

## ATTACHMENT A-2

### DGS Document Regarding Implied Dedication

The following discussion of Implied Dedication was prepared by the California Department of General Services, which relates to Item 28 of the DGS Specifications.

#### PRESCRIPTIVE RIGHTS AND ADVERSE POSSESSION

##### Study of California Coastal Commission Work in the Area of Implied Dedication

1. The Gion v City of Santa Cruz case was a landmark implied dedication case for the California Coastal Commission.<sup>[321]</sup> The case has been superseded by statute in some instances, has been subject to fairly intense criticism and has been rejected by other state jurisdictions in the United States.<sup>[322]</sup> Thus, it is fair to say then the principles enunciated by Gion are controversial, even in the deeds context.
2. Notwithstanding its approach to application of the principles of implied dedication, Gion has been cited to stand for the time-tested proposition that land could be impliedly dedicated to the public in a number of forms: inland roads, public beaches, navigable waters such as the Colorado River, and inland access along irrigation canals.<sup>[323]</sup> Thus, the concept that areas used by the public as if it were private property is well-developed in California. These concepts seem comfortable in the setting offered by the Deeds System as the public demands for access to the heavily populated coastal areas of Southern California are as natural to apply as the doctrine of public trust to areas traditionally used by the public.<sup>[324]</sup>
3. The major criticism of Gion v City of Santa Cruz lies in the application of the reasoning and the elements of implied dedication.<sup>[325]</sup> Gion can be interpreted as suggesting that two alternative methods are available for a determination of whether an implied dedication has occurred.<sup>[326]</sup> The Gion decision suggests that the elements of implied dedication, namely intent and the adverse nature of the use, can be subsumed into one element, so that either of those components can be evinced to supply proof of an implied dedication.
4. A conservative approach to implied dedication in the Deeds System requires both intent and a showing that the use was adverse to the interests of the owner.<sup>[327]</sup> The question is raised, whether a more conservative approach taken to implied dedication in the Deeds System would surely be more consistent for application in the Torrens system, if appropriate for application in the Torrens System at all.

#### Facts of Gion/Dietz

5. Gion represented facts very common to implied dedication cases taken to maintain coastal access in California. The Gion case actually represented two cases, which were jointly heard by the Supreme Court of the State of California in order to consolidate and consistently apply the principles of implied dedication to both.<sup>[328]</sup> In each case the public had traversed across land which adjoined a beach, where the public "proceeded toward the sea to fish, swim, picnic, and view the ocean."<sup>[329]</sup>
6. Mr Gion, a successor landowner, had occasionally posted no trespass signs but he had never required anyone to leave his property. The City of Santa Cruz had undertaken maintenance of the properties for erosion control, and instituted trash collection receptacles for the management of litter, assuming rightly there was public use being made of the property.
7. The Superior Court, as the trial court, held that an easement was appropriate across the property for use of the public for recreational purposes. The trial court reasoning was that an

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implied dedication of an easement for access to the coast had been intended based on facts which included the uninterrupted public use over a period exceeding five years, the assertion of control by the City of Santa Cruz, and a conclusion that this had occurred in conjunction with the plaintiff's full acknowledgment of the use, dominion and control by the public.<sup>[330]</sup>

8. The Dietz matter (the consolidated case) was initiated by a request for an injunction in the Superior Court to keep the public from interfering with the use of a stretch of coastline called Navarro Beach. Navarro Beach is located in Mendocino County, a fairly remote rural area of Northern California, and was solely accessible by an unimproved dirt road. The beach was characterised by a "small sandy peninsular jutting out into the Pacific Ocean."<sup>[331]</sup> In short, Navarro Beach and its peninsula was a stunning property very attractive to beachgoers located along the northern California coastline. Evidence was submitted at trial that "[t]he public has used the beach and road for at least 100 years".<sup>[332]</sup>

9. Evidence was produced that after 1950 the public use of the beach expanded exponentially and was accessible through use of the road by persons coming via automobiles, trucks, campers and trailers. Evidence was further produced that this beach was also frequented by commercial fisherman, "picnicking, hiking, swimming, fishing, skin-diving, camping, driftwood collecting, firewood collecting, and related activities."<sup>[333]</sup>

10. Although Navarro Beach Road was owned by a succession of companies and persons, no one had ever objected to the public use of Navarro Beach Road. One previous owner "testified by deposition that she and her husband encouraged the public to use the road. 'We intended,' she said, 'that the public would go through and enjoy that beach without any charge, and just for the fun of being out there.'"<sup>[334]</sup>

11. During World War II the United States Coast Guard had barred the public from their use of the beach for defence reasons. Successive owners attempted to obstruct the public access and placed 'no trespassing' signs across the entrance, however, the public removed those obstructions, including chains. The Mendocino County Superior Court ruled in favour of the landowners "concluding that there had been no dedication of the beach or of the road and, in particular, that widespread public use does not lead to imply dedication."<sup>[335]</sup>

### Analysis and Reasoning of the Supreme Court in Gion/Dietz

12. The California Supreme Court began their decision on appeal by citing to the Court's "most recent discussion on common law dedication, Union Transport Co. v Sacramento County<sup>[336]</sup> The principles outlined in Union Transport case were set out in full by the Gion Court:

"In common law dedication of property to the public can be proved either by showing acquiescence of the owner in use of the land under circumstances that negate the idea that the use is under a licence or by establishing open and continuous use by the public for the prescriptive period. When dedication by acquiescence for a period of less than five years is claimed, the owners actual consent to the dedication must be proved. The owners intent is the crucial factor.

.... when, on the other hand, a litigant seeks to prove dedication by adverse use, the inquiry shifts from the intent inactivities of the owner to those of the public. The question then is whether the public has used the land 'for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so, and without objection being made by anyone.' .... as other cases have stated, the question is whether 'the public has engaged in

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long-continued adverse use' of the land sufficient to raise the 'conclusive and undisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere licence.'"[337]

13. The California Supreme Court indicates that two tests are available for an analysis of whether there was an implied dedication to the public.[338] The first test requires acquiescence or an intention to dedicate. At trial, there was an inference raised that the landowners had acquiesced in the public use of the land, but the argument was not furthered on appeal. The second test related to whether there was an adverse use of the land consistent with the owners' acknowledgment of the adverse use, and actions which indicate no objection to the continuance of that use.[339] Notwithstanding that the California Supreme Court applied the tests relating to whether the use was adverse, the Court noted three questions which had been raised by lower courts struggling with the problem of whether a use could be considered to be adverse such that dedication was warranted. Those questions were:

- "(1) When is a public use deemed to be adverse?
- (2) Must a litigant representing the public prove that the owner did not grant a licence to the public?
- (3) Is there any difference between dedication of shoreline property and other property?"[340]

14. After setting out the above questions, the Court clearly notes that analogies drawn from the law of adverse possession and easement by prescription in implied dedication cases should be used with caution as they "can be misleading".[341] Differentiation in the reasoning of the law of adverse possession and prescription stems from the nature of the rights gained and identification of the person or user gaining those rights.

15. The Court does not go so far to say that the concepts underlying adverse possession and easements by prescription are so remote as to be distinctive and different at law. The concept of implied dedication still carries the burden of similarities associated with an adverse use, which is wholly overlooked by the High Court and rejected by the Court of Appeal in its effort to distinguish Section 64 of the Land Transfer Act 1952.

16. Simply put, adverse possession and easements by prescription are grounded in a person acting to gain a right to possess, or to use. The actual possession or use defines the nature of what is acquired. The difference with implied dedication is not related to an absence of an adverse use, instead, it is related to the fact that a sufficient group of undefined persons called "the public" must believe they have a right to use, or to possess. What follows is that no objection is taken by the owner to that use, or to possession, after an acknowledgment that the use is adverse to the owner's interests.[342]

17. The Court notes that "[t]his public use [in implied dedication cases] may not be 'adverse' to the interests of the owner in the sense that the word is used in adverse possession cases".[343] The Gion Court explained that the element of adversity did not need to be shown by the litigants because the use was in excess of the statutory period of five years.[344] The Gion Court goes on to explain that the litigants needed to show that "persons have used the land as they would have used public land.... if a road is involved, the litigants must show that it was used as if it were a public road".[345] In other words, to establish dedication to the public an ill-defined limited number of persons cannot assert a public claim. To reach the threshold of being a public claim a litigant must present evidence showing the "scene of significance is that whoever wanted to use the land did so... when they wished to do so without asking permission and without protest from the landowners".[346]

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18. The California Supreme Court went on to address the second question which the lower courts had laboured with, namely, the question of whether a "use by the public is under a licence by the fee owner", and whether a presumption of a licence must be overcome by the public with presentation of evidence to the contrary.<sup>[347]</sup> The California Supreme Court rejects that any presumptions in favour of a licence should be implied, and indicates that "[t]he question where the public use of privately owned land is under a licence of the owner is ordinarily one of fact."<sup>[348]</sup> In fact, the California Supreme Court provides a legal test that could be used to negate a finding of intent to dedicate through adverse use, which was, that the landowner "must either affirmatively prove that he has granted the public a licence to use his property or demonstrate that he has made a bona fide attempt to prevent public use."<sup>[349]</sup>

19. The California Supreme Court further indicated that an owner may denote an objection to the adverse use by erecting 'No Trespassing' signs or by other efforts which the Court described as making "more than minimal and ineffectual efforts to exclude the public".<sup>[350]</sup>

20. The landmark holding by the Gion Court was based on the following text:

"the rules governing shoreline property [do not] 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 a roadway".<sup>[351]</sup>

21. The public policy support for the application of the rules of common law implied dedication to the shoreline, were held to be in accordance with the strong policies expressed in the State of California constitution and statutes "encouraging public use of shoreline recreational areas".<sup>[352]</sup> The Gion Court found further support for its decision in the United States constitution which the court stated "clearly indicates that we should encourage public use of shoreline areas whenever that can be done consistently with the Federal constitution".<sup>[353]</sup>

22. The analogy the Court makes, therefore, had lasting implications for application of the principles of implied dedication as the areas now subject to those principles were expanded from well defined roadways to beaches following the "the increased urbanisation of this State".<sup>[354]</sup> The reason which seemed most significant to the Court that implied dedication was warranted, was reiterated at the end of the Court's decision.<sup>[355]</sup> The Court was persuaded that in "both cases [Gion and Dietz] the public used the land in public ways, as if the land was owned by a government, as if the land were a public park".<sup>[356]</sup>

23. The Gion Court was also persuaded by evidence that the city's maintenance of the cliffs along the beach in association with the public use warranted a finding of implied dedication. The long period of time (100 years) was also instrumental in persuading the Court that use of the beach has been as if the public owned it. The Gion court also noted the public's freedom from interference regarding their use of the beach and prior owners had given casual permission to a few to use the beach, which the Gion court held would not "deprive the many, whose rights are claimed totally independent of any permission asked or received of their interest in the land".<sup>[357]</sup>

24. Unlike John Spencer, the property owners in Gion did not approve of the public's use of the property.<sup>[358]</sup> The Gion court recognised, however, that the widespread public use of the land prior to the current ownership had given effect to the implied dedication by the public.

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25. Notwithstanding that an analysis of the interest in land that was acquired by the public was relegated to a final footnote by the Gion court, the footnote is significant in regard to a finding of what can actually be gained by the public in accordance with a common law implied dedication.<sup>[359]</sup> An important distinction was made by the Gion court in relation to the acquisition of public parks, as opposed to easements for general recreation. The California Supreme Court found that common law implied dedication principles will only extend a dedication over the scope of what use or possession the public actually acquired.

26. Another argument made by the appellants was that notwithstanding that section 802 of the Civil Code in California only granted easements, that this statute did not restrict the Court's ability to assess the nature of the public's acquisition as a park, which would in turn allow a fee simple ownership to be impliedly dedicated (a possessory use is associated with a park in contrast to a use associated with access). This argument, even in the context somewhat controversial reasoning by the California Supreme Court in Gion, was rejected.<sup>[360]</sup>

27. The footnote, however, makes a very important point which distinguishes the rights granted by the High Court and Court of Appeal in the Stony Batter Decisions: the New Zealand lower courts arguably go beyond even that provided by Deeds System cases by granting fee simple ownership. No detailed examination was given of any evidence in either Stony Batter Decision that described the nature of the use, the scope of the users (aside from a generalised description of the public) and the character of their use and following from this, what property right may have been acquired. In essence a possessory estate was assumed.

### **Guidance or Aftermath - History in Accordance with Gion**

28. Directly after the Gion decision, the California legislature amended California Civil Code section 813.<sup>[361]</sup> California Civil Code section 813 is entitled "Recordation of Notice of Consent to Use Land; Effect; Revocation; Mailing Notice; Restriction in Notice". Although this Civil Code section was added in 1963, the 1971 amendment is considered to be a direct reaction to the Gion decision.<sup>[362]</sup> Section 813 was understood to authorise notices that could be posted offering permission to the public which could be conditioned in the notice to restrict time, place, and the manner of the public use. The California legislature also enacted California Civil Code section 1009 at the same time of the amendment of section 813. California Civil Code section 1009 "prospectively imposes restrictions on the acquisition of the public's right an easement".<sup>[363]</sup>

29. The legislative changes in California in 1971 made it eminently clear that such a notice providing permission of the public for use of private property would be construed conclusively as a licence to use, as follows:

"a notice of consent to the use of land, or any portion thereof, for the purpose described in the notice [would be construed as] conclusive... of consent... during the time such use is in effect by the public or any user for any purpose... in any judicial proceeding involving the issue as to whether all or any portion of such land has been dedicated to the public use or whether any user has a prescriptive right in such land or any portion thereof.... and no use in violation of such restriction shall be considered public use for purposes of a finding of implied dedication".<sup>[364]</sup>

30. This amendment was significant for landowners faced with the possibility that the public may be using property owned in remote areas that would be difficult to police for trespass, particularly where neither the means or the inclination to undertake a physical confrontation to exclude the public looked available and attractive. This California Civil Code section provides an



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alternative: property owners can provide clear notice of a licence for the public to use property at the discretion of a landowner in a manner which will not ripen into a finding of implied dedication.

31. Notwithstanding that the 23 September 1970 Letter could surely have been construed as a permission in the nature of a license, consistent with the evidence, it seems harsh to have expected Arthur Hooks to take measures equivalent to physical confrontation to exclude the public from his property when the evidence at trial clearly illustrated his absence from the island, his disabled state in a nursing home, with a partially absentee son for a farm manager, with no clear indication of what Arthur Hooks was being told about events (particularly use of the formed road).

### Other cases following Gion/Dietz

32. Friends of the Trails v Blasius is a recent California Court of Appeal case involving acquisition of a public easement by implied dedication through a property which had an irrigation "ditch ... used to convey water for purposes of the Nevada Irrigation District (NID)". [365] Nevada Irrigation District already had an easement on title for the conveyance of water through related infrastructure. The property through which the infrastructure ditch traverse was owned by various persons over time.

33. Upon acquiring the property in 1996 the successor landowners attempted to block the canal road adjacent to the ditch with a locked gate, and continued to deny passage through the gate to members of the public and adjoining neighbours. Friends of the Trails instituted an action seeking injunctive and declaratory relief, as well as a claim "to quiet title to a public easement for recreational purposes". [366]

34. Friends of the Trails argued that the public had acquired an easement for recreational purposes prior to the legislative change which followed the Gion California Supreme Court decision. Friends of the Trails argued that the public had by implication been granted the use of a non-motorised right-of-way in spite of the vehicular road having existed along the canal that was undoubtedly used in conjunction with the irrigation district. [367]

35. The California Court of Appeal in Friends of the Trails restates the law in relation to implied dedication, 30 years after Gion and following a change in legislation there was no real change to the analysis:

Dedications may occur pursuant to statute or the common law. ....

Dedication has been defined as an appropriation of land for some public use, made by the fee owner, and accepted by the public. By virtue of this offer which the fee owner has made, he is precluded from reasserting an exclusive right over the land now used for public purposes. American courts have freely applied this common law doctrine, not only to streets, parks, squares, and commons, but to other places subject to public use. California has been no exception to the general approach of wide application of the doctrine. [Citations.]. [368]

36. The Friends of the Trails court relies heavily on the reasoning and application of the principles as they are founded in Gion, although it notes that these principles will only be good to public acquisitions prior to the legislative change. The landowners in Friends of the Trails argued vigorously against the holding in Gion that the legislative change made in reaction to Gion signalled a dissatisfaction from the reasoning of the Supreme Court. The landowners alleged that Gion marked "a departure from settled approaches to the law of dedication" and

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"that it was a troubling holding" that should not be "exacerbate[d] and extend[ed]" due to its "malignant effects".<sup>[369]</sup>

37. The California Court of Appeal declined to "ignore a settled precedent".<sup>[370]</sup> The Friends of the Trails court disagreed with the landowners argument that Gion is a "departure from settled approaches to the doctrine of implied dedication.... [and is] a sudden unpredictable change in legal norms governing property rights and public dedication ...."<sup>[371]</sup>

38. The road used by NID was obviously present on the property in Friends of the Trails, and an easement was registered and actively used by the Irrigation District in conjunction with the canal conveying water. This is closely analogous to the situation in Stony Batter when John Spencer may have been cognisant of roads present on the Hooks property, which could have been taken to be crude farm tracks. There would be no reason at all to question the Old Army Road as an easement was clearly defined in favour of the Crown.<sup>[372]</sup>

39. It is not clear how a subsequent bona fide purchaser for value, even looking beyond the title, would be able to make a subtle distinctions between the nature of the user for purposes of challenging a right to access. For example, would the landowner ask: was this a water irrigation user or someone else who should be ejected? Similarly, is this a hiker seeking access to the Stony Batter historic reserve via the Lands & Survey easement from Man O' War Bay or is this someone who should be challenged? Users in Friends of the Trails, as in the Man O' War Bay Old Army Road easement would be partaking in the rights clearly associated with and existing easement.

40. It seems unreasonable to expect a prospective property owner to split hair over distinctions as subtle as those in Friends of the Trails. The Court in Friends of the Trails indicated they felt the distinction was justified by an examination of facts "often imbued with overtones of local norms, customs, and expectations .... generally warrant[ing a] difference to the local finder of fact."<sup>[373]</sup> The court accepted evidence presented at trial which clearly indicated that previous owners knew the uses being undertaken were recreational in nature and not associated with the irrigation canal easement.<sup>[374]</sup> No in depth analysis of this kind made its way into the Stony Batter High Court or Court of Appeal Decision that delineated between the existing easement users and any user from the public.<sup>[375]</sup>

41. The Court of Appeal in Redwood Empire v Gombos upheld previous rulings that the "changes [by the California legislature] operated prospectively only" so that any implied dedication, allegedly occurring before the legislative changes in 1971, would still be at issue.<sup>[376]</sup> Redwood Empire was a forestry company which used forestry roads to access remote areas of commercial forests consistent with its business. The lower courts in New Zealand seemed to somewhat unfairly dismiss the appellant's concerns about the implications for effectively "backdating": we don't know how rare implied dedication really is because we don't know how many claims have accrued over the years. It is not as if a ledger balance is being kept on titles, unlike a registrable interest.

42. Following Gion, the Redwood Empire court held unequivocally that "the public's rights are limited to those consistent with the types of public uses upon which implied dedication was based".<sup>[377]</sup> The Redwood Empire Court referred to the more recent case Friends Of The Trails v Blasius<sup>[378]</sup> and noted that the California Supreme Court in that case had specifically restrained its holding to the grant of an easement under the principles of implied dedication (not fee simple ownership).<sup>[379]</sup> The Redwood Empire Court cites a number of authorities acknowledging that the rights gained by prescriptive easements govern the scope of what should be granted by implied dedication, then summarized the principles gleaned from each of them as follows:

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"[i]t is settled law that the scope of a prescriptive easement is determined by the use through which it is acquired. A person using the land of another for the prescriptive period may acquire the right to such use, but does not acquire the right to make other uses of it. [Citations.] The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired. We see no reason the same rule should not apply to a public easement that has arisen through implied dedication."[\[380\]](#)

43. The Redwood Empire Court clarifies the statements made in *Gion* regarding the use of caution in relation to analogies made to prescriptive easements: application of the component of adversity in implied dedication should differ in principal only as to the use that can be gained, which would be personal to the adverse user or possessor as opposed to the use acquired by the public.[\[381\]](#)

44. The Court of Appeal in California states that:

"[w]hen it comes to the issue of whether an impliedly dedicated public easement should be limited to the use that gave rise to it, prescriptive rights appear fully analogous [Citations.]. A dedication is legally equivalent to the granting of an easement".[\[382\]](#)

The guidance provided by the Redwood Empire decision in relation to licences is also valuable, in that the scope of what was once a licence could incorporate foreseeable developments in relation to uses undertaken, on the other hand, could simply define the scope of what was acquired.[\[383\]](#)

END OF ATTACHMENT A-2