CASE NO. S230104

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JAIME A. SCHER, et al.

Plaintiffs, Appellants and Respondents.

v.

JOHN BURKE, et al.

Defendants, Appellants and Respondents,

On Review From The Court of Appeal For the Second Appellate District, Division Three, Civil No. B235892

After An Appeal From the Supreme Court For The State of California, County of Los Angeles, Case Number BC415646, Hon. Malcolm Mackey

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APPLICATION OF KERI MIKKELSON, *ET AL.* TO FILE AMICI CURIAE BRIEF IN SUPPORT OF NEITHER PARTY

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To the Honorable Tani Cantil-Sakauye, Chief Justice of the Supreme Court of California:

Pursuant to Rule 8.520(f) of the California Rules of Court, KERI MIKKELSON, JEROME FRIESENHAHN, BRYAN BELL, ALISON BELL, SCOTT HUDLOW, KIRSTIN HUDLOW, TODD IRVINE, KIMBERLY IRVINE, TERRY KLOTH, MARGARET KLOTH, JOHN DOVER, GEORGIA WAGES, JANICE LUNDY, RONALD LUNDY and JOHN FARNSWORTH (collectively, "Amici" or "Keri Mikkelson, *et al.*") hereby respectfully submit this application for leave to file a brief as amici curiae in this proceeding (i) in support of the Plaintiff, Respondent and Petitioner JAIME A. SCHER, et al., ("Plaintiff"), and (ii) in responding to the question presented in the **negative** (i.e., "This case presents 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?").

Interest of Amici

Over the decades, the number of court decisions involving common law dedication has dwindled given the increasing importance of statutory dedication and land use regulation (e.g., the Subdivision Map Act). As a result, litigation involving common law implied dedication arises with less frequency.

The Amici, Keri Mikkelson and several similarly-situated homeowners, are presently parties in a litigation matter venued in Kern County that involves the doctrine of implied dedication. (Kern County Superior Court, No. S-1500-CV-280077-DRL; presently on appeal to the Fifth District Court of Appeal, No. F072990.) One of the issues raised late in that litigation was whether Civil Code section 1009 ("Section 1009") precluded any implied dedication. Importantly, that litigation addressed the distinction between **implied in fact** dedication (which is based on the intent of the grantor) and **implied in law** dedication (which is based solely on the adverse use). This critical distinction does not exist in the *Scher* matter, which solely involves an implied in law dedication. Thus, none of the parties in the *Scher* appeal to this court, nor the *Scher* Court of Appeal decision, addresses this important distinction.

In addition to the distinction between implied in fact and implied in law dedication, the proposed amicus curiae brief below will assist the court by addressing issues of broader concern that were not addressed in the parties' briefing to this court. Respectfully, the parties' briefing to this court focused more on the immediate facts of their case as opposed to the broader question of whether Section 1009 abrogates the doctrine of implied dedication for any use of non-coastal private property (i.e., not just recreational use), which Amici submit is not the case.

The common law doctrine of implied dedication has a long history in California dating back to the 1850's. It can be used in certain, defined situations to resolve conflicts arising from the public's use of private property. For example, in a situation involving a failed dedication (e.g., if a developer intends to dedicate a road for public use, but somehow the formalities of that dedication fail and the public uses the roadway for a decade or two), the doctrine of implied dedication provides the public with certain protections to ensure continued use of the property consist with the original intent of the developer. Respectfully, the broad brush of the *Scher* decision imperils the above common sense result.

For these reasons, Amici believe that the attached brief will assist the court in deciding this matter, and respectfully request that this application to appear as amici curiae be granted.

Dated: July 12, 2016 MILLER STARR REGALIA

By: /s/ Kenneth R. Styles
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I. INTRODUCTION

Before addressing the question presented (i.e., "Does Civil Code section 1009 ["Section 1009"] preclude non-recreational use of non-coastal private property from ripening into an implied dedication of a public road?"), Amici provide the following observation. Devoid of context, the *Scher* decision's central argument – i.e., that the word "use" in Section 1009(b) means "any use" – brings to mind a movie scene from the final cross-examination of Jack Nickelson's character in "A Few Good Men" (Columbia Pictures, 1992):

> "[Question to Colonel Jessep:] If you gave an order that Santiago wasn't to be touched, and your orders are always followed, then why would Santiago be in danger? Why would it be necessary to transfer him off the base?"

If the Legislature truly intended Section 1009 to eliminate one hundred and sixty (160) years of common law implied dedication in California (excepting within 1,000 yards of the coast), then why did the Legislature explicitly refer to "recreational use" in expressing its legislative intent in Sections 1009(a)(1) and 1009(a)(2)? Why would the Legislature express its intent as "recreational use" if the Legislature truly intended to prohibit any "use" creating an implied dedication?

Similarly, why would the Legislature, in enacting Section 1009 in 1971 in response to this Court's decision in *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29 ("*Gion*") – a case that involved recreational use of

private property – also substantially amend Civil Code section 813 ("Section 813") to include additional protections against public use ripening into an implied dedication when, according to the Defendants, the companion statute (Section 1009) eliminated the doctrine of implied dedication in non-coastal California?

In addition, in the intervening forty-five (45) years after the enactment of Section 1009, why would the Legislature remain absolutely silent in the face of California court decisions that uniformly held that Section 1009 applied only to recreational use?

The common sense response to these observations is simple: the Legislature expressed its intent in Section 1009 with reference to "recreational use" because the Legislature intended to prevent the public's "recreational use" from establishing an implied dedication in non-coastal California areas, thereby eliminating the affirmative burdens of "halting" public use that the *Gion* decision placed on private property owners. As all courts prior to *Scher* have held, Section 1009 does not abrogate the long-established doctrine of implied dedication for non-recreational use of private property throughout California.

Importantly, the *Scher* decision failed to distinguish between "***implied in fact***" and "***implied in law***" dedication. As addressed in more detail below, "implied in fact" dedication arises "by the affirmative acts or acquiescence of the property owner" as opposed to mere user of the

property. For example, if a real estate developer intended to dedicate property for public use, but that dedication failed for whatever reason (e.g., negligently failing to record the necessary paperwork), an implied in fact dedication may exist. By failing to address this critical distinction, the *Scher* holding arguably prohibits any implied dedication for any reason. Such an overbroad reading of Section 1009 makes no legal nor any practical sense.

Implied dedication is a well-established and important legal doctrine that applies in certain limited situations. In 1971, the Legislature – concerned by the *Gion* decision's broad application of implied in law dedication to the public's recreational use of private property – enacted Section 1009 and substantially amended Section 813 to protect private land owners from such recreational use easements. Within Section 1009, the Legislature expressed its intent regarding recreational use of property, as all prior California courts have upheld. In reaching its contrary conclusion, the *Scher* ignored:

- The critical distinction between "implied in fact" and "implied in law" dedication;
- The key facts and legal issues raised in *Gion*, the decision leading to the Legislature's enactment of Section 1009;
- The co-legislation enacted contemporaneously with Section 1009, namely Section 813; and
- The long and well-established history of implied dedication in California.

In response to the question presented (i.e., "Does [Section 1009] preclude non-recreational use of non-coastal private property from ripening into an implied dedication of a public road?"), Amici respectfully submit that the answer is "No." The Legislature enacted Section 1009, and substantially amended Section 813, in response to the *Gion* decision in order to prohibit the creation of recreational use easements over privately-owned, non-coastal land. At a minimum, Section 1009 only applies to implied in law dedications based solely on the public's use of private property.

II. LEGAL DISCUSSION

A. The Critical Distinction Between "Implied in Fact" and "Implied in Law" Dedication.

In its general discussion of the law of implied dedication, the *Scher* court noted the distinction between implied in fact and implied in law dedication. (See p. 24 ["Dedications can be implied in law and implied in fact."] However, the *Scher* court never returned to that distinction nor addressed how Section 1009 or the court's holding applied to each type of implied dedication. The *Scher* decision's failure to distinguish between these two types of implied dedication was a critical error in its ultimate conclusion.

In short, **implied in fact** dedication is premised upon either affirmative acts or acquiescence of the property owner, and thus derives

from the legal notion of estoppel. In contrast, **implied in law** dedication arises from continuous adverse public use of private property throughout the prescriptive time period without substantial interference by the owner, and thus derives from the legal notion of implied waiver (i.e., it is based upon user as opposed to the conduct or acquiescence of the property owner).

If the Legislature intended Section 1009(b) to prevent any "use" from creating a public right of access (outside of coastal areas), that prohibition must be limited to implied in law dedications that arise from public use of the property. Because implied in fact dedications are not based entirely upon adverse use (e.g., the dedication offer derives from the grantor's conduct or acquiescence), such dedications are not prohibited by Section 1009.

The distinction between (i) an implied in fact dedication and (ii) an implied in law dedication, is well established in California law. The distinction hinges upon whether the implied dedication arises from the property owner's conduct (including acquiescence), or whether it arises from the public's use of the property:

> Dedication may also be implied in one of two ways: either by the affirmative acts or acquiescence of the property owner (an implied-in-fact dedication), or by the continuous adverse public use of the property throughout the prescriptive period without substantial interference by the owner (implied-in-law

dedication). (*Union Transp. Co. v. Sacramento County*, 42 Cal.2d 235, 240-241, 267 P.2d 10.)

(*Brumbaugh v. County of Imperial* (1982) 134 Cal.App.3d 556, 562.)

As further addressed below, in *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29 ("*Gion*"), the California Supreme Court addressed the distinction between implied in fact and implied in law dedication as follows:

> In our most recent discussion of common-law dedication, [citation omitted], we noted that a 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 license 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 owner's actual consent to the dedication must be proved. **The owner's intent is the crucial factor**. [citation omitted.] When, on the other hand, a litigant seeks to prove dedication by adverse use, the inquiry shifts from the intent and activities of the owner to those of the public.
>
> In both cases at issue here, the litigants representing the public contend that the second test has been met. Although there is evidence in both cases from which it might be inferred that owners preceding the present fee owners acquiesced in the public use of the land, that argument has not been pressed before this court. **We therefore turn to the issue of dedication by adverse use**.

(*Id.* at 38-39 (emph. add.).) In other words, the *Gion* decision – i.e., the precipitating factor leading to the Legislature's enactment of Section 1009 – involved implied in law, not implied in fact, dedication. (See *Brumbaugh v. County of Imperial, supra,* 134 Cal.App.3d at 562 ["*Gion, supra,* involved an implied-in-law dedication."].)

In 1971, the Legislature enacted Second 1009 in response to the *Gion* decision. (*See Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 822 ["The *Gion–Dietz* opinion was controversial. . .In March 1971, Senate Bill No. 504 was initially introduced as urgency legislation [footnote omitted] in response to the controversy. The bill was the vehicle for the enactment of Civil Code section 1009 and the amendment of Civil Code section 813." [footnote omitted].)

Importantly, Section 1009 only addresses implied in law dedication based on the "use" of the property by the public. Section 1009 does not address implied in fact dedication based upon the conduct of the property owner. Thus, the first two sections of Section 1009 provide:

> (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).

(Civ. Code, §1009(a) & (b).) (emph. add.)

Prior to the *Scher* decision, California courts uniformly held that Section 1009 only prohibited claims of implied dedication for recreational use of property. (*See e.g., Hanshaw v. Long Valley Road Ass'n* (2004) 116 Cal.App.4th 471, 484 ["Civil Code section 1009 involves the inability to establish a public road by *public recreational uses* of private property." (emph. orig.)]) The *Scher* court held otherwise, concluding that

no use of non-coastal private property could ripen into an implied dedication.

By precluding application of the doctrine of implied dedication to all non-coastal private property in California, the *Scher* decision failed to distinguish between implied in fact and implied in law dedication. As drafted, Section 1009 can only apply to implied in law dedication, which is focused exclusively on the public's use of the private property. Section 1009 never mentions nor addresses the conduct of the private property owner.

Accordingly, if Section 1009 applies to any use as opposed to just recreational use, its prohibition only affects implied in law dedications. Section 1009 does not affect implied in fact dedications.

B. The *Gion* Decision Placed An Extreme Burden On Property Owners To "Halt Public Use" In Order To Avoid Public Recreational Easements.

Forty-five (45) years after its enactment, Section 1009 must be read in context. And that context was the Legislature's stated desire, in 1971, to limit the effects of the *Gion* decision.

The holding in *Gion*, which applied the doctrine of implied in law dedication to grant the public certain easement rights over private, coastal land for recreational use, was not remarkable. The *Gion* court cited a number of prior California decisions applying dedication "in park land,"

"in athletic fields," and "in beaches." (*Id.* at 42.) The *Gion* court cited to prior years of unfettered public access and also addressed the public policy favoring public use of the shoreline. Thus, the ultimate holding in *Gion* was not extraordinary.

However, the *Gion* decision was remarkable for the broad scope of its discussion of implied in law dedication and the burdens it placed on owners to protect their private property to avoid creating public, recreational use easements. For example, the *Gion* court identified three problems of interpretation raised in the lower courts with respect to such recreational use easements, the second of which concerned, "[m]ust a litigant representing the public prove that the owner did not grant a license to the public?" (*Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 821.) The *Gion* court rejected a "presumption of permissive use," but then included the following discussion (which did not contain any citation to statutory, case or secondary legal authority):

> No reason appears for distinguishing proof of implied dedication by invoking a presumption of permissive use. The question whether public use of privately owned lands is under a license of the owner is ordinarily one of fact. We will not presume that owners of property today knowingly permit the general public to use their lands and grant a license to the public to do so. **For a fee owner to negate a finding of intent to dedicate based on uninterrupted public use for more than five years, therefore, he must either affirmatively prove that he has granted the public a license to use his**

> **property or demonstrate that he has made a bona fide attempt to prevent public use**. Whether an owner's efforts to halt public use are adequate in a particular case will turn on the means the owner uses in relation to the character of the property and the extent of public use. Although 'No Trespassing' signs may be sufficient when only an occasional hiker traverses an isolated property, the same action cannot reasonably be expected to halt a continuous influx of beach users to an attractive seashore property. If the fee owner proves that he has made more than minimal and ineffectual efforts to exclude the public, then the trier of fact must decide whether the owner's activities have been adequate. **If the owner has not attempted to halt public use in any significant way, however, it will be held as a matter of law that he intended to dedicate the property or an easement therein to the public**, and evidence that the public used the property for the prescriptive period is sufficient to establish dedication.

(*Id.* at 41 (emph. add.).)

Respectfully, the above paragraph constituted an extraordinary expression of the law of adverse use or implied dedication. In essence, the *Gion* court concluded – as a matter of law – that a land owner must utilize "significant" methods to prevent the public from using private property. For example, the *Gion* court stated that posting "no trespass" signs may be insufficient, even though Civil Code section 1008 (enacted in 1965) prohibited any use from ripening into an easement if appropriate signs were posted on the property ("Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code.")

Moreover, the above paragraph placed the burden on the property owner to either "affirmatively prove that he [she] has granted the public a license to use his [her] property" or "demonstrate that he [she] has made a bona fide attempt to prevent public use." This stated standard is not only substantially burdensome on property owners, but is contrary to the law of adverse possession or prescriptive easement, in which the mere expression of consent eliminates the necessary element of hostility. (*See Felgenhauer v. Soni* (2004) 121 Cal.App.4th 445, 450 ["Claim of right does not require a belief or claim that the use is legally justified. [citation omitted] It simply means that the property was used without permission of the owner of the land."].)

The *Gion* court concluded the above paragraph by holding that unless a private property owner "attempted to halt public use in [a] significant way," an implied dedication could arise "as a matter of law." The only reasonable reading of this standard would require a private property owner to physically block ("halt") the public from using the property.

Whereas the *Gion* court acknowledged the public policy in favor of public use of coastal lands – a distinction adopted by Section 1009 – the *Gion* court ultimately held that regardless of the current owners' desire to prohibit public access, "[p]revious owners, however, by ignoring the wide-spread public use of the land for more than five years have

impliedly dedicated the property to the public." (Id. at 44.) In other words, simply allowing the public to use private property – and placing the burden on the property owner to show a "bona fide" and "significant" effort to "halt" public use – could create an implied dedication.

Considering this background, the Legislature's enactment of Section 1009, and its amendment to Section 813, in the aftermath of the *Gion* decision makes sense. The Legislature expressed its intent to allow the public's recreational use of private property without creating an implied dedication. The Legislature did not want property owners to utilize "significant" efforts to "halt" the public's use of such property for recreational purposes. Consistent with the public policy identified in *Gion*, the Legislature carved out coastal lands from this recreational use prohibition. The Legislature also strengthened the property owner's right to record a notice of consent pursuant to Section 813.

Respectfully, the *Scher* decision ignored this context, as well as the Legislature's intent and purpose in enacting Section 1009 in response to the *Gion* decision. As others have highlighted, for the past forty-five (45) years California courts have uniformly held that Section 1009 only prohibits the public's recreational use from ripening into a permanent, public right. In response to those decisions, the Legislature has remained silent, a silence that starkly contrasts with its immediate legislative reaction to the *Gion* decision. Considering this entire context, Section 1009 was

intended to prohibit recreational use public easements in non-coastal areas of California.

C. The Legislature Amended Section 813 Contemporaneously With Enacting Section 1009.

In response to the *Gion* decision, the Legislature not only enacted Section 1009, but it also substantially amended Section 813. The Legislature's amendments to Section 813 must be read and analyzed in conjunction with its enactment of Section 1009.

Importantly, the Legislature's 1971 amendments to Section 813 substantially modified that statute and expressly applied that statute to "public use" and to provide protection from an "implied dedication," clearly in response to the *Gion* decision. These substantial amendments to Section 813 necessarily beg the question: if Section 1009 truly eliminated the common law doctrine of implied dedication for any public use of non-coastal private property, then why would the Legislature bother "beefing up" Section 813 to allow greater protection for property owners from implied dedication?

Alternatively, why would a property owner worried about implied dedication go the effort of recording a "notice of consent" in the county recorder's office if, in fact, Section 1009 eliminated the public's ability to obtain an implied dedication as a matter of law?

Prior to 1971, Section 813 (entitled, "Notice of Consent") stated as follows:

> The holder of record title to land may record in the office of the recorder of any county in which any part of the land is situated, a notice of consent to the use of his land, or any portion thereof, for the purpose described in the notice. The recorded notice of consent is evidence that subsequent use of the land for such purpose is permissive and with consent. The notice of consent may be revoked by the holder of record title by recording a notice of revocation in the office of the recorder wherein the notice of consent is recorded.
>
> In the event of use by other than the general public, any such notices, to be effective, shall also be served by registered mail on the user.
>
> The recording of a notice of consent shall not be deemed to affect rights vested at the time of recording.

Prior Section 813 contained two notable elements. First, the property owner who recorded a notice of consent was required to identify the "purpose" of the property's use. Second, prior Section 813 never mentioned implied dedication nor referenced the "public" other than the second paragraph, which contained procedural requirements for mail service on an individual user.

In 1971, the Legislature substantially amended Section 813 into its present form. Importantly, Section 813 eliminates the need to identify specific uses by the public or by individuals – the statute now

applies to any use. In addition, section 813 expressly applies to public use and mentions the doctrine of implied dedication.

> The holder of record title to land may record in the office of the recorder of any county in which any part of the land is situated, a description of said land and a notice reading substantially as follows: "The right of the public or any person to make any use whatsoever of the above described land or any portion thereof (other than any use expressly allowed by a written or recorded map, agreement, deed or dedication) is by permission, and subject to control, of owner: Section 813, Civil Code."
>
> The recorded notice is conclusive evidence that subsequent use of the land during the time such notice is in effect by the public or any user for any purpose (other than any use expressly allowed by a written or recorded map, agreement, deed or dedication) is permissive and with consent in any judicial proceeding involving the issue as to whether all or any portion of such land has been dedicated to public use or whether any user has a prescriptive right in such land or any portion thereof. The notice may be revoked by the holder of record title by recording a notice of revocation in the office of the recorder wherein the notice is recorded. After recording a notice pursuant to this section, and prior to any revocation thereof, the owner shall not prevent any public use appropriate thereto by physical obstruction, notice or otherwise.
>
> In the event of use by other than the general public, any such notices, to be effective, shall also be served by registered mail on the user.

> The recording of a notice pursuant to this section shall not be deemed to affect rights vested at the time of recording.
>
> The permission for public use of real property provided for in such a recorded notice 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.

The general purpose of Section 813 was, and after the Legislature's 1971 amendments is, to permit a property owner to record a notice of consent effectively rendering any use of the property by the public, or by an individual, "permissive" thereby defeating a claim of implied dedication (by the public) or adverse prescription or prescriptive easement (by an individual).

Again, if the Legislature truly intended to eliminate the common law doctrine of implied dedication, then there was no need to substantially amend Section 813 in 1971 to provide property owners greater protection against implied dedication by recoding a notice of consent. If Section 1009 truly eliminated the doctrine of implied dedication in non-coastal areas of California, then the Legislature should have amended Section 813 to apply only in coastal areas of California.

In fact, the Legislature's 1971 amendments to Section 813 make perfect sense if Section 1009 is properly limited to recreational use by the public. For example, Section 1009(b) prevents any implied dedication

for recreational use even if the property owner fails to comply with Section 813. However, if the property owner does comply with Section 813, then no use (recreational or otherwise) by the public can ever create an implied dedication.

Clearly, the Legislature enacted Section 1009 to protect private property owners (of non-coastal land) from recreational use easements, so those owners would allow the public to use their private property without the risk of creating an implied public easement. The Legislature's contemporaneous amendments to Section 813 are fully consistent with that legislative intent.

D. The Common Law Doctrine Of Implied Dedication Has A Long And Well-Established History In California.

California courts have long recognized the common law doctrine of implied dedication. One of the first cases to address the question of common law dedication was *San Francisco v. Scott* (1854) 4 Cal. 114, wherein this court held that dedication could arise "from the lapse of time or acquiescence of the party":

> There are several ways in which a dedication of land to the public use as a street or highway may be made. It may be made by deed or other overt act, or may be presumed from the lapse of time or acquiescence of the party.
>
> There is no precise limit of time from which dedication will be presumed. In some cases it has been decided that twenty years were

> necessary to raise the presumption of dedication, while in others it has been held that a much shorter period was sufficient.

(*Id.* at 116.)

One of the early California decisions addressing implied dedication relating to a public street was *People v. Reed* (1889) 81 Cal. 70, wherein this Court held, based on the facts of that case, that the subject property had not been dedicated for public use.

By the late 1800's, California courts utilized the term "implied dedication," thus distinguishing it from express dedication. For example, in *People v. Marin* (1894) 102 Cal. 223, after distinguishing between statutory dedications and common law dedications, this Court described the latter as follows:

> Common-law dedications are, for convenience of description, frequently subdivided by law writers into two classes,—express dedications and **implied dedications**. The substantial difference between the two consists in the mode of proof. In the former case the intention to appropriate the land to public use is manifested by some outward act of the owner manifesting his purpose, while in the latter it is usually by such acts or conduct not directly manifesting the intention, but from which the law will imply the intent, *Waugh v. Leech*, 28 Ill. 488, it was said: The authorities show that dedications have been established in every conceivable way by which the intention of the party could be manifested.' And it may be said generally: 'If the donor's acts are such as indicate an intention to appropriate the land to the public use, then,

> upon acceptance by the public, the dedication becomes complete.' Elliott, Roads & S. p. 92.

(*Id.* at 227-28 (emph. add.).) Many of the early California cases addressing implied dedications involved implied in fact dedications, focusing on the intent of the property owner, as an evidentiary substitute for express dedications.

However, California courts also recognized that an owner's acquiesce may be established by the public's long use of the subject property. For example, in *Schwerdtle v. Placer County* (1895) 108 Cal. 89, this Court described the dedication question before it as follows:

> This court there says: 'Where the dedication is sought to be established by user as a highway, it must appear that such user was with the knowledge of the owner, with his consent, or without objection on his part.' In that case the findings showed a use for only eighteen months or two years. If a dedication is sought to be established by a use which has continued a short time,—not long enough to perfect the rights of the public under the rules of prescription,—then, truly, the actual consent or acquiescence of the owner is an essential matter, since without it no dedication could be proved, and none would be presumed; but where this actual consent and acquiescence can be proved, then the length of time of the public use ceases to be of any importance, because, the offer to dedicate and the acceptance by use both being shown, the rights of the public have immediately vested. But where the claim of the public rests upon long-continued adverse use, that use establishes against the owner the conclusive presumption of consent, and so of dedication. It affords the conclusive and

> indisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license.

(*Id.* at 593.)

By 1954, this Court expressly distinguished between implied in law and implied in fact dedication in *Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235:

> Dedication by adverse user has been characterized as dedication implied by law, while a dedication inferred from the acts of the owner or from his acquiescence in public user may be termed a dedication implied in fact. [Citations omitted.]

(*Id.* at 241.) This Court cited to *Diamond Match Co. v. Savercool* (1933) 218 Cal. 665, 669 ("The law will imply an intention to dedicate from long acquiescence in the use of land for highway purposes, for it is settled that the common-law rule as to the presumption of dedication by adverse user is applicable in this state.").

Over the past several decades, California has adopted a more regulated approach to real property development, which emphasizes statutory dedications (e.g., the Subdivision Map Act). As a result, legal disputes involving common law dedications, whether express or implied, arise less often today. However, implied dedications still arise from time to time. A common situation involves the public's long-term use of property

that everyone thought was either dedicated or involved a public easement, but for some reason that dedication or easement was not properly created.

Respectfully, Section 1009 was never intended to eliminate the common law doctrine of implied dedication for those purposes. Section 1009 was intended, for example, to allow the public to continue crossing private property to access a swimming hole in a stream located on private property without creating public easement rights. And that is how Section 1009 has been applied, and understood, for the past forty-five (45) years. (*See* Witkin, Summary of California Law (10th Ed. 2005), Real Property § 250 ["Nothing in the statute suggests a purpose to prevent all nonstatutory dedications of property, including those outside the recreational use context. (*Hanshaw v. Long Valley Road Assn.* (2004) 116 C.A.4th 471, 484, 485, 11 C.R.3d 357 [C.C. 1009 did not prevent common law dedication of road used by public for nonrecreational purposes].)"]

III. CONCLUSION

Respectfully, the *Scher* decision not only misinterprets the language of Section 1009, but it also ignores the broader context of the Legislature's intent in 1971, including the Legislature's desire to eliminate the burden on private property owners from "halting" recreational use as well as the Legislature's contemporaneous amendments to Section 813. At a minimum, Section 1009 only applies to implied in law dedications based

solely on the public's use of private property and does not apply to implied in fact dedications.

Dated: July 12, 2016 MILLER STARR REGALIA

By: /s/ Kenneth R. Styles
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