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 TO KERI MIKKELSON, ET AL.'S AMICUS BRIEF

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I.

Civil Code section 1009 bars all uses, not just "recreational" uses, from ripening into a "vested right."

Mikkelson attempts to draw a distinction between implied in fact dedication and implied in law dedication. She argues Civil Code section 1009 only applies to "recreational" use, or if it applies to "any use," it only applies to implied in law dedication. Mikkelson is plainly mistaken.

Mikkelson argues the reference in the preamble (subdivision (a)(1)) to "recreational use" supports the conclusion that section 1009 only bars "recreational use" from ripening into an implied dedication. As discussed at length in the Answer Brief on the Merits of Erickson et al., the preamble's statement of purpose is not controlling. (See pp. 14–31.) The purpose of section 1009 was to encourage private property owners to allow the public to use their land for recreation, and in order to do so, section 1009, subdivision (b) prospectively abrogated the entire doctrine of common law dedication in the non-coastal zone to assure owners that they would not lose any property rights by doing so.

Mikkelson's and plaintiffs' interpretation that the statute only precludes "recreational" uses from ripening into an implied dedication would be a half-measure that would frustrate the other purpose of section 1009, to wit, to stabilize the "marketability of record titles." (§ 1009, subd. (a)(3).) As discussed on pages 27–30 of the Erickson Answer Brief, the Legislature wanted certainty. Using the undefined term "recreational" does not serve that purpose; it would only invite more litigation, because disputes would focus on what the term "recreational" meant, and whether the public use was "recreational." (See Erickson

Answer Brief, pp. 28–30 for a discussion of the problems with the amorphous concept of "recreation"—a concern that even the Legislative Counsel expressed when SB 504 was being considered.)

Nor is there an exception for roads. Section 1009 applies to *all uses*, including roads. (See Erickson Answer Brief, at pp. 37–40.)

For example, in *Friends of Hastain Trail v. Coldwater Development LLC* (2016) 1 Cal.App.5th 1013 (*Friends of Hastain Trail*), the court of appeal held that section 1009 prospectively abrogated *Gion v. Santa Cruz* and *Dietz v. King* (1970) 2 Cal.3d 29, 41 [84 Cal.Rptr. 162, 465 P.2d 50] (*Gion-Dietz*). The court further rejected the argument that different rules existed for implied dedication of roads. The court explained that "no different rules exist for roadways or other areas ..." (*Friends of Hastain Trail*, 1 Cal.App.5th, at p. 1028, citing *Gion-Dietz, supra*, 2 Cal.3d at pp. 41–42.)[1]

The court surveyed the implied dedication caselaw, finding that "the doctrine of implied public dedication is not limited to any specific kind of real property." (*Id.* at pp. 1028–1029, citing *County of Los Angeles v. Berk*, (1980) 26 Cal.3d 201, 214–215 [161 Cal.Rptr. 742, 605 P.2d 381]; *Burch v. Gombos* (2000) 82 Cal.App.4th 352, 355, 356–358 [98 Cal.Rptr.2d 119] [involving a dirt road]; *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 824 [93 Cal.Rptr.2d 193] (*Blasius*); *County of Orange v. Chandler-Sherman Corp.* (1976) 54 Cal.App.3d 561, 564 [126 Cal. Rptr. 765].)

Thus, section 1009, which prospectively abrogated *Gion-Dietz* in the non-coastal zone, necessarily applies to roads.

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[1] Recently published, on July 27, 2016.

II.

Section 1009 does not merely apply to implied in law dedication; it applies to all forms of dedication that are created by public use.

Mikkelson is also plainly mistaken by arguing that if section 1009 applies to "any use," it only applies to implied in law dedication.

A. Section 1009 makes no reference to any particular theory of implied dedication; on the contrary, it states public use will not confer any "vested right" in private property on the public or government.

First, demonstrating that the Legislature did not intend for section 1009 to apply only to implied in law dedication (not implied in fact dedication), section 1009 makes no reference to or distinction between these two theories. Section 1009 does not mention "implied" dedication, except under the provisions pertaining to coastal property. (§ 1009, subds. (f), (g).) Even under the coastal provisions, the Legislature simply used the word "implied"—parsing the theory no further. (§ 1009, subds. (f), (g).)

We must "presume the Legislature meant what it said." (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1250 [140 Cal.Rptr.3d 173, 274 P.3d 1160].) It is improper for Mikkelson to insert that which the Legislature did not. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 786 [11 Cal.Rptr.3d 222, 86 P.3d 290] ["courts generally may not insert what the Legislature has omitted from a statute"].)

B. The statute applies to implied in fact dedication where a claim of implied in fact dedication is based on public use.

Second, section 1009 applies to implied in fact dedications that are based on public use—because the Legislature mandated that "no use" would give rise to a "vested right" in the public or the government.

Dedication requires both (1) an intent by the owner to dedicate, and (2) acceptance by the public. (*County of Inyo v. Given* (1920) 183 Cal. 415, 418 [191 P. 688].) Before section 1009, both elements could be established by appropriate public use. Section 1009, however, barred public use occurring after the statute's effective date from satisfying either element—intent or acceptance.

"A common law dedication may be express or implied. Express dedication arises where the owner's intent to dedicate is manifested in the overt acts of the owner, e.g., by execution of a deed. An implied dedication arises when the evidence supports an attribution of intent to dedicate without the presence of such acts. 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. A dedication is implied by law when the public use is *adverse* and exceeds the period for prescription." (*Blasius, supra,* 78 Cal.App.4th 810, 821, original italics, citing, *inter alia, Union Transportation Co. v. Sacramento County* (1954) 42 Cal.2d 235, 241 [267 P.2d 10] (*Union Transportation*).)

In *County of Inyo v. Given, supra,* 183 Cal. 415, this Court said, "[A] dedication, like a contract, consists of an offer and acceptance, and it is settled law that a dedication is not binding until acceptance, proof

of which must be unequivocal [citation]. *The acceptance may be actual or implied.* It is actual when formal acceptance is made by the proper authorities, and implied, when a use has been made of the property by the public for such a length of time as will evidence an intention to accept the dedication." (*Id.* at p. 418, italics added.)

Thus, even in the case of express dedication, the owner's offer must still be accepted—and before section 1009, public use could constitute the required acceptance. (*See, e.g., McKinney v. Ruderman* (1962) 203 Cal.App.2d 109, 115–116 [21 Cal.Rptr. 263] [filing a subdivision map showing a street is an offer to dedicate that could be accepted by public use "over a reasonable period of time"].)

In short, historically, the owner's offer could either be express or implied from public use, and the acceptance could either be express or implied from public use.

The Legislature was not concerned with the myriad or technical theories that the public, the government, or private citizens like plaintiffs Scher and McAllister might assert in order to appropriate private property to public use (without compensation). Instead, the whole point of section 1009 was to prospectively bar *public use* of private property, alone, from conferring a "vested right" in the government or the public, *regardless* of the legal theory—except in the narrow circumstances expressly prescribed by section 1009, neither of which applies here.[2] The Legislature stated plainly: "no use of [private

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[2] To wit, expenditure of public funds for five years on (a) "visible improvements" on private property or (b) "the cleaning or maintenance related to the public use of" private property "in such a manner so that the owner knows or should know that the public is making such use of his land." (§ 1009, subds. (b), (c), (d).) The Legislature narrowed the "government expenditure" exception even further: no "vested right" is conferred on the government if the owner (1) grants the government

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 ...." (§ 1009, subd. (b).) Section 1009 necessarily applies to both implied in fact and implied in law dedication, because public use is an element of both. (*Union Transportation,* 42 Cal.2d at p. 241.)[3]

Indeed, by its plain meaning, the term "vested right" encompasses all permanent property rights, including implied in fact, and implied in law dedication. Webster's online dictionary defines "vested right" as "a right belonging completely and unconditionally to a person as a property interest which cannot be impaired or taken away (as through retroactive legislation) without the consent of the owner." (<http://www.merriam-webster.com/legal/vested%20right> [as of September 19, 2016].)

That interpretation is confirmed by the provision authorizing dedication by an owner's "express written irrevocable offer of dedication," which begins, "In addition to any procedure authorized by law *and not prohibited by this section* ...." (§ 1009, subd. (c), italics added.) In other words, the Legislature abolished any procedure for dedication that was contrary to section 1009—i.e., dedication based in any manner on public use of private property occurring after section 1009's effective date, regardless of the legal theory.

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permission, or (2) takes "reasonable steps to enjoin, remove or prohibit such use." (*Id.*, subd. (d).)

[3] And it likewise necessarily applies to express dedication when the acceptance element is sought to be proved by public use occurring after March 1972. Plaintiffs, for their part, agree that there is "little practical difference" between express and implied dedication, because historically, each could be based on public use. (Plaintiffs' Reply Brief on the Merits, p. 20.)

C. Mikkelson's interpretation would render parts of section 1009 superfluous.

Third, Mikkelson's proposed interpretation would render provisions of section 1009 superfluous—contrary to fundamental rules of statutory construction. (*In re C.H.* (2011) 53 Cal.4th 94, 103 [133 Cal.Rptr.3d 573, 264 P.3d 357] ["It is a settled principle of statutory construction that courts should 'strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous.' [Citation.]"].)

Implied in *fact* dedication arises where, in addition to public use, "the acts or omissions of the owner afford an implication of actual consent or acquiescence to dedication." (*Blasius*, 78 Cal.App.4th 810, 821.) If the Legislature had intended to allow such a theory to survive, the Legislature would not have required "an express written irrevocable offer of dedication." (§ 1009, subd. (b); see *id.*, subd. (c).) By including that provision, the Legislature was necessarily mandating that bare "acts or omissions of the owner" were no longer sufficient.

Likewise, section 1009, subdivision (b)'s requirement that the express irrevocable offer to dedicate be accepted by a governmental body also contradicts another principle of implied in fact dedication, to wit, that it does not require a formal acceptance by a governmental body. (*Western Aggregates, Inc. v. County of Yuba*, (2002) 101 Cal.App.4th 278, 298 [130 Cal.Rptr.2d 436] ["Via R.S. 2477, Congress made an *actual* offer of dedication ... It is the *acceptance* which, when not done by formal governmental action, may be implied by the conduct of members of the public." [Italics in original.]].)

In short, the Legislature drew no distinction between implied in fact dedication and implied in law dedication. On the contrary, the breadth of the statute compels only one conclusion: that except as prescribed by the narrow statutory exceptions, the Legislature barred public use of private property occurring after the statute's effective date from ripening into a "vested right"—regardless of the theory.

D. The legislative history confirms the statute applies to implied in fact dedication to the extent an implied in fact dedication is sought to be proved by public use.

Fourth, the legislative history confirms the Legislature intended to prospectively abrogate the doctrine of implied dedication in the non-coastal zone, without regard to the theory of dedication. Section 3 of SB 504 provides in pertinent part: "nor shall this act be construed to affect, diminish or extinguish any right of rights **vested** as of the effective date hereof by reason of **express or implied dedication, or otherwise.**" (RJN to Erickson answer brief, Ex. D, p. 1848, emphasis added.) The Legislature necessarily intended for section 1009 to apply to rights that had *not* already "vested ... by reason of express or implied dedication, or otherwise."

As the Legislature explained, "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; RJN in support of Answer to Mikkelson Brief, Ex A, Assem. Com. on Planning and Land Use, Analysis of Sen. Bill No. 504 (Legislative Sess.) July 20, 1971, p. 2 ["total abolition"].)

Likewise, SB 504's author, Senator Robert J. Lagomarsino, did not distinguish between the theories of implied dedication. Instead, he explained to the Governor that no "use of the public generally of such property will create **any legal threat** to the owner's title." (RJN to Erickson answer brief on merits, Ex. A, Sen. Lagomarsino, letter to Gov. Reagan, Sep. 27, 1971, p. 2, emphasis added.)

E. The Court need not decide whether section 1009 applies to express common law dedication or implied in fact dedication because those theories are not before this Court.

Finally, all of this is much ado about nothing. The Court need not decide whether section 1009 bars public use from satisfying the "acceptance" element of express common law dedication. The case before this Court does not involve that theory. Plaintiffs did not raise express dedication in their petition for review, and this Court did not grant review on that basis. The only issue before this Court is: "Does Civil Code section 1009 preclude non-recreational use of non-coastal private property from ripening into an implied dedication of a public road?"

In any event, the court of appeal rejected a theory of express common law dedication. Plaintiffs asserted such dedication based on irrevocable offers to dedicate that were recorded by defendant Marshall and by the predecessors of the defendant Schroder/Erickson properties. However, as the district court of appeal explained, those offers were for a "*hiking and equestrian trail*" a "*trail* easement," and a "public access *trails* easement . . . *limited to hiking and equestrian uses only*" during "daylight" hours. (Slip. opn., p. 34, original italics.) The court explained,

"[T]hese instruments do not dedicate public roads for the unlimited vehicular access at anytime of the day and night that plaintiffs seek." (Slip Opn., p. 34.) "The express dedication of property for public use for horses and pedestrians alone does not result in implied dedications of the same land as a street for cars." (Slip opn., p. 34; see AOB of Erickson, et al., pp. 61–62, 79–81; Combined Appellants' Reply Brief and Cross-Respondents' Brief of Erickson et al., p. 21.)

Plaintiffs also attempted to assert that a 1949 written easement and three "Declarations of Grant of Easements" recorded in 1968 and 1970 had dedicated Gold Stone and Henry Ridge as public roads. The district court of appeal rejected the claim, because these documents provided for "easements" that were "appurtenant" to specific real property, unless the conditions identified in the documents for establishing public roads over different portions of Henry Ridge and Gold Stone were established—which never occurred. (Slip opn., pp. 35–36; see AOB of Erickson, et al., pp. 43,70–78; Combined Appellants' Reply Brief and Cross-Respondents' Brief of Erickson et al., pp. 24–29.)

In fact, the 1968 and 1970 declarations offered easements to owners in land sections *other* than where Plaintiffs' Henry Ridge Property is located; thus, those easements would not have benefitted Plaintiffs' Henry Ridge Property in any event. (Slip opn., pp. 14–15; AOB of Erickson, et al., pp. 70-78; Combined Appellants' Reply Brief and Cross-Respondents' Brief of Erickson et al., pp. 24–29; Answer Brief on the Merits of Erickson, et al., pp. 47–48.)

In short, this Court need not decide whether public use can satisfy the "acceptance" element of express dedication, or decide the import of section 1009, subdivision (b)'s requirement of an "accept[ance]

by the county, city, or other public body to which the offer of dedication was made, in the manner set forth in subdivision (c)."

III.

Mikkelson's arguments under section 813 miss the mark.

A. Section 813 does not demonstrate that section 1009 applies only to implied in law dedication; section 1009 applies to both implied in fact and implied in law dedication.

Mikkelson's argument that the Legislature amended section 813 to protect against implied in fact dedication because section 1009 purportedly only protects against implied in law dedication misses the mark.

As discussed above, section 1009 applies to implied in fact dedication where the purported "acceptance" is based on public use. Public use can no longer give rise to a "vested right" in the public or government excepted as provided in section 1009.

B. The fact that the Legislature did not limit section 813 to coastal property does not mean that section 1009, subdivision (b) only bars recreational use of non-coastal property from ripening into a public dedication.

Mikkelson further argues that "[i]f 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." (Amicus Br. 18.) Mikkelson concludes the

Legislature only meant for section 1009 to bar *recreational* use of non-coastal property from giving rise to a vested right in the public or government. Mikkelson is once again mistaken.

1. The Legislature amended section 813 at the same time it added section 1009; because the Legislature was carving-out coastal property from the protections of section 1009, subdivision (b), the Legislature concurrently amended section 813 in order to *protect* owners in the coastal zone.

The legislative history of SB 504 (including the various amendments) shows section 813 was amended to bolster protections for coastal zone owners *because* the coastal zone was carved-out of section 1009, subdivision (b).

SB 504 was introduced in the Senate on March 9, 1971. (RJN to Erickson answer brief, Ex. D, p. LIS-1a.) It was first amended, in the Senate, on May 4, 1971. (*Id.*, at p. LIS-1b.) It was amended a second time, in the Assembly, on June 10, 1971.

As finally enacted, section 1009 carved-out the coastal zone from the protections of subdivision (b). (§ 1009, subd. (e).) But the coastal-zone carve-out was not part of the original bill. This carve-out was added by the third amendment of SB 504 in the Assembly, on July 22, 1971. (RJN to Erickson answer brief, Ex. D, p. LIS-1d; see John Briscoe & Jan S. Stevens, *Gion After Seven Years: Revolution or Evolution?* (1977) 53 L.A. Bar J. 207, 224.) Until then, subdivision (b)'s protections applied to both the coastal zone and the non-coastal zone.

In this same amendment to SB 504, the Legislature added the amendments to section 813, a statute that was originally enacted in 1963. (RJN to Erickson answer brief, Ex. D, p. LIS-1d.)

This same July 22, 1971 amendment also added subsection (f) to section 1009, which listed actions that a coastal zone owner could take to prevent public use from ripening into a dedication. (RJN to Erickson answer brief, Ex. D, p. LIS-1d.)

In his letter urging the Governor to sign the bill, Senator Lagomarsino confirmed section 813 was amended to give greater protections to coastal zone owners in the wake of the Legislature's carving-out the coastal zone from section 1009's protections:

> As amended on July 20, the bill distinguishes between property adjacent to the coast, bays, and estuaries, and other private lands in the State. **Owners of property lying within 1,000 yards inland of the mean high tide line of the ocean, or between the mean high tide line and a nearer public *would be required to take positive steps* to avoid losing rights to property through future public uses.** If the coastal owner is willing to allow public use of coastal lands he could do one of the following:
>
> **(a) Record consent to use [section 813]**
>
> (b) Post appropriate signs [section 1008]
>
> (c) Publish notice of consent, or
>
> (d) Enter into an agreement with a governmental agency providing for public use of the land.

> Such use could be subject to reasonable restrictions as to the time, place and manner. If the coastal owner is not willing to allow public use of his property he can enforce trespass laws. The amendments affecting coastal property reflect the constitutional rights of the public to use State tidelands. **For all other 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 to Erickson answer brief, Ex. A, Sen. Lagomarsino, letter to Gov. Reagan, Sep. 27, 1971, pp. 1-2, emphasis added.)

In short, section 813 was amended—and section 1009, subdivision (f) was added concurrently—to protect the coastal zone owner, who was now left unprotected by section 1009, subdivision (b).

2. Section 813 applies to all property—coastal and non-coastal; before it was amended, section 813 applied to all property, and the Legislature left it that way when it amended section 813 at the same time it added section 1009.

Moreover, the amendments to section 813 do not support Mikkelson's assertion that section 1009, subdivision (b) was not intended to abrogate the doctrine of implied dedication in the non-coastal zone.

Section 813 was amended as follows (deleted language is stricken-through; added language is underlined):

> 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~~ 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 ~~of consent is~~ is conclusive evidence that subsequent use of the land ~~for such purpose~~ 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 ~~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. 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.

Section 813 applies to all property—coastal and non-coastal. That fact does not mean the Legislature only intended for section 1009, subdivision (b) to bar recreational use of non-coastal property from ripening into a vested right. Nor is there somehow an inherent inconsistency behind the Legislature's decision to apply section 1009, subdivision (b) to non-coastal property and section 813 to all property.

Section 813 was a pre-existing statute, enacted in 1963. Before SB 504, section 813 permitted landowners to record "a notice of consent to the use of his land, or any portion thereof, for the purpose described in the notice." The statute did not state that such notices were only effective in the coastal zone; they applied to all property. When it enacted SB 504, the Legislature obviously did not want to nullify all notices that had already been recorded in the non-coastal zone. Hence, the Legislature left section 813 applicable to all property.

The Legislature left section 813 applicable to all property for yet another reason. Before SB 504, a section 813 notice barred not just an implied *public* dedication; it also barred a *private easement* by prescription. That feature remained after section 813 was amended. Again, the Legislature did not want to nullify notices that had already been recorded. The Legislature wanted to ensure both (1) the continued validity of pre-SB 504 notices, and (2) that owners could continue to record section 813 notices in order to bar future *private prescriptive easements*.

Perhaps most important, section 1009, subdivision (b)'s bar expressly applies "*[r]egardless* 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 ...." (§ 1009, subd. (b), italics added.) The fact the Legislature said "regardless" necessarily means the Legislature believed there could be overlap between the two statutes. In other words, the Legislature was stating that *even if* a section 813 notice was recorded, section 1009, subdivision (b) would still apply. The Legislature was expanding individual rights, not narrowing them.

3. The amendments to SB 504—in which the Legislature amended section 813—demonstrate the Legislature did not mean "no recreational use" when it stated "no use" in section 1009, subdivision (b).

Moreover, contrary to Mikkelson's assertion, the amendments to SB 504 that carved-out the coastal zone and amended section 813 support the conclusion that the Legislature did not mean "no recreational use" when it said "no use" in section 1009, subdivision (b).

The amendments show the Legislature knows how to qualify and limit the use it is referring to, *if it means to do so*. Section 813 states in part, "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 ...." (Language added by amendment is underlined.) The Legislature thus *amended* section 813 to state: "(other than any use expressly allowed by a written or recorded map, agreement, deed or dedication)." Section 1009, subdivision (b) contains no such qualification or limitation.

Likewise, recall the 1971 Legislative Counsel was concerned with enacting a statute in response to *Gion-Dietz* that did *not* define "recreational." (Answer Brief on the Merits of Erickson, et al., p. 28.)[4] Section 1009 does not define "recreational"—nor was there a need to do so, because subdivision (b) mandates "no use." The same 1971 Legislature that enacted section 1009 and amended section 813 also added "rock collecting" to the long list of "recreational" activities subject to the protections of Civil Code section 846. (Answer Brief on the Merits of Erickson, et al., pp. 31–34.) Had the Legislature meant "no recreational use" of coastal property when it said "no use" in section 1009, the Legislature would have defined "recreational"—as

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[4] 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: "**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 Murphy, letter to Assemblyman Paul Priolo, Apr. 15, 1971, emphasis added.)

admonished by the Legislative Counsel, and as the Legislature did when it amended section 846 that same year.

The June 1971 amendments to SB 504—including adding section 1009, subdivision (f)—further demonstrate the Legislature did not mean "no recreational use" when it said "no use" in subdivision (b). Subdivision (f) shows the Legislature was not defining the property to which subdivision (b) was subject based on the *use* to which the property was put; it was defining the property to which subdivision (b) was subject based on the *location* of the property—coastal or non-coastal.

As noted in the Answer Brief on the Merits of Erickson et al. (at pp. 34–36), *Pulido v. Pereira* (2015) 234 Cal.App.4th 1246, 1252 [184 Cal.Rptr.3d 754] and *Hanshaw v. Long Valley Road Assn.* (2004) 116 Cal.App.4th 471, 485 [11 Cal.Rptr.3d 357] held that subdivision (b) bars only recreational use from resulting in a vested right. Those cases concluded that "such property" in subdivision (b)'s phrase "no use of such property" refers back to subdivision (a)'s phrase "lands available for public recreational use." (*Pulido* at p. 1252; *Hanshaw* at p. 485.)

As discussed in the prior briefing of Erickson et al., these cases are mistaken. "[S]uch property" in subdivision (b) refers simply and naturally to "private" property used earlier in that very sentence.

But subdivision (f) demonstrates these cases are mistaken as well. Like subdivision (b), subdivision (f) also uses the simple phrase "no use": "No use, subsequent to the effective date of this section, by the public of property described in subdivision (e) [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" (1) posts signs under Civil Code section 1009,

or (2) records a notice under section 813, or (3) enters into a written agreement with the government.

If *Pulido* and *Hanshaw* were correct that "such" refers to "lands available for public recreational use"—in other words, that the Legislature was defining the type of property based not on location but on the use to which it was being put—then subdivision (f) would have stated, "No use, subsequent to the effective date of this section, by the public of *such* property, *if such property is located within the zone* described in subdivision (e)—shall constitute evidence ...." But the Legislature did not. Instead, it broadly carved-out an entire *zone* of property, based on where that property was located, not based on how it was being used.

4. If "no use" in section 1009 meant "no recreational use," then section 1009, subdivision (f)'s reference to section 813 would meaningless—and inconsistent with section 813.

" 'When a word or phrase is repeated in a statute, it is normally presumed to have the same meaning throughout.' [Citation.]" (*People v. Briceno* (2004) 34 Cal.4th 451, 461 [20 Cal.Rptr.3d 418, 99 P.3d 1007].)

If "no use" in section 1009, subdivision (b) means "no recreational use," then "no use" in subdivision (f) must also mean "no recreational use." That interpretation, however, would render part of section 813 meaningless and inconsistent with section 1009.

Section 1009, subdivision (f) states no dedication can occur if an owner records a notice under section 813. There is no dispute that section 813 is not limited to just "recreational" use; it applies to non-recreational use as well. Yet, what would be the point of section 1009,

subdivision (f)'s stating that "no recreational use" can ripen into an implied dedication if the owner records a notice under section 813, given that section 813 already states recording a notice bars "any use whatsoever" from ripening into an implied dedication (or a prescriptive easement)?

Section 1009, subdivisions (b) and (f) do not merely bar recreational use from ripening into an implied dedication. They bar all uses from doing so.

* * *

In sum, section 1009, subdivision (b) was intended to apply broadly to bar public use in the non-coastal zone from ripening into a "vested right" in the public or government—including recreational and non-recreational use. The Legislature did not intend for section 1009, subdivision (b) to apply only to recreational use and for section 813 to apply to all uses as Mikkelson suggests. The Legislature's use of the term "regardless" in section 1009, subdivision (b) makes clear the Legislature intended for subdivision (b) to apply even if an owner had recorded a section 813 notice.

IV.

Conclusion.

Civil Code section 1009 prospectively abrogated implied dedication by any public use in the non-coastal zone. The Court should affirm the court of appeal's opinion.

DATED: September 19, 2016

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify that the foregoing Answer to Keri Mikkelson et al's Amicus Brief contains 7,086 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 8.204(c)(1), stating the number of words in an answering brief may not exceed 14,000.

DATED: September 19, 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.

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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 September 19, 2016 at Pasadena, California.

DELORISE CAMERON