CASE NO.: S230104

IN THE
SUPREME COURT OF CALIFORNIA

JAIME A. SCHER and JANE McALLISTER,
Petitioners,
v.

JOHN F. BURKE; et al.,
Respondent.

After a Decision By The Court of Appeal Second Appellate District, Division 3
Docket Number: B235892
Superior Court of Los Angeles, The Honorable Malcolm Mackey; Case No: BC 415646

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Petitioners ostensible reason for seeking review is to resolve a conflict between the Opinion here, holding that Civil Code section 1009 bars the ripening of *any* public use of private property into a dedication to the public (Opn. 33), and earlier decisions which hold

that the section 1009 bar applies only to use for "recreational" purposes (Ptn. 1).

But Petitioners fail to make any argument for limiting section 1009's application to recreational use. And, that failure is an effective admission that the Court of Appeal here came to the correct conclusion about the meaning of section 1009, leaving no real conflict for this Court to resolve.

Petitioners now contend that there is another exception to the applicability of section 1009, one not raised in the earlier cases, or in this case until now. They claim that section 1009 is inapplicable to bar the implied dedication of *roads*. (Ptn., pp. 1, 14-16). As shown below, however, Petitioners provide no good reason to read that exception into section 1009 either.

More generally, Petitioners complain that the Court of Appeal's holding that "the law of implied dedication has been completely obliterated by section 1009" (except for coastal property) extends that statute's reach "far beyond what [its] genesis and language... indicate the Legislature intended." (Ptn. 20).

The Opinion demonstrates, however, that this was precisely

what the Legislature intended. Legislative history quoted in the Opinion makes clear the Legislature's expectation that, with the passage of section 1009, "*the doctrine of implied dedication would be deleted prospectively...*" except for coastal land, and with that exception the statute would "[p]rohibit[] *any use* of private land... *from conferring a vested right in* [*the*] *public...*" without an "express written irrevocable offer" and acceptance in accordance with subsection (c) (emphasis in the original). (Opn., p. 31).

In rejecting the earlier cases' more limited interpretation, the Court of Appeal was here fulfilling the Legislature's clearly expressed intention, confirming that section 1009 means exactly what it says. The Petition should be denied.

I. PETITIONERS FAIL TO CHALLENGE THE OPINION'S DEMONSTRATION THAT SECTION 1009 APPLIES TO NON-RECREATIONAL USES.

Petitioners made extensive arguments for the limitation of section 1009's effect to recreational uses in their briefing on appeal (RB 30-37). Now, in the face of the Court of Appeal's compelling reasons for rejecting that limitation, Petitioners have abandoned those arguments entirely.

The Court of Appeal found decisive reasons for concluding that section 1009 applies to all uses of private property by the public, in both the words of the statute and its legislative history.

First, the Court of Appeal found that the unambiguous language of the statute made it applicable to all uses. Prior decisions had found the limitation of the statute's ban to recreational uses in subdivision (a), the "preamble" of the statute, in which the Legislature states its intent to encourage landowners to "make their lands available for public recreational use." *Hanshaw v. Long Valley Road Association* (2004) 116 Cal.App.4th 471, 485, *Bustillos v. Murphy* (2006) 96 Cal.App.4th 1277, 1280-81, *Pulido v. Pereira* (2015) 234 Cal.App.4th 1246, 1250.[1]

But the Court of Appeal here noted that the term "recreational" is found *only* in the preamble; it appears nowhere in the operative provisions of the statute. (Opn., p. 29). In contrast to subdivision (a)'s reference to "public recreational use", the operative section (b) provides that "no use... by the public" shall ever ripen into a vested

[1] Only one of these decisions, *Hanshaw* -- in which there were deeds referring to recorded maps containing offers of dedication, i.e., "explicit dedication, with an acceptance by public user"-- actually held section 1009 limited to recreational use. 116 Cal.App.4th 471, 476, 482-483. The statements of the limitation in the other cases are dicta.

public right to use that property.

Where, as here, the Legislature uses a term in one part of a statute and omits it from another, it shows an intention "to convey a different meaning." *Klein v. United States of America* (2010) 50 Cal.4th 68 at 80. The "preamble's" use of "recreational" in subdivision (a) cannot be read into the operative language of subdivision (b) (Opn., pp. 28-29).

Recognizing that other courts had interpreted subdivision (b) to apply only to recreational uses, however, the Court of Appeal went on to examine the legislative history of section 1009. As already shown, that history only confirmed the court's own unqualified reading of the statute. The Legislature's intent was to "delete" the "doctrine of implied dedication" except for coastal property, forbidding "any use" of other private land from "conferring a vested right in [the] public." (Opn., p. 31).

Finally, the Court of Appeal showed that the importation of the term "recreational" from subsection (a) of the statute into subsection (b) would thwart the Legislature's declared purpose rather than furthering it. Landowners who are told that only non-recreational –

not recreational – use can ripen into dedication to the public, but are unable to distinguish between the two kinds of users, will be discouraged from allowing *any* public use of their property. The result would be to defeat the Legislature's intent. (Opn., p. 32)

As confirmed by Petitioners' silence, the Opinion here has put to rest the issue of whether section 1009 applied only to recreational use. There is no need for this Court's intervention.

II. THERE ARE NO GROUNDS FOR AN EXCEPTION IN SECTION 1009 FOR ROADS.

To support of their new proposal to except roads from section 1009, Petitioners turn to the statute's silence on the subject. The statute distinguishes between coastal and non-coastal property, and between recreational and other uses, but says nothing specific about roads. From that silence, Petitioners conclude that the Legislature "did not evidence any intent to change the law of implied dedication as it relates to roads." (Ptn. 15)

First, however, the failure of a statute using general language to reference a specific subject from that language cannot be reason to except that subject from the statute's ambit. Otherwise there would be no end to exceptions. Section 1009 does not reference property used

for parking or agriculture, either. But that does not justify making exceptions for them.

Second, and crucially, section 1009 is not entirely silent on the subject. In subsection (a)(2) the Legislature expressed its intent to free owners from the fear they will lose property rights, not only if they allow the public to "use" and "enjoy" their property, but also if they allow the public to "pass over their property for recreational purposes." Roads are among the principal means of passing over property. In the absence of an explicitly stated exception for roads, it is reasonable to assume that the Legislature intended to encourage owners to allow passage over their property by roads as well as other means.

Petitioners seek to distinguish roads from open land on the basis that the dedication of a road does not "prevent all other use of an entire parcel of property." (Ptn. 9). But the same is true of any dedication resulting from owners' willingness to have the public "pass over their property."

Petitioners' effort to draw an exception for roads from case law fares no better. Petitioners begin with a lengthy discussion of *Gion v.*

City of Santa Cruz (1970) 2 Cal.3d 29 (*Gion-Dietz*), the implied dedication case that stimulated the passage of section 1009. (Ptn. 6-9). While first admitting that roads were included in the property subjected to implied dedication in *Gion-Dietz* (Ptn. 6), Petitioners later assert that *Gion-Dietz* "solely dealt with use of open land, not specifically roads...," for recreational purposes. (Ptn. 8).

The *Gion-Dietz* opinion shows, however, that the implied dedication in *Gion* was of property used as a parking lot, and gave the public the right "in, on, over, and across said property." 2 Cal.3d 29 at 35. In *Dietz*, it was a beach and a dirt road leading to it. 2 Cal.3d 29, 36. This Court made no distinction there between the land being used for recreation and the land traversed to get to the recreation. On the contrary, the fact that *Gion-Dietz'* dealt with roads and parking lots is confirmation that section 1009 was, for one thing, aimed at facilitating the public's access to recreation by making it possible for them to drive across private land to recreational sites.

Petitioners claim that the concern which was generated by *Gion-Dietz* and led to the enactment of section 1009 was not about the implied dedication of roads at all, but only of open land. (Ptn. 6, 9-

10). They provide no support for that claim, and the facts as we know them are to the contrary.

Petitioners also address the cases dealing with section 1009 since its passage, *Burch v. Gombos* (2000) 78 Cal.App.4th 352, 356, n. 12, *Friends of the Trail v. Blasius* (2000) 78 Cal.App.4th 810, 817, *Hanshaw v. Long Valley Road Association, supra*, 116 Cal.App.4th 471, 485, *Bustillos v. Murphy, supra*, 96 Cal.App.4th 1277, 1280-81, *Pulido v. Pereira, supra*, 234 Cal.App.4th 1246, 1250. (Ptn. 17-19). Petitioners assert that each of these cases "conclude[s], one way or another, that implied dedication of roads is not prevented by Section 1009." (Ptn. 17).

Again, Petitioners are attempting to draw affirmative support from silence. All of these cases deal with the question of whether roads or trails have been subjected to implied dedication. And, in none but *Bustillos* did the courts find section 1009 applicable to bar implied dedication. Nowhere, however, did any of these the courts indicate that section 1009 was inapplicable just because there was a road or trail involved.

Further, *Bustillos* did apply section 1009 to prevent public

recreational use of *trails* from ripening into implied dedication. And the *Bustillos* court nowhere suggested that the result would have been different if members of the public passed over private land on a road, as in *Gion-Dietz*, rather than on a path. 96 Cal.App.4th 1277, 1280-81

Petitioners express a concern that application of section 1009 to roads could deprive owners of legal access to their homes, "just as it prevents plaintiffs here from accessing their home." (Ptn. 20)

But Petitioners have not even claimed that they cannot access their home, only that they are being denied access by the "quickest and most convenient route." (Opn., p. 45). As the Court of Appeal explained: "Plaintiffs calculate that traveling Henry Ridge Motorway south to Gold Stone Road is more convenient because this route to Topanga center takes 7 to 10 minutes. There are numerous roads connecting to Henry Ridge Motorway in the north to Topanga center, but those routes take plaintiffs 18 to 20 minutes." (Opn., p. 16).

Nor is this a case, like *Gion,* 2 Cal.3d 29, 36-37, in which hordes of the public seek, and have been denied, access to defendants' properties. It involves only Petitioners, a husband and wife who want to use their neighbors' property out of convenience.

If, then, there were an argument that section 1009, though entirely silent regarding roads, should be read as making an exception for roads, whether because people may otherwise be denied legal access to their homes, or because the public at large may be denied access to a place they are clamoring to go, this is not the case in which to consider the issue.

In sum, Petitioners have given this Court no good reason to believe that the Legislature did not intend section 1009 to encourage landowners to allow the public to "pass over their property for recreational purposes" by roads as well as footpaths.

III. PETITIONERS CONTENTION THAT SECTION 1009 IS INHERENTLY CONTRADICTORY IS BASELESS.

In an effort to show that the Legislature could not have meant section 1009 to eliminate the doctrine of implied dedication from California law completely, Petitioners argue that the provisions of the statute are confusing and inherently contradictory. (Ptn. 14-16).

Petitioners' argument is that, while subsection (b) provides that dedication to public use can only be done "in the manner set forth in subdivision (c)," subdivision (c) itself provides that dedication may be done in the manner prescribed by Government Code section 7050,

"[i]n addition to any procedure authorized by law and not prohibited by this section...."

According to Petitioners, subsection (b) points to subsection (c), and through it to section 7050, as the only means of obtaining dedication. But (c) explicitly allows for procedures other than that prescribed by 7050, so long as they are not otherwise forbidden by section 1009. So section 1009 does not completely eliminate other methods of dedication after all.

There is no contradiction.

Subsection (b) prohibits dedication in the absence of an "express written irrevocable offer" made in accordance with subsection (c). Subsection (c) provides that such an offer can be made either under section 7050, or using any other procedure authorized by law and not prohibited by section 1009.

However, as section 1009 prohibits dedication except by an "express written irrevocable offer," the other procedures referred to must be modes of making "express written irrevocable offers" other than under section 7050. That provides no basis for concluding, for example, that an offer of dedication can be inferred from public use.

CONCLUSION

The Court of Appeal worked hard and reached a thoroughly-researched decision that correctly resolves the scope of Civil Code section 1009. Petitioners present no convincing reason for this court to address the issue.

For the reasons stated above, Respondents respectfully request that the Petition be denied.

Dated: November 10, 2015

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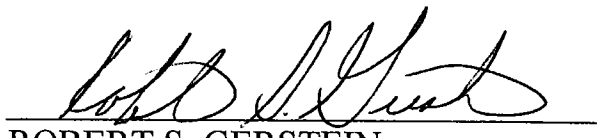
By: 

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CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.204(c)(1), I certify that the ANSWER TO PETITION FOR REVIEW is proportionately spaced, has typeface of 14 points or more, and contains 2342 words.

Dated: November 10, 2015 LAW OFFICES OF ROBERT S. GERSTEIN

By: _____
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PROOF OF SERVICE

Re: *Scher, et al. vs. Erickson, et al.*
Docket No.: B235892;
LASC Case No.: BC 415 646.

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is 12400 Wilshire Boulevard, Suite 1300, Los Angeles, CA 90025.

On November 12, 2015, I served true and correct copies of the foregoing document described as **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action addressed as follows:

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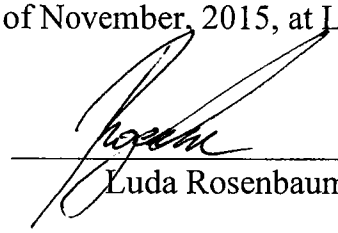
[X BY MAIL: I am readily familiar with the firm's practice of collection and processing correspondence for mailing I know that the correspondence is deposited with the U.S. Postal Service on the same day this declaration was executed and in the ordinary course of business. I know that the envelope was sealed, and, with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practice, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 12th Day of November, 2015, at Los Angeles, California.



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SCHER, et al. v. ERICKSON, et al.
Docket No.: B235892 - LASC Case No.: BC 415 646

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