S230104

In The

Supreme Court of California

JAIME A. SCHER, et al,

Plaintiffs, Appellants and Respondents,

v.

JOHN F. BURKE, et al,

Defendants, Appellants and Respondents.

On Review From The Court Of Appeal For The Second Appellate District,
Division Three, 2nd Civil No. B235892

After An Appeal From The California Superior Court,
County of Los Angeles, Case Number BC415646
Hon. Malcolm Mackey

CONSOLIDATED ANSWER TO MULTIPLE AMICUS BRIEFS

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CONSOLIDATED ANSWER TO MULTIPLE AMICUS BRIEFS

Defendant, appellant and respondent Gemma Marshall ("Marshall"), together with defendants, appellants and respondents John and Germaine Burke and Bennett Kerns, Trustee of the ASA Trust ("Burkes" and together with Marshall, the "Respondents"), respectfully provide this consolidated answer to the amicus briefs filed by (1) 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, "Mikkelson, et al."), and (2) Pacific Legal Foundation ("Pacific Legal" and together with Mikkelson, et al., "amici"), pursuant to California Rules of Court, rule 8.520(f)(7).

DISCUSSION

I. Mikkelson, Et Al. Are Trying to Influence Their Own Unrelated Litigation

In their application to file an amicus brief, Mikkelson, et al. concede that the issue most critical to their own pending lawsuit – the distinction between implied-in-fact and implied-in-law dedication – "does not exist" in the instant case, and was never addressed either in the court of appeal or in the briefing before this Court. (MACB at Application, p. 1.) Like the Schers, they invite this Court to invent a judicially-created exception to the clear and express language of Civil Code section 1009, which

(subject to certain explicit exceptions) prohibits public use of private land from ripening to an implied dedication.

The distinction between implied-in-fact and implied-in-law dedication is irrelevant to the action before this Court. By its plain terms, section 1009 prohibits public use of private land from ripening to confer a vested right to continue such use permanently. This bars implied dedication after 1972 *regardless* of whether the dedication could be implied from the owner's acquiescence (implied-in-fact) or from lack of substantial interference (implied-in-law). This Court should not muddy the waters just to benefit amicus in unrelated litigation not before this Court.

II. Amici Completely Ignored the Legislative History, Which Confirms the Legislature Intended Section 1009 to Mean Exactly What it Says

Mikkelson, et al. present the underlying purpose of section 1009 as an issue shrouded in mystery. Why, they ask, would the legislature prohibit any "use" from ripening to implied dedication if the conduct they were seeking to protect was merely "recreational use?" (MACB 1.) Why, they ask, would the Legislature enact this rule in response to *Gion*, a case involving recreational use? (MACB 1-2.) And why, they ask (as the Schers did in their merits brief), would the Legislature remain "silent" in the time since section 1009 was enacted? (MACB 3.)

The answer to these questions can be found in the extensive legislative history supporting the enactment of section 1009, which was judicially noticed by the court of appeal and set forth in the published portion of the opinion. (Slip. Op. at p. 31-32.) The Legislature designed section 1009 to "***treat the effect of implied dedication differently in the coastal zone*** than in the remainder of the state." (Assem. Com. on Planning and Land Use, Analysis of Proposed Amendments to Sen. Bill No. 504, (1971 Reg. Sess.) July 20, 1971, p. 1, emphasis added.) Under section 1009, "[***t]he doctrine of implied dedication would be deleted prospectively except for the 'coastal zone'*** . . . ." (*Ibid.*, emphasis added.) The statute was written with the express purpose and intent to "***[p]rohibit[] any use*** of private land, except specified ocean frontage land, after [the] effective date of [the] act ***from conferring a vested right in [the] public*** . . . With regard to specified ocean frontage property, [section 1009] makes use by the public inadmissible to prove implied dedication *if* specified actions are taken by owner." (Legis. Counsel's Dig., Sen. Bill. No. 504 (1971 Reg. Sess. & 1971 1st Ex. Sess.) Summary Dig., p. 136, emphasis added; accord, Enrolled Bill Memorandum to Governor for Sen. Bill. No. 504 (1971 Reg. Sess.) Oct. 7, 1971, p.1; *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1169-1170 [Legislative Counsel's summary is entitled to great weight].)

To summarize, using the words of the court of appeal:

> "[T]he express legislative purpose of Civil Code section 1009 is to encourage recreational use of private property by

> preventing implied dedication of coastal property based on public use if the landowner takes one of the specified steps in subdivision (f), while *eliminating* all *implied* dedication of non-coastal property to public use after March 1972. A contrary construction of Civil Code section 1009 undermines the Legislature's findings and purpose, namely "to encourage owners of private real property to continue to make their lands available for public recreational use" by enabling property owners to allow recreational use of their land without fear of risking a cloud on their title. (Civ. Code, section 1009, subd. (a).)"

(Slip Op. at pp. 31-32, original italics.) The court of appeal correctly interpreted the statutory language and legislative history. When considered as a whole, the legislative history of section 1009 does not reveal an intent to distinguish between implied-in-fact dedication and implied-in-law dedication as Mikkelson, et al. now urge. Nowhere in the text of the statute or the extensive legislative history can there be found any reference to a distinction between the kinds of implied dedication. Rather, the clear intent was to distinguish ***coastal*** property from ***non-coastal*** property. The Legislature expressly stated its intention to treat the effect of implied dedication differently in the coastal zone than in the remainder of the state. It sought to create a new law that would prohibit ***any*** use of private land from conferring a vested right to the public (without an "express written irrevocable offer"), except for coastal land.

III. Under Section 1009, Implied-in-Fact Versus Implied-in-Law Dedication is a Distinction Without a Difference

The Schers' central contention on the merits was that section 1009 prohibits only "recreational" use from giving rise to dedication, whereas "non-recreational" use or "roadway" use still could give rise to dedication.[1] (OB 3.) Mikkelson, et al. devote most of their attention to developing another creative yet equally erroneous departure from the clear purpose of the statute. They now ask the court to distinguish between the two types of implied dedication – implied-in-law and implied-in-fact – and contend that section 1009 was intended to abrogate only the former, while leaving the latter intact.[2] (MACB 8.) The express statutory language, the extensive legislative history, and plain common sense squarely contradict amici's artificial distinction.

"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

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[1] The recent decision in *Friends of the Hastain Trail v. Coldwater Development LLC* (2016) 1 Cal.App.5th 1013, 1029, makes clear Respondents' error in seeking to distinguish roadways from open land with regard to implied dedication. After reviewing much of the case law cited in Respondents' merits briefs, the *Hastain* court conclusively determined that "the doctrine of implied dedication is ***not limited*** to any specific kind of property." (*Id.*, at p. 1029, emphasis added, citations omitted.)

[2] Pacific Legal, too, implicitly suggests that section 1009 repudiated only implied-in-law dedication, without mentioning any effect on implied-in-fact dedication. (PACB 15.)

acquiescence to dedication. [Citation.] A dedication is implied by law when the public use is adverse and exceeds the period for prescription." (*Blasius, supra,* 78 Cal.App.4th at p. 821, citations omitted.) Put another way, an implied in fact dedication requires evidence of affirmative acts or acquiescence of the property owner, while implied in law dedication is established by the continuous adverse public use of the property for the prescriptive period without substantial interference by the owner. (*Union Transp. Co. v. Sacramento County* (1973) 42 Cal.2d 235, 240-41.)

Mikkelson, et al. read section 1009, subdivision (b) ("no use" of private land by the public can ripen into vested public rights) to bar only dedications based "*entirely* on adverse use...." (MACB 6, emphasis added.) Because "implied in fact" dedications are based on an implied offer from the owner *and* public use, they argue, implied-in-fact dedication is not prohibited by section 1009. (MACB 6, emphasis added.)

That reading ignores the qualification which follows the "no use" language in section 1009, subdivision (b), providing that "no use" will ripen into public rights "*in the absence of* an express written irrevocable offer to dedicate the property...." (Emphasis added.) Because a dedication initiated by an "express written irrevocable offer" is one example of a dedication not based exclusively on public use, to accept Mikkelson et al.'s reading would render that explicit provision for "express written irrevocable offers" unnecessary, and therefore meaningless.

"[S]tatutes are to be construed to give meaningful effect to all of their provisions, and to avoid rendering language

superfluous." (*Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 270.) Mikkelson, et al.'s distinction between implied-in-fact and implied-in-law dedication must be rejected.

Section 1009, subdivision (b) was intended to bar *all* implied dedications within its ambit, and express dedications as well, except those dedications based on an "express written irrevocable" offer and acceptance as provided by subdivision (c). The clause in subdivision (b) allowing dedication by public use in response to an express written irrevocable offer in no way detracts from that statement of intent. A dedication created by public use in response to an express written offer is not to an implied dedication, whether in law or in fact. It is an *express* dedication. (*Hanshaw v. Long Valley Road Association* (2004) 116 Cal.App.4th 471, 481-82; *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810; see, MACB 9-10.) If the Legislature had intended section 1009 not to reach dedication arising from the "acts or omissions of the owner afford[ing] an implication of actual consent or acquiescence" (*Blasius, supra,* 78 Cal.App.4th at p. 821), the Legislature would not have included an exception in subdivision (b) for dedication by an express irrevocable offer. Under subdivision (b), mere acquiescence or implied consent is no longer sufficient.

Moreover, section 1009 explicitly provides for exceptions to the ban on implied dedication set forth in subdivision (b). Under subdivision (d), another exception exists for private land being used by public entities with the owner's knowledge. Under

subdivision (e), yet another exception exists for implied dedication of coastal property. Clearly, the statute contemplates situations in which an implied dedication may still arise by public use. But implied-in-fact dedication is not one of them.

"Under the familiar rule of construction, expressio unius est exclusio alterius, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed." (*In re Lance W.* (1985) 37 Cal. 3d 873, 888, quoting *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195.) The presence of the explicit exceptions to the ban on implied dedication in subsections (d) and (e) provide another independent reason to reject the Mikkelson et al.'s proposed exception for implied-in-fact dedication.

In sum, Mikkelson et al.'s attempt to split hairs between implied-in-fact and implied-in-law dedication undermines the express framework of the statute. It departs from the plain language of section 1009, which contains no express or implied exception to allow implied-in-fact dedication to survive. It also squarely contradicts the legislative history, which uniformly reflects the Legislature's intent to eliminate the concept of "implied dedication," without distinguishing implied-in-law from implied-in-fact. The Court should treat amici's effort to divide an owner's acquiescence in public use from an owner's failure to substantially interfere with public use as a distinction without a difference.

IV. The Enactment of Section 1009 in Response to *Gion* Supports Respondents' Interpretation

Mikkelson et al. go on to assert that the court of appeal "ignored" the fact that section 1009 was enacted in response to *Gion v. City of Santa Clara* (1970) 2 Cal.3d 29. (MACB 14.) That obviously is not so. (Slip op. at p. 25-26.) More to the point, seeing section 1009 as a reaction *Gion* does not detract from the court of appeal's conclusion that the statute bans all forms of implied dedication. Nothing in *Gion*, or in any of the cases that follow it, supports amici's argument that a silent exception exists for implied-in-fact dedication.

Gion restated and clarified the law of implied dedication, and applied that law to a "unique pattern of factual circumstances." (*County of Los Angeles v. Berk* (1980) 26 Cal.3d 201, 213.) The case involved a stretch of land which the public historically used to access the sea with the owner's permission. The opinion initially shocked critics who argued it imposed additional and unwarranted burdens on property owners desiring to permit public use without relinquishing ownership permanently. As this Court later recognized, however, many of the assumptions underlying the rationale in *Gion* were "quickly and decisively repudiated" with the passage of section 1009. (*Berk, supra,* 26 Cal.3d at p. 229.) The Legislature did not want to burden property owners with a duty to take "significant" measures to prevent public use to preserve their rights (MACB 12), so it crafted a rule specifically designed to abrogate the

doctrine of implied dedication prospectively, except in the coastal zone. (*Friends of the Hastain Trail, supra,* 1 Cal.App.5th at p. 1028.)

Gion is significant insofar as it brought widespread public awareness to the lingering problem of implied dedication. Indeed, the Legislature swiftly repudiated the doctrine of implied dedication in response to the opinion squarely supports Respondents' interpretation. As shown more fully in section VII, below, property owners cannot be expected to split hairs by distinguishing between implied-in-fact versus implied-in-law dedication as Mikkelson et al. propose. Their only option would be to prevent any public use of their property, which is exactly what the Legislature sought to avoid.

V. The Absence of Subsequent Legislative Action Does Not Validate Erroneous Case Law

Mikkelson, et al. further contend, as did the Schers, that the fact the Legislature has remained "absolutely silent" in the 45 years since the enactment of section 1009 indicates that the Legislature supports their interpretation. (MACB 3.) No rule or case has ever held the absence of legislative action may be used to indicate approval or disapproval.

The only case cited by Mikkelson et al. is *Hanshaw v. Long Valley Road Ass'n (*2004) 116 Cal.App.4th 471. (MACB 9.) This was also the case relied upon most heavily by the Schers, which the trial court used to justify its determination that section 1009

has no application to "non-recreational" use of property. (6CT1221.)

In *Hanshaw*, an express written offer to dedicate a portion of a road "for public access" had been formally accepted and recorded by the county. (116 Cal.App.4th at p. 475.) Dissatisfied, neighboring landowners argued that the dedication was nevertheless barred by section 1009. (*Id.*, at p. 479-480.) The court of appeal for the Third District rejected this argument, concluding "Civil Code Section 1009...has no application to nonrecreational use of land." (*Id.*, at p. 474.) For all the reasons explained in Respondents' merits brief and this brief, and as articulated by the court of appeal in the instant case, this conclusion is incorrect as a matter of law. (Slip Op. p. 32-33.)

The notion that in this case the Legislature's silence demonstrates a legislative intent that is the polar opposite of its own legislative history, defies belief. A meaningful determination of legislative intent should begin and end with the unambiguous language of the rule itself. To the extent legislative history is considered, there is only one reasonable conclusion: the statute was intended to mean exactly what it says.

VI. Contemporaneous Amendments to Section 813 Confirm the Legislature's Intent to Ban Implied Dedication Except in Certain Circumstances

Mikkelson et al. next argue that the 1972 amendment to Civil Code section 813 somehow indicates the Legislature's intent to not prohibit implied dedication. (MACB 15.) They ask: if

section 1009 truly eliminated the doctrine of implied dedication on non-coastal private property, why would they bother amending section 813? (MACB 15.) The answer is found in section 1009 subdivision (f)(2), which Mikkelson et al. do not discuss. Section 813 was amended to facilitate an exception to the general rule that implied dedication may still arise in coastal property, providing protection for owners who record notice of permission to allow continued public use.

Section 1009, subdivision (e) says that the ban on implied dedication (set forth in subdivision (b)) shall not apply to coastal property. In other words, public use of private coastal property may theoretically still ripen to an implied dedication. However, subdivision (f) says that even on coastal property, no public use shall ripen to an implied dedication if the owner (1) posts signs pursuant to section 1009, (2) records a notice as provided in Section 813, or (3) enters a written agreement with the government. To put it simply: an owner of coastal private property who "[r]ecords a notice as provided in section 813" is protected against public use of his or her land ripening into an implied dedication. (Civ. Code § 1009, subd. (f)(2).)

Thus, the notion that section 813 would be unnecessary or redundant is based on a false premise. The Legislature intended section 1009 to completely eliminate implied dedication in non-coastal property, but not in coastal property. In non-coastal property, the owner is protected from implied dedication without any further action. (Civ. Code § 1009, subd. (b) ("no use" shall

ripen to confer a vested right to continue such use "***[r]egardless*** of whether or not a private owner of real property has recorded a notice...pursuant to Section 813...") But in the coastal zone, there are additional steps a landowner has to take. One of those steps is recording a notice pursuant to section 813. If section 813 had not been amended to provide the procedure for recording a notice, the mechanism of protection set forth in section 1009 subdivision (f)(2) would be impossible to carry out.

VII. A Judicially-Created Exception for Implied-In-Fact Dedication Would Undermine the Purposes for Which Section 1009 Was Enacted

Section 1009 is capable of being implemented and enforced because the distinction between coastal property and noncoastal property is defined by objective criteria. A property owner knows that if his or her property lies within 1,000 yards of the coast, a decision to permit public use of the property may lead to an implied dedication unless additional steps are taken. Likewise, if the property is more than 1,000 yards of the coast, the owner can rest easy knowing implied dedication is not an issue.

Mikkelson, et al. urge this Court to blur this bright line distinction by crafting a judicially-created exception to section 1009, subdivision (b) for implied-in-fact dedication. Such a ruling would erode the very purpose for which section 1009 was enacted (section 1009, subd. (a)). Landowners are not going to jeopardize their property rights by permitting public use without objective

criteria by which they can be certain their rights will be protected.

Section 1009 was enacted to encourage landowners to allow public use of their land without having to worry that they will forever lose their rights for it. If they are informed that they could accomplish the purpose only if their conduct *cannot* be interpreted as affording "an implication of actual consent or acquiescence to dedication" (*Blasius*, *supra*, 78 Cal.App.4th at p. 821), and making the wrong call would risk permanent loss of property rights, landowners will have no practical choice but to block the public from using their land for any purpose – the exact chilling effect on public access to private property that section 1009 was enacted to avoid.

CONCLUSION

Section 1009 means exactly what it says: no use of non-coastal private property by the public shall ever ripen to a vested right to continue such use permanently in the absence of an express written irrevocable offer. The Court should not entertain amici's invitation to imply an exception into this clear rule for implied-in-fact dedication. Doing so would create confusion and discourage public use of private land, impairing the very reason the statute was enacted.

Dated: Respectfully submitted,

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September 19, 2016 By _____

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CERTIFICATE OF WORD COUNT

(Rule 8.204(c)(1), California Rules of Court)

The text of this brief consists of 3300 words as counted by the Microsoft Word word-processing program used to generate this brief.

Dated: September 19, 2016

Joshua S. Hopstone

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF VENTURA:

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Ventura, State of California. My business address is 1050 South Kimball Road, Ventura, California 93004.

On September 20, 2016, I served true copies of the following document(s) described as CONSOLIDATED ANSWER TO MULTIPLE AMICUS BRIEFS on the interested parties in this action as follows:

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