S230104

In The

Supreme Court of California

JAIME A. SCHER, *et al.*,
Plaintiffs and Respondents,

vs.

JOHN F. BURKE, *et al.*,
Defendants and Appellants.

After a Decision by the Court of Appeal
Second Appellate District, Division Three—Case No. B235892

On Appeal from the Los Angeles Superior Court
Hon. Malcolm Mackey, Judge—Case No. BC415646

ANSWER BRIEF ON THE MERITS OF RICHARD ERICKSON, WENDIE MALICK, RICHARD B. SCHRODER, and ANDREA D. SCHRODER

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I.

Issue Presented.

The Court granted review of the following issue: "Does Civil Code section 1009 preclude non-recreational use of non-coastal private property from ripening into an implied dedication of a public road?"

The answer is an unequivocal, "Yes."[1]

II.

Introduction.

This case is not about landowners who cannot access their property. Plaintiffs (who, like defendants, live in a rural, sparsely populated, mountainous area) have five access routes to their property (not counting the one they seek over defendants' properties). (Slip Opn., pp. 4, 16, 21, 45.) Indeed, plaintiffs traveled to court during trial by using their alternate routes. (5RT614.) The trial court (following a bench trial) did not find that plaintiffs were landlocked, and Division Three of the Second District found, "Plaintiffs' land is by no means landlocked." (Slip Opn., p. 21.) As the court of appeal explained, plaintiffs simply wish to use defendants' properties because it is sometimes more "convenient" and shaves a few minutes off of plaintiffs' drive to the nearby rustic town of Topanga. (See Slip Opn., pp. 16, 45.)

Nor (as plaintiffs urge) does the court of appeal's reading of section 1009 bar a landowner from acquiring *private* access rights via, for example, a prescriptive, express, or equitable easement.

Instead, this case is about plaintiffs' desire to use the doctrine of implied dedication (by public user) to gain access for *themselves* in order to avoid the findings by the trial and appellate courts that

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[1] Unspecified statutory references are to the Civil Code. A copy of section 1009 is appended to this brief.

plaintiffs do not have any *private* right to use defendants' properties. (Slip Opn., pp. 42–44.) No one else is clamoring for an implied dedication.

The Legislature, however, prospectively abrogated the doctrine of implied dedication based on public use in the non-coastal zone (absent the government's expending funds on visible improvements on private land) when section 1009 became effective in March 1972. The properties at issue are not located in the coastal zone (and the government expenditure exception does not apply). As such, the court of appeal—after an exhaustive and thorough analysis of the statute and legislative history—correctly rejected plaintiffs' claim for an implied dedication based on purported public use of defendants' properties after March 1972.

Plaintiffs urge (as they did in the court of appeal below) that their claim for implied dedication was properly based on purported public "non-recreational use" of defendants' properties. Plaintiffs contend that by enacting section 1009, the Legislature only intended to bar "recreational use" from ripening into an implied public dedication. The Legislature said and implied no such thing.

To support their argument, plaintiffs rely on the preamble to section 1009, which states in part: "It is in the best interests of the state to encourage owners of private real property to continue to make their lands available for public *recreational use* to supplement opportunities available on tax-supported publicly owned facilities." (§ 1009, subd. (a)(1), italics added.)

But (as the court of appeal held) plaintiffs ignore the operative language of the statute, where the Legislature—which we presume knew what it said and said what it meant—stated plainly that ***"no***

use" of non-coastal property would ripen into an implied dedication. (§ 1009, subd. (b).) The Legislature surely knew how to say "recreational use" in subdivision (a), but expressly chose "no use" in subdivision (b) (and subdivisions (f) and (g).)

The Legislature believed that barring *any* use of non-coastal property from ripening into an implied public dedication would protect property owners and thus encourage them to make their lands available to the public without fear of losing their rights.

The legislative history confirms the Legislature created a coastal zone in which implied dedication survived (with limited exceptions), but otherwise prospectively abrogated the doctrine, including:

The Legislative Counsel's Digest: "Prohibits ***any use*** of private land, except specified ocean frontage land, after effective date [March 4, 1972] from conferring a vested right in public with specified exception for a public entity that makes visible improvement on such property ...." (RJN in support of AOB of Erickson, Ex. H, Legis. Counsel's Dig., Sen. Bill. No. 504 (1971 Reg. Sess. & 1971 1st Ex. Sess.) Summary Dig., p. 136, emphasis added.)

The Assembly's Analysis: "The doctrine of implied dedication would be ***deleted prospectively*** except for the 'coastal zone' ...." (RJN in support of AOB of Erickson, Ex. F, Assem. Com. on Planning and Land Use, Analysis of Sen. Bill No. 504 (Legislative Sess.) July 20, 1971, p. 1, emphasis added; see *id.*, p. 2 ["total abolition"]; see *id.*, p. 2 [addressing concern that "abolition" of doctrine of implied dedication might negatively impact access roads in residential subdivisions—bill enacted nonetheless].)

The Enrolled Bill Memorandum to the Governor: "The bill also prohibits ***any use of private land***, except specified ocean frontage

land, after the effective date of the bill from conferring a vested right in the public, with specified exceptions." (RJN in support of AOB of Erickson, Ex. G, Enrolled Bill mem. to Governor Reagan re Sen. Bill. No. 504 (1971 Reg. Sess.) Oct. 7, 1971, p. 1, emphasis added.)

"Recreational Purpose" Rejected: The Legislative Counsel proposed language for a competing bill, which targeted "use of the land for any ***recreational purpose***," but the Legislative Counsel noted that "a question could be raised" about the meaning of "recreational purpose" unless that phrase were defined. (RJN, Ex. C, Legislative Counsel George Murphy, letter to Assemblyman Paul Priolo, Apr. 15, 1971, emphasis added.) By enacting section 1009 without that limitation, the Legislature necessarily rejected the idea of barring only recreational use from ripening into an implied dedication; instead, it barred all use from ripening into an implied dedication.

* * *

This is not a complicated case. The statute says "no use." It is unambiguous. This Court should affirm the court of appeal's judgment.

III.

The properties and access roads at issue.

The parties live in the rural, unincorporated area of Topanga in the Santa Monica Mountains of Los Angeles County. (See Slip Opn., p. 2; Trial Ex. 211.)

Plaintiffs' property is north of defendants' properties. South of plaintiffs' property is the Marshall property. Immediately south of the Marshall property is the Erickson/Malick property. Immediately east of the southern portion of the Erickson/Malick property is the Schroder property. And immediately east of the Schroder property is the Burke

property. (Slip Opn., pp. 3–4; Tr. Exs. 204 [showing defendants' properties], 203 [showing plaintiffs' property].)

Plaintiffs' property is approximately 20 acres in size, Marshall's is 10 acres, Erickson's/Malick's is over 50, the Schroders' is over 20, and the Burkes' is over 5. (Tr. Exs. 203, 204; 6RT932; 7RT1338; 9RT1834, 1847; 11RT2462, 2541; 12RT2769.)

This case concerns two "roadways" that are really just long driveways: Henry Ridge Motorway and Gold Stone Road. Henry Ridge crosses plaintiffs' property as well as the Marshall, Erickson/Malick, and Schroder properties. Along the eastern portion of the Schroder property, Henry Ridge becomes Gold Stone. Gold Stone crosses the Schroder and Burke properties, where it eventually connects to Greenleaf Canyon Road. (Slip Opn., pp. 3–4; Tr. Exs. 203, 204.)[2]

Trial Exhibits 203 and 204 show Gold Stone and Henry Ridge in blue, as they lay on the ground. A local map identifies them as part of a continuous "private" "trail" bounded by "gate[s]." (Tr. Ex. 211 [center of map]; Slip Opn., p. 4.)

IV.

Henry Ridge "Motorway" is not safe nor fit for *public* use.

Before delving-into the merits, let us first dispense with any notion that Henry Ridge Motorway and Gold Stone comprise a grand thoroughfare. They do not, nor did the lower courts find otherwise. The "roadways"—using that term loosely—are little more than narrow, winding, back-country driveways of the kind one might expect in the

[2] Plaintiffs also own property elsewhere in the area (in "Section 12"), but that property does not touch Gold Stone or Henry Ridge. (See Slip Opn., pp. 14–15, 45.)

rustic and sparsely populated Topanga mountains where the parties live.

Henry Ridge Motorway is dangerous. It is only 12-feet-wide at its widest, and narrows to a mere 9-feet. (Slip Opn., p. 3; 11RT2469.) Henry Ridge and Gold Stone join by way of a hairpin turn. (Slip Opn., p. 3.) The road is so narrow that two cars cannot pass one another: one car would have to drive backwards through steep, blind turns, without the aid of a turnaround. (11RT2470–2471.)

Henry Ridge is also at risk of washing-away during a storm. In 2005, a large mudslide eroded much of the hillside along the Schroder property; an engineered retaining wall would be required to even begin making the roadway safe for public use. (See 11RT2469.)

Further, Henry Ridge is only partially paved. (*See, e.g.,* Tr. Exs. 15-11, 15-12, 15-15, 15-21, 34-1, 34-5, and 34-8.)

Against this backdrop, one can understand why the County of Los Angeles defines a "motorway" as: "A truck trail or trail through mountainous terrain, usually for fire equipment usage or service access; e.g., power lines, Nike sites, etc. ***Not for public use.***" (Slip Opn., p. 7 & fn. 4, quoting the Street Name Policy of the County of Los Angeles Department of Public Works as of June 28, 1999, and the House Numbering and Street Naming Manual of the Los Angeles Department of Public Works, dated April 1999, emphasis added.)

One can also understand why the fire department's approved emergency access is from the north of plaintiffs' property, not from the south across defendants' properties. (10RT2241–2242.)

And one can understand why the prior owner of plaintiffs' property (Pauline Stewart) testified that no one in his or her "right

mind" would use the portions of Henry Ridge traversing defendants' properties. (Slip Opn., p. 14; 8RT1544.)

V.

Because the government has not accepted the purported "dedication," and does not maintain the roads, defendants are gravely concerned they will be held liable for maintenance of, and any injuries occurring on, Henry Ridge and Gold Stone if Henry Ridge and Gold Stone are impliedly declared "public."

Defendants are gravely concerned about the effect of declaring Henry Ridge and Gold Stone "public" roads—particularly because, somewhat paradoxically, the government (1) has no duty to maintain a road that has been impliedly dedicated through public use unless the government formally *accepts* the dedication, and (2) is not liable for any injuries unless the government either formally *accepts* the dedication or *maintains* the road. (See Sts. & Hwy. Code, § 941, subd. (b); *id.*, § 1806, subd. (a); Gov. Code, § 831.3; *see, e.g., Hanshaw v. Long Valley Road Ass'n* (2004) 116 Cal.App.4th 471, 479–480 [11 Cal.Rptr.3d 357].) The government has not accepted the purported dedication, and does not maintain the roads. (Slip Opn., p. 33, fn. 13.)[3]

As discussed below, by enacting section 1009, the Legislature prospectively abrogated the doctrine of implied dedication in the non-

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[3] Pauline Stewart—the prior owner of plaintiffs' property—testified that for many years, the roads in the area were "just fire roads." (5RT658–659.) There is no evidence government funds were used to build Henry Ridge or Gold Stone, but the fire department maintained Henry Ridge until around 1992–1993 (7RT1219-1220; 11RT2502), when the county sent a letter stating that the fire department would no longer maintain Henry Ridge, and "declared" it a "private" road (8RT1546; 5RT666–667).

coastal zone, *unless* the government either (1) *accepts* a landowner's express offer of dedication, or (2) expends funds to *construct* or *maintain* visible improvements located on private land. (§ 1009, subds. (b), (d).)

Whether a landowner intends to dedicate his or her property to the public is of paramount concern. "To hold that property has been dedicated to a public use is not a trivial thing, and such dedication is never presumed without evidence of unequivocal intention." (*Trask v. Moore* (1944) 24 Cal.2d 365, 373 [149 P.2d 854], internal citations and quotations omitted.)

Requiring the government to expend funds on "visible" improvements, or requiring the owner to make an "express" offer of dedication, ensures the owner actually intends to dedicate his or her property. It is no longer enough to imply that intent simply because the public has purportedly used the property for five years, as permitted at common law prior to section 1009. (See *Gion v. City of Santa Cruz* (consolidated with *Dietz v. King*) (1970) 2 Cal.3d 29, 39 [84 Cal.Rptr. 162, 465 P.2d 50] (*Gion-Dietz*).)

VI.

Civil Code section 1009 precludes non-recreational use of non-coastal private property from ripening into an implied dedication of a public road.

In response to a widely perceived narrowing of private property rights by *Gion-Dietz*—and, equally if not more important, the ensuing risk that landowners would close their lands to public uses—the Legislature enacted Civil Code section 1009 to preserve and promote public recreational use of private property. (John Briscoe & Jan S.

Stevens, *Gion After Seven Years: Revolution or Evolution?* (1977) 53 L.A. Bar J. 207, 222-225.)

The Legislature understood that to achieve its goal of supplementing government-owned recreational areas, landowners would need to rest assured that "*no use*" of their property (not merely "no recreational use") could ripen into public rights. Otherwise, given the risk of any ambiguity between "recreational" and "non-recreational" use, landowners would simply shut-out the public completely rather than risk losing their property.

Thus, the Legislature prospectively abrogated the doctrine of implied dedication outside the coastal zone (property more than 1,000 yards from the mean high tide line).

This Court should affirm the court of appeal's judgment holding that section 1009 bars plaintiffs' claim for an implied dedication based on purported public use after section 1009 took effect in March 1972.

A. "No Use": The Legislature said what it meant and meant what it said.

Rules of statutory interpretation are well settled. " '[W]e must look first to the words of the statute, 'because they generally provide the most reliable indicator of legislative intent.' [Citation.] If the statutory language is clear and unambiguous our inquiry ends. 'If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.' [Citations.] In reading statutes, we are mindful that words are to be given their plain and commonsense meaning. [Citation.] ... Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in

interpretation.' [Citation.]" (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1250 [140 Cal.Rptr.3d 173, 274 P.3d 1160] (*Kirby*).)

Section 1009, subdivision (b), states: "Regardless of whether or not a private owner of real property has recorded a notice of consent to use of any particular property pursuant to Section 813 of the Civil Code or has posted signs on such property pursuant to Section 1008 of the Civil Code, except as otherwise provided in subdivision (d) [government expenditure exception], ***no use*** of such property by the public after the effective date of this section shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently, in the absence of an express written irrevocable offer of dedication of such property to such use, made by the owner thereof in the manner prescribed in subdivision (c) of this section, which has been accepted by the county, city, or other public body to which the offer of dedication was made, in the manner set forth in subdivision (c)." (Emphasis added.)

The Legislature carved-out coastal land, allowing the doctrine of implied dedication to survive in the coastal zone: "Subdivision (b) shall not apply to any coastal property which lies within 1,000 yards inland of the mean high tide line of the Pacific Ocean, and harbors, estuaries, bays and inlets thereof, but not including any property lying inland of the Carquinez Straits bridge, or between the mean high tide line and the nearest public road or highway, whichever distance is less." (§ 1009, subd. (e).)

Defendants' lands are outside the coastal zone. (Slip Opn., p. 27.) The court of appeal thus correctly held plaintiffs could not establish an implied dedication over defendants' private property based on purported public use after section 1009 became effective. Subdivision

(b) states ***"no use"*** of private property shall give rise to a public dedication. "[N]o use" is clear and unambiguous. (Slip Opn., p. 29.) It has a "plain and commonsense meaning." (*Kirby, supra,* 53 Cal.4th, 1244, 1250.)

Relying on the term "recreational use" in section 1009's preamble (subdivision (a)), plaintiffs ask the Court to insert "recreational" between "no" and "use." But as this Court has "often explained, 'insert[ing]' additional language into a statute 'violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes. [Citations.]' [Citation.] " (*People v. Guzman* (2005) 35 Cal.4th 577, 587 [25 Cal.Rptr.3d 761, 107 P.3d 860], quoting Code Civ. Proc., § 1858.)

Other parts of section 1009 confirm the Legislature did not mean "no recreational use" when it said "no use." For example, subdivision (f) states, "***No use***, subsequent to the effective date of this section, by the public of [coastal property] shall constitute evidence or be admissible as evidence that the public or any governmental body or unit has any right in such property by implied dedication if the owner" grants permission to the public to cross his property. (Emphasis added.)

Subdivision (g) states the owner may condition this permission "upon reasonable restrictions on the time, place, and manner of such public use," but "***no use*** in violation of such restrictions shall be considered public use for purposes of a finding of implied dedication." (Emphasis added.) Again, the Legislature made no distinction between recreational and non-recreational use.

Likewise, the government-expenditure exception in subdivision (d) is worded broadly to apply to *any* public use: "Where a governmental entity is using private lands by an expenditure of public

funds on visible improvements on or across such lands or on the cleaning or maintenance related to the *public use* of such lands in such a manner so that the owner knows or should know that the public is making *such use* of his land, *such use*, including *any public use* reasonably related to the purposes of such improvement" may ripen into a government "right to continue such use" unless the owner gives permission or takes steps to prohibit "such use." (§ 1009, subd. (d), italics added.)

That the Legislature said "recreational use" in subdivision (a)—but not anywhere else in the statute—is itself significant. " 'Ordinarily, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning. [Citation.]' [Citation.]" (*Rashidi v. Moser* (2014) 60 Cal.4th 718, 725 [181 Cal.Rptr.3d 59, 339 P.3d 344]; see *In re Young* (2004) 32 Cal.4th 900, 907 [12 Cal.Rptr.3d 48, 87 P.3d 797] ["absence of term 'credit' in section 2935 is significant"].)

The Legislature certainly knew how to define and qualify "use" where it intended to do so. For example, the last paragraph of subdivision (f) states in part, "... the owner shall not prevent any public use which is *appropriate under the permission granted....*" (Italics added.)

As the court of appeal found below, "The absence of the word 'recreational' from the phrase 'no use' in subdivision (b) indicates that the Legislature's aim was to comprehensively preclude implied public dedications from arising from *any kind* of public use of private real property." (Slip Opn., p. 29, original italics.)

Plaintiffs' interpretation (that subdivision (b) only bars recreational use from ripening into an implied dedication) also renders meaningless the term "[r]egardless" in subdivision (b). "Interpretations that lead to absurd results or render words surplusage are to be avoided." (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037 [175 Cal.Rptr.3d 601, 330 P.3d 912], internal quotations and citations omitted.) Subdivision (b) states that its bar applies "[r]egardless" of whether the owner has recorded a notice every year under section 813 or posted signs under section 1008. The point of "[r]egardless" is to make clear that the doctrine of implied dedication has been deleted prospectively outside the coastal zone *as a matter of State law*, without regard to any actions taken by a specific owner concerning any "particular property." (§ 1009, subd. (b).)

The Legislature did not want the availability of private lands for recreational purposes to turn on whether the landowner recorded annual notices (or posted signs). Indeed, "[r]ecordation as the sole means of protection was discarded relatively early in response to advice from the State Chamber of Commerce that it did not adequately protect the landowner who failed to record all possible public uses, and in fact that land adjacent to lands for which recordation had been made would still be subject to the threat of implied dedication." (Briscoe & Stevens, *supra*, 53 L.A. Bar J. 207, 225.) Indeed, one must wonder why owners would go to this trouble and expense in order to permit the public to use their property, when it is the public that benefits from the use.

Finally, the fact that "recreational use" appears in the preamble—subdivision (a)—is not controlling. "Legislative findings and statements of purpose in a statute's preamble can be illuminating if a statute is ambiguous. But a preamble is not binding in the

interpretation of the statute. Moreover, the preamble may not overturn the statute's language." (*Yeager v. Blue Cross of California* (2009) 175 Cal.App.4th 1098, 1103 [96 Cal.Rptr.3d 723], citing *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118 [81 Cal.Rptr.2d 471, 969 P.2d 564], *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 52 [276 Cal.Rptr. 114, 801 P.2d 357].)

* * *

"No use" means "no use." It does not mean "no recreational use." This Court should affirm the court of appeal's judgment.

B. The legislative history confirms that section 1009, subdivision (b), bars *any use* from ripening into an implied dedication, not just "recreational use."

Section 1009 was added to the Civil Code by Senate Bill 504. It was one of several bills considered by the Legislature following *Gion-Dietz*, and the one that ultimately passed. (Briscoe & Stevens, *supra*, 53 L.A. Bar J. 207, 223.)

Myriad documents contemporaneous to SB 504's enactment confirm that "no use" by the public would ever ripen into an implied dedication after the statute's effective date in 1972, because the doctrine of implied public dedication was being "deleted prospectively" *except* in the coastal zone.[4] None suggests the Legislature intended to

[4] SB 504 originally did not contain an exception for coastal land. That exception was added later. But there was never any mention of roads, never any mention of barring only "recreational use" from ripening into an implied dedication, and the legislative counsel's digest was consistent that the bill applied to any use. (RJN, Ex. D, original SB 504 and amendments.)

limit the abrogation to "recreational use" or intended to exclude "roads" as plaintiffs urge.

1. The Legislative Counsel's digest.

The Legislative Counsel's digest summarized SB 504 as follows: "Declares public policy favoring public use of private lands for recreational purposes without impairing rights of landowners. [¶] Prohibits ***any use*** of private land, except specified ocean frontage land, after effective date of act from conferring a vested right in public with specified exception for a public entity that makes visible improvement on such property to continue such use permanently in the absence of express written irrevocable offer by owner of property accepted by specified public agency." (Legis. Counsel's Dig., Sen. Bill. No. 504, *supra*, p. 136, emphasis added.)[5]

2. The Assembly's analysis.

The Assembly committee that passed on SB 504 stated: "The doctrine of implied dedication would be ***deleted prospectively*** except for the 'coastal zone' ...." (Assem. Com. on Planning and Land Use, Analysis of Sen. Bill No. 504, *supra*, p. 1 [proposed amendments],

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[5] The Legislative Counsel's digest is entitled to "great weight." (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1169–1170 [72 Cal.Rptr.3d 624, 177 P.3d 232].) It "is printed as a preface to every bill considered by the Legislature. It constitutes the official summary of the legal effect of the bill and is relied upon by the Legislature throughout the legislative process, and thus is recognized as a primary indication of legislative intent." (*In re M.G.* (2014) 228 Cal.App.4th 1268, 1277, fn. 7 [176 Cal.Rptr.3d 459], citations and internal quotations omitted.)

emphasis added; *id.* at p. 2 ["total abolition," "eliminating any doctrine"].)

3. The author's letter urging the Governor to sign.

The author of SB 504 urged the Governor to sign the bill, writing that the bill was supported by numerous groups, including the California Land Title Association, Sierra Club, and California Wildlife Federation. The author explained that SB 504's exception for "coastal property reflect[s] the constitutional right of the public to use State tidelands. ***For all other [non-coastal] property***, the bill provides that ***no future use*** by the ***public generally*** of such property will create any legal threat to the owner's title." (RJN, Ex. A, Sen. Lagomarsino, letter to Gov. Reagan, Sep. 27, 1971, emphasis added.)

4. The enrolled bill memorandum to the governor.

Likewise, the enrolled bill memorandum to the governor explained that the bill "prohibits ***any use of private land***, except specified ocean frontage land, after the effective date of the bill from conferring a vested right in the public, with specified exceptions." (Enrolled Bill mem. to Governor Reagan re Sen. Bill. No. 504, *supra*, p. 1, emphasis added.)[6]

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[6] The court of appeal took judicial notice of the 1971 Legislative Counsel's Digest, the July 20, 1971 California Assembly report, and the October 7, 1971 Enrolled Bill Memorandum to the Governor. (Slip. Opn., p. 31, fn. 12.)

5. The bill sponsor's commentary.

SB 504 was sponsored by the California Chamber of Commerce along with "a number of statewide regional agricultural, forest and other resources organizations representing landowners and recreationists." (RJN Ex. B, Legislative Issue Report, California Chamber of Commerce, No. 71-3, Mar. 16, 1971, p. 1.)

A memorandum by the Chamber listed arguments in support of the bill, including: "The common law rule of 'implied dedication' is obsolete and inequitable ...." (*Ibid.*, p. 2.) It also listed potential arguments against the bill, including: "***Complete revocation*** of the common law rule of 'implied dedication' as to future uses is a drastic measure and may work against the interests of local governments." (*Id.* at p. 3, emphasis added.)[7]

6. Contemporaneous legal commentary.

Shortly after section 1009 became effective, Jay L. Shavelson, a state Assistant Attorney General, penned, "[T]he legislation...: ***Abrogates,*** with certain exceptions, the doctrine of implied dedication ***as to all inland areas***; i.e., lands more than 1,000 yards from the mean high tide line .... As to inland properties, the doctrine of implied dedication ***still*** applies to lands improved, cleaned or maintained at public expense, in such a manner as to put the owner on reasonable

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[7] "The statements of the sponsor of legislation are entitled to be considered in determining the import of the legislation." (*Kern v. County of Imperial* (1990) 226 Cal.App.3d 391, 401 [276 Cal.Rptr. 524]; see *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1136, fn. 1 [104 Cal.Rptr.2d 377, 17 P.3d 735] [taking judicial notice of sponsor's statements].)

notice." (Jay L. Shavelson, Asst. Atty Gen., *Gion v. City of Santa Cruz, Where do We Go From Here?,* Calif. State Bar J., pp. 416–417, Sept.–Oct. 1972, emphasis added.)[8]

7. Subsequent legal commentary.

In 1977, a scholarly article (written by a Deputy California Attorney General who had served since 1972 and an Assistant California Attorney General who had served since 1959) was published that surveyed *Gion-Dietz* and the various bills introduced in response, including SB 504. (Briscoe & Stevens, *supra,* 53 L.A. Bar J. 207.)

This article, too, confirms section 1009 abrogated the doctrine of implied dedication in the non-coastal zone: "But even *the relatively modest proposal* of Senate Bill 504 for ***prospective abrogation*** of the doctrine was criticized in that, [¶] '... as a practical matter the bill results in the loss of rights that have already vested in the public. Since ***no public use*** after the effective date of the act would count for dedication purposes, as the years pass there will be less and less evidence available to prove *pre-existing* public use.' [¶] ... Under continued pressure, the bill was amended in the Assembly to be ***inapplicable*** to any coastal-property 1,000 yards inland. ... Implied dedication ***remained*** available where a government entity expended funds on visible improvements on or across the lands or in the cleaning or maintenance related to public use of the lands...." (*Id.* at pp. 223–224, second and third ellipses added, fns. omitted, emphasis added.)

The article continued, "Notwithstanding the pressure on the Legislature to repeal *Gion*, the effect of Civil Code section 1009 is an

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[8] Mr. Shavelson wrote an amicus curiae brief and argued *Gion* before the Court. (Shavelson, *supra,* Calif. State Bar J. at p. 415.)

affirmation of the doctrine and of the strong public policy of this State aimed at insuring individuals access to ***coastal*** areas." (*Id.* at p. 225, emphasis added, fn. omitted.)[9]

8. Plaintiffs' citation to legislative history does not support their restrictive interpretation of section 1009, subdivision (b).

Finally, plaintiffs erroneously argue that the legislative history supports their interpretation of section 1009. They contend the Legislature wanted to protect and encourage recreational uses. They further contend that because the Legislature wanted to enact SB 504 on an urgency basis in advance of the "forthcoming recreational season," the Legislature was only concerned with barring recreational use from ripening into an implied dedication.

The arguments do not follow. There is no doubt the Legislature wanted to protect and encourage public recreational use of private land—this is stated in the section 1009's preamble and throughout the legislative history. But that does not prove the Legislature intended for section 1009, subdivision (b), to apply *only* to recreational use. On the contrary, as discussed above and throughout this brief, the Legislature

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[9] See *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201, 231 [161 Cal.Rptr. 742, 605 P.2d 381] (dis. opn. of Clark, J.) [Referring to section 1009: "As to the noncoastal properties, prescriptive dedication is available only where governmental agencies have improved, maintained or cleaned the land by expenditure of public funds. As to the coastal properties, landowners may easily avoid the effect of *Gion-Dietz* by recording notices, or annually posting or publishing notices."; majority opinion reaffirmed *Gion-Dietz* in case based on pre-section 1009 use].)

manifested its intent by barring *all* use from ripening into an implied dedication in the non-coastal zone.

Moreover, "the urgency clause was [ultimately] deleted and the legislation allowed to take effect without urgency." (*Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 822, fn. 2 [93 Cal.Rptr.2d 193] (*Blasius*).)

* * *

The contemporaneous records—and scholarly articles written by those who had served in the California Department of Justice in 1972 and earlier—repeatedly show that, in order to fulfill its intent to supplement recreational opportunities offered by government-owned lands, the Legislature barred *any future use* of private non-coastal property from ripening into an implied dedication—not merely "any recreational use."

The court of appeal below correctly implemented the Legislature's intent. This Court should affirm.

C. The Legislature wanted certainty, not more litigation in the wake of *Gion-Dietz*: The Legislature considered barring *only* "recreational use" from ripening into a dedication but opted against that limitation because doing so would have thwarted the Legislature's intent.

The Legislature considered limiting its abrogation of *Gion-Dietz* to "recreational" use, but ultimately rejected this. Shortly after SB 504 was introduced, the Legislative Counsel wrote to Assemblyman Paul Priolo, then the chair of the Assembly Committee on Planning and Land Use (the committee that issued the SB 504 analysis quoted above stating that the doctrine of implied dedication would be "deleted

prospectively"—see Assem. Com. on Planning and Land Use, Analysis of Sen. Bill No. 504, p. 1 [proposed amendment].)

In the letter, the Legislative Counsel stated: "Pursuant to your request we have prepared the enclosed draft of a bill relating to permissive use of private land. [¶] Among other things, the bill would amend Section 813 of the Civil Code to provide that specified notice of consent to use land would be conclusive evidence that subsequent use of the land for ***any recreational purpose*** reasonably foreseeable by the holder of the land is permissive and with consent. [¶] In this regard, ***in the absence of any definition***, a question could be raised as to the ***scope of the meaning*** to be attributed to such ***'recreational purpose.'*** " (RJN, Ex. C, Legislative Counsel George H. Murphy, by James L. Ashford, Deputy Legislative Counsel, letter to Assem. Paul Priolo, Apr. 15, 1971, emphasis added.)

The fact that section 1009, subdivision (b), does not state "no recreational use" or "no use for recreational purposes," and the fact that section 1009 nowhere defines "recreational"—despite language proposed by the Legislative Counsel to the very Assembly committee that ultimately passed on SB 504—is compelling evidence demonstrating the Legislature did not intend to restrict subdivision (b) to recreational use. (*People v. Soto* (2011) 51 Cal.4th 229, 241 [119 Cal.Rptr.3d 775, 245 P.3d 410] [Legislature's rejection of language in competing bills may be used to ascertain Legislature's intent].)

As the court of appeal found below, interpreting subdivision (b) to prevent *any* use from ripening into a public dedication—not just recreational use—honors the purpose of the statute. (Slip Opn., p. 32.) Otherwise, landowners are likely to block any use of their land, out of a concern that some use—under the amorphous and undefined concept of

"non-recreational"—could still ripen into an implied dedication. Given the ambiguity inherent in "recreational," as observed by the Legislative Counsel, how would a landowner know for certain whether a particular member of the public was using his or her land for "recreational" or "non-recreational" purposes? Landowners are not sentries poised to question all passers-by whether their use is "recreational," or "non-recreational."[10] The problem is exacerbated in areas when the parties' properties are located near public lands as in our case. For example, Henry Ridge traverses part of the Topanga–Henry Ridge Trail, which intersects the Backbone Trail. These trails provide access to public recreational areas in the Santa Monica Mountains. (E.g., Ex. 194, Map #7, pp. 16, 19; Ex. 211.) If the public is crossing private property to picnic on a bluff area (also on private property), is the passage "recreational" or only the picnicking?

Indeed, in *Jackson v. Pacific Gas & Electric Co.* (2001) 94 Cal.App.4th 1110 (*Jackson*), it took years of litigation, a published appellate decision, and a petition for review to this Court (which was ultimately denied) to determine that "recreational" includes the *act* of retrieving a kite that has blown inadvertently onto private property. (*Jackson* at p. 1115, *rev. denied*, Case No. S104146; see *Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1160 [90 Cal.Rptr.3d 732, 202 P.3d 1115], citing *Jackson*.) "Recreation" is not always obvious.[11]

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[10] "[O]ur members have been extremely concerned over the possibility of having to restrict free passage over their lands to the point of imposing *constant vigilance* over their properties." (RJN, Ex. E, Jul. 23, 1971 letter from SB 504 proponent So. Cal. Rock Products Assn. to Assemblyman Paul V. Priolo, italics added.)

[11] In *Shingle Springs Rancheria v. Grassy Run Community Services*, for example, a federal district judge—holding that section 1009,

Plaintiffs' interpretation would also encourage efforts to argue after the fact that the public's recreational use was somehow "non-recreational," or vice-versa, burdening the courts with costly and unnecessary litigation.

All of this assumes, of course, that there is an ascertainable distinction between "recreational" and "non-recreational" use—not merely ascertainable to courts and lawyers, but to landowners making snap decisions about whom to allow to cross their properties. Any rational landowner would bar all use, contravening the very purpose of the statute.

As the instant court of appeal explained, interpreting subdivision (b) to apply only to "recreational use" would "discourage non-coastal landowners, unable to distinguish between recreational and nonrecreational users, from allowing any entry on their inland property for fear that 'non-recreational' use would become permanent. Such a result would improperly thwart the statute's declared purpose and return the law to the state it was under *Gion*, thus defeating the Legislature's motive for enacting the statute." (Slip Opn., p. 32.)

* * *

The Legislature wanted certainty—not more questions for the bar, the bench, and scholars to ponder and debate.

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subdivision (b), bars *all* use, not just recreational use, from ripening into an implied dedication—aptly queried: "[I]s the public's use of a boardwalk along a beach 'recreational' or 'commercial' if many of the people are walking along the boardwalk in order to shop at the stores lining the boardwalk? Is the public's use of a roadway to drive to a casino recreational or commercial? From the casino patron's point of view, the use is probably recreational, while from the casino owner's point of view, the use is commercial." (RJN, Ex. I, *Shingle Springs, supra,* mem. of opn., p. 10, fn. 9.)

D. The 1971 Legislature knew how to specify recreational uses—and would have done so had it intended to prevent only recreational use of non-coastal property from ripening into an implied dedication.

In 1963, the Legislature enacted Civil Code section 846, which provided, in general, that an owner of property "owe[d] no duty of care" to keep the land safe for, or to warn, those using the property for certain specified recreational purposes.

In 1970, section 846 was amended to read, in pertinent part: "An owner of any estate in real property owes no duty of care to keep the premises safe for entry or use by others for fishing, hunting, camping, water sports, hiking, riding, or sightseeing or to give any warning of hazardous conditions, uses or, structures, or activities on such premises to persons entering for such purposes, except as provided in this section." (RJN, Ex. F, SB 291.) The Legislative Counsel explained that the legislation "[r]evises laws relating to liability of owner of real property to persons entering or using property for *various recreational purposes*." (RJN, Ex. G, Legis. Counsel's Dig., Sen. Bill. No. 291 (1970 Reg. Sess.) Summary Dig., p. 110, italics added.)

In 1971, the Legislature that enacted section 1009 also amended section 846 to add "rock collecting" to the list of recreational activities. (RJN, Ex. H, see Historical Note, 7 West's Annotated California Codes, Civil Code, §§ 654-1090 (1982 ed.), p. 433.)

Later, the statute was amended to add the term "recreational purpose," providing that an owner of property "owes no duty of care" (1) to keep land safe for those using the land "for any recreational purpose," or (2) to warn "persons entering for a recreational purpose" of

hazardous conditions. The statute included a definition of "recreational purpose," listing myriad activities. (§ 846.)[12]

Section 846 shows careful attention to detail by the Legislature in identifying discrete and specific recreational activities. We must presume the Legislature, in enacting that statute, thought it necessary and important to specify those recreational activities, and not merely state—without definition—that the statute applied to "recreational purposes." We must presume the Legislature did not believe "recreational" was sufficiently obvious. Otherwise, there would have been no need to list specific activities.

The fact that the 1971 Legislative Counsel raised concerns with enacting a statute in response to *Gion-Dietz* that did *not* define "recreational" (as discussed, *ante*)—coupled with the fact the same Legislature that enacted section 1009 also delineated specific recreational uses when it amended section 846 instead of merely using "recreational," coupled with the fact that this same Legislature said "no use" in section 1009, subdivision (b)—demonstrates the Legislature did not intend to restrict subdivision (b) to recreational uses. Otherwise, the Legislature would have specified what it meant by "recreational."

Finally, even if we could use section 846 as a guide for the types of activities that could be viewed as "recreational," doing so further

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[12] Section 846 currently defines "recreational purpose" as follows: "A 'recreational purpose,' as used in this section, includes activities such as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, private noncommercial aviation activities, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites."

demonstrates why limiting section 1009, subdivision (b) to "recreational use" would thwart the Legislature's intent behind enacting section 1009. Section 846 currently defines "recreational purpose" to include "viewing or enjoying historical, archaeological, scenic, natural, or scientific sites" (§ 846, subd. (b).) The definition also " 'encompasses [activities on] improved streets.' " (*Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 706-707 [190 Cal.Rptr. 494, 660 P.2d 1168]; see *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1101 [17 Cal.Rptr.2d 594, 847 P.2d 560] [section 846 "draws no distinction between natural and artificial conditions"].) Given this, one must wonder whether "recreational use" under plaintiffs' interpretation of section 1009 would include someone's driving the "scenic route" to work or the post office, or a momentary stop to meditate in the tranquility of the mountains on his or her way to getting a root canal. Or does a use become non-recreational only when the driver loathes the terrain?

Even with a statute like section 846 that carefully defines "recreational," the answers are not always straightforward, as demonstrated by *Jackson, supra,* 94 Cal.App.4th 1110—where years of litigation were required to determine that "recreational" includes the *act* of retrieving a wayward kite, thereby triggering section 846's immunity. (*Jackson*, at p. 1115.)

Perhaps lawyers and courts could debate and resolve these interesting questions, but leaving them open (1) would *not* "encourage owners of private real property to continue to make their lands available for public recreational use to supplement opportunities available on tax-supported publicly owned facilities," and (2) would *not* assuage landowners' concerns over the "threat of loss of rights in [private] property" (§ 1009, subd. (a).) On the contrary, landowners

would simply shut-out the public rather than allow their property rights to turn on the nuances of "recreation."

Again, the Legislature wanted certainty—hence, section 1009, subdivision (b), states: "no use."

E. *Pulido* and *Hanshaw* erroneously interpreted section 1009: Subdivision (b) applies to all non-coastal lands, not just lands available for public recreational use."

Plaintiffs rely on *Pulido v. Pereira* (2015) 234 Cal.App.4th 1246 [184 Cal.Rptr.3d 754] and *Hanshaw v. Long Valley Road Assn.* (2004) 116 Cal.App.4th 471 [11 Cal.Rptr.3d 357].

Pulido concluded that "no use of such property" in subdivision (b) "refers back to subdivision (a)(1), which explains that the subject of the statute is the public recreational use of private real property." (*Id.* at p. 1252.)

Likewise, *Hanshaw* held that "such property" in the phrase "no use of such property" "refer[s] to 'lands available for public recreational use' (Civ. Code, § 1009, subd. (a)(1)), 'property for recreational purposes' (*id.*, subd. (a)(2)), and 'such public use' (*id.*, subd. (a)(3)), as those phrases are used earlier in the statute." (*Hanshaw,* 116 Cal.App.4th 471, 485.)

It defies logic to conclude the Legislature thought that allowing *non-recreational* use of "lands available for public recreational use" to *still* ripen into an implied dedication would somehow "encourage owners of private real property to continue to make their lands available for public recreational use" (§ 1009, subd. (a))(1)). Any rational landowner would simply bar the public completely.

In any event, the instant court of appeal—following a detailed analysis of *Pulido* and *Hanshaw*—correctly rejected *Pulido*'s and *Hanshaw*'s interpretation, and concluded there is no need to look to subdivision (a). Subdivision (b) actually defines the property to which it refers. The first clause of subdivision (b) states, "Regardless of whether or not a *private owner* of *real property* has recorded a notice of consent to use of any *particular property* pursuant to Section 813 of the Civil Code or has posted signs on *such property* pursuant to Section 1008 of the Civil Code ...." (Italics added.) The second clause of the first sentence declares, "no use of *such* property ... shall ever ripen to confer" a vested right in the public by implication. (Italics added.) As our court of appeal explained, "[r]eference back to subdivision (a) to define the type of property discussed in subdivision (b) is unnecessary because the operative sentence of subdivision (b) contains its own definition, namely 'any particular' private property." (Slip Opn., p. 29.)

"[S]uch property" in "no use of such property" refers simply and naturally to privately owned real property—regardless of whether that property is the subject of an annual section 813 notice or section 1008 signs. That is its "plain and commonsense meaning." (*Kirby, supra,* 53 Cal.4th 1244, 1250.) There is no need to reach back to subdivision (a) to determine what "such" refers to.

Indeed, *Hanshaw* arrived at its conclusion after quoting only a portion of subdivision (b): " 'Regardless of whether or not a private owner of real property has recorded a notice of consent to use of any particular property ... except as otherwise provided in subdivision (d), no use of such property by the public ...." (*Hanshaw*, 116 Cal.App.4th at p. 484, first ellipsis in original.) The language *Hanshaw* omitted through the first ellipsis, however, is important: "pursuant to Section

813 of the Civil Code or has posted signs on *such property* pursuant to Section 1008 of the Civil Code." (Italics added.) When read in its full context, the Legislature was plainly focused on *all* private property, and it is an impermissible strain for plaintiffs to restrict "such property" to "lands available for public recreational use."

Moreover, if section 1009 applied only to "lands available for recreational use," whose state of mind would control—the user's or the owner's? How would we assess their state of mind? Must a landowner post welcome signs, despite subdivision (b)'s stating that its bar applies "regardless" of whether section 1008 signs have been posted? Again, the Legislature was not looking to foster intellectual debates or foment litigation.

* * *

Neither the statute nor the contemporaneous records suggest the Legislature was parsing the doctrine of implied dedication based on the type of use being made on private non-coastal property. On the contrary, the only distinctions the Legislature drew were (1) between private land and (by necessary implication) public land, and (2) between private coastal land and private non-coastal land.

F. Even if subdivision (b) only applies to "lands available for public recreational use," the Schroders, Erickson, Malick, and Marshall would still prevail: Their lands have been made available for limited public trail and equestrian use, and thus have been made "available for public recreational use."

Even if we were to accept the interpretation that "such property" in section 1009, subdivision (b), means "lands available for public

recreational use," the Schroders, Erickson, Malick, and Marshall would still prevail.

Portions of Henry Ridge that cross the properties owned by the Schroders, Erickson, Malick, and Marshall have been the subject of express dedications for *trail* and *equestrian* purposes (limited to daylight hours for Erickson, Malick, and the Schroders). (Slip Opn., pp. 11–12, 34–35; Ex. 194, Doc. #7 and #19; AOB of Erickson, *et al.*, pp. 12–14.) Thus, their properties have been "lands available for public recreational use."

Subdivision (b) includes an express exception for uses permitted by an "express written irrevocable offer of dedication"—but the exception extends only to the uses expressly permitted by that offer.

As such, under subdivision (b), "no use" of defendants' properties for recreational or non-recreational purposes (such as the unfettered vehicular access at all hours of the day and night that plaintiffs desire) "shall ever ripen" into an implied dedication—apart from the limited trail and equestrian use permitted by the express offers of dedication.

G. The Legislature did not carve-out an exception for roads.

In addition to arguing the Legislature carved-out non-recreational use from subdivision (b), plaintiffs also urge the Legislature carved-out roads—recreational or otherwise. There is nothing in the statute to which to tether such a parsing.

The statute nowhere uses the term "roads" nor any related term, and there is nothing in the text of the statute or the legislative history or commentary that would suggest such an interpretation. Plaintiffs are again conjuring language the Legislature did not, contrary to rules

of statutory construction. (*People v. Guzman, supra,* 35 Cal.4th 577, 587.)

Indeed, the fact that section 1009 was enacted in response to *Gion-Dietz* demonstrates the Legislature did not intend to carve-out roads (for any purpose). *Gion-Dietz* held that the same rules applicable to implied dedication of roads were applicable to *any* public use: "A final question that has concerned lower courts is whether the rules governing shoreline property differ from those governing other types of property, particularly roads. Most of the case law involving dedication in this state has concerned roads and land bordering roads. [Citations.] This emphasis on roadways arises from the ease with which one can define a road, the frequent need for roadways through private property, and perhaps also the relative frequency with which express dedications of roadways are made. The rules governing implied dedication apply with equal force, however, to land used by the public for purposes other than as a roadway." (*Gion-Dietz,* 2 Cal.3d 29, 41–42.)

Given *Gion-Dietz*'s holding that roads and other uses were subject to the same rules, there is no basis for concluding the Legislature intended to parse such a distinction. That is reinforced by the fact the Legislature made no such reference in the statute.

Plaintiffs also claim to be concerned that homeowners in standard residential subdivisions (*i.e.,* not multi-acre properties located in secluded, rural, mountainous areas as in our case) might not be able to access their homes without the doctrine of implied dedication. Once again, the Legislature considered this and rejected it. The Assembly analysis cited above explains, "The use of implied dedication to control deceptive practices in subdivision sales (i.e. such as promised roads, etc.) may be an incidental benefit of the doctrine. However, such

practices are directly controlled by the *Subdivision Map Act*, as well as *criminal and civil fraud sanctions*. Recalling that implied dedication takes five (5) years to ripen it may be problematic that a fraudulent scheme could run over that period of time." (Assem. Com. on Planning and Land Use, Analysis of Sen. Bill No. 504, July 20, 1971, *supra*, p. 2, italics added.)

Indeed, the Subdivision Map Act abrogated any common law doctrines of dedication that are contrary to it. (*Stump v. Cornell Constr. Co.* (1946) 29 Cal.2d 448, 451 [175 P.2d 510].) The Subdivision Map Act is intended to accomplish structured land-planning. Implied dedication complicates and can often be detrimental to good land-planning. Section 1009 places the dedication of property for public purposes into a structured environment.[13]

The Subdivision Map Act balances the needs of the public and private landowners. Developers are generally required to lay-out roads on their tract and parcel maps. The Subdivision Map Act empowers municipalities to require dedication under local ordinances. (Gov. Code, § 66475.)

Assuming the developer does not expressly dedicate roads or grant easements, buyers may gain private easement rights over those

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[13] "The [Subdivision Map Act] is 'the primary regulatory control' governing the subdivision of real property in California. [Citation.]" (*Gardner v. County of Sonoma* (2003) 29 Cal.4th 990, 996–997 [129 Cal.Rptr.2d 869, 62 P.3d 103].) It "vests the '[r]egulation and control of the design and improvement of subdivisions' in the legislative bodies of local agencies, which must promulgate ordinances on the subject." (*Id.* at p. 997, citing Gov. Code, § 66411.) "The Subdivision Map Act has three principal goals: to encourage orderly community development, to prevent undue burdens on the public, and to protect individual real estate buyers." (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 563-564 [6 Cal.Rptr.3d 746], citing *Gardner*, 29 Cal.4th at pp. 997–998.)

roads; those rights are "entirely independent" of any dedication. (See Gov. Code, §§ 66439, 66475–66479; *Danielson v. Sykes* (1910) 157 Cal. 686, 689 [109 P. 87]; *Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1029 [141 Cal.Rptr.3d 109]; *Tract Development Services, Inc. v. Kepler* (1988) 199 Cal.App.3d 1374, 1383 [246 Cal.Rptr. 469].)

What is more—again evidencing that the Legislature has both restricted the doctrine of implied dedication and protected private property rights *even in subdivisions*—the Subdivision Map Act mandates: "In the event any street shown on a final map is *not* offered for dedication, the statement may contain a declaration to this effect. If the statement appears on the final map and if the map is approved by the legislative body, *the use of the street or streets by the public shall be permissive only.*" (Gov. Code, § 66439, subd. (b), italics added; see *id.*, subd. (c) ["An offer of dedication of real property for street or public utility easement purposes *shall be deemed not to include* any public utility facilities located on or under the real property *unless*, and only to *the extent* that, an intent to dedicate the facilities is *expressly declared* in the statement."; italics added].)

The Legislature abrogated the doctrine of implied dedication outside the coastal zone notwithstanding the "subdivision concerns" plaintiffs raise.

* * *

Section 1009 does not carve-out roads. It applies to all uses.

VII.

Plaintiffs do not need to use defendants' properties to get to and from their home; plaintiffs have five other access routes.

Plaintiffs contend they cannot get to or from their house. They implore the Court, "Let Jaime and Jane go home." (OBM, p. 57.) They do not say where they have been living all of these years. Plaintiffs even go so far as to claim, incredibly, that "there is ***no*** other safe, secure, and viable route." (OBM, p. 52, emphasis added.) Plaintiffs' "post-apocalyptic nightmare" is fantasy. (OBM, p. 1.)

Neither the trial court nor the court of appeal found plaintiffs had "no other safe, secure, and viable route." Indeed, the fire department's approved emergency access is from the north of plaintiffs' property, not from the south across defendants' properties. (10RT2241–2242.) Presumably the fire department believes plaintiffs' northern routes to be "safe, secure, and viable." It would be absurd to suggest otherwise.

Moreover, the court of appeal found, "Plaintiffs' land is by no means landlocked." (Slip Opn., at p. 21.) In reality, as the court of appeal observed after exhaustively examining the record, "plaintiffs argue Henry Ridge Motorway to Gold Stone Road 'is the quickest and most convenient route.' " (Slip Opn., at p. 45.) "Plaintiffs calculate that traveling Henry Ridge Motorway south to Gold Stone Road is more convenient because this route to Topanga center takes 7 to 10 minutes. There are numerous roads connecting to Henry Ridge Motorway in the north to Topanga center, but those routes take plaintiffs 18 to 20 minutes." (Slip Opn., at p. 16; 4RT363–364.)

Plaintiffs have five other access routes, which they have been using for years. (*E.g.*, 4RT406; Slip Opn., p. 4.) There are several routes north of plaintiffs' property, which plaintiffs used to travel to court during trial. (5RT614; Slip Opn., p. 4.) For example, Henry Ridge to the north leads to Mulholland Boulevard (8RT1675; Slip Opn., p. 4), a major highway, as well as to Adamsville Avenue, Alta Drive, and Summit-to-Summit Motorway. (See Tr. Ex. 194, Map #17; Tr. Exs. 203, 211; Slip Opn., p. 4.) Plaintiffs can also take Henry Ridge south to Old Field Ranch Road (before reaching Marshall's property), to reach Greenleaf Canyon (a public road). (7RT1256; Tr. Exs. 204, 211; Slip Opn., p. 4.)

Plaintiffs claim to be concerned the roads north of their property might be blocked. Scher has only been "stuck" once, so he used Old Field Ranch Road. (4RT433–434.) McAllister testified Alta Drive was being paved for a week, there was a chain across Adamsville Avenue once, and an owner once parked her car in the middle of Entrada Road. (7RT1295–1296,1326–1327.) On the other hand, plaintiffs' witness and neighbor, Ralph Weiss, testified that Alta Drive has always been open since 1996, except for a temporary closure when a neighbor parked a car to block the road, but only on one day. (8RT1610–1611; accord, 12RT2765–2766.)

Plaintiffs also dislike using Summit-to-Summit because there is a locked chain across the road. Plaintiffs have their own key, but testified it is "inconvenient" to exit the car to unlock the gate. (7RT1296, 1328.)

Additionally, plaintiffs prefer not to use Old Field because it is an unpaved dirt road. McAllister testified Old Field is treacherous and dangerous. (7RT1256.) Scher, however, will use Old Field on dry days.

(4RT407.) In some areas, Henry Ridge is not much better than Old Field. (See p. 12, *ante*.)

Plaintiffs speculate their alternative routes might be blocked in the future, but there is and was no evidence that *all* five of their alternate routes would be blocked at the same time.

Plaintiffs argue they need to use Henry Ridge and Gold Stone in an emergency. But Erickson and Malick have already agreed to allow emergency access (10RT2240), as have the Schroders (see Slip Opn., p. 45). Indeed, the Schroders' gate automatically opens when anyone is trying to exit.

* * *

Plaintiffs' desire to purportedly shave 10–11 minutes off of their drive time does not justify appropriating defendants' properties for public use without compensation, nor foisting onto defendants the obligation to maintain the road for unfettered vehicular traffic, nor subjecting defendants to liability for non-recreational accidents.

VIII.

If the Court concludes section 1009 does not apply, the Court should remand to the court of appeal to decide defendants' other defenses, including whether the Schroders are bona fide purchasers and whether there was substantial evidence of post-1972 use.

"To hold that property has been dedicated to a public use is 'not a trivial thing', and such dedication is never presumed 'without evidence of unequivocal intention.' " (*Trask v. Moore*, *supra*, 24 Cal.2d 365, 373, internal citations and quotations omitted.)

Thus, "[l]itigants seeking to establish dedication to the public must [ ] show that various groups of persons have used the land" rather than "a limited and definable number of persons." (*Gion-Dietz*, *supra*, 2 Cal.3d 29, 39.) "The use must be substantial, diverse, and sufficient, concerning all of the circumstances, to convey to the owner notice that the public is using the passage as if it had a right to do so." (*Blasius*, *supra*, 78 Cal.App.4th 810, 826, fn. 7; accord, *Ball v. Stephens* (1945) 68 Cal.App.2d 843, 849 [158 P.2d 207] ["many people used the road for different purposes"].)

The evidence is that, after 1972, Gold Stone and Henry Ridge were used by landowners, neighbors, guests, and some "strangers," "teenagers," and "lookie-loos." (XRB/ARB of Erickson, *et al.*, pp. 10–14.)

The instant court of appeal did not need to decide whether this was sufficient to meet the heightened requirements explained in *Gion-Dietz* and *Blasius*, because the court concluded no post-1972 use could give rise to an implied dedication. (Slip Opn., pp. 33–34, 41 & fn. 18.)

For these same reasons, the court did not need to consider defendants' other defenses—including that the Schroders are bona fide purchasers, and bought their property free and clear of the purported dedication. (Slip Opn., pp. 33–34, 41 & fn. 18; AOB of Erickson, *et al.*, pp. 81–85.)

If this Court holds section 1009 is inapplicable, the Court should remand to the court of appeal to decide the remaining issues.

IX.

The court of appeal did not violate rules of appellate review, and that issue is not before this Court in any event.

Plaintiffs devote seven pages of their opening brief to contending the court of appeal improperly held that plaintiffs had failed to offer substantial evidence of implied dedication. (OBM, pp. 50–57.) Plaintiffs argue, "The most glaring example of the court of appeal's reweighing of the evidence pertains to testimony regarding use of the roads by Plaintiffs and others." (OBM, p. 51.) Plaintiffs further urge, "Despite having erroneously concluded Section 1009 completely did away with the law of implied dedication, the court of appeal went on to discuss the evidence related to implied dedication. (Slip Opn., pp. 33–37.)" (OBM, p. 52.) Plaintiffs likewise assert the trial court "found an implied in law dedication over both Henry Ridge Motorway and Gold Stone Road over Defendants' properties as a result of use of the roads by Plaintiffs, and by Defendants (including use prior to their purchase of their properties), and by non-parties passing through or spending time in the area for various reasons." (OBM, p. 53.)

Plaintiffs' substantial evidence arguments are improper. Plaintiffs did not raise these arguments in their petition for review, and this Court did not grant review on that basis. The only issue before this Court is whether section 1009 applies to purported non-recreational use after March 1972. Accordingly, the Court should disregard these arguments. (Cal. Rules Court, rule 8.516, subd. (a)(1) ["Unless the court orders otherwise, the parties must limit their briefs and arguments to those issues and any issues fairly included in them."].)

In any event, plaintiffs conflate the record, the appellate court's opinion, and the evidence. The court of appeal did not analyze the sufficiency of the purported evidence of use *after* 1972. The court did not need to reach that issue because the court held section 1009 barred post-1972 use from ripening into an implied dedication as a matter of law. (Slip Opn., pp. 33, 35, 41.)

Instead, the court examined the sufficiency of the purported evidence of *pre-1972* use. (Slip Opn., pp. 33–37.) Neither plaintiffs nor anyone else testified that they or others used Henry Ridge and Gold Stone before 1972. Plaintiffs were not even in the area 44 years ago. McAllister and Scher first started visiting the area in 1986 and 1988, respectively. (3RT59–60; 7RT1248). As the court of appeal explained, "No witness testified about using or seeing anyone else use these roads for vehicular access before March 1972. Even the Matriarch of Henry Ridge, Stewart, only moved to Henry Ridge Motorway in 1977. Although Stewart testified that the roads 'have been used for fifty years,' this testimony does not begin to describe the number and variety of use that *Gion* and *Blasius* require to find an implied dedication to public use. [Citation.] Also, Stewart admitted that she had no personal knowledge of anyone driving Gold Stone Road to Henry Ridge Motorway." (Slip Opn., p. 33.)[14]

Substantial evidence is, of course, "not synonymous with 'any' evidence" (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651 [51 Cal.Rptr.2d 907], internal quotations and citations omitted.) Nor are "isolated bits of evidence" enough. (*People v. Johnson* (1980) 26

[14] Stewart only used Henry Ridge-to-Gold Stone twice in 20 years; instead, if she traveled south of her property at all, she took Henry Ridge to School Road. (See 7RT1359–1360; 8RT1548-1549; Tr. Ex. 211; OBM, p. 13.)

Cal.3d 557, 577 [162 Cal.Rptr. 431, 606 P.2d 738].) The appellate court was required to review the "whole record" in order to " 'preclude the risk of affirming a finding that should be disaffirmed as a matter of law.' " (*People v. Johnson*, *supra*, 26 Cal.3d at pp. 577–578, citation omitted.)

Division Three of the Second District took that charge seriously and honored it. As its 46-page opinion demonstrates, the court conducted an exhaustive review of the record—comprising over 400 pages of briefing, over 3,000 pages of the reporter's transcript, nearly 700 pages of the clerk's transcript, and dozens of trial exhibits. The court spent 20 months analyzing the briefs, law, and record from when the case was fully briefed in January 2014 until it issued its opinion in September 2015. Plaintiffs simply speculated about *public* use of Henry Ridge or Gold Stone, but failed to offer actual evidence of public use as required by law. (Slip Opn., pp. 33, 35–40.)

Finally, plaintiffs contend the court of appeal violated the substantial evidence rule by rejecting their claim for implied-in-fact dedication based on a 1949 easement, and 1968 and 1970 declarations. (OBM, p. 55.)[15] Plaintiffs are again mistaken. The court rejected their claims by first looking to the language of the documents themselves, and further concluding there was no evidence to imply an offer: "Upon inspection, none of the instruments cited by the trial court effectuated a dedication of Henry Ridge Motorway or Gold Stone Road to the public, their use of the word 'dedication' in the titles notwithstanding.

[15] "A dedication is implied in fact 'when the period of public use is less than the period for prescription and the acts or omissions of the owner afford an implication of ***actual consent or acquiescence*** to dedication.' " (Slip Opn., p. 24, quoting *Blasius*, *supra*, 78 Cal.App.4th 810, 821 [93 Cal.Rptr.2d 193], citing *Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 241 [267 P.2d 10], emphasis added.)

Although the grantors desired to subdivide and to provide the new parcels with access to a public street, each of the documents explicitly declared 'appurtenant' 'easements for road purposes' with the proviso that *if* final tract maps were recorded dedicating public streets, or in the case of the 1949 Easement the state or county *accepted* it as a public road, *then* the easements would no longer be effective. When a dedication is conditional, the conditions precedent must occur or the offer is inoperative. [Citation.] The conditions in these instruments were never satisfied: the 'said map[s]' attached to the 1968 and 1970 Declarations are not final tract maps; no acceptance was recorded for any of these instruments; and no testimony was introduced about public use before 1972 such as would constitute implied acceptance." (Slip Opn., p. 36, original emphasis.)

X.

Conclusion.

"No use" means "no use." It does not mean "no recreational use." The Legislature enacted section 1009 to "delete prospectively" and "abrogate" the doctrine of implied dedication in the non-coastal zone. Plaintiffs' attempts to parse the statute are flatly contradicted by the plain language of the statute and all legislative history.

This Court should affirm the judgment of the court of appeal, holding, as a matter of law, that no purported post-1972 use of defendants' properties could ripen into an implied dedication of a public road.

DATED: May 16, 2016

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify that the foregoing Answer Brief on the Merits of Richard Erickson, Wendie Malick, Richard B. Schroder, and Andrea D. Schroder contains 11,093 words. In reaching this total, I relied on the word count of the computer program used to prepare this brief. This certification is prepared in accordance with California Rules of Court, rule 8.520(c), stating the number of words in an answering brief may not exceed 14,000.

DATED: May 16, 2016

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CERTIFICATE OF MAILING

I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of Los Angeles in the office of a member of the bar of this court at whose direction the service was made. My business address is 225 S. Lake Ave., Suite 1400, Pasadena, California 91101.

On May 16, 2016, I served an executed copy of the Answer Brief on the Merits of Richard Erickson, Wendie Malick, Richard B. Schroder, and Andrea D. Schroder

Pursuant to the court's e-Submissions procedures, a true and correct copy was uploaded through their on-line system. The original and eight copies were deposited in the facility regularly maintained by Federal Express, in a sealed envelope with delivery fees fully provided for and addressed as follows

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct and, that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on May 16, 2016 at Pasadena, California.

Lorraine Bille
LORRAINE V. BILLE

Cal. Civ. Code § 1099

Document:Cal Civ Code § 1009

Cal Civ Code § 1009

Copy Citation

Deering's California Codes are current with urgency legislation through Chapter 11 of the 2016 Regular Session and Chapter 3 of the 2015-16 2nd Extraordinary Session.

Deering's California Code Annotated > CIVIL CODE > Division 2. Property > Part 4. Acquisition of Property > Title 2. Occupancy

§ 1009. Public use of private lands; Dedication prerequisite to vested right; Offer to governmental entity; Vested right from governmental expenditure; Coastal property affected; Owners precluding evidence of implied dedication

(a) The Legislature finds that:

(1) It is in the best interests of the state to encourage owners of private real property to continue to make their lands available for public recreational use to supplement opportunities available on tax-supported publicly owned facilities.

(2) Owners of private real property are confronted with the threat of loss of rights in their property if they allow or continue to allow members of the public to use, enjoy or pass over their property for recreational purposes.

(3) The stability and marketability of record titles is clouded by such public use, thereby compelling the owner to exclude the public from his property.

(b) Regardless of whether or not a private owner of real property has recorded a notice of consent to use of any particular property pursuant to Section 813 of the Civil Code or has posted signs on such property pursuant to Section 1008 of the Civil Code, except as otherwise provided in subdivision (d), no use of such property by the public after the effective date of this section shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently, in the absence of an express written irrevocable offer of dedication of such property to such use, made by the owner thereof in the

manner prescribed in subdivision (c) of this section, which has been accepted by the county, city, or other public body to which the offer of dedication was made, in the manner set forth in subdivision (c).

(c) In addition to any procedure authorized by law and not prohibited by this section, an irrevocable offer of dedication may be made in the manner prescribed in Section 7050 of the Government Code to any county, city, or other public body, and may be accepted or terminated, in the manner prescribed in that section, by the county board of supervisors in the case of an offer of dedication to a county, by the city council in the case of an offer of dedication to a city, or by the governing board of any other public body in the case of an offer of dedication to such body.

(d) Where a governmental entity is using private lands by an expenditure of public funds on visible improvements on or across such lands or on the cleaning or maintenance related to the public use of such lands in such a manner so that the owner knows or should know that the public is making such use of his land, such use, including any public use reasonably related to the purposes of such improvement, in the absence of either express permission by the owner to continue such use or the taking by the owner of reasonable steps to enjoin, remove or prohibit such use, shall after five years ripen to confer upon the governmental entity a vested right to continue such use.

(e) Subdivision (b) shall not apply to any coastal property which lies within 1,000 yards inland of the mean high tide line of the Pacific Ocean, and harbors, estuaries, bays and inlets thereof, but not including any property lying inland of the Carquinez Straits bridge, or between the mean high tide line and the nearest public road or highway, whichever distance is less.

(f) No use, subsequent to the effective date of this section, by the public of property described in subdivision (e) shall constitute evidence or be admissible as evidence that the public or any governmental body or unit has any right in such property by implied dedication if the owner does any of the following actions:

(1) Posts signs, as provided in Section 1008, and renews the same, if they are removed, at least once a year, or publishes annually, pursuant to Section 6066 of the Government Code, in a newspaper of general circulation in the county or counties in which the land is located, a statement describing the property and reading substantially as follows: "Right to pass by permission and subject to control of owner: Section 1008, Civil Code."

(2) Records a notice as provided in Section 813.

(3) Enters into a written agreement with any federal, state, or local agency providing for the public use of such land.

After taking any of the actions set forth in paragraph (1), (2), or (3), and during the time such action is effective, the owner shall not prevent any public use which is appropriate under the permission granted pursuant to such paragraphs by physical obstruction, notice, or otherwise.

(g) The permission for public use of real property referred to in subdivision (f) may be conditioned upon reasonable restrictions on the time, place, and manner of such public use,

and no use in violation of such restrictions shall be considered public use for purposes of a finding of implied dedication.

History

Added Stats 1971 ch 941 § 2.

▶ Annotations

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