advisory Committee is to be appointed by the State Air Resources Board to recommend factors and methodologies for setting the targets and to update the targets every 8 years. If the sustainable communities strategy is unable to meet the greenhouse gas emission reduction targets, then the affected metropolitan planning organization is required to prepare an alternative planning strategy to achieve the targets. The sustainable communities or alternative strategies are deemed not to regulate the use of land and are not subject to state approval. Local land-use policies are not required to be consistent with the regional transportation plan.

The Planning and Zoning Law requires each local government to prepare and adopt a general plan containing certain mandatory elements. Under existing law, the housing element contains a 5-year schedule of actions to implement the goals of the housing element. This law requires the schedule to include a timetable for implementation, including the rezoning needed to meet housing needs within specified time periods. Under certain conditions, a local government that fails to rezone as required is prohibited from disapproving a housing development project or taking actions that would make the project infeasible. In addition, the project applicant or any interested person could bring a lawsuit to enforce the statute. The court is authorized to compel compliance from a local government and to impose sanctions for not complying with the court order. This law extends the time period for reviewing and revising the housing element to every 8 years for local governments with a metropolitan planning organization, depending on the circumstances.

This law also affects matters concerning the California Environmental Quality Act (CEQA). A transit priority project that meets certain requirements and is declared by the local legislative body to be a sustainable communities project is exempt from CEQA. The environmental documents for certain other residential projects would be exempt from requirements for information on growth-inducing impacts or impacts from vehicle trips. In addition, the local legislative body is authorized to adopt traffic mitigation measures for transit priority projects that would exempt a transit priority project from compliance with additional traffic mitigation measures.

Environment

Extension of deadlines and duration of pilot program on surface transportation project delivery.

Stats 2008, ch 248 (AB 2650—Carter)

Amends Str & H C §820.1.

Under existing law, California is participating in the U.S. Secretary of Transportation's pilot program on surface transportation project delivery, with respect to the environmental review process under the Environmental Policy Act. California has consented to federal court jurisdiction regarding responsibilities assumed under the pilot program and has agreed to submit reports to the legislature relating to the program. This chapter adds an assessment of overall project delivery time as an element of the reports, extends the due dates for the reports to January 1, 2009, and January 1, 2011, and extends operation of the pilot program until January 1, 2012.

Exactions and Fees

Local agency may defer collection of development fees until close of escrow.

Stats 2008, ch 246 (AB 2604—Torrico)

Amends Govt C §66007.

In general, existing law forbids the imposition of any fees or charges on a residential development for construction of public improvements before the date of the final inspection or the date of issuance of the certificate of occupancy. If the fee is not paid before issuance of the building permit, the local agency may require a contract for payment at the specified time. This chapter allows the local agency to defer collection of one or more fees up to the close of escrow.

Authorizes impact fees proportionate to lower rate of estimated automobile trip generation for housing development when specified characteristics satisfied.

Stats 2008, ch 692 (AB 3005—Jones)

Amends Govt C §65460.1 and adds, repeals, and adds Govt C §66005.1.

If a proposed housing development satisfies specified criteria, this law requires the local agency, when imposing a vehicular impact fee, to set the fee to reflect a lower rate of automobile trip generation. Until January 1, 2011, areas having a capital improvement plan supported by traffic mitigation fees would be exempt from this provision. If the housing development does not have the specified characteristics, then the local agency is authorized to require an impact fee proportionate to the estimated rate of automobile trip generation for housing developments.

Subdivisions and Subdivision Maps

Qualified exemption from the Subdivision Map Act granted for land used for solar energy devices; authority to award attorney fees in actions regarding adequate satisfaction of local government share of regional housing need repealed; and time period for installment payment of sewer connection fees extended to 30 years.

Stats 2008, ch 709 (SB 1124—Committee on Local Government)

Amends Health & S C §5474 and Govt C §§66412 and 65863.

The Local Government Omnibus Act of 2008 (the Act) has three sections of interest to real property lawyers. Section 13 of the Act amends Govt C §66412, exempting from the requirements of the Subdivision Map Act the leasing of or granting of an easement to real property in connection with the financing, construction, and sale or lease of a solar electrical generation device, provided that the project is subject to review under local agency ordinances regulating design and improvement or is subject to discretionary action by the advisory agency or legislative body.

Section 12.5 of the Act amends Govt C §65863 concerning the housing element inventory or program. The amendment repeals prior authorization for courts to award attorney fees to a successful plaintiff in an action against the local government for the failure of the housing element inventory or program to make sufficient sites available for its share of the regional housing need during the planning period.

Section 15 of the Act amends Health & S C §5474 to extend from 15 years to 30 years the period of time for installment payments of the fee for connecting to sanitation or sewage facilities.

Supportive housing development funded by Multifamily Housing Program may be restricted to persons with veteran status under certain circumstances.

Stats 2008, ch 618 (SB 1220—Cedillo)

Amends Health & S C §50675.1.

Existing law established the Multifamily Housing Program with a standardized set of program rules and features based on the California Housing Rehabilitation Program. This law authorizes a sponsor of a supportive housing development, funded by the Multifamily Housing Program, to restrict a project to persons with veteran status in certain circumstances.

Mobilehomes and Mobilehome Parks

Provisions for adjusting allocation of regional housing needs, regarding appropriations in the Emergency Housing and Assistance Program, and regarding alterations to mobilehomes, manufactured homes, and multifamily manufactured homes.

Stats 2008, ch 664 (AB 2016—Committee on Housing and Community Development)

Amends Govt C §§65400, 65583, 65583.2, 65584.04, 65584.05, 65588, 66427.1, 66452.21; amends and renumbers Govt C §§66452.8 and 66452.9; adds Govt C §§66452.19 and 66452.20; repeals Govt §§66452.14 and 66452.15; and amends Health & S C §§18029, 18031.7, 18897, 18897.2, 18897.4, 18897.6, 18897.7 50675.14, and 50802.

Under existing law, local governments adopt a general plan, including a housing element, identifying the housing needs of all economic segments of the community. In the final allocation plan of the council of governments or delegate subregion, allocations are adjusted based on an appeals process. This law would require the council of governments or delegate subregion to adjust allocations of regional housing needs based on a specified revision request process.

Existing law provides for the appropriation of money for operating facilities and capital development programs from the Emergency Housing and Assistance Fund to the Department of Housing and Community Development in the Budget Act of 2007. This law would include such provisions in the Emergency Housing and Assistance Program.

The Department of Housing and Community Development enforces various laws concerning the structural, fire safety, plumbing, heating, and electrical systems and equipment of a manufactured home, mobilehome, and certain vehicles. This law adds multifamily manufactured homes to the coverage of these provisions. This law provides that persons who fail to apply for a required permit to alter or convert such systems are subject to double application fees or, for subsequent failures within 5 years, 10 times the application fee. The law also allows the replacement of certain heating appliances in manufactured homes, mobilehomes, or multifamily manufactured homes with certain fuel-gas appliances.

Planning and Land Use

Additional procedures and requirements established relating to density bonuses and other incentives or concessions for the production of low-income housing.

Stats 2008, ch 454 (AB 2280—Saldana)

Amends Govt C §65915.

The Planning and Zoning Law requires a local jurisdiction to provide a developer with a density bonus and other incentives or concessions for the production of lower income housing units or the donation of land within the development, if the developer, among other things, agrees to construct a specified percentage of units for low-, very low, or moderate-income households or qualifying residents. The amendment imposes certain procedures on applications for a density bonus; requires granting the incentive or concession requested under existing law unless the local government makes a written finding supported by substantial evidence that the incentive or concession would be contrary to state or federal law; requires that if the condition for granting the density bonus is a land donation, the local agency must identify a source of funding for the very low income units; and deletes the requirement that the applicant for a waiver or reduction of development standards make a showing that waiver or modification is necessary to make the proposed housing units economically feasible.

Persons subdividing property within one mile of farm or ranch land must include that fact in notice of intention to sell subdivided lands filed with Department of Real Estate.

Stats 2008, ch 686 (AB 2881—Wolk)

Amends Bus & P C §11010 and CC §1103.4.

Existing law requires persons intending to sell subdivided lands to file with the Department of Real Estate a notice of intention that includes a statement of things, such as an airport, that may affect the use of the property. A violation of this requirement is a crime. This law requires that the notice of intention include a specified notice for any property within one mile of farm or ranch land, as specified. Existing law limits the disclosure liability of transferors who obtain an expert report regarding specified natural hazards. This law requires a determination whether the property is within one mile of farm or ranch land to be included in the expert report.

Administrative Agencies

Name of Resources Agency changed to Natural Resources Agency.

Stats 2008, ch 205 (SB 1464—Maldonado)

Amends Govt C §12800; adds Govt C §12802; and repeals and adds Govt C §12805.

Existing law establishes a Resources Agency in state government and specifies the entities within that agency. This chapter changes the name of the Resources Agency to Natural Resources Agency and makes related changes.

Foreclosures

Additional foreclosure procedures applicable to residential mortgage loans made from January 1, 2003, until December 31, 2007, for owner-occupied residences.

Stats 2008, ch 69 (SB 1137—Perata)Urgency legislation, effective July 8, 2008.

Adds and repeals CC §§2923.5, 2923.5, 2923.6, 2924.8 and 2929.3 and adds and repeals CCP §1161b.

This law imposes additional foreclosure procedures on home mortgage loans made between January 1, 2003, and December 31, 2007, for owner-occupied residences, until January 1, 2013. The mortgagee, trustee, beneficiary, or authorized agent must wait 30 days after contacting the borrower or satisfying due diligence requirements, as specified, before filing a notice of default. The purpose of the contact is to explore options to avoid foreclosure. If requested, a second meeting must be held within 14 days. In addition, the borrower must be provided with specified information. The foreclosing party must include a specified declaration of compliance with the contact and due diligence requirements, within the notice of default.

In addition, until January 1, 2013, the law requires the legal owner to maintain vacant residential property acquired through foreclosure and authorizes government entities to impose civil fines and penalties for a failure to maintain, after a minimum 14-day opportunity to correct the violation. Until January 1, 2013, tenants or subtenants of a rental housing unit at the time the building is sold in foreclosure shall be given 60 days to quit the property.

As urgency legislation, this law took effect immediately on the Governor's approval on July 8, 2008.

Fire Hazard Zones

Additional criteria for designation as a very high fire hazard severity zone, including requirements for owners to maintain defensible space within a prescribed distance from structures.

Stats 2008, ch 366 (SB 1595—Kehoe)

Amends Govt C §§51175, 51178, 51182, 51183 and 51189; amends Pub Res C §§4202 and 4291.

This law adds to the criteria for the designation of an area as a "very high fire hazard severity zone" by the Director of Forestry and Fire Protection. The law also changes the prior brush clearance requirements. The owner or person in control of a qualified property is now required to maintain a defensible space within a specified distance from any structure so as to significantly reduce the risk of ignition of a habitable structure. The Department is required to develop and maintain on its website a guidance document on fuels management.

Provisions governing transfers of regional housing needs allocations revised.

Stats 2008, ch 11 (AB 242—Blakeslee)

Amends Govt C §65584.07.

The Planning and Zoning Law requires local governments to adopt comprehensive general plans that include a housing element. Existing law authorizes a city or county to transfer a portion of its share of the regional housing needs to another city or county and establishes procedures to revise the housing elements and to reallocate fulfillment of housing needs by mutually acceptable agreement. The chapter revises the procedures for the adoption, amendment, and fulfillment of the housing element, particularly when a city is newly incorporated or land is annexed.

LAFCOs

Committees supporting or opposing LAFCO measures must file campaign statements under the Political Reform Act of 1974.

Stats 2008, ch 192 (AB 1998—Silva)

Amends the Political Reform Act of 1974 and adds Govt C §§82035.5 and 84250–84252.

Existing law provides for a local agency formation commission (LAFCO) in each county to control the process of municipal expansion. This law imposes on a committee formed to support or oppose a LAFCO

proposal the duty to file campaign statements under the Political Reform Act of 1974 (Reform Act) beginning from the time a petition is circulated until a measure is put on the ballot or the committee is terminated. From the time a LAFCO measure is placed on the ballot, a committee formed to support or oppose the measure must file campaign statements as required of other committees supporting or opposing ballot measures under the Reform Act. Existing law makes a willful violation of the Reform Act a misdemeanor subjecting an offender to criminal penalties.

Treatment of surrounded territories revised. Provision for schedule of service charges and related matters.

Stats 2009, ch 64 (AB 1263—Caballero)

Amends Govt C §§56375, 56375.4, and 56383.

Existing law authorizes a Local Agency Formation Commission (LAFCO) to initiate, conduct, and complete annexation proceedings, except for territories that became surrounded or substantially surrounded after January 1, 2000, by the city to which annexation is proposed. This law removes the exception as to "islands" created after January 1, 2000, as a result of boundary adjustments between two counties. Under the statute, the LAFCO is also authorized to initiate proposals to form a new district. Existing law provides for a schedule of fees for the costs of proceedings. Under the statute, the LAFCO is authorized to establish a schedule of service charges as well. The service charges may not exceed the cost of providing the service. Provision is also made to regulate advance deposits, the reduction or waiver of fees or charges, and the mandatory time limits for commission action.

Streets and Highways

Extends termination and reporting deadlines for neighborhood electric vehicle (NEV) transportation plans in cities of Lincoln and Rocklin.

Stats 2008, ch 199 (AB 2963—Gaines)

Amends Str & H C §1963.7; amends, adds, and renumbers Str & H C §1963.8; and adds Str & H C §1963.9.

Under existing law, the cities of Rocklin and Lincoln are authorized, until January 2009, to establish neighborhood electric vehicle (NEV) transportation plans permitting low-speed vehicles to operate on certain roads and adopting permit and safety rules. The cities must also report on the effectiveness of the plans and recommend termination, continuance, or expansion of the plans. This chapter extends the time for initial (in the case of Rocklin) and subsequent reports, and also extends the term of the plans.

Certain parcel maps granted automatic one-year extensions.

Stats 2008, ch 124 (SB 1185—Lowenthal)Urgency legislation, effective July 15, 2008.

Amends Govt C §§66452.6 and 66463.5; amends and renumbers Govt C §§66452.11 and 66452.12;and adds Govt C §66452.21.

The statute extends by one year the life of existing tentative maps, vesting tentative maps, and parcel maps that were valid on July 15, 2008, and would otherwise expire before January 1, 2011. The statute also authorizes local governments, in their discretion, to approve an additional one-year extension of a tentative map, for a total period of six years. Administrative or other approvals issued by a state agency are automatically extended by one year as well. The legislation does not extend the life of local agency approvals, such as design review, development permits, and conditional use permits. The extensions apply to maps for residential, mixed use, and commercial projects. For detailed discussion of parcel maps and tentative maps, see California Subdivision Map Act and the Development Process (2d ed Cal CEB 2001) and California Land Use Practice (Cal CEB 2007).

Certain solar electrical generation and biogas projects exempted from requirements of Subdivision Map Act, if otherwise subject to review under local agency ordinances or subject to discretionary action by advisory agency or legislative body

Stats 2008, ch 658 (AB 1510—Plescia)

Amends Govt C §66412.

Existing law exempts specified types of property from the requirements of the Subdivision Map Act. This law would exempt land used for:

- Biogas projects that use agricultural waste or by-products from the land where the project is located and that reduce the overall greenhouse gas emissions from the agricultural operations on that land; or
- A solar electrical generation device;

provided the projects are subject to review under local agency ordinances regulating design and improvement or subject to discretionary action by the advisory agency or legislative body.

Williamson Act

For purposes of Williamson Act, definition of "agricultural commodity plant products" includes products used for producing biofuels; definition of "open-space use" includes land enrolled in United States Department of Agriculture's Conservation Reserve Program or Conservation Reserve Enhancement Program.

Stats 2008, ch 136 (AB 1764—Blakeslee)

Amends Govt C §51201.

This law amends the existing definition of "agricultural commodity" under the Williamson Act by including plant products used for producing biofuels in the definition. The law also amends the definition of "open-space use" under the Williamson Act to include land that is within an area enrolled in the United States Department of Agriculture's Conservation Reserve Program or Conservation Reserve Enhancement Program.

Provisions for resolving material breaches, cancellation, and rescission of Williamson Act contracts revised.

Stats 2008, ch 503 (AB 2921—Laird)

Amends Govt C §§51201, 51250, 51256, 51257, 51282, 51283, and 51297 and adds Govt C §51223.

Under the Williamson Act, the Department of Conservation is required to notify the city or county if it discovers a possible material breach of contract. The city or county is required to take action to resolve the breach. Reimbursement is provided to the city or county or to the Department if it discharges the responsibility of a city or county that fails to act. This law also authorizes the Department to take certain actions if the city or county finds no material breach, but the finding is not supported by the evidence or was not made on the record at a public hearing. This law also revises the conditions under which a landowner may cancel a Williamson Act contract to place other land under agricultural conservation preserve; prohibits approval of a petition to cancel after notification of a likely breach; requires the city or county to determine the cancellation fee when cancellation is for purposes of entering a farmland security zone contract; and extends to January 1, 2010, the authorization for parties to rescind contracts for purposes of entering a new contract to facilitate lot line adjustment. The law also authorizes the Department to use funds in the Soil Conservation Fund to cover the administrative costs regarding discovery of material breaches of a Williamson Act contract.

Landlord-Tenant

Housing

Domestic violence, sexual assault, and stalking are made grounds for termination of tenancy by tenant. Commission of such acts is a rebuttable presumption affecting the burden of proof that the person committing the acts has committed a nuisance on the premises, if the victim's household has not vacated the premises.

Stats 2008, ch 440 (AB 2052—Lieu)Urgency legislation, effective September 27, 2008.

Adds CC §1946.7; amends, repeals, and adds CC §1161.

Existing law controls the renewal and termination of a real property lease, based on the lease terms and behavior of the parties. This chapter authorizes a tenant to notify the landlord in writing that the tenant or a household member has been the victim of domestic violence, sexual assault, or stalking and intends to terminate the tenancy and quit the premises. The tenant must attach to the notice a copy of the temporary restraining order, emergency protective order, or written report by a peace officer. If the tenant quits, the responsibility for rent terminates 30 days after the notice or is prorated upon earlier rental to another party. The notice must be given within 60 days of the court order or peace officer report.

For purposes of unlawful detainer law, this law also provides (until January 1, 2012) that the commission by a person of acts of domestic violence, sexual assault, or stalking against another tenant or subtenant on the premises creates a rebuttable presumption affecting the burden of proof that the person has committed a nuisance on the premises, if the victim has not vacated the premises.

Miscellaneous Remedies

Discrimination

Nondiscrimination provisions expanded.

Stats 2008, ch 682 (AB 2654—Laird)

Amends Govt C §§50260 and 54701.12; amends Ins C §§679.71, 679.72, 699.5, 10141,11628 and 12095; amends Lab C §4600.6; and amends Welf & I C §§103 and 14200.1.

Existing law provides for nondiscrimination as to commissions designed to foster peaceful relations, contracting for construction of rental housing for employees of local agencies, property insurers in the issuance or cancellation of insurance and determinations of insurability, certain actions of the Insurance Commissioner, insurers licensed to issue motor vehicle liability policies in the issuance or cancellation of that insurance, surety insurers in taking action regarding performance bonds, workers' compensation insurers and entities seeking certification as health care organizations as to specified actions, appointment of court-appointed special advocates, and provisions relating to prepaid health plans as to government-supported medical benefits. This law changes the list of characteristics as to which each regulated entity may not discriminate, generally by adding such characteristics as sexual orientation, mental disability, physical disability, medical condition, marital status, national origin, geographic area, and ethnic group identification.

Real Estate Professionals

Escrow Agent

Expansion of provisions for criminal background check of applicants for an escrow agent license.

Stats 2008, ch 262 (AB 2323—Huff)

Amends Fin C §§17209, 17212.1, 17331, and 17414.1.

Under the Escrow Law, the Commissioner of Corporations licenses and regulates escrow agents. Escrow agents are required to be insured through the Escrow Agents' Fidelity Corporation. An applicant for an escrow agent license or Fidelity Corporation indemnification must submit fingerprints for a criminal background check. Employees of an escrow agent also may need to submit fingerprints. This chapter expands these provisions to provide for obtaining federal summary criminal history information from the FBI, electronic submission of fingerprint images and related information, Department of Justice forwarding and compiling of information, and a fee to cover Department of Justice costs.

Common Interest Developments

Provisions prohibiting or restricting solar energy systems in common interest development governing documents are unenforceable.

Stats 2008, ch 40 (AB 1982—Smyth)

Amends CC §714.

Existing law declares void provisions that prohibit or restrict solar energy systems in covenants, restrictions, or conditions in a deed, contract, security instrument, or other instrument affecting the transfer or sale of or any interest in real property. This law applies that provision to the governing documents of a common interest development. For this purpose, the governing documents of a common interest development include the recorded declaration and any other documents governing the operation of the common interest development.

Owner of separate interest in a common interest development may dispute assessment amount within the jurisdictional limit of small claims court by paying under protest and commencing action in small claims court.

Stats 2008, ch 502 (AB 2846—Feuer)

Amends CC §1365.1; adds CC §1367.6.

This law provides that when an owner of a separate interest disputes a charge or other sum levied by the homeowners association, and the amount in dispute does not exceed the jurisdictional limit of the small claims court, the owner may pay the disputed amount under protest and commence an action in small claims court.

Common interest development association is authorized to record request for notice of default affecting any separate interest it governs.

Stats 2008, ch 527 (SB 1511—Ducheny)

Amends CC §2924b.

Existing law permits any person to record a request for a copy of notices of default and notices of sale published before real property is sold at a foreclosure sale, and requires a mortgagee or trustee to comply. Under this law, a common interest development association is permitted to record a request, with respect to any of the separate interests it governs, that a mortgagee, trustee, or other person authorized to record a notice of default regarding any of those separate interests mail a copy of any trustee's deed upon sale for such interest to the association within 15 days of recording the trustee's deed. However, a failure to do so will not affect the title to the real property.

Condominiums

Until July 1, 2014, specific requirements provided for accounting and for reasonableness of liquidated damages relating to sale of units of certain condominium buildings.

Stats 2008, ch 665 (AB 2020—Fuentes)

Amends, repeals, and adds CC §1675.

Existing law provides for the validity of liquidated damages provisions in a contract to purchase and sell residential property under certain circumstances. As to the sale of one of the units in a structure of 10 or more residential condominium units, the seller is required to perform an accounting of costs and revenues. Existing law also addresses the reasonableness of an amount paid as liquidated damages, using a benchmark of 3 percent of the purchase price. Until July 1, 2014, additional provisions apply to the sale of a residential condominium unit in a structure of 20 or more units, standing over 8 stories high, that is high-density infill development, as defined, with a purchase price in excess of $1 million. The minimum purchase price will be adjusted annually, and the seller must give notice to the buyer of the liquidated damages provisions, as specified by the statute. Until July 1, 2014, for the described structures, a benchmark of 6 percent of the purchase price will be used in gauging reasonableness. Unless a later statute deletes or extends the provisions that sunset on July 1, 2014, they become inoperative on that date and are repealed as of January 1, 2015.

Covenants and Servitudes

Declaration of Restrictions

Additional regulation of approval process by homeowners associations for solar energy systems.

Stats 2008, ch 539 (AB 2180—Lieu)

Amends CC §714.

Under existing law, covenants, restrictions, or conditions in documents affecting the transfer or sale or real property that effectively prohibit or restrict the installation or use of a solar energy system are void and unenforceable, except as specified. Existing law also provides that if approval is required, the application must be processed in the same manner as an architectural modification and may not be willfully avoided or delayed, subject to civil penalties of not more than $1000. This law provides additional requirements applicable only to an approving entity that is a homeowners association, not a public entity. The approval or denial of an application must be in writing. If not denied in writing within 60 days from receipt, the application will be deemed approved, unless the delay is the result of a reasonable request for additional information.

Taxation

Taxes and Assessments

Extension of time to meet property tax exemption requirements for supplemental assessments.

Stats 2008, ch 201 (AB 3035—Huffman)

Amends Rev & T C §75.24.

Existing law grants a property tax exemption to certain types of property and to property owned by certain individual taxpayers. The exemption applies to supplemental assessments if the requirements are met within 90 days. This chapter extends the time period to qualify for an exemption from supplemental assessment to 180 days after change in ownership or completion of new construction.

Taxes and Assessments

Assessor authorized to charge a processing fee on late claims for eligible transferee exclusion.

Stats 2008, ch 349 (SB 1223—Harmon)

Amends Rev & T C §63.1.

Under the California Constitution, as amended by Proposition 13, "full cash value" is defined as the assessor's valuation of real property, as shown on the 1975–1976 tax bill under "full cash value" or, thereafter, the appraised value of that real property when purchased, newly constructed, or a change in ownership has occurred. The California Constitution excludes from the definition of "change in ownership" specified property transfers of a principal residence and also the first $1,000,000 of other real property, between parents and their children, as defined by the legislature.

Under this law, on written notification by the county assessor of potential eligibility for exclusion, a transferee eligible for the exclusion must file a certified claim for exclusion within the time specified in the notice. If the certified claim is not filed, the assessor is authorized to send a second notice, as specified, which also would notify the potentially eligible transferee that reassessment of the property may begin, because a certified claim was not received. If the eligible transferee fails to timely file the claim and subsequently qualifies for exclusion, the assessor (on authorization by the board of supervisors) may charge a one-time processing fee.

Tax relief provided for counties subject to property tax revenue reductions due to events declared by the Governor to result in states of emergency.

Stats 2008, ch 386 (SB 1064—Hollingsworth)Urgency legislation, effective September 27, 2008.

Amends Rev & T C §§195.120, 195.122, 218, 17207, 24347.5 and adds Rev & T C §§195.128–195.145.

If counties have been declared by the Governor to be in a state of emergency and have adopted property reassessment ordinances, existing law provides for state allocations, from the Special Fund for Economic Uncertainties, of the estimated amount of reduction in property tax revenue resulting from the reassessments. The following counties have been affected by specified events and are provided such state allocations by this law: Inyo, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara, Ventura, Butte, Kern, Mariposa, Mendocino, Monterey, Plumas, Santa Clara, Santa Cruz, Shasta, Trinity, and Humboldt.

Existing law provides homeowners with a $7000 property tax exemption for their principal place of residence. This law provides that any dwelling that qualified for that tax exemption before the Governor's disaster proclamations of 2007 and 2008, and that has not transferred ownership since such dates, may not be denied the exemption on the basis that the dwelling was temporarily damaged, destroyed, being reconstructed, or temporarily uninhabited due to restricted access on account of the declared emergency.

Similarly, the loss carryover provisions of the Personal Income Tax Law and the Corporation Tax Law for specified losses due to the disasters declared by the Governor or, as to federal assistance, by the President of the United States, are extended to the following counties by this law: Inyo, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara, Ventura, Butte, Kern, Mariposa, Mendocino, Monterey, Plumas, Santa Clara Santa Cruz, Shasta, Trinity, and Humboldt.

Authorizes the partial welfare exemption to apply to property previously purchased and owned by the Department of Transportation and now solely owned by a tax-exempt organization.

Stats 2008, ch 524 (SB 1284—Lowenthal)Urgency legislation, effective September 28, 2008.

Amends Rev & T C §214 and adds Rev & T C §214.16.

Existing property tax law provides a partial welfare exemption for property used for rental housing and related facilities owned and operated by certain nonprofit entities or veterans' organizations and meeting certain qualifying criteria. This law would extend the exemption to property previously purchased and owned by the Department of Transportation and now solely owned by a tax-exempt organization. Any outstanding tax, interest, or penalty imposed between January 1, 2002, and January 1, 2009, may be canceled if specified conditions were met at the time the tax was imposed.

Provides exclusion from property tax for construction of an active solar energy system in a new building as part of initial construction not occupied by the owner-builder.

Stats 2008, ch 538 (AB 1451—Leno)Urgency legislation, effective September 28, 2008.

Amends Rev & T C §73.

Existing property tax law defines "full cash value" after the 1975–1976 tax year, as the appraised value when purchased, newly constructed, or a change in ownership has occurred. Under the California Constitution, the legislature may provide and has provided through the 2008–2009 year that "newly constructed" does not include, among other things, the construction or addition of an active solar energy system. This law specifies that "the construction or addition of an active solar energy system" includes such construction in the initial construction of a new building, provided that the owner-builder does not intend to occupy or use the building. An initial purchaser of the new building may claim the exclusion if the owner-builder did not claim it and if the purchase occurs before the new building becomes subject to reassessment to the owner-builder. The State Board of Equalization will prescribe the manner, documentation, and form for claiming the exclusion. This law also continues the active solar energy system exclusion through the 2015–2016 year.

For purposes of disabled veteran's property tax exemption, dwelling not occupied due to misfortune continues to be principal residence, provided absence is temporary and there is intention to return. Except as to dwelling totally destroyed in declared state of emergency, when a dwelling has been destroyed and does not exist on the lien date, no exemption applies until structure is rebuilt and occupied as principal residence.

Stats 2008, ch 594 (SB 1495—Kehoe)

Amends Rev & T C §279.

Existing law provides that a disabled veteran's property tax exemption continues in effect until title changes or for other specified reasons the property is no longer the disabled veteran's principal residence. This law provides that a dwelling not occupied due to misfortune continues to be the principal residence for purposes of the property tax exemption, provided that the absence is temporary and the disabled veteran intends to return when able to do so. The law also provides, except as to a dwelling destroyed in a disaster declared by the Governor to be a state of emergency, when a dwelling is totally destroyed and does not exist on the lien date, the exemption is not applicable until the dwelling has been replaced and occupied as a dwelling.