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

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ANSWER TO KERI MIKKELSON, ET AL.'S AMICUS BRIEF

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REQUEST FOR JUDICIAL NOTICE

Defendants and appellants Richard Erickson, Wendie Malick, Richard B. Schroder, and Andrea D. Schroder, request that the Court take judicial notice, under Evidence Code sections 452, 453, and 459, of the California Assembly Committee on Planning and Land Use, Analysis of Senate Bill No. 504 (Legislative Sess.) July 20, 1971, attached hereto as Exhibit J.

A supporting memorandum is attached hereto.

DATED: September 19, 2016

Respectfully submitted,

GARRETT & TULLY, P.C.
Ryan C. Squire
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MEMORANDUM

I.

The Court should take judicial notice of the legislative history of Civil Code section 1009.

It is well-settled that a reviewing court may consider the legislative history of a statute to ascertain its meaning. (*Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 108 [54 Cal.Rptr.3d 28] (concurring opn. of Croskey, J.) Because the construction of a statute presents a purely legal question that this Court reviews independently, it may take judicial notice of legislative history that was not introduced in the trial court. (*Peart v. Ferro* (2004) 119 Cal.App.4th 60, 81 [13 Cal.Rptr.3d 885], citing Evid. Code, §§ 452 & 459.)

The plain language of Civil Code section 1009 provides that *no use* of non-coastal property can ripen into an implied dedication post-1972. There is no distinction between "recreational" and "non-recreational" use. This Court should take judicial notice of the California Assembly Committee on Planning and Land Use, Analysis of Senate Bill No. 504 (Legislative Sess.) July 20, 1971, attached hereto as Exhibit J, which discussed the "total abolition" of the doctrine of implied dedication of non-coastal property under section 1009.

The Erickson Answer Brief on the Merits, at pages 10, 22 and 23 mistakenly attributed the "total abolition" statement to another Assembly Committee on Planning and Land Use, Analysis of Senate Bill No. 504 document, also dated July 20, 1971, which was attached as Exhibit F to the Request for Judicial Notice in support of the Erickson Opening Brief. There are two Assembly documents dated July 20. The

document attached as Exhibit F to the Erickson AOB is two pages, while the document attached as Exhibit J to this request for judicial notice is three pages, and discussed "total abolition" of the doctrine of implied dedication on page 2.

Accordingly, the Court should take judicial notice of the Assembly's analysis of SB 504.

DATED: September 19, 2016

Respectfully submitted,

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EXHIBIT J

ASSEMBLY COMMITTEE ON PLANNING AND LAND USE

PAUL PRIOLO, CHAIRMAN

July 20, 1971

ANALYSIS OF SB 504 (LAGOMARSINO)

BACKGROUND: In 1970 the State Supreme Court in the Gion and Dietz Case (2 Cal.3 d. 29 1970) held that beach front property improved by and used by the public for many years; and a beach access road used by the public for over 100 years although private property was impliedly dedicated to the public.

The standard applied by the court to find implied public dedication consists of five (5) years use by the public without the owner's consent and that no reasonable (emphasis supplied) effort was made to keep the public from trespassing on such lands.

Dicta within the case amplifying the concept of "reasonable effort" has raised the concern of both individual and corporate landholders in areas of the state which attract vacationers and recreationists. In allowing the public to use their land, property owners fear they may be creating a right adverse to their interest in favor of the public. As well, present licensing provisions are not broad enough to cover all types of recreational uses.

As a result of implied dedication, alternatives of either issuing grant permits for use or total exclusion of the public from private recreational land by fencing and patrolling have resulted. Although the dicta was broad, the court did make the analogy that the old doctrine normally applied to roads, but that modern urbanization defined beaches, and beach access corridors with equivalent precision.

Subtleties aside the State Chamber of Commerce and other supporters of the bill claim a potential of 8 to 10 million acres being closed to public use to prevent application of the implied dedication doctrine.

SUMMARY: This bill declares as policy the encouragement of owners of private real property to make their lands available to the public for recreational purposes. Under current law property rights are threatened and bills clouded if the policy is implemented. Therefore, the bill provides that regardless of present provisions of l regarding licensing and posting of consent by the owner of public use, that no use by the public on privately owned land shall ever ripen to confer upon the public a vested right.

COMMENT: The sources of this bill include the Agricultural Council of California, Cattlemen's Association, California Farm Bureau, California Forest Protection Association, California Wildlife Federation, California Chamber of Commerce. This bill is endorsed by the California Land Title Association, California Railroad Association, California Redwood Association, League of California Cities, C.S.A.C., Sierra Cascade Logging Conference, Southern California Rock Products Association, State Board of Forestry, and the Western Wood Products Association.

The bill is opposed by the Sierra Club and the Planning and Conservation League.

DETAILED ISSUES RAISED: One major area which is not provided for in the bill's present form is the situation in which government has expended sums of money for capital improvements on private property either by mistake (such as survey errors, etc.) or under an owner's acquiescence. As well, the effects of a total abolition of doctrine on challenges against the government in quiet title actions is not clear.

Although the doctrine of implied dedication is one of proscribing private property rights by operation of law, the effect of ameliorating the harshness of the doctrine has only an indirect effect on the incentive to land owners to allow public use of their land. Even if the solution deletes the doctrine rather than controlling it, good will and public relations will remain the major factor in allowing the public use of private lands for recreational purposes.

The contention that there are ample existing ways to avoid application of the doctrine while allowing the public use of lands is somewhat conclusionary. Existing law does not completely protect land owners from all the implications of Gion and Dietz. Therefore, either some modification of existing law or abolition of the doctrine is clearly required.

The use of the implied dedication to control deceptive practices in subdivision sales (i.e. such as promised roads, etc.) may be an incidental benefit of the doctrine. However, such practices are directly controlled by the Subdivision Map Act, as well as criminal and civil fraud sanctions. Recalling that implied dedication takes five (5) years to ripen it may be problematic that a fraudulent scheme could run over that period of time.

The issue that practically speaking the prohibition on retroactive application of the doctrine will not have substantial effect within a few years has some merit. It is true that within a few years parties able to come forward to establish public rights will be severely limited due to age, etc. However, it must be kept in mind that in eliminating any doctrine which involves vested rights, there cannot be direct retroactive application under the constitution without compensation. The inherent corollary of abolishing any vested right in the future by operation of law is the abolishing of it retroactively as a matter of fact given the passage of enough time.

The issue that the elimination of the doctrine does not serve the public interest is a succinct statement of the very question which the committee will be determining.

The most salient point of contention is the final one that the bill discriminates between public and private rights

acquired through the element of adversity. The practical effect of the issue is whether the public as a group of individuals could acquire an adverse easement as individuals which they could not acquire as the "public". Because some affirmative act is required to prevent adverse easements, the issue becomes whether some similar act should be required to prevent public dedication.

PROPOSED QUESTIONS:

Under the bill before committee what would be the public's rights in a $7 million road constructed one year after this bill goes into effect where part of the road was located on private property five (5) years after construction?

Have there been studies made to determine the implication of completely removing the doctrine of implied dedication?

CERTIFICATE OF MAILING

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

On September 19, 2016, I served an executed copy of the Request for Judicial Notice in Support of Answer to Keri Mikkelson et al.'s Amicus Brief

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

Clerk of the Supreme Court
Supreme Court of California
Earl Warren Bldg. - Civic Center
350 McAllister Street, Rm. 1295
San Francisco, CA 94102-4797

I caused such envelope with postage thereon fully prepaid to be placed in the U.S. mail at Pasadena, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of a party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

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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