PUBLIC LAW Journal

Vol. 37, No. 1
Winter 2014

An Official Publication of the State Bar of California Public Law Section

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Substandard Designs and Better Technology—New Developments in Design Immunity

*By Kimon Manolius, Christine Hiler and Julie Veit**

I. INTRODUCTION

Design immunity is a powerful tool for public agencies. If established, it bars liability where a reasonable design feature approved in advance of construction causes an injury.[1]

Premised on the separation of powers doctrine, design immunity prevents the judicial branch from interfering with or otherwise second-guessing the discretionary design approval of elected and appointed officials.[2] California Government Code section 830.6, and the cases interpreting it, provide public agencies with the guidance necessary to establish design immunity and to protect themselves from dangerous condition of public property lawsuits. As an affirmative defense, design immunity is particularly appropriate for summary judgment.[3]

This article provides an update on two important developments to this otherwise relatively static doctrine. The first development is the California Supreme Court's recent grant of review in *Hampton v. County of San Diego* and *Curtis v. County*

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of Los Angeles, cases questioning whether a public agency must prove that an authorized employee who approved a design knew it was substandard.[4] The court's decision will impact the design immunity doctrine significantly. No knowledge requirement suggests that public agencies might ignore deviations from applicable standards when approving a design. Imposing a knowledge requirement, on the other hand, could weaken design immunity because proffered evidence of an alleged substandard design could defeat summary judgment.[5]

The second development involves a decision that strengthens design immunity's protections.[6] When changed physical conditions make a design dangerous, the immunity is lost.[7] In *Dammann v. Golden Gate Bridge, Highway and Transportation District*, the First District Court of Appeal held that evidence of changed physical conditions must pertain to conditions at the property in question; technological advancements implemented at other facilities are not sufficient.[8] Limiting the type of evidence that constitutes changed physical conditions limits the ways in which an agency can lose its design immunity.

What do these developments mean for public agencies? For public agencies seeking to obtain design immunity, design officials should document their design choices in as much detail as practicable, especially when they consider and reject design options, and particularly when designs deviate from existing standards. For those seeking to retain design immunity, staff should track whether accidents occur or claims arise that would put the agency on notice that the physical conditions at the property have changed rendering the original design dangerous.

II. DOES DESIGN IMMUNITY REQUIRE KNOWING AND INFORMED APPROVAL OF DESIGNS?

To demonstrate an entitlement to design immunity, public entities must demonstrate that: (1) the design caused the accident; (2) the design was "approved in advance of the construction [] by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval" or was prepared in conformity with standards previously so approved; and, (3) substantial evidence supports the reasonableness of the design.[9] The two cases currently pending before the California Supreme Court, *Hampton* and *Curtis*, focus on the second element.[10]

Under section 830.6, there are three different ways that a public agency can satisfy the second element to show that the design was approved in advance of construction : (1) the legislative body can approve the design; (2) a body or employee given discretionary authority can approve the design; or (3) the design must conform to approved standards.[11] The narrow issue in *Hampton* and *Curtis* is whether the exercise of discretionary authority delegated to an employee to approve a design, under the second prong, must be knowing and informed.[12]

Specifically, the *Hampton* plaintiffs raise the following questions: (1) must an entity demonstrate that an official consciously decided to deviate from applicable standards before approving a substandard design; and (2) assuming knowledge of a substandard design, must the entity show the official had the authority to disregard those standards before approving the substandard design elements?[13]

In *Hampton*, plaintiffs sued the County of San Diego for failing to provide sufficient sight distance at the intersection where they were injured in a car crash.[14] Because there was no evidence that the approving engineer knew of the substandard element, plaintiffs claimed that the public entity did not show the engineer had authority to approve the plan.[15] The trial court rejected this argument, holding that evidence of proper delegation was sufficient to show that the engineer had the approval authority as a matter of law.[16] Proof of knowledge was not required.

Plaintiffs argued on appeal that where the design is substandard, the entity must show that the approving engineer: (1) knew it was substandard, (2) elected to disregard the standard, and (3) had the authority to do so.[17] They cited *Levin v. State of California* and *Hernandez v. Department of Transportation*, the only two cases addressing this issue, for support.[18] The Fourth District Court of Appeal disagreed, holding that evidence that an engineer with approval authority as well as another engineer approved the plans was sufficient to meet the discretionary approval element as a matter of law.[19] Refusing to infer a knowledge requirement into the language of section 830.6, the court explained:

> [w]e respectfully disagree with *Levin* and *Hernandez* to the extent they suggest that a public

> entity attempting to establish the discretionary approval element of a design immunity defense must establish an exercise of informed discretion and that evidence that the public entity failed to adhere to standards pertaining to an element of a design plan constitutes evidence of a lack of discretionary approval of the design. The text of section 830.6, from which the discretionary approval element is derived, does not contain any requirement of informed discretion.[20]

Indeed, the court found section 830.6 only requires evidence that the entity appropriately delegated discretionary approval or evidence that the plan conformed with previously approved standards.[21] The Fourth District concluded that design immunity's second element was satisfied with proof that the official who approved the plans had proper authority to do so.[22] Nothing more was required.

Similarly in *Curtis*, a motorist brought suit against the County of Los Angeles for injuries sustained on a roadway that lacked a median barrier.[23] Plaintiffs claimed that the county did not establish the second element of design immunity because there was no evidence that an authorized official properly considered the standards governing installation of median barriers prior to approving the design with no such barrier.[24] Like the Fourth District in *Hampton*, the Second District affirmed the trial court's grant of design immunity, finding that evidence that the county delegated authority to the engineer who approved the plans was sufficient.[25]

Thus, the key issue in *Hampton* and *Curtis* is whether a public agency must establish that an authorized official knew about deviations from applicable design standards before approving the design in question.[26] Knowledge of deviations assumes the official has knowledge of applicable standards. Plaintiffs argue that public agencies must show that the authorized official had knowledge of an alleged deviation and that he or she consciously disregarded it before approval.[27] In response, the public agencies—and the Fourth and Second District Courts of Appeal—maintain that an authorized official's signature on a set of plans is sufficient evidence that all aspects of the design were considered, including any substandard elements.[28]

The California Supreme Court's resolution of this issue will have significant ramifications for public agencies attempting to meet design immunity's second element. On one side, while there is support for the Fourth and Second Districts' general holdings that design approval by an authorized official is sufficient evidence to satisfy the second element, none of the cases cited by either court involved approval of a substandard design.[29] For example, in *Alvis v. County of Ventura*, upon which the Fourth District relied, the court held that the Board of Supervisors approval of a design did not need to demonstrate that it knew of all comments received during the design process.[30] The Board could rely on its staff. *Alvis* is distinguishable, however, given that approval was not delegated to an employee and plaintiff did not allege that the design deviated from existing statutes or guidelines.[31]

Nonetheless, design immunity is based upon deferential policy goals, which suggest that courts should assume an approving official was diligent in considering all relevant aspects of a design.[32] To hold otherwise would allow a jury or court to simply reweigh the considerations of the public official who approved the design.[33]

Specifically, if courts were to require public agencies to present evidence of knowledge of substandard designs, plaintiffs could simply introduce conflicting evidence to defeat summary judgment. Regardless of whether a design is in compliance with applicable standards, plaintiffs could accomplish this by challenging whether : (1) the proper standards were applied; (2) there is a deviation from a particular standard; and (3) the authorized official had knowledge of the deviation.

This exact scenario occurred in *Hernandez v. Department of Transportation*.[34] There, the court refused to find design immunity where there was conflicting evidence as to whether the off-ramp design at issue deviated from the applicable guardrail standards.[35] This also occurred in *Hampton*, where the parties disputed whether the sight distance at the subject intersection was substandard.[36] Resolution of that factual issue was rendered moot, however, when the court held that the county need not prove that the official had knowledge of the allegedly substandard design.[37]

On the other hand, should the court adopt the view that knowledge is not required when approving substandard designs, the design immunity doctrine may be diluted. Certainly, as a policy matter, agencies should not rely on

officials who blindly approve plans without accounting for applicable standards or deviations therefrom. *Levin, Hernandez,* and indeed the evidence plaintiffs proffered in *Hampton*, support that view.[38]

For example, if *Levin* had not required proof of knowledge of substandard design elements, the state would have enjoyed design immunity even though the subject road was designed with a substandard shoulder and no guardrail, yet there was no evidence that the state engineer considered the existing standards calling for guardrails under the circumstances.[39] In *Hampton*, the county obtained design immunity despite plaintiffs' evidence that the sight distance at the intersection in question was substandard according to the county's standards, and despite the lack of evidence that the county's engineer considered the deviation.[40] As design immunity exists to prevent the judicial branch from second-guessing discretionary approvals by authorized public officials, the efficacy of the doctrine is undermined where those officials are uninformed about basic standards and guidelines.

Whatever the California Supreme Court decides, public agencies should adhere to the best practices outlined in these cases. Officials with delegated authority should document: (1) every element considered or rejected; (2) whether the design satisfies or deviates from applicable standards; and (3) the reasons for deviations, if any. The more care that agencies take in explaining and documenting their reasons for choosing or rejecting design elements, the better insulated their decisions are from review.

III. DO TECHNOLOGICAL ADVANCEMENTS CONSTITUTE CHANGED PHYSICAL CONDITIONS?

Another significant development pertaining to design immunity is the First District Court of Appeal's decision in *Dammann v. Golden Gate Bridge, Highway and Transportation District*, which provided much-needed guidance on how agencies can lose design immunity through "changed conditions."[41] The *Dammann* court held that the advancement of technology alone did not constitute a changed condition to undermine existing design immunity.[42]

Public agencies lose their design immunity when "changed conditions" render the design dangerous.[43] *Baldwin v. State of California* first recognized this doctrine when it held that public entities do not retain their design immunity in perpetuity, but lose it if they "close their eyes" and ignore when "in its actual operation under changed physical conditions" the property "produces a dangerous condition of public property and causes injury."[44] In 1979, the Legislature amended Government Code section 830.6 to incorporate *Baldwin's* holding.[45]

To demonstrate loss of design immunity, a plaintiff must establish that: (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had reasonable time to obtain the funds and complete the necessary remedial work to bring the property back into conformity with a reasonable design; or the public entity was unable to remedy the condition because of impossibility or lack of funds and had not taken reasonable measures to provide adequate warnings.[46] Once a public entity asserts the affirmative defense of design immunity, the plaintiff has the burden to show that an issue of triable fact exists for all three elements necessary to establish changed conditions.[47]

The most litigated issue—and the highest hurdle for plaintiffs to overcome—is whether there is a changed physical condition at the subject property. Courts have recognized only two types of evidence of "changed physical conditions": (1) an increase in traffic volume; and, (2) vehicles traveling at higher speeds on the roadway in question.[48] In fact, most cases focus on what does not constitute a changed condition.[49]

The First District built upon that precedent by addressing the increasingly common question of whether the availability of new technology that arguably might make a public facility safer constitutes a changed condition for purposes of design immunity.[50] *Dammann* involved a May 2008 head-on collision on the Golden Gate Bridge.[51] The plaintiffs alleged that the absence of a median barrier on the bridge rendered the public property a dangerous condition.[52] Citing *Sutton v. Golden Gate Bridge District, Highway & Transportation District*, which granted the District design immunity for its 1985 decision not to install a moveable median barrier on the bridge, the Bridge District moved for summary judgment arguing that there were no changed physical conditions that

undermined *Sutton's* finding of design immunity.[53] Plaintiffs opposed the motion, arguing that when the 1985 decision was made, the only available technology was a two-foot wide moveable median barrier, which was not appropriate for installation on the Golden Gate Bridge due to narrow lane widths and absence of shoulders.[54] After all, the Golden Gate Bridge opened to the public in 1937.[55] Noting technological advances, plaintiffs argued that a one-foot moveable median barrier had existed for almost 20 years and had been installed successfully on the Auckland Harbour Bridge in New Zealand and the Coronado Bridge in San Diego, California.[56] Plaintiffs claimed that the availability of this new technology constituted a changed condition creating an issue of fact as to whether the District had lost its design immunity.[57]

The First District rejected this argument. The court surveyed the history of "changed physical conditions" decisions, including the 1979 amendment to Government Code section 830.6.[58] It then concluded that evidence of changed physical conditions must be "at the public property in question."[59] Nothing in the 1979 amendment altered that conclusion.[60] Further, prior case law, including the California Supreme Court's 2001 decision in *Cornette v. Department of Transportation*, along with almost all other courts that had reviewed this issue, at least implicitly supported this conclusion.[61] Thus, the court concluded "that the technological advances relied on by [plaintiffs] do not constitute the required 'changed physical conditions' and, therefore, that the trial court did not err in granting the District's motion for summary judgment."[62]

This decision reflects sound public policy and represents a key victory for public agencies. Importantly, *Dammann* properly recognized the separation of powers between courts and the legislative branch that is central to the design immunity doctrine.[63] Had the court issued a contrary ruling, it essentially would have made safety the sole and determinative factor that public entities must consider in choosing a design. This result would undermine public entities' inherent discretion in balancing competing interests in public projects, shifting that authority to the judicial branch in contravention of the Legislature's intent.[64]

Safety is just one of many factors public officials must balance when choosing a particular design, including overall traffic volume, accident history, available funds, and other factors.[65] While certainly critical, analyzing safety is not always black-and-white. For example, it is widely-accepted that median barriers result in trade-offs, preventing nearly all cross-median accidents, but causing an overall increase in accidents due to deflections.[66] Another illustration is evident when considering the new Bay Bridge. While the bridge certainly uses more advanced technology and materials than its 76-year-old neighbor, must the District replace the Golden Gate Bridge's suspension cables to match the design of its new neighbor to the east? The Golden Gate Bridge allows 40 million vehicles to travel safely between Marin and San Francisco counties annually, even though it was designed and built long ago.[67] New technology may increase safety, but pose new and different risks. As one court explained "an old mousetrap may still work effectively even after someone invents a better one."[68]

Moreover, a contrary holding would be financially debilitating to public agencies. It would require the continuous incorporation of technological advancements to maintain design immunity protection on any public property and create an endless revolving door of litigation, as there are always new available technologies. *Dammann* eliminated the uncertainty about whether technological advances constitute changed conditions, and with it the need to litigate similar issues in the future.

IV. CONCLUSION

The California Supreme Court's decision to review *Hampton* and *Curtis*—regardless of the outcome—and the Court of Appeal decision in *Dammann*, provide key takeaways that public entities should incorporate into their best practices:

- Document every design element the agency considers, including those that were rejected;
- Document whether the design satisfies applicable statutes or guidelines;
- Document whether there are any deviations from applicable statutes or guidelines;
- Document the reasons explaining any deviations;
- Continually monitor the design and determine whether there are changed conditions;
- If the design is a roadway, pay particular attention to traffic volumes and accident rates.

Following these practices will hinder plaintiffs' ability to attack an agency's design immunity and/or prevent an agency from obtaining design immunity in the first place. Similarly, these practices will help agencies to retain design immunity once established.

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The authors would also like to thank Christopher K. Spiers, a law clerk in Hanson Bridgett's San Francisco office, for his assistance with this article.

Endnotes

1 Cal. Gov't Code § 830.6 (2013).

2 *Laabs v. City of Victorville*, 163 Cal. App. 4th 1242, 1262 (2008); *see also Arreola v. Cnty. of Monterey*, 99 Cal. App. 4th 722, 757 (2002); *Cornette v. Dep't of Transp.*, 26 Cal. 4th 63, 69 (2001); *Cameron v. State of California*, 7 Cal. 3d 318, 326 (1972).

3 *Grenier v. City of Irwindale*, 57 Cal. App. 4th 931, 940, n. 5 (1997).

4 *See Hampton v. County of San Diego*, 218 Cal. App. 4th 286 (2013), rev. granted 2013 Cal. LEXIS 8655 (October 23, 2013); *Curtis v. County of Los Angeles*, 218 Cal. App. 4th 366 (2013), rev. granted 2013 Cal. LEXIS 8656 (Oct. 23, 2013).

5 *See, e.g., Hernandez v. Dep't of Transp.*, 114 Cal. App. 4th 376, 388 (2003) (issue of fact created where parties presented conflicting evidence whether the entity followed the proper standards).

6 *Dammann v. Golden Gate Bridge, Highway & Transp. Dist.*, 212 Cal. App. 4th 335, 354 (2012), reh'g denied (Jan. 10, 2013), rev. denied (Mar. 27, 2013) (holding that technological advances do not constitute "changed physical conditions" which defeat design immunity).

7 *See* Cal. Gov. Code § 830.6; *see also Dole Citrus v. Cal.*, 60 Cal. App. 4th 486, 490 (1997).

8 *Dammann*, 212 Cal. App. 4th at 354.

9 Cal. Gov't Code § 830.6 (emphasis added); *see also Cornette*, 26 Cal. 4th at 69 (2001); *Alvarez v. State*, 79 Cal. App. 4th 720, 727 (1999).

10 *Hampton*, 310 P.3d at 937 (2013); *Curtis*, 310 P.3d at 937 (2013).

11 Cal. Gov't Code § 830.6.

12 Petition for Review at 1, *Hampton v. County of San Diego*, 310 P.3d 937 (2013) (No. S213132); Petition for Review at 28-29, *Curtis v. Cnty. of Los Angeles*, 310 P.3d 937 (2013) (No. S213275).

13 *See* Petition for Review at 1, *Hampton*, 310 P.3d 937; *see also* Petition for Review at 28-29, *Curtis*, 310 P.3d 937.

14 *Hampton*, 218 Cal. App. 4th at 290.

15 *Id.* at 294.

16 *Id.* at 296.

17 *Id.*

18 Petition for Review at 6, *Hampton*, 310 P.3d 937.

19 *Id.* at 304.

20 *Id.* at 300-02.

21 *Id.* at 302.

22 *Id.* at 304.

23 *Curtis*, 218 Cal. App. 4th at 368-69.

24 *Id.* at 207-08.

25 *Id.* at 208.

26 Petition for Review at 1, *Hampton*, 310 P.3d 937; *see also* Petition for Review at 28-29, *Curtis*, 310 P.3d 937.

27 *See, e.g., Curtis*, 218 Cal. App. 4th at 383.

28 *See id.* at 380 (presenting the construction plans that were approved as evidence of the proper discretionary authority); *Hampton*, 218 Cal. App. 4th at 304 (relying on *Becker v. Johnston* 67 Cal.2d 163, 172–173 (1967), *Laabs*, 163 Cal. App. 4th at 1262; *Grenier v. City of Irwindale*, 57 Cal.App.4th 931 (1997)); *see also Curtis*, 218 Cal. App. 4th at 380 (relying on *Sutton v. Golden Gate Bridge, Highway & Transportation Dist.*, 68 Cal.App.4th 1149 (1998) and *Wyckoff v. State of California*, 90 Cal.App.4th 45 (2001)).

29 *See Becker v. Johnston,* 67 Cal.2d 163, 172–173 (1967) (there was no deviation from a standard at the time the design was approved); *Laabs*, 163 Cal. App. 4th at 1262 (no discussion of a deviation from statutory guidelines); *Grenier*, 57 Cal.App.4th 931 (1997) (no discussion of a deviation from a statutory guideline); *Sutton v. Golden Gate Bridge, Highway & Transportation Dist.*, 68 Cal. App.4th 1149 (1998) (the court acknowledged that the public agency complied with the CalTrans guidelines); *Wyckoff v. State of California,* 90 Cal.App.4th 45 (2001) (the court determined that the evidence presented in the case showed that the States's policy did not call for a median barrier so there was no deviation from the standard); *see also Hampton*, 218 Cal. App. 4th at 298-299; *see also Curtis*, 218 Cal. App. 4th at 379-382.

30 *Alvis v. Cnty. of Ventura*, 178 Cal. App. 4th 536, 552-53 (2009).

31 *Id.* at 505-09.

32 *Hampton*, 218 Cal. App. 4th at 303.

33 *Laabs*, 163 Cal. App. 4th at 1262; *see also Arreola*, 99 Cal. App. 4th at 757 (2002); *Cornette*, 26 Cal. 4th at 69.

34 *See Hernandez*, 114 Cal. App. 4th at 376.

35 *Id.* at 388.

36 *Hampton*, 218 Cal. App. 4th at 290.

37 *Id.* at 304.

38 *See Hernandez*, 114 Cal. App. 4th at 380, 388; *see also Hampton*, 218 Cal. App. 4th at 292-294; *see also Levin*, 145 Cal. App. 3d at 415-418.

39 *Levin*, 146 Cal. App. 3d at 415-18.

40 *Hampton*, 218 Cal. App. 4th at 293-94.

41 *Dammann*, 212 Cal. App. 4th at 341, 343-54.

42 *Dammann*, 212 Cal. App. 4th at 354.

43 *Cornette*, 26 Cal. 4th at 66.

44 *Baldwin v. State of California*, 6 Cal. 3d 424, 438 (1972).

45 The 1979 Amendment added the following language: "Notwithstanding notice that constructed or improved public property may no longer be in conformity with a plan or design or a standard which reasonably could be approved by the legislative body or other body or employee, the immunity provided by this section shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work necessary to allow such public property to be in conformity with a plan or design approved by the ... public entity ... or with a plan or design in conformity with a standard previously approved by such legislative body ... or employee." Gov't Code section 830.6.

46 *Cornette*, 26 Cal. 4th at 66.

47 *Laabs*, 163 Cal. App. 4th at 1268.

48 *Wyckoff* , 90 Cal. App. 4th at 45 (addressing an increased amount of traffic on a particular roadway).

49 Continuing Education of the Bar, California Government Tort Liability Practice §12.74B (4th ed. 2013).

50 *Dammann*, 212 Cal. App. 4th at 354.

51 *Id.* at 338.

52 *Id.* at 340.

53 *Id.* at 346 (citing *Sutton*, 68 Cal. App. 4th at 1158).

54 *Id.* at 339.

55 Key Dates: Golden Gate Bridge and Highway Transportation District, available at http://goldengatebridge.org (last visited Dec. 5, 2013).

56 *Id.* at 339.

57 *Id.*

58 *Id.* at 343-49.

59 *Id.* at 348.

60 *Id.* at pp. 351-54.

61 *Cornette*, 26 Cal. 4th at 63. Other cases have followed the reasoning in *Cornette*. *See, e.g., Alvarez*, 79 Cal. App. 4th at 720, *Sutton*, 68 Cal. App. 4th at 1149; *Grenier*, 57 Cal. App. 4th at 931; *Dole Citrus*, 60 Cal. App. 4th at 486; *Mirzada v. Department of Transportation*, 111 Cal.App.4th 802 (2003); *Compton v. City of Santee*, 12 Cal. App. 4th 591 (1993); *cf. Bane v. State of California*, 208 Cal. App. 3d 860, 864 (1989) *abrogated by Cornette*, 26 Cal. 4th at 63.

62 *Dammann*, 212 Cal. App. 4th at 354.

63 *Id.* at 345.

64 *Id.* at 346 (citing *Sutton*, 68 Cal. App. 4th at 1158).

65 *See, e.g., Alvarez*, 70 Cal. App. 4th at 723.

66 Traffic Manual (1996 Metric Version with updates) as effective on May 19, 2004, California Department of Transportation, Ch. 7-04.1-7.04.1, 7-35 (last updated 1/5/12).

67 Annual Vehicle Crossing and Toll Revenues, FY 1938 to FY 2011, available at http://goldengatebridge.org (last visited Dec. 5, 2013).

68 *Dole Citrus*, 60 Cal. App. 4th at 494.

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*By David H. Hirsch**

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Welcome to the Winter 2014 edition of the Public Law Journal. I'm honored and privileged to serve as the Public Law Section Chair for the upcoming year. We have over 1400 members. I'm sure many of you are not familiar with the Section beyond getting the quarterly editions of the Public Law Journal with its many fine and informative articles, and the Section's E-news updates. The Public Law Section is one of the sixteen Sections of the State Bar, and is governed by an Executive Committee. The real work, however, is performed by our many subcommittees. The beginning of a new year provides a good opportunity to recap some of the activities of the Public Law Section and things we will be doing in the upcoming year.

In addition to our flagship publication, the Public Law Journal, our Publications Committee is also responsible for preparing the Section's E-news, in order to keep our membership informed about important news and events. We also have been making an ongoing effort to use Social Media as a way to engage our membership through Facebook and Twitter, under the guidance of our Social Media Committee.

Our Education Committee organizes many fine webinars and seminars, including programs at the State Bar Annual Meeting. In addition, last April we launched our inaugural California Public Records and Open Meetings Conference to a sellout audience of nearly 100 attendees. The program, which was conducted in Los Angeles, was a huge success and provided attendees with 7.5 hours of MCLE credit, including one hour of ethics credit. In 2014 the Section will again be providing another Public Records and Open Meetings Conference to be held in Northern California so that folks in that part of the State have the opportunity to attend. Our Public Records Act Conference Committee is hard at work inviting speakers and organizing the panels. Watch for announcements and register early, since we again anticipate this popular event will be another sell out.

One of our signature activities and events each year is the selection of the recipient of the Ronald M. George Public Lawyer of the Year Award, which is coordinated by our Public Lawyer of the Year Committee. This prestigious Award recognizes an exceptional lawyer who has dedicated a significant portion of his or her career to public service. Award recipients are lawyers who represent the highest level of professional and ethical standards and who are inspirational advocates for the public interest. The award is named after retired California Supreme Court Chief Justice Ronald M. George, who traditionally spoke at the award ceremony and introduced the year's winner. Chief Justice, Tani Cantil-Sakauye, has continued the tradition and has presented the award since becoming Chief Justice. Nominations for this year's Award are due by March 17, 2014. More information about the Public Lawyer of the Year Award is available at www.calbar.ca.gov/publiclaw if you want to nominate a deserving colleague or friend.

Among our other programs is a student writing competition, so if you know of any law students who might be interested please encourage them to participate. The deadline for submittal is May 12, 2014. We offer a great prize. Not only does the winner get $2000 in cash, but their article is published in the Public Law Journal. To top it off, the winner gets to attend the Ronald M. George Public Lawyer of the Year Award reception sponsored by the Public Law Section at the State Bar's Annual Meeting and is acknowledged at the meeting.

The recipient's reasonable transportation and hotel accommodation expenses for two nights are also paid by the Public Law Section.

In a new outreach effort our Membership Committee recently held panel discussions and receptions in San Francisco and San Diego. The programs were designed to provide students and young attorneys interested in public and regulatory law careers an opportunity to meet and interact with some prominent members of the Bar in an informal setting, to learn about public law as a career.

Finally, the Public Law Section is creating a mentoring program in conjunction with the California Young Lawyers Association. See the announcement below!

*David Hirsch is with the firm Carmel & Naccasha in San Luis Obispo. The firm represents seven public entities on the Central Coast, and David currently serves as Assistant City Attorney for the City of Arroyo Grande and Assistant District Counsel for the Cambria Community Services District.

Announcing the Public Law Section and the California Young Lawyers Association **Mentoring Program**

The Public Law Section and the California Young Lawyers Association (CYLA) are proud to announce the kick-off of a mentoring program that is aimed at matching new public lawyers with experienced public lawyers. This unique program strives to develop new public lawyers' skills and knowledge, while promoting collegial relationships among attorneys.

Looking to give back to the legal profession? Consider being a mentor! Mentors must have been in practice for at least 10 years, while mentees will be members of CYLA (attorneys who are under the age of 36 or have been practice five years or less). The formal mentoring relationship will last for six months, during which mentors and mentees are expected to meet in person or telephonically at least three times during the mentoring period, with each meeting lasting no longer than an hour and a half.

Mentors and mentees will be matched by members of the Public Law Section according to practice area interest and location, where possible. Mentors who join the program will be matched as new lawyers become available.

The Mentoring Program is a tremendous opportunity for mentors to meet young professionals in the public law field and to assist in their professional growth. **For more information about the program, or to complete an application, see the Public Law Section website at http://publiclaw.calbar.ca.gov/. For additional information, contact David Hirsch at dhhirsch@hotmail.com or (805) 546-8785 or Kristina Robledo at Kristina.robledo@calbar.ca.gov or (415) 538-2467.**

Public Lawyer of the Year Nominations Sought

STATE BAR SEEKS NOMINATIONS FOR 2014 PUBLIC LAWYER OF THE YEAR

The California State Bar's Public Law Section Executive Committee is accepting nominations for the 2014 Ronald M. George Public Lawyer of the Year Award. Applications are due March 17, 2014.

The annual award recognizes an exceptional lawyer who has dedicated a significant portion of his or her career to public service. Award recipients are lawyers who represent the highest level of professional and ethical standards and who are inspirational advocates for the public interest. The Public Law Section recognizes the award recipient at a reception held at the State Bar's annual conference in the fall.

The award is named after retired California Supreme Court Chief Justice Ronald M. George, who traditionally spoke at the award ceremony and introduced the year's winner. Chief Justice Tani Cantil-Sakauye has continued the tradition and presented the award in 2011, 2012, and 2013.

The 2013 award was given to San Francisco Deputy City Attorney Burk E. "Buck" Delventhal. Delventhal joined the San Francisco City Attorney's Office directly out of law school in 1970 and has served the City and County of San Francisco for more than 43 years. Delventhal has led the Government Team at the City Attorney's Office since the formation of this Division in the late 1970s. During the course of his long and distinguished career, Delventhal argued landmark cases in the California Supreme Court, California Courts of Appeal, and the Ninth Circuit, and has been an attorney of record in over 100 appellate cases. In addition to his work on the City Attorney's Government Team, Buck has been active with the League of Cities and County Counsel's Association serving as a member of the League of California Cities Legal Advocacy Committee for over three decades, as well as being on the Legal Oversight Committee of the County Counsels' Association.

Chief Justice Tani Cantil-Sakauye congratulates Buck Delventhal of the San Francisco City Attorney's Office, the 2013 Public Lawyer of the Year.

Other recent Public Lawyer of the Year Award honorees include: Phyllis Cheng (2012), Richard Winnie (2011), Michael Colantuono (2010), Patricia Sturdevant (2009), Jeff Thom (2008), Ann Miller Ravel (2007), Clara Slifkin (2006), Manuela Albuquerque (2005), Roderick Walston (2004), Ariel Pierre Calonne (2003), Herschel Elkins (2002), and Jayne W. Williams (2001).

For more information on eligibility for the Ronald M. George Public Lawyer of the Year Award or to nominate a colleague or friend, visit www.calbar.ca.gov/publiclaw.

The Public Law Section also seeks sponsors for the 2014 awards ceremony, which will be held at the 2014 State Bar Annual Meeting in San Diego in September. Sponsors will be recognized in the *Public Law Journal*, all press releases announcing the winner of the 2014 award, and in signage at the awards ceremony. For more information about sponsorship opportunities, contact State Bar Section Administrator Kristina Robledo at (415) 538-2467 or kristina.robledo@calbar.ca.gov

The Public Law Section executive committee thanks the 2013 sponsors: **Gold Sponsors**: Arnold & Porter LLP; Burke, Williams & Sorenson LLP; Colantuono & Levin LLP; Holland & Knight; Liebert Cassidy Whitmore; Meyers, Nave, Riback, Silver & Wilson; Renne Sloan Holtzman Sakai LLP ; and Walkup Melodia Kelly & Schoenberger LLP. **Silver Sponsors**: Best Best & Krieger LLP; Carmel & Naccasha LLP; County Counsels' Association of California; Hanson Bridgett LLP; Jarvis Fay Doporto and Gibson LLP; League of California Cities; Littler Mendelson; Remy Moose Manley; Richards Watson Gershon; Kramer Telecom Law Firm PC. **Bronze Sponsors**: Bertrand, Fox & Elliott; California Political Law, Inc; Law Offices of William Seligmann; Meredith, Weinstein & Numbers LLP; Moscone Emblidge Sater & Otis LLP; Newdorf Legal; Rosales Law Partners LLP

The California State Bar's Public Law Section ensures that the laws relating to the function and operation of public agencies are clear, effective and serve the public interest; advances public service through public law practice; and enhances the effectiveness of public law practitioners.

The section focuses on administrative law, municipal law, open meeting laws, political law, education law, state and federal legislation, public employment, government contracts, tort liability and regulations, land use/environment issues, and public lawyer ethics. The section provides educational programs, seminars and resource materials, and publishes the quarterly *Public Law Journal*.

2012 Public Lawyer of the Year Phyllis Cheng, Director of the California Department of Fair Employment and Housing, with Chief Justice Cantil-Sakauye and Court of Appeal Justice Laurie Zelon.

INVITATION FOR NOMINATIONS
PUBLIC LAW SECTION OF THE STATE BAR OF CALIFORNIA

2014 RONALD M. GEORGE LAWYER OF THE YEAR AWARD

The Executive Committee of the Public Law Section of the State Bar of California is pleased to announce that it is accepting nominations from members of the Public Law Section, the State Bar and the public at large for the 2014 Ronald M. George Public Lawyer of the Year Award. The Public Law Section established this award to recognize a public law practitioner who has provided outstanding service to the public and possesses an exemplary reputation in the legal community and the highest of ethical standards. Recognizing a public law practitioner who has quietly excelled in his or her public service is a consideration of the Executive Committee in selecting the award recipient. In addition, the Executive Committee supports the goal of diversity in the membership and leadership of the State Bar. As such, promoting and achieving diversity is considered in selecting an outstanding member of the State Bar as the Ronald M. George Public Lawyer of the Year.

ELIGIBILITY

To be eligible, a nominee must meet the following criteria:

- Be a member of the State Bar of California with an exemplary record; and
- Have at least five years of recent, continuous practice in public law in California

SELECTION CRITERIA

The following factors may be considered by the Executive Committee in its selection of the recipient of the Public Lawyer of the Year Award:

- Demonstrated commitment of the nominee to the practice of public law
- Use of innovative or creative problem-solving by the nominee in the practice of public law
- Exceptional accomplishments by the nominee in the practice of public law
- Provisions of legal services by the nominee to the public above and beyond that which is considered ordinary.

NOMINATION PROCESS

To nominate an individual for this award, please submit the following:

1. Nomination Form
2. Nominator's Statement of Nomination (600 words maximum)
3. Nominee's Resume or Biography (indicating the nominee's principal areas of practice, the number of years of practice, professional achievements, and other features of his or her career, such as community involvement and bar association activities.)
4. Any Letter(s) of Support (*Optional* -- 5 letters maximum)

Nominations and supporting materials must be ***received*** no later than ***March 17, 2014***, by mail, e-mail or fax at:

Ronald M. George Public Lawyer of the Year Award
Public Law Section, Attn: Raven Ogden
180 Howard Street, 4th Floor
San Francisco, CA 94105-1639
E-Mail: raven.ogden@calbar.ca.gov
Fax: (415) 538-2467

NOMINATION FORM

PUBLIC LAW SECTION OF THE STATE BAR OF CALIFORNIA

NOMINEE INFORMATION

Nominee's Name: _____

State Bar Number: _____

Agency or Organization: _____

Job Title: _____

Address: _____

_____

Business Phone: _____

Home/Cell Phone: _____

E-Mail: _____

NOMINATOR INFORMATION

Nominator's Name: _____

Agency or Organization: _____

Address: _____

_____

Business Phone: _____

Home/Cell Phone: _____

E-Mail: _____

STATEMENT OF NOMINATION / RESUME

Please attach a narrative description (6*00 words or less*) of the significant aspects of the Nominee's career, community service or other activities that demonstrate the Nominee's contribution to public law. Please attach a copy of the Nominee's resume or biography.

LETTERS OF SUPPORT

Broad support for your Nominee is desirable. You may encourage other persons or organizations to submit letters of support on behalf of your Nominee. You may submit a maximum of five letters of support.

For Office Use:

☐ Nomination Form

☐ Statement of Nomination

☐ Nominee's Resume or Biography

Date Received: _____

☐ State Bar Record Verified

☐ Letter(s) of Support Received

Municipal Condemnation of Mortgage Loans

*By John Vlahoplus**

INTRODUCTION

Cities across California and the nation are considering using their powers of eminent domain to purchase both performing and defaulted underwater mortgage loans (those whose principal balance exceeds the value of the encumbered home). They seek to reduce principal on the loans in order to minimize defaults, short sales and foreclosures, and thereby to mitigate the broad community costs of the negative equity crisis (the "Municipal Plan"). Many cities are specifically considering purchasing loans held in private securitization trusts, which do not benefit from any federal government guarantees.

The Municipal Plan is certainly controversial, and opponents have raised constitutional challenges and criticized it as poor policy, as unlikely to achieve its stated goals, and as providing significant benefits for private parties (including private parties that fund the loan purchases or advise cities).[1] This essay considers the applicable law in the context of the principal legal challenges to the Municipal Plan.

EMINENT DOMAIN GENERALLY

The power of eminent domain is inherent in State sovereignty, and States did not yield the power by ratifying the federal constitution.[2] California delegates this sovereign power to cities with few limitations.[3] The power extends to all types of property, real and personal, tangible and intangible.[4] In particular, "[a] chose in action, a charter, or any kind of contract are, along with land and movables, within the sweep of this sovereign authority."[5] This includes mortgages. In fact, the U.S. Supreme Court has instructed States to use eminent domain when helping individual mortgagors at the expense of mortgagees furthers the public good.[6]

CONTRACT CLAUSE

Some critics claim that the Municipal Plan impairs the mortgage loan contracts and therefore violates the Contract Clause[7] of the federal constitution. However, the U.S. Supreme Court has declared for over one hundred and fifty years that a condemnation is a purchase, not an impairment, and that the Contract Clause does not apply to eminent domain. The Court stated as recently as 1984 that the Contract Clause argument has "no merit" because the "Clause has never been thought to protect against the exercise of the power of eminent domain."[8] As the Court explained in 1912:

> The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropriated as an existing, enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated. All of this has been so long settled as to need only the citation of some of the many cases.[9]

The rule is fundamental to State sovereignty and to our federal system of government. The Court explained in 1848 the underlying constitutional principles, which include: (1) all private rights must yield to the paramount authority of eminent domain to promote the public good; (2) contracts are no "more sacred" than land or other property in respect of a State's power of eminent domain; (3) companies are no "more sacred" than human beings in respect of a State's power of eminent domain; and (4) every contract contains an inherent term, which is presumed to be known by all, that it is subject to the power of eminent domain; therefore the power inherently cannot conflict with the Contract Clause.[10]

Eminent domain is so fundamental to sovereignty that a State cannot even contract away the power.

This is true even though the Contract Clause does enforce a State's contractual agreement to forgo other important government powers, such as other police powers and the power of taxation.[11]

TAKINGS CLAUSE

Some critics claim that the Municipal Plan violates the Takings Clause[12] of the federal constitution because it will pay less than fair value for the loans and because it lacks a public purpose. The valuation claim is false by definition. The law requires cities to pay fair value, and disagreement over price does not render a taking unconstitutional.[13]

Longstanding U.S. Supreme Court precedent supports the Municipal Plan's public purposes. The constitutional standard for evaluating a city council's action is simple: the taking is valid as long as it "is rationally related to a conceivable public purpose."[14] The Municipal Plan meets this test.

Any city that adopts the Municipal Plan will determine its public purposes and will articulate them in a resolution of necessity. City councils are considering the Municipal Plan to further a number of public purposes within the traditional police power of health, safety, and welfare: reducing crime; reducing the costs of maintaining vacant properties; improving public health; increasing housing security, availability, and financing opportunities (including restoring normal lending by reducing the number of underwater loans and the shadow inventory of likely future foreclosure and short sales); and protecting their ability to provide vital community services by minimizing adverse property tax impacts (e.g., preventing long term revenue loss and inequality of tax burdens that foreclosure and short sales cause by ratcheting down Proposition 13 assessment caps for current buyers, but not for neighbors who retain their older, higher caps).[15]

Further, principals from academia,[16] government,[17] and the private sector[18] have advocated using eminent domain to reduce principal, keep people in their homes, and solve the mortgage crisis. Nobel Laureate economist Robert Shiller has called the Municipal Plan an effort that "we must hope . . . succeeds."[19] U.S. federal banking regulators support the focus on privately securitized loans,[20] and the Federal Housing Finance Agency has concluded that those loans are the "crux" of the housing crisis and must be fixed if we want to fix the mortgage crisis.[21] Finally, including underwater performing loans in a program also meets this test, because those loans qualify for the most useful state and federal mortgage assistance programs, and the federal government has recognized that loan modifications are most likely to succeed if they are made before a default.[22]

Once a city council has identified a public purpose, the council's decision is then controlling. A court cannot "substitute its judgment" of what constitutes a public purpose unless the government's declared purpose is an "impossibility"[23] or is "palpably without reasonable foundation,"[24] which is not the case here given the demonstrated support of economists and other experts. California law is consistent, expressly providing that the government's resolution of necessity conclusively establishes public purpose.[25]

Nor does it matter that a private party may benefit from the city council's action; the only relevant issue is the government's actual purpose.[26] The mechanics of an eminent domain program may properly provide "direct and significant" benefits to private parties because public purposes "may be as well or better served through an agency of private enterprise than through a department of government. . . ."[27] In fact, California expressly authorizes private businesses to exercise eminent domain for their own profit where the business furthers the public good.[28] Finally, implementing a joint public/private effort like the Municipal Plan follows express California legislative direction. The legislature has declared a decent home for each family to be a goal of the highest priority, and it specifically directs "the private and public sectors of the economy to cooperate" in achieving that goal.[29]

"The valuation claim is false by definition. The law requires cities to pay fair value, and disagreement over price does not render a taking unconstitutional."

LOCATION OF LOANS

Some critics argue that the Municipal Plan attempts to assert extraterritorial jurisdiction, claiming that the loans are located at the place of the creditor. However, the law makes clear that the loans are located in the municipality, together with the borrower and the security property.

An intangible asset such as a debt claim or a security interest in property has no physical form. Its location depends upon the totality of the circumstances surrounding the action to be taken with respect to it.[30] All of the important factors involving the loans and security interests for eminent domain purposes are within the municipality, because that is where: (a) the borrower is domiciled, (b) the security is located (i.e. the home), (c) the creditor's remedies are based, (d) the public purpose for which the loans would be condemned is effectuated (protecting the local community), and (e) the information necessary to value the loans is located (the borrower and the security property). The physical location of the home in the municipality is enough to give jurisdiction, because under federal and California law the two components of a mortgage loan are inextricably linked—the loan cannot be separated from the local security property.[31]

In addition, longstanding law involving condemnation for eminent domain and other governmental purposes locates the loans and security interests in the municipality, including: condemnation of corporate stock at the place of the issuer; condemnation of an intangible debt claim and related intangible mortgage security interest at the place of the debtor, even though the tangible note, tangible mortgage document and creditor were located elsewhere; and condemnation of a bearer bond at the place of the debtor.[32] Condemnation practice and legislative intent also locate the loans in the municipality, including Connecticut having used its power of eminent domain to condemn covenants in its own state debt,[33] and New York having expressly authorized the Long Island Power Authority to condemn debt issued by local utilities,[34] in both cases without regard to locations of creditors.

"The Court concluded that the judiciary is institutionally incompetent to make economic cost-benefit decisions about diversification of debt holdings and interstate credit flows."

DORMANT COMMERCE CLAUSE

Some critics argue that the Municipal Plan would violate the Dormant Commerce Clause of the federal constitution because: (1) municipal power to condemn loans would reduce the ability to hold broadly diversified debt obligations within trusts, consequently impeding the interstate flow of credit and creating various local and interstate market harms, and/or (2) condemnation would interfere with tightly integrated debt holdings within trusts, thus causing interstate harms. Despite these criticisms, the U.S. Supreme Court has expressly rejected the first claim, and the second claim involves circumstances unlikely to arise under the Municipal Plan.

The Court rejected the diversification argument in the recent *Davis* case, which involved state tax exemption for interest earned on local (but not out of state) municipal debt.[35] The plaintiffs claimed that the law reduced the diversification of national municipal bond funds, causing harm to the interstate credit market including reducing access to the local credit market and distorting interstate credit flows.

The Court rejected the claims, reasoning that to even consider them would require it to determine whether capital flows more readily through diversified or undiversified debt funds, and whether a decision one way or the other would increase capital flows or cause "capital to some degree simply [to] dry up" (as some critics claim the use of eminent domain would). The Court concluded that the judiciary is institutionally incompetent to make economic cost-benefit decisions about diversification of debt holdings and interstate credit flows. It therefore rejected the Dormant Commerce Clause challenge

and ruled that the normal *Pike* evaluation of local benefits and interstate burdens does not apply in this context.[36]

The *Davis* Court also rejected the Dormant Commerce Clause challenge on an independent ground, that in applying the Clause the judiciary must particularly defer to legislatures in their exercise of traditional health, safety and welfare powers. This ground applies with full force to the Municipal Plan, which protects broad health, safety and welfare community interests and utilizes the traditional and inalienable police power of eminent domain. Even if the Municipal Plan involved regulation (rather than a purchase of loans), and even if the Court permitted the *Pike* balancing test to apply, the Dormant Commerce Clause challenge would fail on this independent ground because of the deferential standard and longstanding case law upholding local housing and land use regulation, such as regulations that exclude capital from local jurisdictions.[37]

The Dormant Commerce Clause argument also ignores the fact that housing and housing finance are predominantly and broadly subject to state and local laws that differ across jurisdictions, such as: recourse or nonrecourse liability; single or multiple action foreclosure procedures; notice, race, or race notice security priority; eminent domain generally (such as condemnation of homes); debtor protection laws; and more. The trusts that hold the loans at issue disclosed to their investors the material risks of local condemnation and local debtor protection laws.[38] Recent securitizations go further and directly disclose the risk of loan condemnation.[39] Other pooled investment vehicles holding debt, including domestic bond funds, regularly warn investors of the risks of condemnation and other local laws.[40] The interstate housing finance market already works within this legal framework of predominantly local laws, which do not violate the Dormant Commerce Clause.

In the second claim, critics argue that condemning securitized loans would violate the Dormant Commerce Clause under the *Oakland Raiders* authority.[41] That decision held that condemning the Raiders would violate the Clause by interfering with an interstate league consisting of teams that are tightly integrated and interdependent, finding that each team depends on the others for competition and revenue; that the teams share television and gate proceeds; and that each franchise owner has an important interest in the identity, personality, financial stability, commitment, and good faith of each other owner. But mortgage securitization trusts are deliberately arranged to lack these factors. They are designed to hold diversified, unrelated loans with no interdependence of cash flows, no borrower knowing the identity of any other borrower, no investor management rights, and generally no investor knowledge of or dependence on any other investor.[42]

CONCLUSION

This report addresses the critics' legal arguments. Moreover, Amherst Securities has revealed in a private report that critics of the Municipal Plan expect to lose in court if a condemnation ever occurs.[43] Therefore they have proposed multiple "non-legal" steps to try to stop cities from even trying[44]—steps that California Lt. Gov. Newsom has noted violate antitrust and anti-redlining laws.[45] Any cities considering the Municipal Plan must be prepared to face these aggressive tactics from attorneys involved in the national opposition to the Municipal Plan.

**John Vlahoplus is a founder and Chief Strategy Officer of Mortgage Resolution Partners LLC, a company advising cities nationwide on utilizing local powers to acquire mortgage loans. His previous experience includes tax practice at Sullivan & Cromwell and new product development and marketing for the Zurich Financial Services Group, BNP Paribas, and Credit Suisse.*

Endnotes

1 The author's firm, Mortgage Resolution Partners, has worked under contract with a number of California cities to develop plans to acquire mortgages via eminent domain.

2 *See, e.g., West River Bridge Company v. Dix*, 47 U.S. 507, 532 (1848), and *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60 (1982).

3 *See* Cal. Govt Code § 37350.5 (general delegation), Cal. Const., art. 1, § 19(b) (limitation forbidding transfer of condemned owner-occupied private residence to another private person).

4 *See, e.g., City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60 (Cal. 1982).

5 *See City of Cincinnati v. Louisville & Nashville Railroad Co.*, 223 U.S. 390, 400 (1912).

6 *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935).

7 U.S. CONST. art. I, § 10.

8 *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 243 n. 6 (1984) (contracts between private parties).

9 *See Louisville & Nashville Railroad Co.*, 223 U.S. at 400 (citing case law dating to colonial franchise rights granted in 1650).

10 *See Dix*, 47 U.S. at 532-34.

11 *See, e.g.*, Stephen Siegel, *Understanding the Nineteenth Century Contract Clause: the role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 SO. CAL. L. REV. 1, 46-54 (1986).

12 U.S. CONST. amend. V.

13 *See, e.g., Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.").

14 *Midkiff,* 467 U.S. 229, 241 (1984).

15 For specific legislative public purposes that the Municipal Plan can serve, *see, e.g.*, CAL. HEALTH AND SAFETY CODE §§ 50001-50004 and 51600; for an extended analysis of policies underlying the Municipal Plan, see Robert Hockett and John Vlahoplus, *A Federalist Blessing in Disguise: From National Inaction to Local Action on Underwater Mortgages*, 7 HARV. L. & POL'Y REV. 253 (2013).

16 *See* Lauren Willis, *Stabilize Home Mortgage Borrowers, and the Financial System Will Follow*, (Sep. 24, 2008) (homes), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273268; and Howell Jackson, *Build a better bailout*, CHRISTIAN SCIENCE MONITOR (Sep. 25, 2008) (loans), *available at* http://www.csmonitor.com/Commentary/Opinion/2008/0925/p09s02-coop.html.

17 *See* Rep. Brad Miller, *UnHAMPered*, THE NEW REPUBLIC (Feb. 24, 2010), *available at* http://www.tnr.com/article/unhampered?page=0,1.

18 *See* Buck Wargo, Builder: *Eminent domain could calm foreclosure chaos*, LAS VEGAS SUN (Feb. 13, 2009), *available at* http://www.lasvegassun.com/news/2009/feb/13/builder-eminent-domain-could-calm-foreclosure-chao/.

19 *See* Robert Shiller, *Reviving Real Estate Requires Collective Action*, NEW YORK TIMES (June 23, 2012): http://www.nytimes.com/2012/06/24/business/economy/real-estates-collective-action-problem.html.

20 *See* Shahien Nasiripour and Tom Braithwaite, *US housing plan aims to woo bondholders*, FINANCIAL TIMES (Sept. 27, 2012).

21 *See* James Lockhart, *Speech to the American Securitization Forum*, February 9, 2009 at page 5, *available at* http://www.fhfa.gov/webfiles/823/ASFSpeech2909.pdf.

22 *See, e.g.*, Rev. Proc. 2009-23 (§ 2.02), *available at* http://www.irs.gov/pub/irs-drop/rp-09-23.pdf.

23 *See Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925), cited with approval in *Midkiff*, 467 U.S at 240.

24 *Midkiff*, 467 U.S. at 241, quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896).

25 Except in the case of gross abuse of discretion (which would not apply to the carefully considered actions of cities here), the resolution of necessity is conclusive. *See* Cal. Code Civ. Proc. §§ 1245.250(a) ("Except as otherwise provided by statute, a resolution of necessity adopted by the governing body of the public entity pursuant to this article conclusively establishes the matters referred to in Section 1240.030."), 1245.255(b) (gross abuse of discretion exception), and 1240.030(a) (prerequisite that "The public interest . . . require[s] the project.").

26 *See Kelo v. City of New London*, 545 U.S. 469, 482, quoting *Midkiff*, 467 U.S. at 244.

27 *See Kelo*, 545 U.S. at 485-86, quoting *Berman v. Parker*, 348 U.S. 26, 33-34 (1954).

28 *See* CAL. PUB. UTIL. CODE §§ 611-625 (companies providing railroad, electric, gas, heat, pipeline, telephone, telegraph, water, wharf, warehouse, motor or water carrier, or sewage services).

29 *See* CAL. HEALTH AND SAFETY CODE § 50002.

30 *See, e.g., Waite v. Waite*, 6 Cal.3d 461, 467 (1972) (California law), *disapproved on other grounds by In re Marriage of Brown*, 15 Cal.3d 838, 851 n.14 (1976); *Office Depot Inc. v. Zuccarini*, 596 F.3d 696, 702 (9th Cir. 2010) (federal law); *City of Oakland v. Oakland Raiders*, 31 Cal.3d 656 (1982) (totality of circumstances).

31 *See* Cal. Civ. Code § 2936 ("The assignment of a debt secured by mortgage carries with it the security."); *Carpenter v. Longan*, 83 U.S. 271, 274 (1872) ("The note and mortgage are inseparable."); *Hyde v. Mangan*, 88 Cal. 319, 327 (1891) ("The debt and security are inseparable; the mortgage alone is not a subject of transfer.")

32 *See Offield v. New York, New Haven & Hartford R.R. Co.*, 203 U.S. 372 (1906) (eminent domain condemnation of corporate stock), Brown v. Kennedy, 82 U.S. 591 (1872) (condemnation of secured debt and the related mortgage interest held by Confederate supporter); *Cities Service Co. v. McGrath*, 342 U.S. 330 (1952) (pursuant to the Trading With the Enemy Act, the United States could seize debts owed by an obligor within the United States even though they were evidenced by bearer bonds outside of the United States); *Silesian Am. Corp. v. Clark*, 332 U.S. 469 (1947) (the United States could seize shares of stock held by an enemy alien in a domestic corporation even though the stock certificates and owner were outside the jurisdiction); *Miller v. United States*, 78 U.S. 268, 294-98 (1870) (upholding the confiscation of a Confederate supporter's shares of stock by seizure at the corporation's domicile, effected by notice to the corporate officer, even though the shareholder was a non-resident).

33 *See* Jonathan Rabinovitz, *Legislature Acts to Stop Tax Loss on Bonds*, NEW YORK TIMES (March 9, 1995), *available at* http://www.nytimes.com/1995/03/09/nyregion/legislature-acts-to-stop-tax-loss-on-bonds.html. The Connecticut legislation followed the express instructions of the U.S. Supreme Court to use eminent domain when the public interest requires altering bond covenants. See *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 29 n. 27 (1977). Similarly, cities that adopt the Municipal Plan will be following the Court's express instruction in Radford.

34 *See* New York State Public Authorities Law, art. 5, tit. 1-A, § 1020-F (e), *available at* http://law.onecle.com/new-york/public-authorities/PBA01020-F_1020-F.html.

35 *See Department of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008).

36 *See Davis*, 553 U.S. *slip op.* at 24-25 (quoting respondents' brief).

37 *See, e.g.*, Richard Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 519 (2009).

38 *See, e.g.*, Prospectus Supplement dated Oct. 24, 2004 for Merrill Lynch Mortgage Investors Trust, Series 2004-WMC5, page S-20, and Prospectus included therein, page 64, *available at* http://www.sec.gov/Archives/edgar/809940/000095012304012610/y67949e424b5.txt.

39 *See, e.g.*, Prospectus Supplement, dated September 20, 2012, for the Sequoia Mortgage Trust 2012-4, page S-117, *available at* http://www.sec.gov/Archives/edgar/data/1176320/000114420412052666/v744346_424b5.htm.

40 *See, e.g.*, disclosure for PIMCO's Convertible Fund, Emerging Local Bond Fund, and other funds, in PIMCO Funds Prospectus (Oct. 1, 2010), *available at* http://www.sec.gov/Archives/edgar/data/810893/000119312510221729/d497.htm.

41 *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414 (Cal. App. 1st Dist. 1985)

42 *See, e.g.*, Adam Ashcraft, Paul Goldsmith-Pinkham and James Vickery, *MBS Ratings and the Mortgage Credit Boom*, Federal Reserve Bank of New York Staff Report No. 449 (May 2010), *available at* http://www.newyorkfed.org/research/staff_reports/sr449.pdf; and Larry Cordell, Yilin Huang and Meredith Williams, *Collateral Damage: Sizing and Assessing the Subprime CDO Crisis*, Federal Reserve Bank of Philadelphia Working Paper No. 11-30/R (May 2012), *available at* http://www.philadelphiafed.org/research-and-data/publications/working-papers/2011/wp11-30.pdf.

43 Amherst Securities Group LP, *Creative Uses of Eminent Domain–Implications For PLS Trusts*, at 13 (June 28, 2012).

44 Amherst Securities Group LP, *Creative Uses of Eminent Domain–Implications For PLS Trusts*, at 13 (June 28, 2012).

45 *See* Press Release, Office of Lieutenant Governor of Cal., Lt. Gov. Gavin Newsom Sends Letter to US Attorney General Holder and Antitrust Division (Sept. 10, 2012), *available at* http://ltg.ca.gov/news.2012.09.10_USDOJ_Letter.html; Press Release, Office of Lieutenant Governor of Cal., Lt. Gov. Gavin Newsom: Local Governments Should Have Freedom to Explore Options to Address Mortgage Crisis (July 27, 2012), *available at* http://www.ltg.ca.gov/news.2012.07.27_SB_Mortgage.html.

ENTER THE PUBLIC LAW SECTION STUDENT WRITING COMPETITION—DEADLINE MAY 12

The Public Law Section seeks entries for its annual Student Writing Competition, which has a deadline of May 12, 2014. If you teach at a law school, mentor a law student, or have student interns in your office, be sure to pass along information about this great opportunity. Students need not be Public Law Section members to enter the competition.

The competition is open to students at all California-accredited law schools, and the winner receives a **$2,000 cash prize**, transportation and hotel expenses for two nights at the State Bar Annual Meeting in September where the winner will be recognized at an awards reception, and publication in the Public Law Journal.

Articles must be 2,000-3,000 words (not including endnotes) and must be on a topic related to public law—a wide field that covers areas such as administrative law, constitutional law, municipal law, open meetings/open records law, political/election law, education law, state and federal legislation, public employment and labor law, government contracts, government tort liability and regulations, land use/environmental issues, public law ethics, public finance, and water law.

Articles must be received by 5:00 p.m. (PST) on May 12, 2014. Articles must be submitted, by email, in Microsoft Word documents in Times New Roman 12-point font, single-spaced. Citations must be included in endnotes, not footnotes. Articles may include headings and subheadings, but excessive headings are discouraged. Email articles to scott.smith@bbklaw.com or Rachel_Sommovilla@ci.richmond.ca.us by 5:00 p.m. on May 12, 2014.

For more information about the Student Writing Competition, visit http://publiclaw.calbar.ca.gov/.

2013 Student Writing Competition winner Jennifer Lai with 2013 Student Writing Competition's Co-Chairs Rachel Sommovilla (left) and Caroline Fowler, and Chief Justice Cantil-Sakauye

The Public Law Section 2014 Student Writing Competition

Win a $2,000 cash prize, get published in the Public Law Journal, and win a trip to the 2014 State Bar Annual Meeting!

Deadline May 12, 2014

The California State Bar Public Law Section seeks entries for its annual Student Writing Competition. The competition is open to students at all California-accredited law schools, and the winner receives a $2,000 cash prize; transportation and hotel expenses for two nights at the State Bar Annual Meeting in San Diego in September where the winner will be recognized at an awards reception; and publication in the Public Law Journal.

WHAT ARTICLES ARE ELIGIBLE?

Articles must be 2,000-3,000 words (not including endnotes) and must be on a topic related to public law -- a field that covers areas such as administrative law, constitutional law, municipal law, open meetings/open records law, political/election law, education law, state and federal legislation, public employment and labor law, government contracts, government tort liability and regulations, land use/environmental issues, public law ethics, public finance, and water law. Articles should be written in a style suitable for publication in the Public Law Journal and should include citations in either Bluebook or California Style Manual format, with citations included in endnotes, not footnotes. Articles should be the original work of the submitting students without substantial editorial input from others. Examples of past selected articles include: "A Tale of Two Cities: Day Labor Solicitation after *Redondo Beach*"; "Funding Public Transmit in California After Proposition 26" and "California Environmental Quality Act (CEQA) Reform: Standing As A Tool To Limit Cases Unrelated To CEQA's Purposes".

WHO CAN ENTER?

As of May 12, 2014, students must be enrolled in good standing at a California law school's Juris Doctor program that is accredited by the Committee of Bar Examiners of the State Bar of California. Students need not be Public Law Section members to enter the competition.

DEADLINE/METHOD OF SUBMISSION

Articles must be received by 5:00 p.m. (PST) on May 12, 2014. Articles must be submitted, by email, in Microsoft Word documents in Times New Roman 12-point font, single-spaced. Citations must be included in endnotes, not footnotes. Articles may include headings and subheadings, but excessive headings are discouraged. Email articles to scott.smith@bbklaw.com or Rachel_Sommovilla@ci.richmond.ca.us by 5:00 p.m. on May 12, 2014. A member of the Public Law Section's Executive Committee will notify the winner by June 16, 2014.

By submitting an article as part of this contest, the author grants the Public Law Section the right to edit (as necessary) and publish any article in the Public Law Journal.

QUESTIONS?

Please direct any questions about the contest to Rachel Sommovilla (510) 620-6506 or Scott Smith at (949) 263-6561.

AWARD

The winner will receive a $2,000 cash prize from the Public Law Section and will have his or her article published in the Public Law Journal. The winner also will be recognized at the Ronald M. George Public Lawyer of the Year Award reception sponsored by the Public Law Section at the State Bar's Annual Meeting in San Diego in September 2014. The Public Law Section will pay the winner's reasonable transportation and hotel accommodation expenses for two nights to attend the award reception.

JUDGING

Articles will be judged by the Executive Committee of the Public Law Section based on the following criteria:

- Relevancy to one or more areas of public law (see description of eligible articles and examples of past winners)
- Quality of writing
- Complexity of topic
- Timeliness of topic to current developments in public law
- Originality
- Compliance with contest rules

ABOUT THE PUBLIC LAW SECTION

The Public Law Section seeks to ensure that laws affecting the public sector are clear, effective and serve the public interest; to advance public service through public law practice; and to enhance the effectiveness of public law practitioners. With more than 1,300 members, including law students, the Public Law Section focuses on addressing issues related to all areas of public law – including administrative law, constitutional law, municipal and county law, open meetings/open records laws, political/election law, education law, water law, state and federal legislation, public employment, government contracts, government tort liability, agency regulations, land use/environmental issues, public lawyer ethics, and public finance.

The Public Law Section provides educational programs, seminars and resource materials; presents the annual "Ronald M. George Public Lawyer of the Year Award" to public law practitioners who have made significant contributions to the profession; sponsors the annual Student Writing Competition; and publishes the quarterly Public Law Journal.

Police Liability for Tactical Conduct Preceding the Use of Force—The Implications of *Hayes v. County of San Diego*

*By Michael R. Linden and Justin B. Atkinson**

The Spring 2012 edition of the *Public Law Journal* featured an article (written by the authors herein) entitled "Can a Lawful Arrest Be Negligent?" This article discussed the issue of whether law enforcement officers owed a legal duty to arrestees to use reasonable care in the tactics employed to effectuate an arrest. While citing authority supporting the existence of a duty to use reasonable force, the article also cited the cases *Adams v. City of Fremont ("Adams")* and *Munoz v. City of Union City ("Munoz")* for the proposition that law enforcement officers did not owe a duty to potential arrestees with respect to the tactics utilized prior to the use of force.[1]

Since the Spring 2012 article was published, however, the foundation of the broad rule of no duty set forth in *Adams* and *Munoz* has slowly eroded On August 19, 2013, the California Supreme Court issued a decision in the case *Hayes v. County of San Diego* that substantially limits the holdings in *Adams* and *Munoz* in cases where police officers cause the death of a subject in the field.[2] How this change came about is discussed below.

I. *HERNANDEZ V. CITY OF POMONA*

In 2009, the California Supreme Court decided the case *Hernandez v. City of Pomona ("Hernandez")*.[3] In *Hernandez*, George Hernandez was shot and killed by police officers after fleeing arrest. The decedent's relatives originally brought suit in federal court, setting forth both Federal civil rights claims pursuant to 42 U.S.C. section 1983 ("Section 1983"), and a pendent wrongful death claim. A jury found in favor of the defendants on claims for excessive force brought under the Fourth and Fourteenth Amendments.[4] The federal court declined to exercise supplemental jurisdiction over the state law wrongful death claim.[5] The plaintiffs then filed a wrongful death action in state court against the same defendants.[6] The trial court entered judgment in favor of the defendants, precluding what the court viewed as a re-litigation of the federal court's factual findings regarding excessive force. The court of appeal reversed, however, finding that the plaintiffs "could proceed on the theory that the officers failed to use reasonable care in creating, through their preshooting conduct, a situation in which it was reasonable for them to use deadly force."[7] Upon review, the Supreme Court held that based on collateral estoppel, because the federal court jury found the use of force to have been reasonable, the wrongful death could not be based on the defendants' alleged tactical negligence.[8] Therefore, the Court declined to address the defendants' argument that "they owed no duty of care regarding their preshooting conduct."[9]

In *Hernandez*, Justice Carlos Moreno issued a concurring opinion. Justice Moreno was of the belief that the plaintiffs did not meet "their burden of proving that it is reasonably possible that they [could] amend their complaint to allege a cause of action for preshooting negligence," and as such the Court "need say no more to resolve this case."[10] The majority responded by stating that "we find that plaintiffs have adequately shown how they would amend their complaint to allege a preshooting negligence claim, and that we must determine whether any of the preshooting acts plaintiffs have identified can support negligence liability."[11] Justice Moreno's statement would prove to be very significant.

II. *HAYES V. COUNTY OF SAN DIEGO ("HAYES I")*

In the case *Hayes v. County of San Diego*, sheriff's deputies arrived at a residence in response to a call from

a neighbor, who said she had heard screaming.[12] Upon their arrival, the deputies were informed by Shane Hayes's girlfriend that Hayes had tried to kill himself earlier in the evening.[13] When the deputies entered the residence, Hayes came after them with a large knife.[14] The deputies then shot and killed Hayes.[15]

Hayes's daughter filed suit in federal court, asserting both Section 1983 claims (based on her father's Fourth Amendment rights and her own Fourteenth Amendment substantive due process right to familial association) and a pendent wrongful death claim. The district court granted summary judgment on both the federal and state law claims. With respect to the wrongful death claim, the plaintiff argued that the deputies were negligent "because they failed to gather all potentially available information about Hayes or request a PERT team before confronting him."[16] Relying on *Adams* and *Munoz*, however, the district court held that the deputies owed no duty of care for their conduct prior to the use of force.[17]

On appeal, a Ninth Circuit panel unanimously affirmed the district court's ruling with respect to the Fourteenth Amendment claim, and remanded the case back to the trial court with respect to the plaintiff's standing to vicariously assert her father's Fourth Amendment rights.[18] With respect to the negligent wrongful death claim, the panel majority noted that after the district court granted summary judgment, the *Hernandez* court had "indicated that law enforcement officers might be subject to negligence liability for certain preshooting conduct."[19] While acknowledging that the *Hernandez* decision did not discuss the *Adams* and *Munoz* cases, the majority found that "the court's analysis of whether the officers' preshooting conduct independently constituted breach of a duty of care strongly indicates that California's highest court would not adopt a rule that officers owe no such duty."[20]

In dissent, Judge Johnnie Rawlinson disagreed with the panel majority's finding that the *Hernandez* decision supported a conclusion that the plaintiff "had a viable negligence claim."[21] Judge Rawlinson noted that the *Hernandez* court was only asked to consider the following question:

> When a federal court enters judgment in favor of the defendants in a civil rights claim brought under 42 United States Code section 1983 ..., in which the plaintiffs seek damages for police use of deadly and constitutionally excessive force in pursuing a suspect, and the court then dismisses a supplemental

> state law wrongful death claim arising out of the same incident, what, if any, preclusive effect does the judgment have in a subsequent state court wrongful death action?[22]

Judge Rawlinson reasoned "that if the California Supreme Court was inclined to overrule the holdings of *Munoz* and *Adams*, it would have done so," and lamented that the majority had disregarded "the resulting continuing vitality of *Munoz* and *Adams*."[23]

After a request for re-hearing, the Ninth Circuit withdrew its decision and issued an order certifying a question for the California Supreme Court.[24] The question, as stated, was "[w]hether under California negligence law, sheriff's deputies owe a duty of care to a suicidal person when preparing, approaching, and performing a welfare check on him."[25] The Ninth Circuit found that "[t]here is disagreement within this court as to whether this discussion in *Hernandez* suggests that the California Supreme Court would not follow the holdings in *Adams* and *Munoz*," and as such "we believe the California Supreme Court should have the opportunity to speak for itself on the issue."[26]

III. SUBSEQUENT FEDERAL DISTRICT COURT CASES

After the certified question was submitted to the California Supreme Court in *Hayes I*, at least two federal district courts declined to apply the broad rule from *Adams* and *Munoz*. In the case *J.P. ex rel. Balderas v. City of Porterville*, police officers shot and killed Eusebio Prieto during a stand-off at a business location that took place after a high speed vehicle chase.[27] Prieto's relatives filed suit in federal court including, among others, claims under Section 1983. The defendants made a motion for summary judgment, and the plaintiffs attempted to defeat the motion by citing the Ninth Circuit's initial *Hayes* opinion. In the district court's order, it was noted that after the motion was taken under submission, "the Ninth Circuit withdrew its *Hayes* opinion, certified a question to the California Supreme Court regarding the viability of negligence claims against police officers, stayed the case, and maintained jurisdiction over the appeal."[28] The district court found that "[t]he Ninth Circuit's subsequent *Hayes* certification opinion casts some doubt as to whether the California Supreme Court would agree with *Munoz* and *Adams*."[29] As such, the court stated that it would "assume without deciding" that the officers owed the subject "a duty to use due care with respect to their pre-shooting tactics."[30]

In the case *Alvarado v. City of Santa Ana*, Elmer Alexander Perez was shot and killed after an unlawful entry into a residence.[31] Perez's relatives filed a complaint in federal court, seeking "to impose liability on the officers for allegedly negligent tactics," including an officer's "call for less-lethal force, but failure to wait for said means to arrive before entering," and an officer's "failure to use a taser."[32] Based on the pending certification question in the *Hayes* case, the district court declined to grant summary judgment with respect to pre-shooting negligence because the court perceived a "lack of clear precedent foreclosing such claims."[33]

IV. *HAYES V. COUNTY OF SAN DIEGO ("HAYES II")*

On August 19, 2013, the California Supreme Court issued its decision in *Hayes v. County of San Diego*.[34] The Court rephrased the question as "[w]hether under California negligence law, liability can arise from tactical conduct and decisions employed by law enforcement preceding the use of deadly force."[35] In the Court's view, the Ninth Circuit phrased the issue so as to implicitly divide the encounter into two separate duties. "The first duty would be to prepare, approach, and perform a welfare check on a suicidal person in a reasonable manner, a duty that may or may not exist. The second duty would be to use deadly force in a reasonable manner, a duty we have long recognized in California."[36]

The Court found the possible existence of two separate duties to be problematic because "this case involves a single primary right (plaintiff's right not to be deprived of her father by an improper use of deadly force), which necessarily corresponds to a single duty (the duty not to use deadly force in an improper manner), and the breach of that duty gives rise to a single indivisible cause of action."[37] The Court reasoned that "[b]ecause plaintiff did not allege a separate injury from the preshooting conduct of law enforcement personnel, the preshooting conduct *is only relevant here to the extent it shows, as part of the totality of circumstances, that the shooting itself was negligent*."[38]

Next, the Court analyzed the facts of *Adams* (a suicide case) and *Munoz* (a use of deadly force case) and found the distinction between the two cases "significant" because "this court has never addressed whether peace officers owe a duty of care when, without any use of deadly force, they merely come to the aid of a suicidal person—the existence of such a duty is not at issue here."[39] Thus, the Court expressed "no view" on the *Adams* holding.[40]

However, citing *Munoz v. Olin* and *Grudt v. City of Los Angeles ("Grudt")*, the Court found that it "has long recognized that peace officers have a duty to act reasonably when using deadly force."[41] As such, the *Munoz* case was disapproved.[42] In doing so, the Court pointed out that:

> [T]he *Munoz* court may have been influenced by the rule that applies to violations of the federal Constitution's Fourth Amendment. ... The Fourth Amendment's "reasonableness" standard is not the same as the standard of "reasonable care" under tort law, and negligent acts do not incur constitutional liability. ... [S]tate negligence law, which considers the totality of the circumstances surrounding any use of deadly force ... is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used. ... [As such the] state and federal standards are not the same.[43]

The Court held that "[l]aw enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability."[44] "Such liability can arise, for example, if the tactical conduct and decisions show, as part of the totality of circumstances, that the use of deadly force was unreasonable."[45] The Court, however, emphasized that "a final determination that the shooting was not negligent would preclude plaintiff from pursuing a separate theory of liability based on the preshooting conduct alone."[46] "Moreover, because plaintiff did not allege a separate preshooting injury, this case does not raise the question of what independent duty, if any, law enforcement personnel owe with regard to their preshooting conduct, and we have no reason here to decide that question."[47]

V. *HAYES V. COUNTY OF SAN DIEGO ("HAYES III")*

On December 2, 2013, the Ninth Circuit issued its order with consideration of the Supreme Court's decision in *Hayes II*.[48] The court summarized *Hayes II*, and observed that the high court concluded that "under *Grudt*, an officer's preshooting conduct is properly 'included in the totality of circumstances surrounding [his] use of deadly force, and *therefore the officer's duty to act reasonably when using deadly force extends to preshooting conduct.*'"[49] Thus, the Ninth Circuit found that "[c]onsistent with our obligation to follow the authority of California's highest court, . . . we conclude that the deputies' duty of reasonable care extended to their conduct before the shooting, and reverse the district court's conclusion to the contrary."[50]

Judge Rawlinson again dissented, arguing that in *Hayes II*, the California Supreme Court "simply reiterated our obligation to resolve the excessive force claim by reviewing the totality of the circumstances, rather than by dissecting the analysis into separate considerations of preshooting conduct and shooting conduct."[51] The Supreme Court emphasized that pre-shooting conduct is only relevant if it shows that the shooting itself was negligent, and a law enforcement officer need not choose "the most reasonable action or the conduct that is least likely to cause harm."[52] Also, the Supreme Court rejected a bright line rule, and recognized that law enforcement officers have discretion in how they choose to address situations in the field.[53] Judge Rawlinson concluded that "the district court in its analysis touched all the bases laid out by the California Supreme Court," and as such summary judgment should have been affirmed.[54]

"The holding in *Hayes II*, however, has widened the specter of tort liability based (at least in part) on tactical decisions in the field."

VI. THE FUTURE UNDER THE *HAYES II* RULE

The rule prior to *Hayes II* was based on the courts' recognition that "the need to protect the overall safety of the community by encouraging law enforcement officers to exercise their best judgment in deciding

how to deal with public safety emergencies vastly outweighs the societal value of imposing tort liability for the judgments they make in emergency situations."[55] The holding in *Hayes II*, however, has widened the specter of tort liability based (at least in part) on tactical decisions in the field. Sonoma Deputy County Counsel Anne Keck believes that, because of the Supreme Court's decision in *Hayes II*, "discovery [in excessive force cases] will become more extensive and more evidence will be admissible at trial with respect to pre-shooting conduct," even if this conduct "did not exacerbate the situation or cause the need for use of force." While it is possible that there will be more excessive force cases in state court with only state law claims, the prospect of recovering attorney fees under 42 U.S.C. section 1988 provides ample incentive to plaintiffs' attorneys to plead federal claims as well.

As for obtaining summary judgment in use of force cases, Keck believes that "more use of force negligence cases will likely to go to trial, as the pronounced standards will make it more difficult for public agencies to obtain summary judgment on such claims in the future." On the other hand, veteran defense litigator James Fitzgerald, a partner of the law firm McNamara, Ney, Beatty, Slattery, Borges & Ambacher in Walnut Creek, opines that even if there is a triable issue of fact with respect to negligent tactics, defense litigators should still seek summary judgment on any federal claims to remove exposure to attorney fees. If summary judgment is not obtained, it appears that defense litigators will need to grapple with two "reasonableness" standards. Evidence of tactics that might be relevant to a negligence claim might not be relevant to a federal Fourth Amendment claim. As observed by Fitzgerald, the new *Hayes II* standard is in conflict with the federal jury instructions with respect to the use of force, which allow for "no second guessing."[56] It is true that the California Supreme Court in *Hayes II* was careful to emphasize that the tactics must bear some relevance to the reasonableness of the use of force. Allowing a plaintiff's expert to opine on whether law enforcement officers could have avoided the use of force, had they used different tactics, would make it a difficult task for defense counsel to keep the jury from engaging in "Monday Morning Quarterbacking" with respect to the federal claims. James Arendt, a partner with Weakley & Arendt in Fresno, commented that while defense attorneys used to have "a fighting chance" of limiting expert opinions on police tactics, in light of *Hayes II*, it's "all fair game now."

Some defense attorneys like Fitzgerald believe that the rule of no legal duty in *Adams* will only apply if the police do not inflict the injury, and otherwise traditional negligence will apply. Thus, the applicability of the *Hayes II* rule will depend on the outcome of the emergency situation. The *Adams* case provides a great example. While the decedent died of a self-inflicted gunshot wound, he was also subject to gunshots from the surrounding officers, who believed they had been shot at.[57] Under the rule in *Hayes II*, if the officers had caused the decedent's death in *Adams*, the responding officers' legal duty would have been different, even though all of the police tactics leading up to the death-causing event would have been the same.

Ultimately, only time will tell what kind of effect *Hayes II* will have on law enforcement liability. At the very least, defense attorneys now have to prove to the satisfaction of the court, or the jury, that the tactics employed by law enforcement prior to the use of force were irrelevant to the ultimate outcome. Depending on the facts of a particular case, this may be possible. On this issue, some of the reasoning set forth in *Adams* is still pertinent. In *Adams*, the court emphasized that many of the alleged negligent tactics were related to officer safety, and "[t]he social value of protecting the lives of police officers involved in a standoff with an armed individual is extremely high."[58] The *Adams* court also rejected the notion that increasing the tension at the scene was enough to create a "special relationship" between the police and the subject, recognizing that "basic police work often involves anxiety-producing conduct."[59] These arguments are no less valid in a case where the death or injury was caused by law enforcement. Because the Supreme Court in *Hayes II* expressly declined to find a tactical duty independent of the duty to use reasonable force, it still should be possible to preclude opinions of negligent tactics. However, whether preclusion is warranted or not is now governed by issues of causation and relevance rather than a broad rule of no duty.

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Endnotes

1 *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243; *Munoz v. City of Union City* (2004) 120 Cal. App.4th 1077.

2 *Hayes v. County of San Diego* (2013) 57 Cal.4th 622.

3 *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501.

4 *Id.* at 509.

5 *Id.*

6 *Id.*

7 *Id.* at 510.

8 *Id.* at 511-521.

9 *Id.* at 521, n. 18.

10 *Id.* at 522 (Moreno, J., concurring).

11 *Id.* at 521, n. 18.

12 *Hayes v. County of San Diego* (9th Cir. 2010) 638 F.3d 688, 690-691, opinion withdrawn and question certified, (9th Cir. 2011) 658 F.3d 867.

13 *Hayes, supra*, 638 F.3d at 690.

14 *Id.* at 691.

15 *Id.*

16 *Id.* at 695.

17 *Id.* at 695-96.

18 *Id.* at 692-94.

19 *Id.* at 696.

20 *Id.*

21 *Id.* at 702 (Rawlinson, J., dissenting).

22 *Id.*, citing *Hernandez, supra*, 46 Cal.4th at 505.

23 *Hayes, supra*, 638 F.3d at 702.

24 *Hayes v. County of San Diego* (9th Cir. 2011) 658 F.3d 867.

25 *Id.* at 868.

26 *Id.* at 872-73.

27 *J.P. ex rel. Balderas v. City of Porterville* (E.D. Cal. 2011) 801 F.Supp.2d 965.

28 *Id.* at 990.

29 *Id.*

30 *Id.*

31 *Alvarado v. City of Santa Ana* (C.D. Cal. 2013) 2013 WL 2237891.

32 *Id.* at 11.

33 *Id.* at 12.

34 *Hayes, supra*, 57 Cal.4th 622.

35 *Id.* at 630.

36 *Id.*, citing *Munoz v. Olin* (1979) 24 Cal.3d 629, 634; *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 587.

37 *Id.* at 631.

38 *Id.* (italics added).

39 *Id.* at 636.

40 *Id.* at 637.

41 *Id.* at 636.

42 *Id.* at 639, n.1.

43 *Id.* at 638-639 (citations omitted), citing *Munoz, supra*, 120 Cal. App.4th at 1102, fn. 6 (stating that Fourth Amendment jurisprudence is "instructive" when deciding excessive force claims) and quoting *Billington v. Smith* (9th Cir.2002) 292 F.3d 1177,1190.

44 *Id.*

45 *Id.*

46 *Id.* at 631.

47 *Id.*

48 *Hayes v. County of San Diego* (9th Cir. 2013) 2013 WL 6224281.

49 *Id.* at 9, quoting *Hayes, supra*, 57 Cal.4th at 632 (emphasis added).

50 *Hayes, supra*, 2013 WL 6224281, at 9.

51 *Id.* at 11 (Rawlinson, J. dissenting).

52 *Id.* at 11-12.

53 *Id.* at 12.

54 *Id.* at 12-13.

55 *Munoz, supra*, 120 Cal.App.4th at 1097.

56 *See Graham v. Connor* (1989) 490 U.S. 386, 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.")

57 *Adams, supra*, 68 Cal.App.4th at 254.

58 *Id.* at 276.

59 *Id.* at 284.

Legislation Update

*Compiled by Kenneth J. Price**

HERE WE GO AGAIN!

In my last legislative update (Fall 2013), I showcased numerous bills passed by the Legislature and approved by the Governor that could impact the practices of our State Bar Public Law Section members. Now, as I write this update, the Governor has introduced a proposed budget and we face the very beginning of a flurry of yet more bills affecting public agencies.

Last year, the theme of my updates seemed to be happy times are here again! After several years of declining revenues, thanks in large part to Proposition 30 and an improving economy, the State enjoyed a significant surplus of revenues. As a result, legislators felt compelled to introduce new programs, which translated into efforts to ramp up spending.

THE CAUTIOUS BUDGET

After last year's temporary euphoria of new revenues, the reality of sound budgetary planning has set in this year. On January 10, Governor Brown introduced a $154.9 billion spending plan, which includes a $1.6 billion rainy-day fund and a few billion more for paying off some of the State's long-term debt. The Governor appears eager to be seen as promoting fiscal restraint. "Now some people would say because we have this little, little black mark there, that we should go on a spending binge," said Brown. "I don't agree with that…it isn't the time to just embark on a whole raft of new initiatives."

Despite the Governor's effort at fiscal restraint, the State remains in debt. The budget proposal projects long-term financial liabilities of $354.5 billion, including $217.8 billion in unfunded future retirement obligations.

Predictably, not everyone was happy with the budget. The Governor received flack from both sides of the aisle. On the right, Assemblyman Tim Donnelly, who has already announced his candidacy for Governor, contended the proposed budget contained too much spending. "It must be nice to view the state's problems through such rose-colored lenses. The reality is, a magnitude of problems still face California. The governor's surplus is a myth. It will be short-lived, as businesses flee the state to escape Prop. 30." On the left, Senate President Pro Tem Darrell Steinberg took the opposite approach. "We shouldn't be shy to say that there is room, with this kind of economy and this kind of a budget, to invest and to reinvest in California's economy and its people."

So what is in the budget that is making everyone so unhappy?

- Taxes: The Governor rejects any new taxes even in the face of some Democrats' call for a new tax on oil extraction. Moreover, he is calling for a November initiative that would divert capital gains revenues into a rainy-day fund to be used during down years. Finally, the Governor would make it easier for local governments to raise money for redevelopment-type projects by permitting cities and counties to sell bonds and raise taxes with the approval of 55% of the voters rather than the current two-thirds threshold required in most cases.
- Education: The proposed budget would allocate $61.6 billion for elementary and secondary education, a boost of $6.3 billion from last year. The Governor is also adding more than $1 billion in the budget for California's universities and junior colleges.
- Healthcare: The budget recognizes new mandates that will result from the Affordable Care Act by allocating $16.9

billion for Medi-Cal, which is now the second largest program funded in the State. Of this spending, $670 million will be used for new mental health benefits, substance abuse treatment, nutrition programs, and adult and children's dental services.

- Social Services: The Governor anticipates that approximately 529,000 families will receive assistance through CalWorks, which represents a modest decrease from last fiscal year's caseload. However, the budget increases funding for CalWorks by 5%, which was allocated in last year's State budget, and boosts In-Home Supportive Services by 6% to approximately $2 billion.
- Criminal Justice: As part of the State's effort to comply with the federal mandate to reduce jail overcrowding, the Governor anticipates that 2,200 inmates would be eligible for release during this new Fiscal Year. Despite this, the State will still miss the courts' April deadline to reduce overcrowding and, as a result, the Governor is requesting a delay in the compliance deadline. If not, the State will spend an additional $315 million to move inmates to privately owned prisons. The Governor also proposes $500 million to build more prisons.
- Environment and Transportation: The Budget anticipates $850 million from fees under the "cap and trade" program. Moreover, he has included $250 million to help pay for the initial construction of high speed rail in the Central Valley.

Despite all of the criticism, columnist Dan Walters notes that the Governor is trying hard to avoid the mistakes of many of his predecessors who spent every dollar of the State's revenue windfall. "Brown seems genuinely bent on bringing order to California's chaotic fiscal affairs. . . ."

NEW LEGISLATION

February 21 marks the last day bills may be introduced. In upcoming updates, we will be highlighting various legislation introduced during this cycle. Significant changes to the Public Contracting Code, the Public Records Act, the Public Utilities Code, and County retirement system (1937 Act) are expected. Stay tuned!

Kenneth J. Price is a Partner at Baker Manock & Jensen PC in Fresno. His practice includes representing Local Agency Formation Commissions, First 5 agencies and various other local entities as general counsel. He also handles a myriad of transactional matters for public and private sector clients.

Litigation & Case Law Update

*By Scott Dickey**

CEQA/ACTS CONSTITUTING APPROVAL

City of Irvine v. County of Orange (2013) 221 Cal.App.4th 846

County's application for state funds did not constitute a project approval under CEQA because it did not commit the County to a definite course of action regarding the expansion of its jail facility, and did not effectively preclude consideration of any project alternatives or mitigation measures otherwise required by CEQA.

For more than 40 years, Orange County has operated a jail facility on 100 acres of unincorporated land it owns adjacent to the City of Irvine. The County built the facility originally as an honor farm, but over the years it has expanded to house 1,200 minimum-security inmates.

Facing increasing incarceration levels, in 1996, the County prepared an Environmental Impact Report for a phased expansion of the facility to a maximum capacity of 7,584 inmates, noting that the expansion depended upon the availability of funding. The County later certified the EIR as complete and adequate under CEQA and the County "approve[d] . . . and authorize[d] the pursuit of funding, the initiation of design, and the construction of the [facility expansion]." Irvine sued, asking the court to overturn the certification of the EIR for failure to adequately address and mitigate the environmental impacts associated with the expansion project. The trial court agreed and ordered the County to vacate its approval of the EIR and the expansion plan, and to revise the EIR. The County appealed, and the Court of Appeal reversed, finding that the EIR "satisfie[d] all of CEQA's requirements." Nevertheless, while the appeal was pending, the County revised and recertified the EIR and approved the expansion plan. The County did not proceed with the expansion, however, because it lacked the funding to undertake the project.

In 2007, the California Legislature passed Assembly Bill 900 to provide $1.2 billion in funding for local jail construction. The County applied for and was granted funds under AB 900, but declined to accept those funds based on conditions imposed on their use, including a requirement that the County pay 25% of the construction costs, and construct a re-entry facility for exiting inmates. Four years later, the Legislature passed AB 109, which shifted responsibility for jailing lower-level offenders from the state to the counties. Concurrently, the Legislature amended AB 900's funding provisions to increase the amount available to counties, while lowering the standards for entitlement, and reducing the amount the counties would have to contribute to construction. The County applied for construction funds under the amended AB 900. The Board of Supervisor's resolution approving the application included several assurances required by the state, and a resolution that the County comply with CEQA before accepting the state's funds.

In January 2012, Irvine filed a writ petition seeking a writ compelling the Board of Supervisors to vacate their approval of the resolution authorizing the application and enjoining the County from proceeding with the AB 900 process until the County complied with CEQA. Irvine argued that the approval of the application for state funds was an approval under CEQA and that the County could not do so until it prepared and certified and EIR or other CEQA document addressing the current environmental impacts associated with the facility. The trial court denied Irvine's petition, and Irvine appealed.

In *City of Irvine v. County of Orange* (2013) 221 Cal.App.4th 846, the Fourth Appellate District agreed

with the trial court, holding that the "County's application for state funds did not constitute a project approval under CEQA because it did not commit the County to a definite course of action regarding the expansion of its jail facility." The Court called the application a "preliminary step," and noted that the state did not require the County to initiate CEQA review until after the County received conditional approval to fund the project. In reaching this conclusion, the Court relied heavily on the California Supreme Court decision in *Save Tara v. City of West Hollywood* (2008) 45, Cal.4th 116, in which the Supreme Court held that the determination whether an agency has approved a project requires a review of the "totality of the circumstances and the practical effect of the public agency's action on its ability and willingness to modify or reject the proposed project." "The critical question is whether the totality of the circumstances surrounding the public agency's action has effectively committed the agency to the project even though it has not provided all approvals or entitlements necessary to proceed." The *Irvine* Court noted that although public agencies are often required to provide project approvals for their own projects, "an agency does not commit itself to a project simply be being a proponent or advocate of the project." It is only when the actions taken "effectively preclude[] . . . [consideration of] any project alternatives or mitigation measures" otherwise required by CEQA that a public agency has gone too far.

FFBOR/USE OF ADVERSE COMMENTS

Poole v. Orange County Fire Authority (2013) 221 Cal.App.4th 155

Adverse comments contained in Captain's daily log of supervisee's job performance—but not their personnel files—were subject to the notice and response requirements of the Firefighters Procedural Bill of Rights if they are used for personnel purposes.

As part of his daily routine, Orange County Fire Authority ("OCFA") Captain Brett Culp kept notes—which he called "daily logs"—of the performance of each of the employees he supervised, noting "any factual occurrence or occurrences that would aid . . . in writing a thorough and fair annual review" for each employee. He kept these logs by hand initially, but later began maintaining them electronically, creating a unique log for each employee, and keeping a printed copy in a manila folder in his desk with the employee's name. The logs documented the efficiency of the firefighters, as well as whether the firefighters complied with instructions and adhered to rules. Consequently, the logs frequently included adverse comments.

In 2009, Culp prepared an annual performance evaluation for Steven Poole, a firefighter who Culp supervised from September 2008 to October 2010. The evaluation concluded that Poole's performance during the previous year had been "substandard," finding his work habits, personal relations, adaptability and progress to be "unsatisfactory." Culp informed his Battalion Chief that he based his evaluation on the daily logs he kept, and provided the Battalion Chief with a copy of the log because he felt that the incidents reflected in the log merited further review by the OCFA. The OCFA subsequently issued a performance improvement plan to Poole.

In August 2010, Bob James, Poole's representative with the Orange County Professional Firefighters Association demanded a copy of Poole's "station file" from Culp. Culp provided James the log he kept on Poole, which included more than 100 entries noting times when Poole failed to be prepared in a timely fashion, failed to pass his pager to his replacement before leaving his shift, failing to remove his gear from the OCFA unit before leaving for the day, and apparently panicking during a training exercise. In September 2010, Poole demanded that all adverse comments be removed from his "personnel file" located in the station house. The OCFA refused this request on the grounds that the log notes were not entered into a "personnel file," and that to the extent the comments are reflected in Poole's annual evaluation, he had the right to respond to any adverse comments in the evaluation before they were placed in his personnel file.

Poole and the Firefighters' Association filed a petition for writ of mandate seeking a writ directing OCFA to include adverse comments in Poole's files only after complying with section 3255 of the Firefighters Procedural Bill of Rights ("FFBOR"), which provides that "[a] firefighter shall not have any comment adverse to his or her interest entered in his or her

personnel file, or any other file used for any personnel purposes, by his or her employer without the firefighter having first read and signed the instrument containing the adverse comment indicating he or she is aware of the comment." The trial court denied the relief sought. The Court concluded that the daily logs Culp kept were not part of Poole's personnel file, and were therefore not subject to the requirements of section 3255. The trial court analogized the logs to "Post-it notes" used as reminders.

In Poole v. Orange County Fire Authority (2013) 221 Cal.App.4th 155, the Court of Appeal for the Fourth District reversed the trial court's ruling, concluding that "the files were used for personnel purposes and are subject to the protective procedures instituted in the FFBOR." In reaching this conclusion, the Court noted that the "FFBOR's purpose of providing firefighters a right to meaningfully respond to adverse comments that may affect personnel decisions concerning the firefighter is frustrated when the firefighter's supervisor maintains a daily log containing adverse comments that may reach as far back as the day after the firefighter's last yearly evaluation," which may be well beyond the time in which the firefighter could reasonably be expected to recall the events leading to the adverse comments.

PUBLIC RECORDS ACT/ DEFINITION OF PUBLIC RECORDS

Regents of the University of California v. Superior Court (Reuters America LLC) (2013) 222 Cal. App. 4th 383, ___ Cal.Rptr.3d___ (2013 WL 6680787, filed Dec. 19, 2013).

Financial documents not prepared, owned, used, or retained by a public entity are not "public records" for purposes of the California Public Records Act, even if those documents relate to the conduct of the People's business.

As of October 2012, the Regents of the University of California owned $71.6 billion in investment assets, which it uses to help fund employee pensions student scholarships, research, and other university operations. Since 1979, approximately 2 percent of the Regents' investment assets have been invested in "private equity." Until 2003, the Regents received reports from the private equity firms holding its investments that allowed it to monitor the health of those investments, such as the identity of privately held companies in which the fund invested, the amounts of those investments, and other information the private equity firms regarded as confidential business information. These reports where provided in confidence to the Regents.

In 2003, a group calling themselves The Coalition of University Employees ("CUE") submitted a request under the California Public Records Act ("CPRA") for, among other things, the internal rate of return for 94 separate private equity funds. The Regents attempted to prevent disclosure by arguing that the information contained in the private equity firms' reports were trade secrets. The Alameda County Superior Court disagreed, and ordered disclosure. The Regents' attempts to appeal were unsuccessful. Consequently, private equity firms holding the Regents' investments stopped providing the reports.

In September 2011, Reuters submitted a request under the CPRA for various kinds of financial information pertaining to all of the Regents' investments with Kleiner Perkins, Sequoia, and Accel Partners. The Regents responded that it did not have individual fund data for the three private equity firms, but directed Reuters to information already available on the Regents' website, showing the names of the individual funds, the vintage year, the University of California commitment, cash in, current net asset value (NAV), cash out, cash out plus NAV, investment multiple, and, where available, the net internal rate of return (IRR). The Regents also provided aggregate numbers for drawdowns, distributions, and NAV for the Sequoia, Kleiner Perkins, and Accel funds on an aggregate basis. Reuters subsequently narrowed its request to individual fund data for Kleiner Perkins and Sequoia.

When the Regents did not provide the information requested, Reuters filed an action in the Alameda County Superior Court, alleging that the Regents' refusal to provide the individual fund data was a violation of their duty under the CPRA. The trial court agreed, finding that although the Regents had shown that it did not use the Fund Level Information Reuters sought, it did not demonstrate "that the Fund Level Information does not relate to the conduct of the people's business or that it does not have constructive possession of that information." Regents appealed.

In *Regents of the University of California v. Superior Court (Reuters America LLC)* (2013) ___ Cal. Rptr.3d___ (2013 WL 6680787, filed Dec. 19, 2013) the Court of Appeal for the First District reversed. The Court reasoned that section 6252 of the Public Records Act (Gov. Code §§ 6250 *et seq.*) unambiguously defines "public records" as a writing that is both related "to the conduct of the public's business *and* is prepared, owned, used, or retained by" a public entity. The Court found that absent both circumstances, a writing is "not a public record under the CPRA, and its disclosure would not be governed by the Act. No words in this statute suggest that the public entity has an obligation to obtain documents even though it has not prepared, owned, used, or retained them." The Court also found that the trial court erred in reading section 6252 and 6253 to include not only possession of public records but "constructive possession," finding no support for that proposition in the CPRA or the cases relied upon by the trial court.

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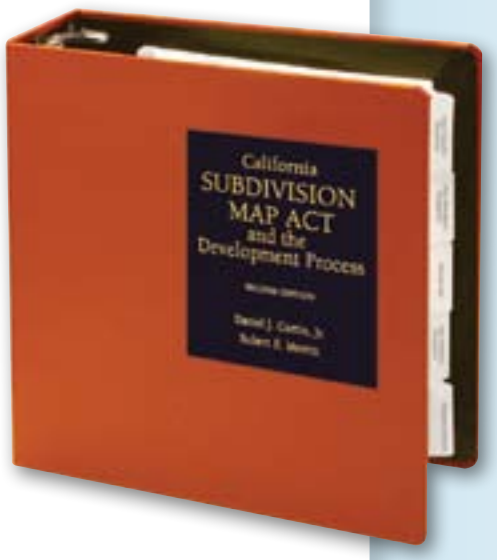

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