CONTINUING EDUCATION OF THE BAR ▪ CALIFORNIA

Neighbor Disputes: Law and Litigation

April 2025 Update

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Neighbor Disputes: Law and Litigation

April 2025 Update

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NEIGHBOR DISPUTES

Law and Litigation

Authors

Todd W. Baxter
Kristine M. Burk
Michael S. Chernis
Jay A. Christofferson
Andrea P. Clark
Carey L. Cooper
Gina Dashman
Alice M. Graham
Peter A. Kleinbrodt
Teresa Buchheit Klinkner
David M. Majchrzak
David M. Marcus
Steven J. Mehlman
Catherine A. Richardson
David L. Roth
Joseph W. Scalia
Lewis J. Soffer
Maya Ferry Stafford
Mary Catherine Wiederhold
Daniel E. Witte
Dennis A. Yniguez

CEB Attorney Editor
Kay F. Rubin

APRIL 2025 UPDATE

Authors

Todd W. Baxter
Jay A. Christofferson
Andrea P. Clark
Carey L. Cooper
Alice M. Graham
David M. Majchrzak
David M. Marcus
Joseph W. Scalia
Maya Ferry Stafford
Mary Catherine Wiederhold
Dennis A. Yniguez

CEB Content Attorney
Kyla K. Rowe

CEB®
CONTINUING EDUCATION OF THE BAR ▪ CALIFORNIA
Oakland, California
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Update Editor
Continuing Education of the Bar—California
CEB Publishing Distribution Center
745 85th Avenue, Suite F
Oakland, CA 94621
customer_service@ceb.ucla.edu

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CEB Advisory Board 2024–2025

Eric A. Bullard
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Stacy Stern
Justia, Mountain View

Charles P. Ortmeyer
Law Offices of Charles P. Ortmeyer, San Ramon

Contents

Preface

Neighbor disputes have been around for as long as there have been neighbors. It takes only a small leap to imagine a dispute among Neanderthals over hunting grounds or the right to pick nuts from a given grove. One can even imagine that these disputes were sometimes taken to a tribal council for adjudication (presumably without the benefit of counsel). Some would say that we have progressed to a time when these issues can be resolved in an organized and intellectual fashion, and yet the Neanderthals would undoubtedly recognize the strong (and sometimes irrational) emotions that underlie many of these disputes. It is those emotions, and the complexity of the law surrounding the various issues, that drive neighbors to seek the aid of counsel.

This new book aims to aid counsel in guiding clients through neighbor disputes in a cogent and intelligent fashion by laying out the specific details of the most common disputes. Each of the first fourteen chapters covers a specific type of dispute and gives valuable insight into the relevant law and the best way to resolve the dispute. Whether the issues involve a boundary line or fence or an easement or encroachment, counsel will find answers here. If the dispute involves water, earth movement, or toxic issues, counsel may again turn to this book. When clients dispute over trees, views, solar access, pets, or a home business, counsel will find this book useful. And if the issues involve neighborhood criminal activity, blight, or vacancy, we again provide support to counsel for these sensitive and complex matters.

The last four chapters cover the nuts and bolts: how to prepare a complaint or response and how to deal with emotional clients. We also discuss a matter of high concern to counsel—how to get paid for the work performed. Throughout the book, we provide information on how and when attorney fees can be recouped and how to advise clients of the high costs of litigating these cases.

CEB is indebted to the attorneys who served as authors and consultants on this book. Their names are listed on the About the Authors and the Acknowledgments pages, respectively.

We plan to update this book on a regular basis. We solicit your suggestions and comments to help us keep it accurate and up to date.

CEB Attorney Editors Kay F. Rubin (Managing Editor), Janis L. Blanchette, and Beth Trittipo and Legal Editors Ragnhild Fougner, Philip Weverka, Roberta Klein, Enrique De Anda, and Kenneth Marr contributed to this book. Administrative support was provided by Nila Kanzaria and Akanke Peyton. Elizabeth J. Asborno handled copyediting and production. Robert W. Burke, Jr., created the index. Composition was performed by CEB's Electronic Publishing staff.

April 2025 Update

CEB expresses its gratitude to the following authors for their continuing dedication to this publication and their contributions to this update: Todd W. Baxter, McCormick Barstow LLP, Fresno; Jay A. Christofferson, McCormick Barstow LLP, Fresno; Andrea P. Clark, Downey Brand LLP, Sacramento; Carey L. Cooper, Klinedinst PC, San Diego; Alice M. Graham, Graham Law Corporation, Marina Del Rey; David M. Majchrzak, Klinedinst PC, San Diego; David M. Marcus, Marcus, Watanabe & Dave, LLP, Los Angeles; Joseph W. Scalia, Law Offices of Joseph W. Scalia, Roseville; Maya Ferry Stafford, California Department of Water Resources, Sacramento; Mary Catherine Wiederhold, Law Office of Mary Catherine Wiederhold, San Francisco; and Dennis A. Yniguez, Tree Decisions, Berkeley.

CEB Content Attorney Kyla K. Rowe and Legal Content Specialist Norman Valera contributed to this title. Christopher Forshay handled copyediting and production. Composition was performed by CEB's Electronic Publishing staff.

Megan Oliver Thompson
Manager
Content Development

Casey Hatton
Director
Content Operations

About the Authors

TODD W. BAXTER, a partner with McCormick Barstow LLP, Fresno, where he is chairman of the Appellate Law Group, is the author of chapters 16–17. He received his received his B.S. from the University of Wisconsin and his J.D. from the University of Nebraska College of Law. He practices appellate litigation, insurance coverage, and insurance bad faith litigation. Mr. Baxter has been certified by the State Bar of California Board of Legal Specialization as a specialist in appellate law.

KRISTINE M. BURK, a deputy public defender with the Sonoma County Public Defender's Office, is a co-author of chapter 10. She received her B.A. from the University of California, Los Angeles, and her J.D. from the University of California College of the Law, San Francisco. Ms. Burk has practiced exclusively in the area of criminal defense for more than 17 years.

MICHAEL S. CHERNIS, a partner with Abner Chernis LLP, Santa Monica, is a co-author of chapter 10. He received his B.A. from Brandeis University and his J.D. from Fordham University School of Law. He represents clients seeking to form medical marijuana collectives and comply with California medical marijuana law; landlords and others seeking to do business with medical marijuana collectives; and individuals and businesses in civil litigation with municipalities arising from such activities. Mr. Chernis also represents individuals and businesses in federal criminal matters and those charged in state court for violating medical marijuana laws. He writes and lectures frequently on matters pertaining to the regulation of medical marijuana.

JAY A. CHRISTOFFERSON, a partner with the firm of McCormick Barstow LLP, Fresno, is a co-author of chapter 8. He received his B.S. and M.S. from the University of California, Santa Barbara, and his J.D. from the University of the Pacific, McGeorge School of Law. Mr. Christofferson specializes in insurance coverage, insurance bad faith, ERISA, civil litigation, and subrogation matters.

ANDREA P. CLARK, counsel with Downey Brand LLP, Sacramento, is a co-author of chapter 14. She received her B.A., with honors, from the

University of California, Berkeley, and her J.D. from the University of Michigan Law School. Ms. Clark is a member of the Water Group and the Food and Agriculture practice. Her areas of expertise include public agency law (including the Brown Act, the Public Records Act, public bidding, financing, contracting, joint powers authorities, and elections), flood control liability, financing and strategy for flood control improvements, water transfers, and the California Environmental Quality Act. Ms. Clark writes and lectures regularly on public agency law and water law.

CAREY L. COOPER, a shareholder and the chair of the Environmental Law Group at Klinedinst PC, San Diego, is a co-author of chapter 7. She received her B.A., cum laude, from California State University, Northridge, and her J.D., cum laude, from Washington & Lee University School of Law. Ms. Cooper's practice includes environmental, business, real estate, and professional liability litigation. She writes and speaks regularly on environmental matters and is a member of the Association of Environmental Professionals and the International Erosion Control Association. Ms. Cooper is a past editor of The National Forum for Environmental and Toxic Tort Issues.

GINA DASHMAN, an attorney with Haapala, Thompson & Abern, LLP, Oakland, is the author of chapter 3. She received her B.A., with honors, from the University of California, Berkeley, and her J.D., with honors, from the George Washington University School of Law. Ms. Dashman's practice includes complex litigation of earth movement, subsidence, and drainage disputes and easement and neighbor disputes; ADA claims; commercial and residential landlord-tenant disputes; construction defect claims; residential buyer-seller contract disputes; premises liability; and torts claims. She is a certified mediator and sits as Judge for the Contra Costa County Superior Court. Ms. Dashman is a member of the Earl Warren American Inn of Court.

ALICE M. GRAHAM, principal of the Graham Law Corporation, Marina Del Rey, is the author of chapter 13. She received her B.A. from the University of California, Los Angeles, and her J.D. from Loyola Law School. Ms. Graham specializes in the areas of real estate, business law, and mediation.

PETER A. KLEINBRODT, managing partner of Freitas, McCarthy, MacMahon & Keating, LLP, San Rafael, is the author of chapter 12. He received his B.A., with honors, from the University of California, Los Angeles, and his J.D. from LaVerne University. Mr. Kleinbrodt represents clients in a broad range of matters with extensive litigation and transactional expertise

in real property and business matters. Mr. Kleinbrodt serves as Judge Pro Tem, commissioner, and arbitrator for the Marin County Superior Court.

TERESA BUCHHEIT KLINKNER, principal of Klinkner Law Offices, Redondo Beach, is the author of chapter 9. She received her B.A., cum laude, from Centre College of Kentucky and her J.D. from Duke University School of Law. Ms. Klinkner practices in the area of real estate and business transactions. She is also a licensed California real estate broker and a member of California Real Estate Women–LA. Ms. Klinkner has served as editor-in-chief of the California Real Property Journal, the official publication of the Real Property Law Section of the State Bar of California.

DAVID M. MAJCHRZAK, counsel at Klinedinst PC, San Diego, is the author of chapter 18. He received his B.A. from the University of Southern California and his J.D., summa cum laude, from the Thomas Jefferson School of Law. Mr. Majchrzak's practice incorporates all phases of litigation, appellate work, and mediation. He focuses primarily on professional liability defense, especially legal malpractice, and insurance coverage litigation. Mr. Majchrzak also serves as president of the William L. Todd, Jr. American Inn of Court.

DAVID M. MARCUS, a partner with Marcus, Watanabe & Dave, LLP, Los Angeles, is the author of chapter 2. He received his B.A. from the University of California, Berkeley, and his J.D. from Loyola Law School. Mr. Marcus's practice includes real property, escrow, title insurance, and general business transactions. He is a former member of the Board of Governors of the State Bar of California. Mr. Marcus is a former co-chair of the Title Insurance Subsection of the Real Estate Section of the Los Angeles County Bar Association and also serves as a Judge Pro Tem with the Los Angeles County Superior Court. He lectures frequently on title insurance and related real estate issues.

STEVEN J. MEHLMAN, a partner with Kimball, Tirey & St. John LLP, Walnut Creek, where he is the managing partner of the Northern California Business Real Estate Group, is the author of chapter 15. He received his B.A. from the University of California, Berkeley; his M.P.P. from the University of Michigan School of Public Policy; and his J.D., cum laude, from the University of Michigan Law School. Mr. Mehlman represents business clients and individuals in a wide variety of civil lawsuits and arbitrations as well as in transactional matters. He is a regular participant in legal advice programs offered by the Contra Costa Bar Association on neighbor disputes and

animal law. He is a former member of both the City of Walnut Creek and Contra Costa County planning commissions.

CATHERINE A. RICHARDSON, senior counsel with Klinedinst PC, San Diego, is a co-author of chapter 7. She received her B.A. from the University of California, San Diego, and her J.D. from the University of San Diego School of Law. Ms. Richardson is a litigator specializing in professional negligence defense, wrongful death, medical malpractice, products liability, construction defects, eminent domain, insurance bad faith, and business cases. She has served as a Pro Tem Administrative Law Judge for the State of California, a Judge Pro Tem for the San Diego Small Claims Court, and an arbitrator for a number of local entities.

DAVID L. ROTH, author of chapter 1, was the principal of the Real Estate Law Offices of David L. Roth, Oakland, and specialized in real estate litigation and transactions. Now deceased, he served as an executive editor of the California Real Property Journal, the quarterly publication of the Real Property Section of the California Lawyers Association, was a chair of the Alameda County Bar Association Real Estate Section, and gave programs for attorney and legal professional groups on real estate topics. Mr. Roth received his B.A. in 1975 from Occidental College and his J.D. in 1978 from the University of California College of the Law, San Francisco.

JOSEPH W. SCALIA, principal of the Law Offices of Joseph W. Scalia, Roseville, is the author of chapter 11. He received his B.A. from the University of Notre Dame and his J.D. from the University of the Pacific, McGeorge School of Law. Mr. Scalia's litigation practice primarily consists of real estate, construction, and business matters as well as entity formation and dissolution and estate planning. He is a Settlement Judge Pro Tem for the Sacramento County Superior Court and an arbitrator and mediator for several local entities.

LEWIS J. SOFFER, a shareholder with Miller Starr Regalia, Walnut Creek, is the author of chapter 5. He received his B.A. from Stanford University and his J.D. and M.B.A. from the University of California, Berkeley, School of Law. Mr. Soffer's practice encompasses a wide variety of litigation involving real estate issues, including title insurance cases for both insureds and insurers; contract disputes; entitlements and environmental matters; commercial leasing; easements, boundary, and prescriptive rights disputes; adverse possession; mortgage and financing transactions; and foreclosures.

MAYA FERRY STAFFORD, the chief counsel specialist with the California Department of Water Resources (DWR), Sacramento, is a co-author of chapter 14. She received her B.S. from the University of Washington and her J.D., cum laude, from Lewis & Clark Law School. Ms. Ferry Stafford advises clients on issues related to water rights, the Endangered Species Act, the California Environmental Quality Act, the National Environmental Policy Act, and land use. Any views expressed in chapter 14 are those of the authors and do not represent the views of the DWR.

MARY CATHERINE WIEDERHOLD, principal in the Law Office of Mary Catherine Wiederhold in San Francisco, is the author of chapter 6. She received her B.A. from the University of California, Berkeley, and her J.D. from the University of San Francisco School of Law. Ms. Wiederhold is a real estate litigator and concentrates in tenant representation, including defending eviction actions and affirmative lawsuits. In 2010, she received the Housing Justice Award from the Bar Association of San Francisco. In 2014, she received the Attorney of the Year Award from the AIDS Legal Referral Panel. She is on the board of directors of the San Francisco Trial Lawyers Association. She is also a member of the executive committee of the Lawyers' Club of San Francisco Inn of Court.

DANIEL E. WITTE, of counsel with the firm of McCormick Barstow LLP, Fresno, is a co-author of chapter 8. He received his M.O.B. and B.S., magna cum laude, from Brigham Young University and his J.D., magna cum laude, from the Brigham Young University School of Law. Mr. Witte concentrates in insurance coverage, insurance bad faith, and subrogation. He has been qualified as a Chartered Financial Consultant (ChFC) and Certified Life Underwriter (CLU). Mr. Witte is a Fellow of the Life Management Institute (FLMI). His designations include Associate, Insurance Regulatory Compliance (AIRC); Associate, Reinsurance Administration (ARA); and Associate, Customer Service (ACS).

DENNIS A. YNIGUEZ, an International Society of Arboriculture Board Certified Master Arborist and the principal of Tree Decisions, an arboricultural consulting firm in Berkeley, is the author of chapter 4. He received his B.A. and M.A. from the University of California, Berkeley, and his J.D. from the University of California, Berkeley, School of Law. Mr. Yniguez is a past president of the American Society of Consulting Arborists and has served on their national faculty since 2000. His consulting practice includes tree health and risk assessment, forensic examination and case analysis,

insurance claim evaluation, expert trial assistance, and alternative dispute resolution for tree-related issues.

About the 2025 Update Authors

TODD W. BAXTER is the update author of chapters 16 and 17. See biography in the About the Authors section.

JAY A. CHRISTOFFERSON is the update author of chapter 8. See biography in the About the Authors section.

ANDREA P. CLARK is an update author of chapter 14. See biography in the About the Authors section.

CAREY L. COOPER is an update author of chapter 7. See biography in the About the Authors section.

ALICE M. GRAHAM is the update author of chapters 1 and 13. See biography in the About the Authors section.

DAVID M. MAJCHRZAK is the update author of chapter 18. See biography in the About the Authors section.

DAVID M. MARCUS is the update author of chapters 2, 5 and 15. See biography in the About the Authors section.

JOSEPH W. SCALIA is the update author of chapter 11. See biography in the About the Authors section.

MAYA FERRY STAFFORD is an update author of chapter 14. See biography in the About the Authors section.

MARY CATHERINE WIEDERHOLD is the update author of chapter 6. See biography in the About the Authors section.

DENNIS A. YNIGUEZ is the update author of chapter 4. See biography in the About the Authors section.

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Arabelle Aportadera-Torres
Morris Polich & Purdy LLP, Los Angeles

JoAnne Dunec
Miller Starr Regalia, Walnut Creek

Karen M. Firstenberg
Morris Polich & Purdy LLP, Los Angeles

Don Franzen
Funsten & Franzen, Beverly Hills

Wendi J. Frisch
Morris Polich & Purdy LLP, Los Angeles

Douglas H. Hoang
Morris Polich & Purdy LLP, Los Angeles

Sue S. Junn
Morris Polich & Purdy LLP, Los Angeles

J. Scott Miller
Klinedinst PC, Sacramento

Sharon Pak
Morris Polich & Purdy LLP, Los Angeles

Jeff H. Rubin
Senior Deputy District Attorney, Alameda County District Attorney's Office

Keith J. Turner
Turner Law Firm, PC, Pacific Palisades

Gillian van Muyden

General Counsel—Community Development Glendale City Attorney's Office

Selected Developments

April 2025 Update

The current update includes changes that reflect recent developments in case law and legislation since publication of the 2024 Update. The following are some of the more pertinent case law developments addressed in this update:

Implied Easements. This update includes more discussion of *Romero v Shih* (2024) 15 C5th 680, in which the California Supreme Court clarified the doctrine of implied easements, holding that unlike a prescriptive easement, an implied easement might be "broadly" or "effectively" exclusive, depending on the facts surrounding its creation. See §§1.24, 2.55, 16.67, 16.68.

Dangerous Animals; Qualified Immunity. This update includes a new section dedicated to discussing qualified immunity for public entities and public employees with regard to dangerous animals, including the recent case *Danielson v County of Humboldt* (2024) 103 CA5th 1, 19 (despite numerous incidents and complaints putting county animal control on notice of dangerous dogs, county still entitled to qualified immunity). See §6.9A.

Private Actions Based on Public Nuisance. *Cohen v Superior Court* (2024) 102 CA5th 706 overruled a line of cases that had held that a private right of action for public nuisance based on the violation of a municipal code existed without a showing of special injury. See §§7.32, 9.37A, 12.17.

Criminal Activities; Cannabis. *JCCrandall, LLC v County of Santa Barbara* (2025) 107 CA5th 1135 held that the use of a private easement for cannabis activities was prohibited by the terms of the easement deed and federal law. See §§10.61, 10.65.

Nuisance Versus Negligence. In *Berry v Frazier* (2023) 90 CA5th 1258, the court of appeal disagreed with the reasoning of its sister court in a previous case (*El Escorial Owners' Ass'n v DLC Plastering, Inc.* (2007) 154 CA4th 1337) and cautioned against using its holding that "a nuisance claim is a negligence claim" when analyzing the viability of a nuisance claim. See §12.37.

Limited Reach of CC&Rs. In *Colyear v Rolling Hills Community Ass'n* (2024) 100 CA5th 110, the court of appeal explained that common interest

development owners are only subject to the CC&Rs recorded on their property's subdivision, and held that the homeowners' association improperly used a tree trimming covenant in a neighboring subdivision's CC&Rs to enter private property. See §13.16.

Nuisance; Cause of Action. In *People ex rel Burns v Wood* (2024) 103 CA5th 700, the court of appeal clarified the requirements of a nuisance cause of action, as well as elements required for a viable "nuisance per se" action. See §16.3.

Cutoff Dates and CEB Citation

Cutoff Dates

We completed legal editing and analysis of authorities cited in this publication as of December 3, 2024, and monitored developments through February 3, 2025.

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Gallegos (2019) 42 CA5th 394. See also *Costa v Fawcett* (1962) 202 CA2d 695, 700; *Richfield Oil Co. v Hercules Gasoline Co.* (1931) 112 CA 431. A profit is similar to an easement in gross (see §1.5). Restatement (Third) of Property: Servitudes §1.2, Comment a (2000). A profit is like an easement in that it is a nonpossessory interest in land. *Gerhard v Stephens* (1968) 68 C2d 864, 883.

§1.13 3. Licenses

Licenses are revocable rights (with exceptions noted below) that allow the holder to enter and use the land of another without possessing any estate in the land. *Jenson v Kenneth I. Mullen Co.* (1989) 211 CA3d 653, 657. They are not interests in land subject to the Statute of Frauds (CC §1624(a)(3)). *Eastman v Piper* (1924) 68 CA 554, 560. A license is generally personal to the holder, which means it is not transferable (*Beckett v City of Paris Dry Goods Co.* (1939) 14 C2d 633, 637), unless the parties expressly choose to make it assignable (*Herman v Rohan* (1918) 37 CA 678, 681).

When a licensee enters on the land pursuant to the license and expends money or labor in reliance on the license, the license becomes irrevocable for as much time as necessary to fulfill the nature of the license. This rule is based on the doctrine of equitable estoppel. *Cooke v Ramponi* (1952) 38 C2d 282, 286; *Richardson v Franc* (2015) 233 CA4th 744. If a written license agreement is for a fixed term, an irrevocable license will generally terminate on expiration of the written agreement. *Golden W. Baseball Co. v City of Anaheim* (1994) 25 CA4th 11, 36.

A revocable license becomes irrevocable when the licensee relies on it when making substantial expenditures of money or labor in regard to it. However, an unrecorded irrevocable license will not bind a subsequent purchaser if the purchaser has no actual or constructive notice of the license. *Gamerberg v 3000 E. 11th St., LLC* (2020) 44 CA5th 424 (involving unrecorded right to use parking spaces).

See also discussion of licenses in §2.33, including the Practice Tip on prudent practices when drafting a license.

§1.14 4. Leases and Deeds of Trust

Unlike an easement or a license, a lease gives a lessee a possessory right to property, while a deed of trust gives the beneficiary contingent possessory rights. A lease provides a nonowner the right to possess the property under specific terms and conditions. A lease may include an implied easement to use portions of a building that are not included in the leased premises but

that are obvious and permanent in nature and reasonably necessary for the use of the leased premises. *Owsley v Hamner* (1951) 36 C2d 710, 718. See §1.23. A deed of trust allows the beneficiary to take title to the property if the trustor defaults on their obligations under the deed of trust. See also discussion of leases in §2.34.

§1.15 B. Zoning and Land Use Regulations

Zoning and other public land use regulations may restrict landowners in the use of their land. Examples include restrictions on fence heights, side yards, and setbacks; restrictions on building on properties that are coastal or near airports; heritage tree ordinances (see chap 4); and view ordinances (see chaps 4, 13). In addition, otherwise valid easements that violate zoning restrictions may be unenforceable. *Baccouche v Blankenship* (2007) 154 CA4th 1551 (easement cannot be used to circumvent zoning restriction).

For more on zoning, including coastal and airport considerations, see California Land Use Practice (Cal CEB). For a discussion regarding whether a zoning ordinance or regulation constitutes a taking, see §12.35 and *Surfrider Found. v Martins Beach 1, LLC* (2017) 14 CA5th 238, 265.

III. CREATION OF EASEMENTS AND TYPES OF EASEMENTS

§1.16 A. Express Easements

Express easements are created by contract or conveyance (often a grant deed or grant of easement), usually in the form of a document recorded in the office of the county recorder where the property is located, and intended to create an easement that complies with the Statute of Frauds (CC §1624). However, a written easement does not have to be recorded to be enforceable, at least against subsequent purchasers with knowledge of the easement. CC §1217; *Pollard v Rebman* (1912) 162 C 633, 634. Also, under certain circumstances, the description of a road easement in a parcel map recorded under the Subdivision Map Act (Govt C §§66410–66499.41) may govern over a different description of the road easement in a deed recorded earlier with the county recorder's office. *Christian v Flora* (2008) 164 CA4th 539.

The extent of an easement is determined by the terms of the grant. CC §806. A grant of an easement is interpreted in accordance with the law of contracts. *Ranch at the Falls LLC v O'Neal* (2019) 38 CA5th 155, 188.

The rules applicable to interpretation of deeds are also used to construe instruments creating express easements. *Wilson v Abrams* (1969) 1 CA3d 1030, 1035. The main goal is to determine and carry out the parties'

intentions. *Thorstrom v Thorstrom* (2011) 196 CA4th 1406, 1416. If the terms of an express easement are not clear from the written document, the court may consider extrinsic evidence in interpreting the express easement. *McLear-Gary v Scott* (2018) 25 CA5th 145, 157. Such extrinsic evidence may include the circumstances surrounding the development and recordation of the document creating the express easement. 25 CA5th at 158. Conversely, when the express easement describes the easement specifically and unambiguously, no extrinsic evidence of the intent of the parties or of prior use is admissible. *Zissler v Saville* (2018) 29 CA5th 630, 644.

When an express easement describes the easement area only in general terms, without specifying or limiting the extent of use, the permissible use is determined by the intent of the parties, which can be inferred from the actual historical use of the easement. *Rye v Tahoe Truckee Sierra Disposal Co.* (2013) 222 CA4th 84, 92. See also *Wilson v Abrams* (1969) 1 CA3d 1030, 1033. This is related to the boundary location doctrine of practical location, by which "a deed indefinite in its terms may be made certain by the conduct of the parties acting under it." *People v Ocean Shore R.R., Inc.* (1948) 32 C2d 406, 414.

A floating easement is created by written grant, but the grant does not specifically identify its location in the servient estate. The location of the easement is determined by its subsequent use by the dominant estate. The use determines the location of the floating easement, at which point the easement becomes fixed and no longer floats. A secondary floating easement can be implied to access, construct, replace, inspect, and maintain power lines located in a granted easement even if it is not specified in the grant. *Southern Cal. Edison Co. v Severns* (2019) 39 CA5th 815, 824.

An access easement for ingress and egress, across a defined portion of the servient tenement, is not a "general easement" because "ingress and egress" is a specific enough designation of the use of the easement. *Zissler v Saville* (2018) 29 CA5th 630, 639. In *Zissler,* the written access easement specified its location, length, and width. The easement also specified that its purpose was to provide "access, ingress and egress to vehicles and pedestrians." The court held that this specification rendered the written easement unambiguous as a matter of law. 29 CA5th at 639.

The uses permitted under an express easement are not strictly limited to the uses specified in the written easement; the permitted uses presumptively include normal future development within the scope of the basic easement. 29 CA5th at 641. "Normal future uses [of an easement] are within the reasonable contemplation of the parties and therefore permissible, but

uncontemplated, abnormal uses, which greatly increase the burden, are not." 29 CA5th at 641.

Common express easements include rights-of-way for driveway or pedestrian access, and utility or sewage easements.

A private landowner may expressly or impliedly dedicate a portion of their property to the public, usually in connection with the creation of a subdivision or other development. This dedication, if accepted by the public or by a relevant government entity, creates either a fee or easement interest in the dedicated property. See *Friends of Hastain Trail v Coldwater Dev. LLC* (2016) 1 CA5th 1013, 1027.

§1.17 B. Prescriptive Easements

A prescriptive easement is acquired by unauthorized use of the burdened property. It is related to the doctrine of adverse possession and is an outgrowth of a public policy to encourage productive use of land and to discourage absentee landlords who hold property without improving it. Restatement (Third) of Property: Servitudes §2.17, Comment b (2000). Water rights can be acquired by prescription. *Brewer v Murphy* (2008) 161 CA4th 928. Adverse use of easement rights can ripen into prescriptive rights limiting the easement holder's rights. *Vieira Enters., Inc. v McCoy* (2017) 8 CA5th 1057. This is sometimes referred to as "adverse possession of the easement." 8 CA5th at 1075. See §1.33. For example, in *Vieira Enters.,* plaintiff's property was subject to a recorded 20-foot-wide easement for road access. Plaintiff proved that some permanent structures had encroached about 7-1/2 feet into the easement area for more than 5 years. The court held that the road easement was reduced in width to 12.5 feet but not eliminated entirely. *Vieira Enters.,* 8 CA5th at 1083.

NOTE➤ The right of the public to use private property for recreational or other purposes is beyond the scope of this book. On this right of the public, see *Scher v Burke* (2017) 3 C5th 136, 141; *County of Los Angeles v Berk* (1980) 26 C3d 201; *Friends of Hastain Trail v Coldwater Dev. LLC* (2016) 1 CA5th 1013, 1027; *Burch v Gombos* (2000) 82 CA4th 352. See also CC §1009 regarding public use of private land; The California Municipal Law Handbook, chap 8 (Cal CEB). Civil Code §1009 does not prevent a landowner from acquiring a prescriptive easement for access to their property, even when the landowner is accessing the property for recreational purposes. Civil Code §1009 concerns only public use of private property and does not apply when there is no question of public use. *Scher,* 3 C5th at 143; *Pulido v*

Pereira (2015) 234 CA4th 1246. If a government entity requires dedication of an easement to public use as a condition of granting approval for development of, or construction on, private property, this may trigger a Fifth Amendment requirement of just compensation. *Surfrider Found. v Martins Beach 1, LLC* (2017) 14 CA5th 238, 259.

Prescriptive easements and adverse possession are also discussed in chap 2 (on encroachment and boundaries), chap 5 (on fences), chap 16 (on causes of action), and chap 18 (on defenses and cross-complaints).

§1.18 1. Necessary Elements

California law recognizes two types of prescription: that under color of title (CCP §§322–323) and that under claim of right (CCP §§324–325). *Gilardi v Hallam* (1981) 30 C3d 317, 321. On the difference between color of title and claim of right, see §§18.21–18.23.

The burden of proof is on the party asserting the prescriptive rights. *Connolly v McDermott* (1984) 162 CA3d 973, 976. Several court of appeal decisions have held that the party seeking to establish a prescriptive easement must prove the elements by clear and convincing evidence. *Grant v Ratliff* (2008) 164 CA4th 1304, 1310; *Brewer v Murphy* (2008) 161 CA4th 928, 938; *Applegate v Ota* (1983) 146 CA3d 702, 708. These decisions were criticized in dictum in *Vieira Enters., Inc. v McCoy* (2017) 8 CA5th 1057, 1074.

"Whether the elements of prescription are established is a question of fact for the trial court." *Warsaw v Chicago Metallic Ceilings, Inc.* (1984) 35 C3d 564, 570. The elements necessary to establish a prescriptive easement are as follows (*Connolly,* 162 CA3d at 976):

- **Use is open or notorious.** Generally, "open" means that the use is not made secretly or that it is visible or apparent; "notorious" means that the owner knows of the use or the use is generally known in the neighborhood. This requirement is met if the owner has actual or constructive notice of the use (*Connolly,* 162 CA3d at 977). Although the requirement is often stated as "open and notorious," the requirement is actually disjunctive, and is satisfied if the use is either open or notorious. Restatement (Third) of Property: Servitudes §2.17, Comment h (2000). This technical legal use of the word "notorious" does not have the negative connotation of the common English use of the word. At least one court held, without citation of authority, that the owner of the servient property must have actual notice of the adverse use.

MacDonald Props., Inc. v Bel-Air Country Club (1977) 72 CA3d 693, 701.

- **Use is continuous and uninterrupted.** The use must be continuous during the prescriptive period; however, this does not mean constant physical use. Seasonal, intermittent, or changing use may satisfy the continuity requirement. See *Twin Peaks Land Co. v Briggs* (1982) 130 CA3d 587, 593 (use uninterrupted if user uses easement whenever necessary). On methods by which a landowner may interrupt the prescriptive period, see §1.20. However, infrequent or very occasional use may not support the requirement of continuous use. *McLear-Gary v Scott* (2018) 25 CA5th 145, 159. The key issue is whether the use is such as to give notice to the owner of the property so that the owner can take appropriate legal action to prevent the use from ripening into a prescriptive easement. 25 CA5th at 159.
- **Use is hostile, under claim of right, or adverse to true owner.** These three terms are used interchangeably. *Aaron v Dunham* (2006) 137 CA4th 1244, 1252. The use of the easement must be without the landowner's consent. *Richmond Ramblers Motorcycle Club v Western Title Guar. Co.* (1975) 47 CA3d 747, 754. This use does not require a belief or claim that the use is legally justified, but simply that the property was used without either express or implied permission of the landowner. *Felgenhauer v Soni* (2004) 121 CA4th 445, 450. When no express permission has been given, a court may infer from all of the facts and circumstances that implied permission was given as a matter of "neighborly accommodation." *Warsaw v Chicago Metallic Ceilings, Inc.* (1984) 35 C3d 564, 572; *Finley v Botto* (1958) 161 CA2d 614, 618. There is a split of authority on whether a presumption of adverse use arises from a significant period of open, notorious, and continuous use. Supporting such a presumption are *Warsaw,* 35 C3d at 571, and *MacDonald Props., Inc. v Bel-Air Country Club* (1977) 72 CA3d 693, 701. Holding against such a presumption is *O'Banion v Borba* (1948) 32 C2d 145, 149, and *Grant v Ratliff,* 164 CA4th at 1308. The Restatement (Third) of Property: Servitudes also recognizes that a prescriptive easement can be created by an imperfect grant of an easement, in other words, an easement created by a permissive use, not an adverse use. Restatement (Third) of Property, Servitudes, §2.16(2) (2000).
- **Permissive use does not ripen into an easement.** But the permission to use another's property must be for the portion of the property the user is actually using. Permission to use one portion of a parcel does

easement. An owner can prevent a use from ripening into a prescriptive easement by giving permission for the use. This permission can be given orally, by conduct, in writing, or by posting under CC §§813, 1008.

Under CC §1008, no prescriptive easement right can be created if the owner posts at each entrance to the property or at intervals of not more than 200 feet along the boundary a sign reading: "Right to pass by permission, and subject to control, of owner: §1008, Civil Code." On "permission to pass" notices, see §18.49.

PRACTICE TIP➤ The §1008 permission to pass notice is effective only if posted by the landowner or, perhaps, an authorized agent of the landowner. A notice posted by a tenant does not prevent creation of a prescriptive easement. *Aaron v Dunham* (2006) 137 CA4th 1244, 1251 (landowner and authorized agent are only persons with legal authority to post sign). See, however, *Dieterich Int'l Truck Sales, Inc. v J. S. & J. Servs., Inc.* (1992) 3 CA4th 1601 1607 (prescriptive easement cannot ripen against reversionary interest).

See also CC §813 (providing for recordation and service of a notice to the general public and individual users that all use of the property, other than use pursuant to a written document, is by permission and cannot ripen into prescriptive rights); Practice Tip in §18.49 on using CC §813 versus CC §1008.

The owner of the servient tenement also can interrupt the 5-year period in certain other ways. The owner can take physical action that interrupts the 5-year period, *e.g.,* by erecting a fence or other barrier that physically prevents the adverse user from continuing the adverse use. See *Zimmer v Dykstra* (1974) 39 CA3d 422, 435. Clearly, this should not be done if it would cause a breach of the peace, and it is probably more effective, albeit more expensive, for the owner of the servient tenement to simply file a lawsuit to determine the parties' rights.

NOTE➤ In some jurisdictions outside California, a verbal or written protest is deemed sufficient to interrupt the prescriptive period (see Korngold, Private Land Use Arrangements: Easements, Real Covenants and Equitable Servitudes §3.33(b)–(c) (2d ed 2004)), but no California cases appear to adopt this rule.

§1.21 4. Difficulty of Obtaining Prescriptive Easement

Although a prescriptive easement may be appropriate for specific uses (*e.g.,* a road or driveway to access landlocked property), it may be difficult

to obtain in other instances (*e.g.,* a boundary line dispute) because prescriptive easements cannot be exclusive (with rare exceptions; see *Otay Water Dist. v Beckwith* (1991) 1 CA4th 1041) and thus cannot be obtained if the result would be to prevent the true owner from making *any* use of the disputed portion of the property. For additional discussion of prescriptive easements and unlikelihood of success, see §§2.50, 5.31, 16.63, 18.30.

§1.22 C. Easements by Estoppel

A landowner may be estopped to deny the existence of an easement if

- The landowner made a representation on which a licensee or buyer reasonably relied and, as a result of this reliance, the licensee or buyer substantially changed its position; and
- Creation of the easement is the only way to avoid injustice.

See *Banning v Kreiter* (1908) 153 C 33; *Christian v Flora* (2008) 164 CA4th 539; *Richardson v Franc* (2015) 233 CA4th 744, 751; *Barnes v Hussa* (2006) 136 CA4th 1358; *Cooke v Ramponi* (1952) 38 C2d 282, 286.

NOTE➤ If the landowner is a public entity, then an additional requirement applies. "In such a case, the court must weigh the policy concerns to determine whether the avoidance of injustice in the particular case justifies any adverse impact on public policy or the public interest." *Schafer v City of Los Angeles* (2015) 237 CA4th 1250, 1261.

§1.23 D. Implied Easements

There are two types of implied easements (*i.e.,* easements not created by express agreement, by use, or by statute): easements implied by prior use (sometimes called easements by implication; see §1.24) and easements by necessity (see §1.25).

§1.24 1. Easements Implied by Prior Use

An easement implied by prior use is created when a landowner uses one portion of their land to benefit another portion, such as constructing a road over one part of the property leading to a house on another part and then selling the latter part. The purchaser of the latter part has, by implication, an easement to continue using the road. *Thorstrom v Thorstrom* (2011) 196 CA4th 1406, 1420; *Kytasty v Godwin* (1980) 102 CA3d 762, 770; *Warfield v Basich* (1958) 161 CA2d 493, 499; Restatement (Third) of Property: Servitudes §2.11 (2000). Although courts do not favor granting easements by

implication, they will do so if they are needed to enforce the parties' intent in cases of reasonable necessity as shown by the facts and circumstances. That is, the plaintiff must prove both that the parties intended to create an easement and that such easement is reasonably necessary for use of the property. *Thorstrom v Thorstrom, supra*; *Wool v Scott* (1956) 140 CA2d 835, 846.

In a case of first impression, the California Supreme Court held that unlike a prescriptive easement, an implied easement might be "broadly" or "effectively" exclusive, depending on the facts surrounding its creation. *Romero v Shih* (2024) 15 C5th 680, 701.

See additional discussion of implied easements in §§2.51, 16.67–16.69, 18.31–18.33.

§1.25 2. Easements Implied by Necessity

An easement by necessity is created when two parcels were under common ownership, which was then severed, and the easement is strictly necessary for the enjoyment of the dominant parcel. *Horowitz v Noble* (1978) 79 CA3d 120, 131. Almost always, an easement by necessity arises when one of the parcels is left landlocked by the severance and has no legal access to a public road. See *Murphy v Burch* (2009) 46 C4th 157; *Kellogg v Garcia* (2002) 102 CA4th 796, 803; *Moores v Walsh* (1995) 38 CA4th 1046, 1049. See additional discussion of easements by necessity in §§18.34–18.36.

§1.26 E. Private Eminent Domain

California law provides that a private landowner can use eminent domain to acquire an easement in two situations:

- To obtain a permanent appurtenant easement on adjacent or nearby property to extend utility service to the property. CC §1001; CCP §1245.325. See *L & M Prof. Consultants, Inc. v Ferreir*a (1983) 146 CA3d 1038, 1051 (condemnation must be "the sole reasonably acceptable means for providing utility service to a piece of property").
- To obtain a temporary right of entry on adjacent or nearby property for the purpose of repairing or reconstructing land or improvements (CC §1002; CCP §1245.326).

Although these easements are often considered a subset of easements by necessity (because CC §§1001–1002 require a showing of necessity), they are statutory and not implied. These statutory easements do not require former common ownership.

PRACTICE TIP➤ A common neighbor dispute occurs when the home or other building of one landowner is on, or very close to, the boundary line so as to prevent reasonable access (without trespassing on the neighbor's property) to repair and maintain the side of the structure facing the boundary, and the neighbor refuses to allow the landowner's workers to have access to make repairs. In such circumstances, the landowner may be able to claim a prescriptive easement if prior repairs or maintenance have occurred for the requisite 5-year period in a manner adverse to the neighbor's title. Such repairs or maintenance must also have been done openly enough and regularly enough to satisfy the "continuous" and "open or notorious" elements. If no prescriptive easement can be claimed, the landowner can use the CC §1002 procedure, or the threat of using the procedure, in order to gain access for necessary repairs and maintenance.

On eminent domain law generally, see Condemnation Practice in California (3d ed Cal CEB). On private rights of eminent domain, see California Easements and Boundaries: Law and Litigation, chap 8 (Cal CEB).

§1.27 F. Equitable Easements and the Doctrine of Relative Hardship; Judicially Created Easements

When one landowner innocently encroaches on another's property, courts may invoke the doctrine of equitable easements (also called the doctrine of relative hardships, the doctrine of balancing conveniences, or equitable encroachment) to deny the latter an injunction to remove or abate the encroachment. See *Linthicum v Butterfield* (2009) 175 CA4th 259, 265. Conversely, continuation of construction by the encroaching party against objections by the neighboring owner negates the good faith required to invoke this doctrine. *Brown Derby Hollywood Corp. v Hatton* (1964) 61 C2d 855, 859. The court may deny an equitable easement and order removal of structures built intentionally, or perhaps even negligently, encroaching on adjacent property. *Warsaw v Chicago Metallic Ceilings, Inc.* (1984) 35 C3d 564, 573; *Brown Derby Hollywood Corp. v Hatton* (1964) 61 C2d 855, 858; *Nellie Gail Ranch Owners' Ass'n v McMullin* (2016) 4 CA5th 982, 1004; *Salazar v Matejcek* (2016) 245 CA4th 634, 649.

The equitable easement doctrine can also be applied by the courts to allow continued use of a driveway, road, or trail for access (*Linthicum v Butterfield, supra; Tashakori v Lakis* (2011) 196 CA4th 1003, 1013) and even to

create access where none existed. *Hinrichs v Melton* (2017) 11 CA5th 516, 523.

The terms "relative hardships" and "balancing of conveniences" are misleading, because the doctrine requires that the trespasser prove that the hardship they would suffer by being forced to remove the encroachments or cease the trespass is greatly disproportionate to the hardship the landowner

would suffer by maintenance of the encroachment or trespass. *Shoen v Zacarias* (2015) 237 CA4th 16, 19 (*Shoen I*). In *Shoen I,* the trial court's opinion granting Zacarias an equitable easement was reversed, because discontinuance of the defendant's use of a portion of plaintiff's property for her unaffixed lawn furniture did not constitute a serious hardship. The parties' fight, however, was not over. Shoen then sued Zacarias for trespass, nuisance, and other causes of action over Zacarias' use of the portion of land in question, totaling a grand 500 square feet. *Shoen v Zacarias* (2019) 33 CA5th 1112 (*Shoen II*). Zacarias, knowing after *Shoen I* that she could not claim an easement, now claimed a license based on her history of permissive use. The trial court considered that only Zacarias had access to the disputed area, which was on a hillside and was not accessible from the Shoen side. The trial court also found Zacarias spent substantial amounts of money or labor improving the area. The trial judge ruled that Zacarias had an exclusive, irrevocable license. The appellate court reversed, noting that an irrevocable license is functionally indistinguishable from an easement. The court of appeal ruled that Zacarias' lawn furniture and landscaping did not constitute a substantial expenditure. Further, "courts are rightly reluctant to exercise 'what is, in effect, the right of eminent domain by permitting [the licensee] to occupy property owned by another.'" 33 CA5th at 1120. Also, the license should not have been granted in perpetuity. While this is nominally a license case, the rules as to easements are parallel. *Shoen II* was remanded. It remains to be seen whether there will be a *Shoen III.*

The factors that the trial court will consider in exercising its discretion to deny an injunction include the following (*Linthicum,* 175 CA4th at 266; *Christensen v Tucker* (1952) 114 CA2d 554, 562):

- The defendant must be innocent; that is, the encroachment must not be the result of the defendant's willful act and perhaps not the result of defendant's negligence. This is the most important of the three elements. *Hansen v Sandridge Partners, L.P.* (2018) 22 CA5th 1020, 1028.
- If the plaintiff will suffer irreparable injury, then the injunction should be granted regardless of the injury to the defendant (except perhaps if the rights of the public would be adversely affected).
- The hardship to the defendant by granting the injunction must be substantially greater than the hardship caused the plaintiff by the continuance of the encroachment.

The defendant has the burden of proving each of these elements. The court's exercise of discretion over whether to apply the doctrine is based on

equitable principles, and the trial court has broad discretion to consider the conduct and intent of both parties. *Linthicum v Butterfield, supra*. "However, unless all three prerequisites are established, a court lacks discretion to grant an equitable easement." *Shoen,* 237 CA4th at 19. The court is not limited to denying an injunction against the encroachment but can also fashion an affirmative, judicially created easement in favor of the encroaching landowner. *Hirshfield v Schwartz* (2001) 91 CA4th 749, 764. Therefore, the doctrine may be raised affirmatively by the plaintiff. *Tashakori v Lakis* (2011) 196 CA4th 1003, 1010.

The creation by the court of an equitable easement is not in violation of the Fifth Amendment "takings clause," because Fifth Amendment analysis applies to legislative and quasi-legislative acts, not judicial decisions. *Hinrichs v Melton* (2017) 11 CA5th 516, 524; but see *Cox Cable of San Diego v Bookspan* (1987) 195 CA3d 22, 25, and *Judio, Inc. v Vons Companies* (1987) 211 CA3d 1020, 1027, both holding that the takings clause applies to injunctions. In *Stop the Beach Renourishment, Inc. v Florida Dep't of Envt'l Protection* (2010) 560 US 702, 707, 130 S Ct 2592, the U.S. Supreme Court considered but did not decide this question. See *Surfrider Found. v Martins Beach 1, LLC* (2017) 14 CA5th 238, 260. In another context, the U.S. Supreme Court found that the state action requirement for violation of equal protection rights under the U.S. Constitution was met by court enforcement of racially discriminatory covenants. *Shelley v Kraemer* (1948) 334 US 1, 68 S Ct 836.

In any case, the Fifth Amendment does not prohibit "takings," it only requires payment of just compensation. *Hinrichs,* 11 CA5th at 524. Because, as noted below, the court creating an equitable easement may order the benefited party to pay compensation for the equitable easement, the Fifth Amendment would not be violated even if it applied to judicial acts. *Hinrichs,* 11 CA5th at 524.

NOTE➤ A court may order an encroaching party to pay money to the landowner as a condition of denying the injunction and for creation of the equitable easement. *Hirshfield,* 91 CA4th at 767; *Hinrichs,* 11 CA5th at 524. In contrast, the court cannot condition a judgment granting a prescriptive easement on the payment of money. *Warsaw v Chicago Metallic Ceilings, Inc.* (1984) 35 C3d 564, 574.

PRACTICE TIP➤ If the party building the encroaching structure has a reasonable good faith belief that the structure is being constructed entirely on that party's property, but it is later proved that the structure encroaches on the neighboring property, the encroacher may seek

the neighbor, with a resultant increase in hostility and difficulty in resolving the dispute. Unless a report will actually produce a solution to the problem, it probably should not be made.

4. Explore Settlement Techniques

§1.42 a. Express Easement, Covenant, or License

Often, a settlement will include one party granting to the other an express easement, a covenant, or a revocable license. In general, the settlement agreement will be a document separate from the instrument conveying the easement, covenant, or license. Most attorneys will have a standard form settlement agreement, which can then be adapted for the particular case. However, the easement, covenant, or license normally will require special drafting.

As with all documents, extreme care must be taken in drafting these types of instruments. These documents should be recorded and may impact not only the current but also any future property owners' rights. See additional discussion of drafting easements, covenants, and licenses in §§2.31–2.34; California Easements and Boundaries: Law and Litigation, chap 8 (Cal CEB). For other useful forms and a detailed discussion of legal descriptions, see California Real Property Sales Transactions, chap 10 (4th ed Cal CEB).

§1.43 (1) Prepare the Legal Description

Normally it is advisable to retain a professional surveyor to prepare the legal description of the property covered by the easement, covenant, or license. Counsel can create some very simple legal descriptions, *e.g.,* when the easement or license is granted over an entire parcel or when the easement or license covers a strip of land that touches and runs parallel to a straight boundary. For a good discussion of common terms used in writing legal descriptions, see Estopinal, *A Guide to Understanding Land Surveys,* chap 13 (3d ed 2009).

§1.44 (2) Contact Senior Lienholders

If appropriate, counsel should contact the client's lender and other secured lienholders to discuss subordination issues because any instruments (express easements, covenants, licenses) recorded after recordation of a deed of trust or other recorded lien will not survive foreclosure of the senior lien. It may be possible to convince the lender to subordinate to the recorded document, but in most cases the parties must understand that the recorded document

may be wiped out in a foreclosure sale. On priority of recorded documents generally, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 9 (4th ed Cal CEB).

§1.45 (3) Review Title Insurance

Counsel should have the client's title insurer review the proposed recorded document to determine whether a policy or endorsement would be issued covering the new easement, covenant, or license. All parties to the agreement (including subordinating lenders or other third parties) should consider purchasing a new title insurance policy to ensure that the newly created easement, covenant, or license is covered. On title insurance for easements, see California Title Insurance Practice, chaps 5, 8A (2d ed Cal CEB); California Easements and Boundaries: Law and Litigation, chap 9 (Cal CEB).

§1.46 b. Lot Line Adjustment

A lot line adjustment is a change to the mutual boundary between two adjacent properties. Lot line adjustments do not result in the creation of additional parcels and therefore are not subject to the requirements of the Subdivision Map Act (Govt C §§66410–66499.41). Before including a lot line adjustment in any settlement, counsel must contact the appropriate local government agency to determine whether the adjustment will be permitted. For required lot line adjustment procedures, see §§2.26–2.30. See also California Subdivision Map Act and the Development Process §§2.17–2.18 (2d ed Cal CEB); California Land Use Practice, chap 9 (Cal CEB); California Easements and Boundaries: Law and Litigation, chap 8 (Cal CEB).

Further, any change to the boundary must be approved by any lenders or other parties holding a secured interest in the property, because a change in the lot size may impair their security. On priority of recorded documents generally, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 9 (4th ed Cal CEB).

Counsel should review any proposed lot line adjustment with the client's title insurer and discuss with the client issuance of a new title insurance policy or endorsement to cover the new parcel.

PRACTICE TIP➤ The client's lender will likely charge a fee for the processing of a modification of the deed of trust on the property to acknowledge the lot line adjustment and likely will require the client to purchase an endorsement from the lender's title insurer as well as the client's insurer.

PRACTICE TIP➤ Counsel should obtain and review all relevant insurance policies, including both liability insurance (such as homeowners' policies and commercial general liability policies) and title insurance, for potential coverage. In determining which cause(s) of action to allege in a particular easement dispute, counsel should carefully consider which claims may trigger insurance coverage. Note that title insurance may cover the expense of prosecuting a lawsuit (for plaintiffs as well as defendants) if prosecution of a lawsuit is reasonably required to clear title.

§1.51 VII. LEGAL THEORIES AND CAUSES OF ACTION

Many causes of action and legal theories may be involved in an easement dispute. Following is a brief overview of the most common claims brought in these types of cases. For in-depth discussion of these claims, see chap 16 (on causes of action), chap 17 (on remedies), and chap 18 (on defenses). See also California Real Property Remedies and Damages, chap 11 (2d ed Cal CEB) (Remedies for Nuisance and Trespass).

§1.52 A. Quiet Title

The most common cause of action alleged in easement disputes, quiet title, is brought to establish title against adverse claims to real property or any interest therein. CCP §760.020. The cause of action must include a legal theory establishing the plaintiff's right to title or to an interest in the property. For example, a landowner might bring a quiet title action against a neighboring owner to establish (or deny) a claim asserting an easement by necessity or an implied easement. *Lichty v Sickels* (1983) 149 CA3d 696. For additional discussion of quiet title actions, see chaps 16–18 and California Real Property Remedies and Damages, chap 7 (2d ed Cal CEB).

§1.53 B. Trespass

Trespass may be alleged when there is an intentional, reckless, or negligent physical invasion of the client's property and interference with their exclusive possession. See *Miller v National Broad. Co.* (1986) 187 CA3d 1463, 1480. On trespass alleged to be negligent, see §1.58.

Because an easement is generally characterized as a nonpossessory interest in land, and because the tort of trespass is an interference with possession, trespass cannot be alleged for an interference with a nonexclusive easement owner's rights. *McBride v Smith* (2018) 18 CA5th 1160, 1173. The holder of

a nonexclusive easement should consider an action for nuisance for interference with their easement rights (see §1.56) or for declaratory and injunctive relief (see §1.59A).

Trespass generally requires a personal entry onto the property, but trespass can also be found if the opposing party caused the entry of material objects or inanimate substances to enter the property. See, *e.g., Wilson v Interlake Steel Co.* (1982) 32 C3d 229 (noise, vibrations, and particulates entering property were trespass). For additional discussion of trespass, see chaps 2, 16–17.

A building or structure's encroachment on neighboring property is a type of trespass. *Troeger v Fink* (1958) 166 CA2d 22, 26. Encroachment by a structure may, in certain circumstances, also be pled in a cause of action for nuisance (see §1.56).

The statute of limitations for trespass is 3 years after the accrual of the cause of action. CCP §338(b). For statute of limitations and damages purposes, trespasses are divided into two types: permanent (see §1.54) and continuing (see §1.55). *Troeger v Fink, supra*.

Reasonable attorney fees are awarded to the prevailing party in an action for damages caused by trespass to "lands either under cultivation or intended or used for the raising of livestock." CCP §1021.9. Such fees are awardable if the trespass affects any portion of the "lands under cultivation," not just the portion actually being cultivated. In *Hoffman v Superior Ready Mix Concrete, L.P.* (2018) 30 CA5th 474, 483, the court held that CCP §1021.9 applies if the trespass occurs anywhere on the "lands," even if the trespass did not occur on the portion of the lands actually under cultivation, and also applies even if the cultivation or livestock use is not commercial. However, "lands under cultivation" usually means agricultural land or at least rural land, not an urban backyard. See *Quarterman v Kefauver* (1997) 55 CA4th 1366, 1373.

§1.54 1. Permanent Trespass

If the trespass is permanent, the cause of action accrues when the permanent trespass occurs (*i.e.,* when the original entry is made onto the property), and the complaint must be filed no later than 3 years thereafter. In such case, the plaintiff is entitled to recover all damages resulting from the trespass, including prospective as well as past damages. However, the plaintiff must bring one action for all past, present, and future damages within the 3-year period after the permanent trespass has occurred. *Spar v Pacific Bell* (1991) 235 CA3d 1480, 1484. The same rule applies to permanent nuisance claims (see §1.56).

intentionally. Counsel must review the specific terms of any homeowners insurance policy to see whether coverage may be excluded.

§2.13 2. Checklist: Plans and Permits

- ____ 2. If the client is the owner accused of an encroachment, obtain
  - ____ a. Architectural plans
  - ____ b. City and county building permit applications
  - ____ c. City and county building permits
  - ____ d. City and county building department sign-offs on the completed improvement or structure
  - ____ e. The application for a zoning variance and the document granting that variance if setback requirements were waived
  - ____ f. The most recent record of survey, if applicable
- ____ 3. If the client is either the encroached-upon party or the current property owner who purchased property after the encroachment was already in place, obtain the appropriate city and county building department file under which the improvement was constructed.

These documents will show whether the encroaching structure was constructed without permits or, if permits were issued, whether the as-built structure conforms to the plans as submitted.

§2.14 3. Checklist: Other Records and Documents

- ____ 4. County tax assessor records
- ____ 5. Historical photographs (both aerial and surface):
  - ____ a. Photographs from the architect, contractor, tract developer, and public records, and personal photographs from current and prior owners
  - ____ b. Aerial photographs from specialized collections (these may require analysis by a trained photogrammetrist)
  - ____ c. Street level and aerial photographs from online sites
  - ____ d. Satellite and surface photos from Google Maps/ Google Earth.
- ____ 6. If the client has a video security system, copies of any video evidence showing acts of trespass

___ 7. Contact information for previous record owners, occupants, and tenants of the properties

___ 8. Any off-record documents such as licenses, leases, encroachment agreements, or notifications of permissive use under CC §1008

___ 9. Correspondence between the neighbors or their predecessors relating to the encroachment

___ 10. Search for prior lawsuits affecting the property.

County assessor records will show if the property was reassessed when the offending structure was built or if the taxes include the value of the encroachment.

§2.15 D. Experts and Consultants

Counsel may want to consider hiring experts such as the following to assist in determining the facts, settling the matter, or proving the case at trial:

- A surveyor to help determine the boundary and the alleged encroachment and to aid in interpretation of other surveys, tracts, and deeds from which the property was subdivided.
- A consultant in municipal building and zoning laws to assist in the review of local zoning and building laws and review of building, planning, and zoning department records and ordinances.
- An architect, contractor, arborist, or landscape architect to discuss the significance of the alleged encroachment or to explore ways it could be removed.
- An appraiser to determine the fair market value of the encroached-upon property in the event of an equitable easement (see §§2.52–2.56).
- A real estate expert on the duty of the seller and broker to disclose the encroachment or boundary deviations to the buyer.

Real estate experts who testify on the duties of the various parties are called "standard of care" experts. For additional discussion of these types of experts, see California Real Estate Brokers: Law and Litigation, chap 13 (Cal CEB). For information on expert witnesses generally, see California Expert Witness Guide (2d ed Cal CEB).

E. Legal Issues

§2.16 1. Encroachment on Public Property

Public entities have limited ability to grant property rights. Does the encroachment intrude onto publicly owned property? A private party cannot

6. Instruments and Agreements to Implement Encroachments

§2.25 a. Overview

Any kind of common neighborly accommodation can be documented in an agreement, if necessary. Encroachment agreements can take a number of different forms. For example, the parties can agree to a lot line adjustment, resulting in the transfer of the property subject to the encroachment to the encroacher. Or the encroached-upon party can retain title to the encroachment area and may use an agreement to grant the encroaching party permission to enter on the land to maintain an encroaching structure or for ingress and egress to the adjoining property.

PRACTICE TIP➤ Counsel should be wary when the landowners agree to allow the matter to remain in the status quo without reducing any resolution to writing. Failure to memorialize the understanding runs the risk of creating problems when either parcel is sold, in the event that a lienholder takes title to the property through judicial or nonjudicial foreclosure, or if the neighbors have a falling out. Whichever mechanism is employed, the documents embodying the resolution of the encroachment dispute must be in writing and should be recorded.

The language and terms employed (not the title of the document) will ultimately define the purpose, scope, and duration of the agreement. To help in interpretation, the agreement should be explicit in its purpose. Failing to describe what is intended invites litigation. When drafting an encroachment agreement, counsel and clients should consider the following items:

- Whether the encroachment or the grant of an easement, covenant, license, or other right will affect the marketability of either property;
- Whether the encroachment or the grant of an easement, covenant, license, or other right will affect the ability to get title insurance on either property;
- Whether the encroacher should add the encroached-upon party as an additional insured under any liability or homeowners policy; and
- Whether there are any lienholders who must be informed of the proposed change in property rights and whether the change will affect any deeds of trust or other liens on the properties.

Counsel should consider including the following provisions:

- Clauses regarding maintenance and repair of the encroachment;

- Clauses relating to the future use of the encroachment (*e.g.,* grant to future property owners, no change in use of area encroached upon); and
- A clause that the parties will execute whatever further documents are reasonably necessary to accomplish the purpose of the agreement;

PRACTICE TIP➤ When the encroachment involves a structure and the agreement involves the grant of an easement, counsel should check with the relevant city or county building department to clarify what happens if the encroacher subsequently demolishes the encroachment. Of paramount importance is whether the building department will grant a permit allowing new construction within the encroachment's old footprint or whether the new construction must be restricted to the actual legal area of the encroaching parcel.

b. Negotiated Lot Line Adjustment

§2.26 (1) Coordination Between Property Owners

Different types of real property interests may be used to amicably resolve an encroachment and boundary dispute. The preferred way is to eliminate the encroachment by changing the location of the boundary itself. A lot line adjustment, sometimes called a boundary line adjustment, refers to the adjustment of a boundary of two or more adjoining properties without the creation of a separate, new parcel of real property. For a detailed discussion of lot line adjustments, see California Subdivision Map Act and the Development Process §§2.17–2.18 (2d ed Cal CEB); California Land Use Practice, chap 9 (Cal CEB).

The adjustment must be made by a recorded deed that conveys the strip of land the parties agree will be transferred for the adjustment. Govt C §66412(d). Any lienholders on the property being transferred must reconvey their deeds of trust as to that portion of the property being conveyed. If the property owners have sufficient land, the lot line adjustment can include a property swap so that neither party has a net gain or loss in the size of their parcel.

PRACTICE TIP➤ If there is a setback requirement for the encroaching structure, that area should also be taken into account in undertaking the lot line adjustment.

EXAMPLE➤ Maxine and Patty own adjoining properties in Los Angeles. Maxine's pool pavilion extends onto Patty's property by several feet.

Patty agrees to convey to Maxine the encroached-upon area in return for Maxine's grant of an additional parking strip at the rear of the properties to Patty. Their attorney, LaVerne, prepares new deeds and records them with the Los Angeles County Recorder's Office. LaVerne also prepares the Certificate of Compliance and performs the other tasks required for the lot line adjustment. See §2.29.

§2.27 (2) Coordination With Public Entities

Counsel should contact the appropriate city or county planning authority to determine the procedure involved in obtaining a lot line adjustment. The local agency must approve or disapprove a lot line adjustment under the Permit Streamlining Act (Govt C §§65920–65964.5). Govt C §66412(d). Counties and cities differ widely in the application requirements and fees and costs charged for the review and processing of applications for lot line adjustments. Each local jurisdiction has its own application forms and procedures that spell out the particular requirements and fees in that locality.

Agencies also vary on the time required for review of the application. Some communities have a relatively simple review process; others have a more complex procedure that involves review by multiple departments within the city or county, including fire, engineering, public works, building, and safety. Also, because cities and counties are statutorily mandated to complete the review of parcel maps and tract maps within certain time periods, lot line adjustment applications may not receive immediate attention.

In addition to the owners, all persons with interests in the parcels subject to the lot line adjustments must be notified of the proceedings. *Horn v County of Ventura* (1979) 24 C3d 605.

PRACTICE TIP➤ Counsel should check the local agency's website, as many public entities make their ordinances, guidelines, application forms, and fees available for review and download.

§2.28 (3) Application of Subdivision Map Act

In evaluating a lot line adjustment, counsel should consider whether the California Subdivision Map Act (Govt C §§66410–66499.41) applies. Certain lot line adjustments between four or fewer existing adjoining parcels are exempt from the Map Act. Govt C §66412(d). The purpose of this exemption is to permit changes in parcel lines without requiring the processing of a subdivision map. To qualify as exempt, the adjustment must involve four or fewer parcels, must not create a greater number of parcels than originally

existed, and must be approved by the local agency or advisory agency. Govt C §66412(d).

Under §66412(d), the local agency or advisory agency may not impose conditions or exactions on its approval of a lot line adjustment except to

- Conform to the local general plan, any applicable specific plan, any applicable coastal plan, and zoning and building ordinances;
- Facilitate the relocation of existing utilities, infrastructures, or easements; or
- Require the prepayment of property taxes.

No tentative map, parcel map, or final map may be required as a condition to approval of a lot line adjustment. Govt C §66412(d). For additional discussion, see California Subdivision Map Act and the Development Process §§2.17–2.18 (2d ed Cal CEB); California Easements and Boundaries: Law and Litigation §§8.35B–8.35D (Cal CEB).

PRACTICE TIP➤ Application of the principles in §66412(d) varies widely among jurisdictions. It is important to review local subdivision ordinances for their lot line adjustment procedures.

§2.29 (4) Survey; Certificate of Compliance

In addition to the fees and costs imposed by the city or county for processing a lot line adjustment application (see §2.27), the parties contemplating a lot line adjustment will also need to consider the costs associated with engaging a surveyor to perform the tasks necessary to complete the application, such as the following:

- If required by the city or county, cost of preparation of a plat that identifies the location of the buildings on each of the lots relative to both the existing boundary as well as the proposed new boundary; and
- If required by statute, cost of preparation and processing of a record of survey if the surveyor must set monuments evidencing the location of the new boundary. See Bus & P C §8762.

NOTE➤ The Attorney General has opined that a city or county may not require a field survey to be performed or a record of survey to be filed for a lot line adjustment that involves creating new points or lines not shown on any subdivision map, official map, or record of survey, unless a record of survey is required by Bus & P C §8762. 77 Ops Cal Atty Gen 231 (1994). See also Govt C §66412(d).

1244, 1252; *Harrison v Welch, supra*; *Mehdizadeh v Mincer* (1996) 46 CA4th 1296, 1305; *Silacci v Abramson* (1996) 45 CA4th 558, 563)

- Open and notorious,
- Continuous and uninterrupted for a 5-year period (CC §1007), and
- Under claim of right and hostile to the true owner.

NOTE➤ "Claim of right simply means that the property was used without permission of the owner of the land. … [I]t means no more than that possession must be hostile, which in turn means only that the owner has not expressly consented to it by lease or license or has not been led into acquiescing in it by the denial of adverse claim on the part of the possessor." *Felgenhauer v Soni* (2004) 121 CA4th 445, 450. Thus, "claim of right" and hostility are the same thing.

If the rightful owner is out of possession of the property while acts of prescription take place, the prescriptive rights are vested only against the rightful owner's tenant and encumbers only the leasehold interest. *Dieterich Int'l Truck Sales, Inc. v J. S. & J. Servs., Inc.* (1992) 3 CA4th 1601. See also CC §741 (action obtained solely against landlord's tenants cannot affect landlord's rights). However, in *King v Wu* (2013) 218 CA4th 1211, 1214, the court enforced the prescriptive right against the owner when the owner was in actual or constructive possession during the 5-year prescriptive period. "If at any point during the adverse use an owner or a landlord has been in possession, including constructively at the expiration of a renewable lease, he or she could and should have taken action to interrupt such use." 218 CA4th at 1214.

It is not unusual for one property to be crossed by the owner of parcels further from the public road. In *Scher v Burke* (2017) 3 C5th 136, the supreme court held that an implied public dedication could not be found based on nonrecreational use of noncoastal property because CC §§813, 1008, and 1009 are applicable to all uses of the road for access to private parcels, not just public recreational usage.

In *Tiburon/Belvedere Residents United to Support the Trails v Martha Co.* (2020) 56 CA5th 461, the appellate court refused to find a recreational easement by implied public dedication despite use by neighbors for 50 years. The court held that diligent efforts by the owners to preserve their private property rights, including posting signs, installing and maintaining gates, and more, were sufficient to protect the private owners from claims based on implied dedication. The use by a relatively small group of neighbors, of whom a significant number were children, was insufficient to establish that the landowner was on notice of a risk of dedication.

§2.49 a. Similarities to Adverse Possession

Both prescriptive easement and adverse possession require that the encroacher's use of the property be open and hostile to the owner of record. Both have a 5-year holding requirement imposed by statute. CC §1007; CCP §321; *Dubin v Robert Newhall Chesebrough Trust* (2002) 96 CA4th 465, 476. As with adverse possession, the statute of limitations does not cut off the true owner's cause of action to recover the property until the elements of prescriptive easement have been met, even if the true owner has not physically been in possession of the property for more than 5 years. *Harrison v Welch* (2004) 116 CA4th 1084, 1095. See §§2.46, 2.67.

§2.50 b. Differences From Adverse Possession

Unlike adverse possession, a prescriptive easement does not require the payment of property taxes. In such cases, the record owner has the burden of proof. *Welsher v Glickman* (1969) 272 CA2d 134, 137. Adverse possession requires an exclusive use of the disputed property by the encroacher, while a prescriptive easement cannot result in an exclusive use. *Harrison v Welch* (2004) 116 CA4th 1084, 1090. Successful adverse possession results in an ownership right, while a prescriptive easement is a right to a specific use of another's property. *Kapner v Meadowlark Ranch Ass'n* (2004) 116 CA4th 1182, 1186.

For a brief disquisition questioning why prescriptive easements and adverse possession are treated differently in the legal system, see Bernhardt, *The Editor's Take,* 24 CEB Real Prop L Rep 255 (Oct. 2001).

§2.51 4. Implied Easement

Under certain circumstances, an encroaching party can seek to justify the encroachment as an implied easement. Easements by implication arise when two adjoining parcels were previously held under common ownership. Restatement (Third) of Property: Servitudes §2.11 (2000). To establish an implied easement for use of a disputed area, the encroaching party must establish the following (*Thorstrom v Thorstrom* (2011) 196 CA4th 1406, 1420 (use of water from wells)):

- The parcels were formerly held under common ownership, were split, and one or both were transferred to others;
- The common owner's use of the disputed property was of a nature that the parties must have intended or believed that the use would continue (*i.e.,* the use was either known to the grantor and the grantee or was so

§2.54 c. Crafting Equitable Easement Instead of Injunction

The creation of an equitable easement allows a court to balance the equities and not only refuse an injunction to remove an encroaching use but also individually tailor relief based on the circumstances. See *Hinrichs v Melton* (2017) 11 CA5th 516; *Tashakori v Lakis* (2011) 196 CA4th 1003, 1009; *Linthicum v Butterfield* (2009) 175 CA4th 259; *Hirshfield v Schwartz* (2001) 91 CA4th 749. The *Tashakori* court noted (196 CA4th at 1008):

> In appropriate cases in which the requirements for traditional easements are not present, California courts have exercised their equity powers to fashion protective interests in land belonging to another, sometimes referring to such an interest as an "equitable easement."

The *Hirshfield* court specifically addressed encroachments, holding that an innocent encroacher whose significant improvements imposed a minimal impact on the neighboring property could maintain the encroachment on a limited basis, not as a true easement but as a protected interest as long as (1) the encroacher continues to own or reside on the property and (2) the encroachee is compensated for loss of use of the land. 91 CA4th at 772.

EXAMPLE➤ Thor and Loki own adjoining properties in Carmel. Thor recently acquired the property and soon realized that to get to his home, he must cross Loki's driveway. Loki objected and threatened to file a lawsuit. Thor filed for declaratory relief and sought an equitable ruling that he could cross Loki's driveway. The court granted the relief and also has the power to require Thor to reimburse Loki for any diminishment in value to his property. See *Tashakori,* 196 CA4th at 1014.

NOTE➤ Although the *Hirshfield* court called the relief granted to the encroacher an "equitable easement," in reality it was more akin to a license—one that would terminate on the transfer of title to (or even transfer of possession of) the encroaching property. In the author's opinion, the rationale for this is likely that an innocent encroachment like the one in *Hirshfield* is personal to the encroacher. On the sale of a property such a license would terminate, instead of running with the land like an easement. A potential buyer would know this fact when determining whether to buy the real property and assessing its value.

Hirshfield was (and continues to be) widely criticized by real property practitioners who litigate equitable easements, due to its internal

inconsistencies, arbitrary distinctions, and logical flaws. For a brief disquisition questioning whether the case's holding was really the best result for the *Hirshfield* parties, see Bernhardt, *The Editor's Take,* 24 CEB Real Prop L Rep 255 (Oct. 2001). Post-*Hirshfield* cases, however, have been able to use the *Hirshfield* holding to expand on the law of equitable easements, creating a more regularized procedure for litigating equitable easement cases. See, *e.g.*, *Hansen v Sandridge Partners, L.P.* (2018) 22 CA5th 1020 (equitable easement not proper remedy when encroachment was negligent); *Tashakori v Lakis* (2011) 196 CA4th 1003 (applying *Hirshfield*/*Christensen* factors to determine equitable easement was properly granted; *Linthicum v Butterfield* (2009) 175 CA4th 259 (quieting title to "equitable easement").

§2.55 d. Equitable Easements Versus Prescriptive Easements

Unlike under a prescriptive easement, the encroacher under an equitable easement may be granted an exclusive right to the disputed area, thus denying even the record owner from access to the disputed area. See, *e.g., Hirshfield v Schwartz* (2001) 91 CA4th 749, 767 (encroachment by extensive and permanent landscaping, including concrete wall, stone deck, pond, waterfalls, putting green, and sand trap). See also *Romero v Shih* (2024) 15 C5th 680 (effectively exclusive easement may be implied, depending on facts surrounding its creation).

NOTE➤ "Equitable easements" under the doctrine of relative hardships appear to be a completely separate line of authority from prescriptive easements, so that prescriptive easement precedent is irrelevant, at least according to some courts. See *Harrison v Welch* (2004) 116 CA4th 1084, 1093 n5; *Hirshfield,* 91 CA4th at 764.

§2.56 e. Limitations on Court's Equitable Powers

When applying the relative hardship doctrine, a court has great discretion and must award relief that imposes the minimum impact necessary to protect the encroacher. *Christensen v Tucker* (1952) 114 CA2d 554, 563 (trial court went too far in granting fee interest to encroacher when easement would have protected encroaching uses).

The scope of an equitable easement should not be greater than is reasonably necessary to protect the defendant's interests. Therefore, the interest

granted to the encroacher can be made subject to termination in the future if the user no longer owns or occupies the encroaching property. To grant a "permanent" right that could extend beyond the need that gives rise to the interest would be inequitable. *Christensen v Tucker, supra*.

In the same manner, the interest granted to the encroacher may be made nontransferable and terminable if the encroacher sells or ceases to occupy the dominant tenement. See *Hirshfield v Schwartz* (2001) 91 CA4th 749, 772. Further, as was the case in *Hirshfield,* compensation can be ordered to be paid to the original fee owner for the fair market value of the interest received. For one commentator's thoughts on the court's "clumsy" ruling in *Hirshfield,* see Bernhardt, *The Editor's Take,* 24 CEB Real Prop L Rep 255 (Oct. 2001).

§2.56A 6. Cullen Earthquake Act: Court-Mandated Boundary Revisions

Boundary issues may also arise from judicial boundary revisions following a natural disaster. The Cullen Earthquake Act (CEA) (CCP §§751.50–751.65) permits courts to equitably revise boundaries when property has shifted as a result of an earthquake or other natural disaster. The CEA provides (CCP §751.50):

> If the boundaries of land owned either by public or by private entities have been disturbed by earth movements such as, but not limited to, slides, subsidence, lateral or vertical displacements or similar disasters caused by man, or by earthquake or other acts of God, so that such lands are in a location different from that at which they were located

varied, and procedurally complex. The Calderon Amendment applies to common interest communities only. The Right to Repair Act applies to all residences and not only alters the building standards for residential structures but also creates multiple statutes of repose depending on the type of defect. For complete discussion, see Advising California Common Interest Communities, chap 11 (2d ed Cal CEB); Const Contracts and Defects, chap 15. On the liability of public entity landowners, see Condemnation Practice in California (3d ed Cal CEB); California Government Tort Liability Practice (4th ed Cal CEB).

§3.11 3. Lateral and Subjacent Support: Reasonableness Standard

Court decisions in lateral and subjacent (defined in §3.1) support disputes are typically premised on the principle that a landowner is responsible for any injury caused to another by want of ordinary care or skill in the management of their property. Specifically, the statutes, and the cases interpreting them, rely on the determination of whether the landowner has acted reasonably in the management of their property. See, *e.g.,* CC §832(2); *Sager v O'Connell* (1944) 67 CA2d 27 (bulkhead built to provide lateral support to neighboring property); *Wharam v Investment Underwriters, Inc.* (1943) 58 CA2d 346 (excavation and subsequent collapse of retaining wall). See also *Marin Mun. Water Dist. v Northwestern Pac. R.R. Co.* (1967) 253 CA2d 83 (collapse of tunnel running under public water system). For additional discussion, see California Real Property Remedies and Damages, chap 12 (2d ed Cal CEB).

§3.12 a. Common Law

At common law, the adjacent property owner had an absolute duty of lateral support: Every landowner was entitled to lateral support from every coterminous owner. *Holtz v San Francisco Bay Area Rapid Transit Dist.* (1976) 17 C3d 648, 652; *Puckett v Sullivan* (1961) 190 CA2d 489. Civil Code §832 relaxed this absolute rule (see §3.13), but it does not permit or excuse negligence that causes damage to or destruction of a neighbor's property; it still requires a party performing excavation to exercise ordinary care and skill. *Holtz v Superior Court* (1970) 3 C3d 296; *Daniels v McPhail* (1949) 93 CA2d 479.

Note, however, that in *Marin Mun. Water Dist. v Northwestern Pac. R.R. Co.* (1967) 253 CA2d 83, the court held that although §832 relaxed the common law as it applied to lateral support, it did not apply between a surface

owner and a subsurface owner, and it did not change the absolute duty of subjacent support owed to the surface by the subsurface.

WARNING➤ If the procedural steps of §832 (see §3.13) are not followed, strict liability under common law will be applied. *Wharam v Investment Underwriters, Inc.* (1943) 58 CA2d 346, 349.

§3.13 b. Statutory Law

Three specific statutory protections cover lateral support:

- Civil Code §801(13) provides that an easement may be created to receive more than natural support from adjacent land or things affixed to it;
- Civil Code §1714 provides that everyone is responsible for injuries to another caused by want of ordinary care or skill in the management of their property; and
- Civil Code §832 provides that each coterminous owner is entitled to the lateral and subjacent support that the adjoining land provides, subject to the right of the owner of the adjoining land to make proper and usual excavation for purposes of construction or improvements.

To fall within the safe harbor of §832, the excavating landowner must meet the following conditions:

- Provide reasonable notice to the owners of adjoining lands and structures, stating the depth to which the excavation is intended to be made and when excavating will begin;
- Use ordinary care and skill and take reasonable precautions to sustain the adjoining land;
- If the excavation will be close enough to endanger adjoining structures and will be deeper than the walls or foundation of the structure, the adjoining landowner must be given at least 30 days to take protective measures and must be provided a reasonable right of entry onto the land to be excavated in order to implement the protections; and
- If the excavation will be deeper than the standard depth of foundations (as defined in the statute), the excavating landowner must, with the permission of the adjoining landowner, take protective measures on the adjoining property and bear responsibility for any resulting harm except for minor settlement cracks.

PRACTICE TIP➤ Notice under §832 to a property owner of a proposed excavation on adjoining property is considered "a substantial and not

(CCP §338) runs from the date the cause of action accrues. The statute does not run from the time the act of diversion or excavation is committed but from the date the injury resulting therefrom is sustained. Moreover, a new and separate cause of action arises with each new subsidence or earth movement caused by the original trespass. 8 CA3d at 677. Unlawful intent is not a requirement to establish trespass. Restatement (Second) of Torts §158 (1977).

As with nuisance (see §3.32), trespass can be either permanent or continuing. For a full discussion, see *Polin v Chung Cho, supra*.

For additional discussion of trespass, see §§2.3, 16.16–16.23. For discussion of the §338 statute of limitation, see §2.66. On statutes of limitation generally, see §§18.7–18.11.

§3.36 C. Negligence

Many of the same acts or conditions that constitute trespass (see §3.35) or ultrahazardous activity (see §3.19) may also constitute negligence under CC §1714(a). In negligence cases, courts review whether the landowner has acted reasonably in regard to the actions taken on their property. The likelihood of injury to neighboring property, the probable seriousness of the injury, the burden of reducing or avoiding the risk, the location of the land, and the landowner's degree of control over the risk-creating condition are among the factors to be considered in evaluating the reasonableness of the landowner's conduct. *Sprecher v Adamson Cos.* (1981) 30 C3d 358, 372. For discussion of negligence cause of action, see §§16.41–16.45.

§3.37 1. Landowner's Liability for Independent Contractors and Employees

Under the law of agency, a landowner may be liable for the negligence of employees, experts, and independent contractors in their activities on the landowner's land. CC §2338. Under the doctrine of respondeat superior, a landowner is vicariously liable for the torts of their employees committed within the scope of their employment. *Lisa M. v Henry Mayo Newhall Mem. Hosp.* (1995) 12 C4th 291, 296.

Generally, a landowner who employs an independent contractor is not liable for injuries resulting from the negligence of the contractor or any of its subcontractors over whom the principal has no control or supervision. See *Johnson v Cal-West Constr. Co.* (1962) 204 CA2d 610, 612; Restatement (Second) of Torts §409 (1965).

A well-established exception to the general rule is the "peculiar risk" doctrine. See, *e.g., Toland v Sunland Hous. Group, Inc.* (1998) 18 C4th 253 ("doctrine serves to ensure that … neighboring landowners injured by the hired contractor's negligence will have a source of compensation even if the contractor turns out to be insolvent"). Under the doctrine of peculiar risk, a person injured by inherently dangerous work performed by a hired contractor can seek tort damages from the person who hired the contractor. *Privette v Superior Court* (1993) 5 C4th 689, 693. In *Gonzalez v Mathis* (2021) 12 C5th 29, the California Supreme Court refused to extend the exception, affirming that the independent contractor is responsible for workplace safety and holding that there is no liability for injuries from a known hazard when the owner did not retain control over part of the contractor's work or affirmatively contribute to the injury. Following *Privette,* a court found liability against a general contractor whose affirmative control over safety conditions contributed to the injuries of its hiree's independent contractor. *Tverberg v Fillner Constr., Inc.* (2012) 202 CA4th 1439 (*Tverberg II*). Recently, the *Privette* decision has been the subject of multiple courts of appeal decisions analyzing its application and its exceptions, particularly relating to the concealed hazard exception and retained control exception. In *Ramirez v PK I Plaza 580 SC LP* (2022) 85 CA5th 252, the court rejected the notion that a landowner may absolve itself of liability for injuries that arise out of conditions in a space it owns and controls, just by assigning its tenant a task within that space.

The peculiar risk doctrine is most commonly applied in personal injury cases, but it is also applied to impose liability for property damage. See *Henderson Bros. Stores v Smiley* (1981) 120 CA3d 903 (owner liable for fire damage to neighbor's property caused when subcontractor's tar kettle exploded). See also *Shurpin v Elmhirst* (1983) 148 CA3d 94 (soils engineer hired by adjoining property owner can be held liable for damage to neighboring property on basis of negligence and nuisance but not for fraud and breach of contract, which require privity between engineer and neighboring property owner).

§3.38 2. Negligence Versus Nuisance

Many cases have stated that a property owner may be liable for nuisance injury to a neighbor even when the owner has taken all due care and there is no negligence. See *Curtis v Kastner* (1934) 220 C 185, 188; *Kafka v Bozio* (1923) 191 C 746, 748; *Redevelopment Agency of City of Stockton v BNSF Ry. Co.* (9th Cir 2011) 643 F3d 668, 673. At least one court, however, has found that there is little distinction between the two. See *Lussier v San*

Lorenzo Valley Water Dist. (1988) 206 CA3d 92, 104, in which the court stated that

PRACTICE TIP➤ In cases involving common interest developments and maintenance duties imposed by CC&Rs, the client may be able to plead a breach of contract cause of action in addition to negligence, thus potentially triggering a right to recover attorney fees. CC §5960.

On cause of action for violation of CC&Rs, see §§16.54–16.60. For further discussion of CC&Rs, HOAs, and common interest developments, see Advising California Common Interest Communities (2d ed Cal CEB).

§3.44 H. Inverse Condemnation

Public entities are often named as defendants in suits involving water saturation, drainage, and runoff because they are actively involved in flood protection and sewer and drainage management. Any claim against a public agency should include a cause of action for inverse condemnation. See, *e.g., Ruiz v County of San Diego* (2020) 47 CA5th 504, in which an inverse condemnation action failed because the county had not expressly or impliedly accepted a drainage easement that would have required it to maintain the private property owner's pipe. The *Ruiz* court noted that the county did not install, maintain, or control the pipe. The court also explained that the county's maintenance of its own pipes but not that of the property owner is relevant to the question of reasonableness for purposes of determining duty. 47 CA5th at 515. See also *Belair v Riverside County Flood Control Dist.* (1988) 47 C3d 550 (condemnation liability may be established when public improvement constitutes substantial cause of damage). A public agency is liable for unreasonable conduct that constitutes a substantial cause of damage to property owners. The claim does not require proof that the public agency affirmatively diverted waters where they would not otherwise have flowed. *Belair v Riverside County Flood Control Dist., supra*. See also *Locklin v City of Lafayette* (1994) 7 C4th 327 (city not liable in tort because landowner did not establish that city acted unreasonably in construction of method to discharge runoff). A public entity may also be held strictly liable. In *Pacific Shores Prop. Owners Ass'n v Department of Fish & Wildlife* (2016) 244 CA4th 12, the Department of Fish and Wildlife was strictly liable for the damages it caused property owners when it intentionally flooded private property to protect environmental resources. Strict liability also applied because this was not a flood control project. "Where the government intentionally reduced the level of historic flood control in order to flood plaintiffs' lands for purposes other than flood control, the agency is strictly liable in inverse condemnation for the damage its actions caused." 244 CA4th at 49.

PRACTICE TIP➤ A condemnation claim can form the basis of recovery of attorney fees, appraisal and engineering fees, and other costs. CCP §1036.

Government immunities apply as defenses in dangerous condition of public property cases (see, *e.g.,* Govt C §831.2, which provides immunity from liability for property damage caused by land failure that results from a natural condition of adjacent unimproved public property), but they do not apply in inverse condemnation cases. California inverse condemnation law is based on Cal Const art I, §19 (formerly §14), which provides that "private property shall not be taken or damaged for public use without just compensation." The California Supreme Court found that the addition of "or damaged" to §19 in 1878 expressed the government's consent to be sued—that is, it represents a waiver of the state's sovereign immunity. *Archer v City of Los Angeles* (1941) 19 C2d 19, 23.

For further discussion of condemnation actions relating to land stability, see Condemnation Practice in California §14.2 (3d ed Cal CEB); McNichols, *From Sovereign Immunity to Strict Liability: Using Inverse Condemnation in Water Damage Actions (Part 1),* 27 CEB Real Prop L Rep 93 (July 2004); McNichols, *From Sovereign Immunity to Strict Liability: Using Inverse Condemnation in Water Damage Actions (Part 2),* 27 CEB Real Prop L Rep 117 (Sept. 2004).

Other causes of action against public entities include nuisance and trespass. See §§3.30, 3.35. Nuisance claims against public entities must be presented within 1 year of the accrual of the cause of action. See Govt C §§911.2, 915–915.4; *City of San Jose v Superior Court* (1974) 12 C3d 447.

§3.45 I. Injunctive Relief

One method of enforcing rights before a landslide or subsidence damage occurs is by a court action for injunctive relief. Possible causes of action are nuisance (see §§3.30–3.34), trespass (see §3.35), negligence under CC §1714 (see §§3.36–3.38), and waste (see §3.39). Compensation for actual damage incurred is also available; however, because injunctive relief has as its purpose the prevention of future harm, compensation for diminution of property value or future damages is not available in addition to injunctive relief. *Spaulding v Cameron* (1952) 38 C2d 265; *Rhodes v San Mateo Inv. Co.* (1955) 130 CA2d 116.

§3.46 J. Temporary Eminent Domain Right

As an alternative to injunctive relief (see §3.45), a property owner may seek a condemnation order in an eminent domain proceeding to gain a temporary right to enter on adjacent or nearby property to effectuate repair or reconstruction work. CC §1002. This right should be granted if the following conditions are met:

- The property to be entered is not used for commercial production of agricultural commodities and forest products (CC §1002(e));
- There is a necessity to do the repair or reconstruction work and there is a great necessity to enter on the adjacent or nearby property because otherwise the work could not be done safely or the cost of the reconstruction would be substantially higher (CC §1002(a)(1));
- The subject property adversely affects the surrounding community (CC §1002(a)(1)(B));
- The right to enter will be exercised in a way that does the least damage to the property and causes the least inconvenience or annoyance to the owners or occupants (CC §1002(a)(2)); and
- The hardship to the person seeking to exercise eminent domain powers clearly outweighs the neighbor's hardship (CC §1002(a)(3)).

The court may order the person acquiring the temporary right of entry to pay the owner of the land subject to the temporary right a reasonable amount of rent for the use of the land. CC §1002(c). In addition, the court may require the person acquiring the temporary right of entry to post a bond or deposit cash security in an amount the court deems necessary to permit the owner of the adjacent or nearby property to restore the property to the condition it was in before the entry, if the person making the repairs does not complete them within a reasonable period of time. CC §1002(b).

§3.47 K. Remedial Action by Public Entity

Most municipalities and public entities will not intervene in private earth movement disputes except in the most egregious of circumstances. This reluctance stems from concern over liability. The legislature has stated that (Govt C §865(a))

> any undertaking to arrest the earth movement may not be successful or may have within it the potential for hastening the movement and the damages resulting from such movement. Regardless of how slight that potential for aggravating the damages, local public entities are

unwilling to undertake action to alleviate the hazard if such undertaking may invite potential liability.

To create an incentive for local public entities to take remedial action regarding gradual earth movement without fear of liability, the legislature has provided immunity for damage caused by their involvement, but only if they are acting in the "public necessity" and to prevent "impending peril." Govt C §866. When this is not the case, the governmental entity is not immune and thus will likely be unwilling to get involved. For this reason, it generally falls to the owner of the damaged property (or property being threatened with damage) to seek injunctive relief or temporary eminent domain. See §§3.44–3.46.

A claim against a public entity for violation of the Subdivision Map Act (Govt C §§66410–66499.41) or the California Environmental Quality Act (CEQA) (Pub Res C §§21000–21189.89.91) should be considered in cases involving new construction in order to prevent a developer from acquiring governmental approval (*i.e.,* permits) for development of residential property that might result in harming the neighboring properties.

V. DAMAGES AND COSTS

§3.48 A. Compensatory Damages

The measure of damages for tortious injury to property is the amount that will compensate for all the detriment proximately caused thereby. CC §3333. These damages are generally calculated as the difference between the value of the property before and after the injury, but an alternative measure of damage is the cost of restoring the property to its condition before the injury together with the value of the lost use. The formula adopted should be the one most appropriate to compensate the injured party for the loss sustained, normally the lesser of the two calculations. *Raven's Cove Townhomes, Inc., v Knuppe Dev. Co.* (1981) 114 CA3d 783. In addition, damages are recoverable for annoyance, inconvenience, discomfort, injury to land, and the cost of minimizing future damages. *City of San Jose v Superior Court* (1974) 12 C3d 447, 464. If the plaintiff's possessory interest is something less than a full freehold interest (*e.g.,* a lease or easement), the recovery of compensatory damages is limited to that proportionate interest. *Razzano v Kent* (1947) 78 CA2d 254.

This action can be premised on causes of action for negligence, nuisance, trespass, and other tort actions discussed in this chapter.

4

Tree-Related Disputes

Dennis A. Yniguez

§4.1 I. BENEFITS AND BURDENS OF TREES

Trees are essential to life. Their benefits include oxygen production, erosion control, storm water diversion, carbon sequestration, wildlife habitat, beauty, shade, privacy, proportion, increased property value, seasonal transition, and historical continuity. Their products include building materials and orchard crops. We must coexist with trees.

Yet not all trees remain appropriate for their location. Because trees constantly change, their growing presence can unreasonably interfere with the lawful use and enjoyment of neighboring properties. They may become a source of annoyance, nuisance, danger, and destruction. The same trees that provide shade, beauty, hammock supports, and family memories for one household can grow to block treasured views, interfere with sunlight access to patios or solar panels, stain cars, crack driveways and foundations with

swelling roots, or extend heavy and sometimes decayed branches over adjacent yards and structures.

II. PRACTICAL AND LEGAL ISSUES

A. Practical Issues

§4.2 1. Emotional Component

Given the dual capacity of the same tree to provide widely disparate benefits and burdens, a tree can become both revered and resented. As a tree grows in stature and beauty, a historic vista may be obscured or a neighbor's once-level walkway may become hazardous from encroaching roots or falling fruit. The competing sentiments of each party can be as tenacious and emotionally exhausting as family law controversies over children, pets, and possessions.

Like trees, humans are often rooted in their neighborhoods and communities. Disputes are complicated by the continuing proximity of the parties and their families and the possibility of encounters while walking the neighborhood or attending social and civic events.

These emotionally fraught cases can result in expensive, court-mandated decisions that may not please anyone. Most of these decisions are unpublished. See, *e.g., Bishop v Hanes* (Oct. 27, 2011, A129018, A130062; not certified for publication) 2011 Cal App Unpub Lexis 8205 (involving mediation, two lawsuits, and amendment of local view ordinance at behest of plaintiffs); *Beck v Hirchag* (Apr. 11, 2011, G041955; not certified for publication) 2011 Cal App Unpub 2649 (involving dueling experts and claims of intentional infliction of emotional distress); *Cordan v Kahn* (July 24, 2006, H029400; not certified for publication) 2006 Cal App Unpub Lexis 6422 (involving HOA CC&Rs, $5,000 in damages, and over $50,000 in attorney fees and costs before appeal).

§4.3 2. Legal Component

Resolution of a tree-related dispute may require awareness of state and local law; neighborhood association rules; homeowners association (referred to throughout this chapter as HOA) covenants, conditions, and restrictions (referred to throughout this chapter as CC&Rs); preexisting express or implied agreements; insurance coverage issues; and a working familiarity with tree characteristics and methods of damage appraisal.

§4.4 3. Neighborhood Component

As if these complications were not enough to induce a sensible attorney to retreat, tree disputes are seldom isolated. Other neighbor issues may be brewing over such matters as property boundaries, parking, and noise, or resentments may be smoldering from prior incidents of disrespect, whether real or imagined. See, *e.g., Save Laguna Creek v City of Pasadena* (Oct. 28, 2009, B206899; not certified for publication) 2009 Cal App Unpub Lexis 8596 (neighborhood organization seeking to save oak trees and stream); *Chinn v Board of Supervisors of County of Monterey* (Oct. 22, 2007, H030183; not certified for publication) 2007 Cal App Unpub Lexis 8560 (complaints from plaintiffs and neighbors that tree removal would diminish beauty of community).

B. Legal Issues

§4.5 1. Ownership

The starting point for any discussion of trees and liability is the determination of ownership. If the trunk originates entirely on one person's property, that person owns the tree. It does not matter where branches and roots extend. CC §833.

If a tree's trunk straddles a property line (a line tree or boundary tree) so that the trunk stands "partly on the land of two or more coterminous owners," it is owned by the coterminous neighbors as tenants in common. CC §834. As a tenancy in common ownership, it makes no difference what percentage of the trunk is on one side of the property line—both neighbors have equal ownership (unity of possession) of the entire tree. *Scarborough v Woodill* (1907) 7 CA 39, 40 (row of cypress trees growing on boundary line belongs to both owners as tenants in common). Neither coterminous landowner may remove a line tree without the other's consent, nor may either landowner cut away any part that extends onto their land if by so doing the landowner injures the common property interest in the tree. Each owner has an interest in the tree identical with the part that is on their land and has a right to demand that the owner of the other portion use that portion so as to "not unreasonably … injure or destroy the whole." 7 CA at 42 (cutting of every other tree on boundary line for firewood was not "legitimate enjoyment of the estate" in such trees). See also *Booska v Patel* (1994) 24 CA4th 1786, 1791 (landowner who removes encroaching parts of neighbor's tree must not unreasonably damage tree); *Anderson v Weiland* (1936) 12 CA2d 730 (enjoining landowner from injuring or destroying line trees used by plaintiff as windbreak).

§4.6 2. Branches and Debris

In *Bonde v Bishop* (1952) 112 CA2d 1, the encroachment on and interference with the neighbor's property was substantial: Three large branches from an established oak extended 40 feet above ground and 25 feet into the neighbor's yard; there was a large visible hole in the main trunk about 14 feet above the base; a sizable limb had previously broken loose and smashed through the plaintiffs' garage and section of fence; smaller branches and debris continually dropped onto the roof and property; one plaintiff was almost struck by a falling branch; and the plaintiffs were unable to leave their infant in their patio area from fear of dropping branches. The court ordered the defendant to abate the nuisance, requiring only the removal of overhanging limbs. See also *Grandona v Lovdal* (1886) 70 C 161, 162 (branches of tree overhanging adjoining land are nuisances; adjoining landowner may cut branches or sue for damages and abatement of nuisance but may not cut down tree or cut branches beyond extent to which they overhang). Note that the self-help recognized in the *Grandona* case was substantially affected by *Booska v Patel* (1994) 24 CA4th 1786, discussed in §4.31.

3. Roots

§4.7 a. Encroaching on Neighbor's Property

In *Crance v Hems* (1936) 17 CA2d 450, trespassing roots that destroyed soil fertility and deprived a neighboring property owner of the use of his land were held to be noxious, allowing the plaintiff to compel abatement and seek recovery of damages. A claim for special damages, such as compensation for time spent cleaning up tree debris, must be specially pleaded and proven. *Bonde v Bishop* (1952) 112 CA2d 1, 5 (trial court's allowance for special damages improper when plaintiffs did not specially plead and prove special damages). See also *Fick v Nilson* (1950) 98 CA2d 683 (adjoining landowner injured by encroaching roots from trees growing on another's land may cut off offending parts or may sue for damages and to abate nuisance but may not enter other's land and cut down trees). Note that the self-help recognized in the *Fick* case was substantially affected by *Booska v Patel* (1994) 24 CA4th 1786, discussed in §4.31.

§4.8 b. Damaging Public Sidewalks

Tree roots often cause cracks or upheavals in sidewalks. Not all sidewalk defects or height differentials between adjacent concrete panels are "dangerous conditions" and may be trivial as a matter of law. *Huckey v City of*

Temecula (2019) 37 CA5th 1092. "[T]he City does not have a duty to protect pedestrians from every sidewalk defect that might pose a tripping hazard—only those defects that create a *substantial* risk of injury to a pedestrian using reasonable care." *Nunez v City of Redondo Beach* (2022) 81 CA5th 749, 759. Although the responsibility for maintaining *public* sidewalks rests with the abutting owner, the owner ordinarily is not liable to third parties for injuries caused by the sidewalk's condition. See *Williams v Foster* (1989) 216 CA3d 510, 522 (property owner not liable to public merely for failing to maintain public sidewalk). The statutory duty to repair and maintain a public sidewalk is owed to the government, not to pedestrians. *Contreras v Anderson* (1997) 59 CA4th 188. Ordinarily, "a defendant cannot be held liable for the defective or dangerous condition of property which it does not own, possess, or control." 59 CA4th at 197.

The duty of the abutting property owner under Str & H C §5610 is limited to performing or paying for the repairs and maintenance of a public sidewalk; the statute does not impose liability on the owner, either to the governmental entity or to pedestrians, for injuries suffered because of a defective sidewalk. *Schaefer v Lenahan* (1944) 63 CA2d 324 (applying predecessor statute). This limitation on liability applies even if the abutting owner has received notice of the need to repair the sidewalk and has failed to do so. 63 CA2d at 331. See also *Williams v Foster, supra* (abutting owner owed no duty under §5610 or similar municipal ordinance to injured pedestrian for defective condition of sidewalk caused by roots of tree on parkway in front of owner's property, in absence of evidence that owner planted tree). But see *Gonzales v City of San Jose* (2004) 125 CA4th 1127 (city may adopt and enforce ordinance making abutting owners liable for injuries caused by sidewalk hazards).

Under the "sidewalk accident decisions" doctrine, liability may be found when injury is caused by a property owner's negligence or nuisance other than mere failure to maintain and repair. See *Jones v Deeter* (1984) 152 CA3d 798, 803 (discussing sidewalk accident doctrine). See also *Alpert v Villa Romano Homeowners Ass'n* (2000) 81 CA4th 1320 (HOA owed duty to warn pedestrians or repair defect in sidewalk caused by roots of tree planted and watered by HOA employee). A landowner or possessor of land also has a duty to take reasonable measures to protect persons from dangerous conditions on adjoining land when the landowner exercises possession or control over that adjacent land. 81 CA4th at 1334; *Jones v Deeter, supra*. However, "[u]nder California's rule, allowing one's customers to use the publicly owned property to access one's business is not enough to constitute an

assertion of 'control.'" *Lopez v City of Los Angeles* (2020) 55 CA5th 244, 263.

4. View Obstruction

§4.9 a. No Right to View, Light, or Air

There is no common law right to air, light, or an unobstructed view. Payment of a premium for a home with a view does not give rise to an easement. One pays for a view without buying it. On views and open space generally, see chap 13.

"It has long been established in this state that a landowner has no easement over adjoining land for light and air in the absence of an express grant or covenant." *Katcher v Home Sav. & Loan Ass'n* (1966) 245 CA2d 425, 429. Nuisance law is in accord: Blockage of light to a neighbor's property, except in cases when malice is the overriding motive, does not constitute actionable nuisance, regardless of the impact on the injured party's property or person. *Sher v Leiderman* (1986) 181 CA3d 867, 875; *Haehlen v Wilson* (1936) 11 CA2d 437, 441. Decreased property values and increased insurance costs to a neighboring owner are incidental to ownership of land and are generally not actionable. Similarly, aesthetic considerations alone are insufficient grounds on which to bring an action. See *Haehlen v Wilson, supra*.

View rights may be established by private agreement (see §§13.13–13.19) or by local ordinance (see *Echevarrieta v City of Rancho Palos Verdes* (2001) 86 CA4th 472; see also §§4.10–4.12).

§4.10 b. Local View Ordinances

Some California charter cities have enacted local ordinances that specify procedures for restoring views (and perhaps access to light) that have been obstructed by tree growth. For example, Alameda County Fairview District, Belvedere, Benicia, Berkeley, Beverly Hills-Trousdale Estates, Corte Madera, Del Mar, El Cerrito, Hillsborough, Kensington, Laguna Beach, Los Altos Hills, Malibu, Oakland, Orinda, Piedmont, Rancho Palos Verdes, Rolling Hills, Rolling Hills Estates, San Francisco, Santa Barbara, Sausalito, Tiburon, Torrance, and Ventura have such ordinances. View ordinances have been upheld as constitutional. See, *e.g., Echevarrieta v City of Rancho Palos Verdes* (2001) 86 CA4th 472 (city's municipal code); *Kucera v Lizza* (1997) 59 CA4th 1141 (Tiburon's view ordinance). By setting forth escalating dispute resolution procedures that may include informal reconciliation, mediation, arbitration, or municipal hearings, all view access

ordinances encourage neighbors to resolve issues voluntarily before a view claimant can proceed to litigation. See, *e.g.,* Sausalito Mun C §11.12.040(B); Berkeley Mun C ch 12.45 (solar access and views).

In *Kahn v Price* (2021) 69 CA5th 223, plaintiff sued under the San Francisco Tree Dispute Resolution Ordinance, claiming that an overgrown Monterey pine tree was a continuing nuisance. The tree grew from a sapling in defendants' backyard until it obstructed plaintiff's view of the San Francisco Bay and Marin County, a right protected by the ordinance. Had defendants heeded complaints from plaintiff long before the tree grew into an overgrown nuisance, the tree could have been trimmed to grow in a way that would have maintained its character and not interfered with plaintiff's view rights. Because defendants failed to do so, the tree could no longer be trimmed in a way that accorded view rights while maintaining the integrity of the tree, and the court upheld the trial court's ruling that the tree had to be removed entirely.

PRACTICE TIP➤ Before commencing a legal action, counsel should encourage the client to first approach the tree owner to voluntarily prune the trees. Some local ordinances have provisions allocating costs for mediation, arbitration, and litigation to the complaining party (see, *e.g.,* Malibu Mun C §17.43.150; Berkeley Mun C §12.45.050). Informal attempts to resolve a view dispute may well succeed and result in significant cost savings for the client.

PRACTICE TIP➤ Some local ordinances require the complaining party to attempt informal dispute resolution before initiating legal action. See, *e.g.,* Malibu Mun C §§17.43.110, 17.43.130 (complaining party must provide written notice to tree owner of view obstruction or offer to submit tree dispute to arbitration). Counsel should therefore check whether any applicable local ordinances have such requirements.

Some ordinances allow view claimants to seek restoration of views available at the time of purchase or other fixed date (see, *e.g.,* Rancho Palos Verdes Mun C §17.02.040 (view restoration and preservation)); others provide that the maximum possible restoration is the best view available at any time during the tenure of ownership (see, *e.g.,* Berkeley Mun C §12.45.040(3)(e); Orinda Mun C §17.22.1; Tiburon Mun C §15-7).

PRACTICE TIP➤ Local ordinances do *not* grant an absolute right to maintain or restore a view—rather, they set forth a procedure for the resolution of disputes relating to views lost to tree growth. See, *e.g.,* Berkeley Mun C §12.45.010; Tiburon Mun C §§15-4, 15-6 (setting

forth criteria for (1) evaluating whether a view right has been unreasonably impaired and (2) determining the appropriate restorative action, if any). Counsel should inform clients who wish to restore a view that photographs of historical views are only evidence to be considered, not guarantees that a court will order full restoration of the documented view.

§4.11 c. Views Versus Trees

An owner who desires to maintain an established view has standing, under local view ordinances, to seek to require other property owners to trim or top trees that grow to block or obscure the established view. However, tree topping is generally discouraged (see Govt C §53067) and is prohibited in some jurisdictions. See, *e.g.,* Alameda County Gen Ord C §12.11.110 (protection of trees). View ordinances require an equitable weighing of possible benefits and detriments to each party if trees are cut to restore views. See, *e.g.,* Oakland Mun C §15.52.010(D). The outcome of a municipal committee hearing, arbitration, or trial may range from a complete denial of view claims to an injunction compelling the removal of trees. See, *e.g., Weiss v City of Del Mar* (2019) 39 CA5th 609 (involving denial of appeal of planning commission's decision on pruning of trees under scenic views ordinance); *Echevarrieta v City of Rancho Palos Verdes* (2001) 86 CA4th 472; *Bishop v Hanes* (Oct. 27, 2011, A129018, A130062; not certified for publication) 2011 Cal App Unpub Lexis 8205 (long-running dispute over trees and views involved ongoing nuisance, res judicata does not apply, each case was reviewable on its facts).

NOTE➤ In *Weiss v City of Del Mar, supra,* the neighboring property owner had trimmed its trees to preserve the plaintiff's view before the planning commission heard the matter. The plaintiff, however, insisted that she was entitled to a determination that the defendant must comply with a plan of periodic trimming of the vegetation four times a year, at her expense, to the heights and widths that existed at the time she purchased the property. This request was denied by both the planning commission and the city council. Both the trial court and the appellate court ruled against the plaintiff on more technical grounds, that her writ petition had been untimely served on the city because the planning commission acted as a zoning board and thus fell under Govt C §65009(c)(1)(E) requiring service within 90 days of a land use or planning decision.

Common interest developments sometimes include provisions in their CC&Rs that require residents to maintain trees below specified heights to prevent view obstructions. See, *e.g., Ekstrom v Marquesa at Monarch Beach Homeowners Ass'n* (2008) 168 CA4th 1111 (board of directors for common interest development could not selectively enforce community's CC&Rs by excluding palm trees from express requirement that all potentially view-obstructing trees must be kept at rooftop height). However, the courts may use a reasonableness test to decide whether view obstruction prohibitions will be upheld. *Zabrucky v McAdams* (2005) 129 CA4th 618; *Stones v Hope Ranch Park Homes Ass'n* (Sept. 18, 2013, B243427; not certified for publication) 2013 Cal App Unpub Lexis 6666.

PRACTICE TIP➤ View ordinances differ greatly in such provisions as recovery of costs, allocation of attorney fees, and conditions under which view claimants or tree owners are required to pay the costs of tree pruning, removal, and replacement planting. Counsel should scrutinize the ordinance and discuss it thoroughly with the client to consider the best- and worst-case scenarios if the dispute escalates.

§4.12 d. Allocating Costs

Some ordinances include cost-shifting measures against tree owners who fail to meet in good faith with a neighbor in the early stages of a dispute. For example, an ordinance may require an uncooperative tree owner who refuses to participate in alternative dispute resolution proceedings and who eventually loses at trial to pay the opposing party's attorney fees. See, *e.g.,* Berkeley Mun C §12.45.050. Other ordinances apply an additional civil penalty if the view claimant ultimately prevails. See, *e.g.,* Oakland Mun C §15.52.080 ($1,000 civil penalty); Piedmont Mun C §3.22.11 (same).

PRACTICE TIP➤ In any case, under any ordinance, a disputant will benefit by creating a consistent paper trail of *respectful* communications should the dispute escalate and require resolution by an arbitrator, municipal committee, or judge.

A disputant who employs extraordinarily obstructive litigation tactics or otherwise acts in bad faith may be held accountable. See, *e.g., Piechuta v Hernandez* (Dec. 17, 2012, A132220; not certified for publication) 2012 Cal App Unpub Lexis 9152 (court upheld issuance of sanctions and default judgment granting plaintiffs permanent injunction, fees, and costs).

PRACTICE TIP➤ When drafting agreements to periodically maintain trees, counsel should specify "return-to" heights rather than "not-to-exceed" heights. The former description can be reestablished with certainty at each pruning session, while the latter description is difficult to interpret when minimal amounts of regrowth begin to exceed a specified height.

View corridors and pruning heights can be established relative to stable reference points such as survey monuments and concrete retaining walls by using tools such as telescoping height rods or handheld laser measurement devices.

§4.13 5. Interference With Crops

In *Grandona v Lovdal* (1889) 78 C 611, a plaintiff complained that trees on neighboring property excessively shaded his property and made it impossible to plow and cultivate for fruit trees. The plaintiff also alleged that the trees broke through his fences and allowed animals to destroy his vegetable and alfalfa crops. Both the trial court and the appellate court denied an injunction because the evidence was insufficient to show that the trees were a nuisance. The court observed that the neighbor had never planted or stated an intention to plant fruit trees, and it held that "we are unable to see how it can be said that land is injuriously affected, or that its owner's personal enjoyment is lessened, because he cannot use it for a purpose which he has never attempted or wished to use it for." 78 C at 617. On the other hand, the defendant provided ample evidence that he maintained the trees by cutting limbs and repairing fences regularly. 78 C at 613.

§4.14 6. Spite Fences

In 1913, California adopted a spite fence statute, declaring it a private nuisance to maliciously erect or maintain a "fence or other structure in the nature of a fence, unnecessarily exceeding ten feet in height … for the purpose of annoying the owner or occupants of adjoining property." Stats 1913, ch 197, §1. It was upheld against constitutional challenge (*Bar Due v Cox* (1920) 47 CA 713) and codified in 1953 as CC §841.4. A row of trees planted along or near the property line between adjoining parcels to separate or mark the boundary between the parcels is a "structure in the nature of a fence" and may be a spite fence under §841.4 if the other elements of the spite fence statute are met. *Wilson v Handley* (2002) 97 CA4th 1301, 1313. On spite fences generally, see §§5.12–5.14.

§4.15 a. Malicious Intent

A fence that is less than 10 feet tall may be a nuisance if it was constructed with malicious intent, it interferes with the plaintiffs' full enjoyment of their home, and its usefulness to the defendants is "subordinate and incidental." *Griffin v Northridge* (1944) 67 CA2d 69, 75. Tree owners may be enjoined from planting and maintaining boundary trees above 10 feet in height if the primary reason is to spite a neighbor. If, however, counsel can show that the trees were planted primarily for such reasons as beautification or privacy, "then annoyance was not the dominant purpose of the row of trees and the 'malice' element of [CC] section 841.4 [will not be] satisfied." *Wilson v Handley* (2002) 97 CA4th 1301, 1313.

§4.16 b. Injury to Comfort and Enjoyment of Property

As with nuisance actions generally, a plaintiff alleging that a neighbor has maliciously maintained trees as a "structure in the nature of a fence" must prove injury to the "comfort or enjoyment" of their property under CC §841.4. *Vanderpol v Starr* (2011) 194 CA4th 385, 394.

§4.17 c. Constructive Fence

Sometimes a line of border trees can be construed under local building, municipal, or zoning codes as a hedge or "constructive fence" requiring maintenance at a specified height if the plantings serve similar purposes such as boundary delineation. See, *e.g.,* Los Angeles County C §22.110.070 ("Trees, shrubs, flowers, and plants may be placed in any required yard, provided that all height restrictions applying to fences and walls shall also apply to hedges planted within yards and forming a barrier serving the same purpose as a fence or wall"). See also the restrictions on branch extensions and site obstruction contained in San Mateo Mun C §§27.84.040, 27.84.050. See also *Kraus v Grilli* (Feb. 3, 2015, B256183; not certified for publication) 2015 Cal App Unpub Lexis 846 (vegetation planted in row was adjudged to be hedge in violation of local ordinance restricting height of "fences, walls, and hedges" regardless of whether plantings were shrubs or "low trees" planted close together).

In addition, trees that exceed a certain height might run afoul of previously recorded easements or CC&Rs for the property. See, *e.g., Ezer v Fuchsloch* (1979) 99 CA3d 849, 860 (recorded restrictions for tract of lots provided that no tree, shrub, or other landscaping should be planted that would at present or in future obstruct view from any other lot); *Petersen v Friedman* (1958) 162 CA2d 245, 246 (deed contained easement reserving

right to receive light, air, and unobstructed view that limited any structure, fence, trees, or shrubs to height not exceeding 28 feet). Easements and CC&Rs should be reviewed closely for any such limitations. For example, in *Pacifica Homeowners' Ass'n v Wesley Palms Retirement Community* (1986) 178 CA3d 1147, a court of appeal found that the conditions stated in a conditional use permit to operate a retirement hotel did not impose height restrictions on trees. On the types of formal easements that have been codified, see generally CC §§801–816. See also chap 1.

§4.18 7. Interference With Solar Access

In 1978, California enacted the Solar Shade Control Act (SSCA) (Pub Res C §§25980–25986) to encourage the use of solar energy through the private installation of solar panels. Stats 1978, ch 1366, §1. The statute created strong incentives to encourage property owners to manage trees so that they would not cast shade on a neighbor's solar collectors during hours of maximum solar intensity. Violators were subject to criminal prosecution and daily fines. Trees that preexisted the solar panel installation were not exempt. On the SSCA and solar uses generally, see chap 8.

The SSCA was revised considerably in 2008 after an unpublished case from Santa Clara County (*California v Bissett* (2008) No. BB727255, Cal Sup Ct Santa Clara County) received national attention when a tree owner was criminally prosecuted and convicted under the SSCA for failing to cut coast redwood trees that shaded a neighbor's solar panels. Under the revised SSCA, violations are no longer criminally prosecuted, but individual users of solar collection devices can now bring a private nuisance action against tree owners for obstruction of light.

The SSCA allows any city or unincorporated area of a county to enact an ordinance exempting itself from the Act. Pub Res C §25985(a); *Zipperer v County of Santa Clara* (2005) 133 CA4th 1013. See also Alameda County Gen Ord C §12.11.290 (exempting Alameda County from the SSCA).

§4.19 a. Tree Exemption

The revised Solar Shade Control Act (SSCA) strengthens the position of tree owners. Trees are now exempted from the SSCA if they

- Are subject to a city or county ordinance (Pub Res C §§25984(d), 25985(b)),
- Were planted before the installation of the solar collector (Pub Res C §25984(a)),

- Were planted to replace trees that predated the installation of a solar collector (Pub Res C §25984(c)), or
- Are growing on land used for the production of timber or commercial agricultural crops (Pub Res C §25984(b)).

§4.20 b. What Is a "Solar Collector"?

In *Sher v Leiderman* (1986) 181 CA3d 867, a court held that a passive solar home, designed to optimize the use of the sun's light and warmth, is not an active "solar collector" as defined in Pub Res C §25981, and therefore neighboring property owners could not be enjoined from shading the home with vegetation. There is still uncertainty about which solar design concepts may be considered active or passive. Anders, Grigsby, Kuduk, Day, Frost & Kaatz, California's Solar Rights Act: A Review of the Statutes and Relevant Cases (2014).

8. Heritage Trees and Protected Trees

§4.21 a. Heritage Trees

Heritage trees are generally defined as those with a tree trunk of a required minimum diameter, as determined by local ordinances, and that are considered to have special historical or environmental value or significant community benefit. A number of cities have enacted local heritage tree ordinances designed to preserve and protect heritage trees on private or city-owned property. See, *e.g.,* Los Angeles County C Title 22, Div 8, ch 22.174 (oak tree permits); Pacifica Mun C §4–12.08 (preservation of heritage trees); Rocklin Mun C ch 17.77 (oak tree preservation); San Mateo Mun C ch 13.40 (heritage trees); Santa Cruz Mun C ch 9.56 (preservation of heritage trees and heritage shrubs); Temecula Mun C ch 8.48 (heritage tree ordinance).

These heritage tree ordinances define what constitutes a heritage tree within the particular locale and prohibit the cutting or removal of a heritage tree without first obtaining a permit to do so. Some local ordinances impose a penalty for a violation of the ordinance. See, *e.g.,* Santa Cruz Mun C §9.56.110 (misdemeanor and fine of $500 or greater, doubling for each successive offense); San Mateo Mun C §13.40.160 (fine up to $10,000 per participant per tree).

Note that an application for a permit to cut or remove a heritage tree may not result in significant adverse environmental impact in violation of the California Environmental Quality Act (CEQA) (Pub Res C §§21000–

21189.89.91). See *Clover Valley Found. v City of Rocklin* (2011) 197 CA4th 200 (city's planned mitigation efforts for oaks and other environmental matters at future development site were sufficient) and *Save Our Big Trees v City of Santa Cruz* (2015) 241 CA4th 694 (city failed to demonstrate that its proposed modification of its heritage tree ordinance fell within categorical exemption to CEQA). See also *Menlo Bus. Park, LLC v City of Menlo Park* (Nov. 30, 2009, A121348; not certified for publication) 2009 Cal App Unpub Lexis 9485 (city's grant of use permit was exempt from CEQA review); *West Davis Neighbors v Regents of Univ. of Cal.* (Dec. 5, 2005, A108104; not certified for publication) 2005 Cal App Unpub Lexis 11200 (denying neighbors' challenge to Regents' draft environmental impact report). Compare *Save the Agoura Cornell Knoll v City of Agoura Hills (Gelfand)* (2020) 46 CA5th 665 (EIR required when substantial evidence supported fair argument that project's mitigated negative declaration was inadequate to protect cultural resources, protected oaks, and other sensitive plants).

§4.22 b. Protected Trees

Local ordinances may also require tree owners to apply for a permit to remove or substantially alter any tree of a designated species, diameter, proximity to roadways or riparian zones, or other characteristics. Ordinances vary greatly in their designations of protected species, minimum diameters of protected trees, and penalties for unauthorized removal. For example, Oakland Mun C ch 12.36 (protected trees) states (Oakland Mun C §12.36.010):

> A. Among the features that contribute to the attractiveness and livability of the city are its trees, both indigenous and introduced, growing as single specimens, in clusters, or in woodland situations. These trees have significant psychological and tangible benefits for both residents and visitors to the city. …
> C. For all these reasons, it is in the interest of the public health, safety and welfare of the Oakland community to protect and preserve trees by regulating their removal; to prevent unnecessary tree loss and minimize environmental damage from improper tree removal; to encourage appropriate tree replacement plantings; to effectively enforce tree preservation regulations; and to promote the appreciation and understanding of trees.

III. HANDLING THE DISPUTE

A. Before Litigation

§4.23 1. Early Retention of Experts

Trees range in size from diminutive mugo pines (*Pinus mugo*) to Sierra redwoods (*Sequoiadendron giganteum*) more than 30 feet in diameter. They vary tremendously in form, growth rate, ultimate size, pruning response, vulnerability to pests and diseases, and susceptibility to environmental changes.

Counsel handling a tree dispute will do well to associate early in the case with a trained landscape professional who has had years of experience working with trees, such as an arborist, forester, landscape architect, or landscape contractor.

Among other things, a competent tree professional can help counsel understand

- The benefits and limitations of trees in specific environments,
- Whether certain species are subject to regulation by local ordinances,
- Whether failure of a tree or its parts may reasonably have been anticipated,
- What conditions and diseases may predispose a tree to decline,
- What measures may be taken to mitigate tree damage or restore lost benefits,
- What forms of appraisal may be appropriate to arrive at a defensible opinion of lost value, and
- What practical remedies may be available for an equitable resolution of a tree dispute.

Two professional arborist organizations, the American Society of Consulting Arborists (ASCA) (https://www.asca-consultants.org/) and the International Society of Arboriculture (ISA) (https://www.isa-arbor.com), maintain membership referral databases that are searchable by geographic area. ASCA designates Registered Consulting Arborists, and ISA designations include Board Certified Master Arborists and Certified Arborists. The education and experience requirements for each designation are described on their websites.

In any professional group, the range of abilities, experience, and communication skills varies considerably. Professional designations are no guarantee of competence or integrity, while some untitled landscape professionals have an abundance of both.

Arborists may become knowledgeable practitioners yet remain unfamiliar or uncomfortable with legal proceedings such as depositions, alternative dispute resolution (ADR) procedures, or trials. Attorneys often look to fellow counsel, casualty claims adjusters, and professional associations for referrals to capable experts.

NOTE➤ In *Fernandez v Lawson* (2003) 31 C4th 31, 37, the California Supreme Court stated that "[i]t is doubtful the average homeowner realizes tree trimming can require a contractor's license." Among the legal consequences of hiring an unlicensed contractor who is injured or whose employee is injured performing the work is that different employment relationships may arise with respect to "employer" liability for workers' compensation or tort damages. *Vebr v Culp* (2015) 241 CA4th 1044, 1051. See *Jones v Sorenson* (2018) 25 CA5th 933 (liability of hiring unlicensed contractor). Generally, an unlicensed tree service contractor or its employee who is injured while performing "tree removal, tree pruning, stump removal, or engages in tree or limb cabling or guying" on trees over 15 feet tall may bring an action for workers' compensation coverage or tort liability against the homeowner or other person who hired the contractor. Bus & P C §7026.1(a)(4).

§4.24 2. Early Investigation

Trees are often subject to local ordinances that regulate tree protection, designation of heritage trees, solar access and views, approved and prohibited tree species, and hazardous tree abatement. Although many cities display their municipal codes online, posted versions are not always current. Diligent counsel should inquire directly of a city clerk, public works department, or forestry department to determine what ordinances apply and whether existing ordinances have been revised or new ordinances are in development.

Parties to a dispute may be subject to neighborhood association rules, HOA CC&Rs, or express or implied agreements with other neighbors that bear directly on a party's rights and liabilities with respect to trees. Counsel should request and examine such documents very early in the case. Counsel should also determine whether the claimed damage or potential dispute may be covered by insurance and, if so, assist the client in notifying the insurer.

§4.24A B. Insurance Coverage Issues

Homeowners insurance policies vary considerably in their definitions of accidents, occurrences, and exclusions. Counsel may help a homeowner increase the likelihood of obtaining defense coverage by closely evaluating the language of the policy and complaint, as well as the facts of the case, and perhaps obtaining assistance from a coverage specialist before tendering a coverage claim on behalf of a homeowner.

In *Albert v Mid-Century Ins. Co.* (2015) 236 CA4th 1281, after receiving a vegetation management order from a local fire department, the homeowner instructed a contractor to prune several olive trees that were growing on a common boundary with an undeveloped rural parcel. The adjacent parcel owner sued for damage to the jointly owned trees and the homeowners insurance carrier declined to defend. The appellate court affirmed the carrier's successful motion for summary judgment, holding that, regardless of the insured's subjective intent not to damage the trees, the pruning was intentional conduct and not an occurrence or "accident … which results in … property damage" as described in policy language. The court held that "it is completely irrelevant that plaintiff did not intend to damage the trees, because she intended for them to be pruned." 236 CA4th at 1292. Intentionally cutting trees on a neighbor's land, even if acting on the good faith but mistaken belief that the trees were not on their land, is not an accident for purposes of insurance coverage, *Ghukasian v Aegis Sec. Ins. Co.* (2022) 78 CA5th 270.

§4.25 C. Alternative Dispute Resolution

For neighbor cases, alternative dispute resolution (ADR) may well be preferable to litigation and allow for a more global settlement of other unresolved issues.

Mediation gives the parties an opportunity to create their own binding agreement. Mediation is often preferable to litigation when the parties will have a continuing relationship with—or at least proximity to—one another after the dispute is resolved.

A professional mediator, who may or may not be an attorney, can often help disputing neighbors avoid litigation. In some municipalities, nonprofit community associations may mediate neighbor disputes at reduced cost.

PRACTICE TIP➤ The California Department of Consumer Affairs maintains a list of local mediation programs on its website (https://www.dca.ca.gov/consumers/dispute_resolution_programs.shtml).

NOTE➤ Beginning January 1, 2019, an attorney representing a client participating in a mediation or a mediation consultation must, before the client agrees to participate in the mediation or mediation consultation, provide the client with a printed disclosure containing the confidentiality restrictions described in Evid C §1119 and obtain a printed acknowledgment signed by that client stating that they have read and understand the confidentiality restrictions. A statutory form used to comply with this requirement can be found in Evid C §1129(d).

Binding arbitration may also be preferable to litigation if both parties are willing to risk an adverse outcome that will not be subject to judicial review. Arbitration is generally less expensive and provides immediacy, confidentiality, and finality of decision.

PRACTICE TIP➤ If the parties wish to try ADR before a lawsuit is filed, it may be prudent to have the parties execute a tolling agreement so that the right to bring a later suit is not waived if they are unable to resolve the dispute informally. If the parties will not agree to enter a tolling agreement, counsel should carefully monitor any applicable statutes of limitation. On statutes of limitation generally, see §§18.7–18.11.

IV. LEGAL THEORIES AND CAUSES OF ACTION

A. Nuisance or Abatement Action Against Neighboring Tree Owner

§4.26 1. Duty of Reasonable Care Owed by Every Landowner

"Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person." CC §1714(a). This statute imposes a duty on landowners to exercise reasonable care. *Lussier v San Lorenzo Valley Water Dist.* (1988) 206 CA3d 92. See also CC §3514 ("One must so use his own rights as not to infringe upon the rights of another").

§4.27 2. Nuisance Generally

Included within the general definition of nuisance in CC §3479 is anything that is "an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Under this definition, a tree may be a nuisance. See *Bonde v Bishop* (1952) 112 CA2d 1 (no right to

maintain trees in manner that unreasonably interferes with neighbor's peaceful enjoyment of property). See also *Vanderpol v Starr* (2011) 194 CA4th 385, 397 (although trees represented spite fence, no evidence of negligence found). A nuisance may be public, private, or both. A dispute between neighbors will generally be a private nuisance.

§4.28 3. Remedies for Private Tree Nuisance

For plaintiff's counsel, liability for nuisance requires proof of interference with the client's use or enjoyment of the property, proof that such interference caused the client to suffer "substantial actual damage," and proof that it was unreasonable as judged under an objective standard—not whether a particular person found the invasion unreasonable but "whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable." *San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 938.

The remedy for a private nuisance is either a civil action for damages or abatement. CC §3501. A person may abate a private nuisance by removing or, if necessary, destroying it without committing a breach of the peace or doing unnecessary injury. CC §3502.

An unreasonable or unlawful use of one's property is subject to abatement if it causes substantial injury to another's property or obstructs its reasonable use and enjoyment. *Griffin v Northridge* (1944) 67 CA2d 69, 75. "[E]ven a lawful use of one's property may be a nuisance if it is part of a general scheme to annoy a neighbor and if the main purpose of the use is to prevent a neighbor from reasonable enjoyment of his own property." *Hutcherson v Alexander* (1968) 264 CA2d 126, 130. The party causing the nuisance bears the expense of abating it. *Shevlin v Johnston* (1922) 56 CA 563, 565.

§4.29 a. Injunctive Relief

Counsel may seek injunctive relief on the client's behalf to compel a neighboring tree owner to abate encroaching branches or roots that have created a nuisance. "An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as defined in Section 3479 of the Civil Code, and by the judgment in that action the nuisance may be enjoined or abated as well as damages recovered therefor." CCP §731.

In *Mattos v Mattos* (1958) 162 CA2d 41, large eucalyptus trees that were blown over by a windstorm onto the plaintiff's property were held to be a nuisance under CC §3479. The plaintiff was entitled to an injunction to abate

regardless of whether the tree owner was negligent or whether the windstorm was an "act of God." The injunction was not based on a claim of negligence but on "the absolute liability of an owner to remove portions of his trees which extend over and upon another's land so as to constitute a nuisance." 162 CA2d at 43.

On injunctive relief generally, see chap 17.

§4.30 b. Separate Actions for Each Instance of Nuisance

When an encroachment is abatable, the nuisance is continuing, and each repetition or continuance amounts to another wrong giving rise to a new cause of action. *Kafka v Bozio* (1923) 191 C 746, 751. Roots and branches of trees may constitute a continuing nuisance. *Stevens v Moon* (1921) 54 CA 737, 743. The fact that damage already suffered is slight is not reason enough to deny an injunction, because the injury is of a continuing nature that increases with the growth of the trees. *Shevlin v Johnston* (1922) 56 CA 563, 565. "A person injured by a continuing nuisance may bring successive actions, even though an action based on the original wrong may be barred. The same rules apply whether the wrong is characterized as nuisance or trespass." *Bookout v State ex rel Department of Transp.* (2010) 186 CA4th 1478, 1489.

The statute of limitations for bringing a trespass or private nuisance claim is 3 years. CCP §338(b). Whether a trespass or nuisance claim is barred by the statute of limitations depends on whether the wrongdoing is permanent or continuing. *Madani v Rabinowitz* (2020) 45 CA5th 602. A trespass or nuisance is continuing if it can be remedied at a reasonable cost by reasonable means. *Mangini v Aerojet-General Corp. (Mangini II)* (1996) 12 C4th 1087, 1103.

§4.31 4. Limits on Self-Help

Before 1994, California law provided that an adjacent landowner whose property was damaged by encroaching roots and branches could cut off the offending parts or seek damages and sue for abatement by the tree owner but could not enter the neighbor's property to cut trees. See *Grandona v Lovdal* (1889) 78 C 611; *Bonde v Bishop* (1952) 112 CA2d 1; *Fick v Nilson* (1950) 98 CA2d 683; *Shevlin v Johnston* (1922) 56 CA 563; *Stevens v Moon* (1921) 54 CA 737.

These cases have been substantially affected by *Booska v Patel* (1994) 24 CA4th 1786. In *Booska,* a tall pine had extended roots beneath a fence into

the defendant's property. The defendant severed all the encroaching roots at the property line to a depth of three feet, although it was unclear whether the roots had caused any damage to the property. The plaintiff thereafter removed his own tree, stating that such drastic root severance by the defendant had caused the tree to become unsafe and a nuisance. Relying on *Grandona v Lovdal, supra,* and successor cases, the defendant claimed that he had an absolute right to remove any encroaching tree parts regardless of whether they were a nuisance and regardless of the effect on the tree owner. The court disagreed, stating that no one "is permitted by law to use his property in such a manner that damage to his neighbor is a foreseeable result" and that the proper test to be applied to the liability of the defendant is "whether in the management of his property he has acted as a reasonable [person] in view of the probability of injury to others." Thus, the court concluded, "whatever rights [the defendant] has in the management of his own land, those rights are tempered by his duty to act reasonably." *Booska,* 24 CA4th at 1791.

WARNING➤ The post-*Booska* rule is that branches extending over a property line or roots extending beneath the soil cannot be removed by self-help without regard for the overall effect on the tree.

Booska's reasonableness standard is symbolic of a judicial movement away from brightline rules. This movement (and the *Booska* holding specifically) has been criticized for "provid[ing] little guidance to parties and foster[ing] or encourag[ing] litigation." 6 Miller & Starr, California Real Estate 17:9 (4th ed).

PRACTICE TIP➤ Neighbors are not required to seek the permission of a tree owner before *reasonably* removing encroaching roots or branches on their own property. However, unreasonable removal of encroaching roots or branches may subject the neighbor and their agent to liability for damages. *Booska v Patel, supra*. One may not, without permission, enter another's property to abate the encroachment (*Fick,* 98 CA2d at 685). Further, the owner of real property has "the right to the surface and to everything permanently situated beneath or above it" (CC §829), and "[a] trespass may be on the surface of the land, above it, or below it" (*Martin Marietta Corp. v Insurance Co. of N. Am.* (1995) 40 CA4th 1113, 1133). See also CACI 2000. Thus, trespass may include the extension of saws, pruning tools, or other equipment into the neighbor's airspace as well as entry by a person without permission. Therefore, it is prudent to obtain unambiguous written permission

from the tree owner and to photograph the tree before and after pruning.

Shearing tree branches in a vertical plane along a boundary line is often inadvisable, for at least three reasons:

- The health or stability of the tree may be adversely affected;
- Ideal locations for proper pruning cuts are not all likely to be directly above the property line; and
- The bases of cut branches may lift and curve upward soon after pruning and appear to have been cut on the tree owner's side, subjecting the pruner to a trespass claim for double or treble damages. See §§4.43–4.47.

PRACTICE TIP➤ A client would do well to seek the recommendations of a competent arborist about the timing and extent of proposed pruning. Tree species and specimens vary in their response to severe pruning, and some trees are more vulnerable to disease infection or pest infestation at different times of the year. Obtaining documented professional advice can prevent or rebut claims that the pruning was unreasonable.

It is always the *tree owner's* decision whether to remove branch stubs between the tree trunk and an adjacent property line. See CC §833. Even a well-intentioned removal of branch stubs beyond a property line to "neaten up" the pruning could subject a neighbor to a trespass claim for double or treble damages. See CCP §733 and CC §3346, discussed in §§4.43–4.46.

§4.32 B. Action Against Neighbor for Damage to Tree

"A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs." CC §660. The measure of damages in California for tortious injury to property is "the amount which will compensate for all the detriment proximately caused thereby." CC §3333. There is no fixed rule for the measure of damage to an interest in real property. *PG&E v County of San Mateo* (1965) 233 CA2d 268, 274.

§4.33 1. Restoration Costs

In *Heninger v Dunn* (1980) 101 CA3d 858, the defendant bulldozed an access road over the plaintiff's property in a mistaken belief that he had a valid easement, destroying 225 trees and undergrowth. The plaintiff demanded about $240,000 to replace the dead or dying trees and

undergrowth, although the land had actually increased in market value by $5,000 (from $179,000 to $184,000). The trial court denied damages because there was no depreciation in the value of the plaintiff's property. The appellate court reversed, holding that "there is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property; whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case, will be adopted." 101 CA3d at 862. Restoration costs may be awarded even though they exceed a decrease in the market value of the property if "there is a reason personal to the owner for restoring the original condition" or "where there is reason to believe that the plaintiff will, in fact, make the repairs." 101 CA3d at 863.

In *Salazar v Matejcek* (2016) 245 CA4th 634, owners of an undeveloped rural property had personal reasons for keeping their 10-acre parcel in a natural undeveloped state, and were awarded $67,500 in restoration costs to replace 225 trees that were willfully and maliciously destroyed by a neighboring property owner. The award was trebled to $202,500 under CCP §733 and CC §3346 (see §§4.43–4.46). On appeal, the bench trial award was found to be reasonable even if the entire parcel only had a value of $75,000, and despite the absence of evidence demonstrating any diminution in property value caused by removal of the trees. 245 CA4th at 644.

§4.34 a. Reasonability of Restoration

Only the reasonable cost of replacing the destroyed trees with identical or substantially similar trees is recoverable. The achievement of a reasonable approximation of the land's former condition may involve something less than substantially identical restoration. "It may be more appropriate to award costs for the planting of saplings, or a few mature trees, or underbrush to prevent erosion and achieve a lesser but, over time, reasonable aesthetic restoration." *Heninger v Dunn* (1980) 101 CA3d 858, 865.

§4.35 b. Personal Reason for Restoration

In *Kelly v CB&I Constructors, Inc.* (2009) 179 CA4th 442, a negligently caused fire resulted in significant damage to soil and trees on a ranch. A jury determined by special verdict that the plaintiff had "a genuine desire to rebuild and repair his property for personal reasons" and awarded restoration damages more than 60 percent in excess of the property's value. On appeal, the court held that the jury's award was supported by substantial evidence and was not excessive as a matter of law. 179 CA4th at 447. See *Kallis v Sones* (2012) 208 CA4th 1274 (given personal value placed on

damaged tree by plaintiffs and likelihood they would restore tree of similar size, restoration costs were properly awarded).

Even when the personal reason exception applies, restoration costs "are allowed only if they are reasonable in light of the value of the real property before the injury and the actual damage sustained." *Orndorff v Christiana Community Builders* (1990) 217 CA3d 683, 690. See also *Heninger v Dunn* (1980) 101 CA3d 858, 865 (damages must, in all cases, be reasonable).

PRACTICE TIP➤ The determination of "just compensation within the overall limits of reasonableness" (101 CA3d at 869*)* can be highly contentious, particularly when different appraisal methods yield wildly different opinions of value and the doubling or trebling of damages is at stake. In such cases it is seldom helpful for counsel or experts to foster rigid expectations of compensation (so-called set points or anchor points) in the minds of the parties, thereby reducing the opportunity for flexible compromise in settlement talks.

§4.36 2. Professional Guidance

The Council of Tree and Landscape Appraisers' Guide for Plant Appraisal (10th ed 2018) has been widely used by landscape professionals to determine a measure of damages when trees and plants are injured or destroyed. According to the Guide, larger trees are generally considered to be worth more than smaller trees of the same species, but this may not be true when older trees have become overmature, brittle, diseased, dangerous, or otherwise less suitable for the site. However, the Guide is not a mandated industry standard, and other approaches to valuation may be appropriate and admissible.

NOTE➤ The Guide underwent a major revision in 2018 for its 10th edition, and has since been updated with a "corrigenda" and several revised forms. The updated contents are included in the most recent publication of the Guide (10th ed, Rev), which is available from the International Society of Arboriculture at https://wwv.isa-arbor.com/store/product/4390/cid/43/. The publication includes additional guidance on such topics as the contribution of trees to real estate market value (CREMV), appraisal of forest trees, and the use of benefit-based approaches (*e.g.,* i-Tree) to tree valuation. Appraisers are not required to apply the new guidelines, and national training workshops are being administered to familiarize tree specialists with updated 10th Edition appraisal procedures. A certification course for experienced

tree appraisers (Tree and Plant Appraisal Qualification (TPAQ)) is administered by the American Society of Consulting Arborists (https://www.asca-consultants.org/).

§4.37 3. Appraisal of Damage to Trees

Expert appraisals of tree damage can vary greatly depending on the selected approach to valuation. Generally, damages are appraised under the sales comparison (see §4.38), income (see §4.39), or cost (see §4.40) approach to value.

§4.38 a. Sales Comparison Approach

Under the sales comparison approach (sometimes called the market approach), the measure of damages is the difference in the value of the real property before and after the incident. *Hassoldt v Patrick Media Group, Inc.* (2000) 84 CA4th 153, 167. This approach is generally used by real estate professionals and is determined by reference to the price of comparable properties and by estimating loss in desirability and selling price as a result of the incident.

§4.39 b. Income Approach

Under the income approach, calculation of damages applies to the lost market value of trees or tree products in such situations as standing timber, Christmas tree lots, or fruit and nut crops. See *Montgomery v Locke* (1887) 72 C 75; *Hill v Morrison* (1928) 88 CA 405.

§4.40 c. Cost Approach

Under the cost approach, the appraiser may calculate repair, reproduction, or functional replacement costs, or may use a formulaic approach to value calculation such as the trunk formula technique. These approaches take into account and adjust for such factors as tree species, size, specimen quality, growth rates, resilience, vulnerability to decay and insect infestation, aesthetic and functional contributions, and suitability of the tree to the site and climate. See, *e.g., Salazar v Matejcek* (2016) 245 CA4th 634; *Kallis v Sones* (2012) 208 CA4th 1274; *Rony v Costa* (2012) 210 CA4th 746.

§4.41 4. Criminal Violations

Penal Code §602(a) provides that willfully committing a trespass by "[c]utting down, destroying, or injuring any kind of wood or timber standing

or growing upon the lands of another" is a misdemeanor. Similarly, willful injury to or disfigurement or destruction of a shade tree or ornamental plant within municipal limits (whether on private or public property) is also a misdemeanor. Pen C §622.

V. ATTORNEY FEES, DAMAGES, AND COSTS

§4.42 A. Attorney Fees

In California, attorney fees are not recoverable unless authorized by statute or contract. CCP §1021. In tree disputes, for example, a plaintiff may seek fees under the theory that the injury occurred on lands either under cultivation or intended or used for the raising of livestock. See CCP §1021.9; *Kelly v CB&I Constructors, Inc.* (2009) 179 CA4th 442. The trespass need not occur onto the specific portion of the land under cultivation. *Hoffman v Superior Ready Mix Concrete, L.P.* (2018) 30 CA5th 474, 483. If there are only nominal damages, and not any actual or compensable injury to real or personal property as a result of the trespass, under CCP §1021.9 attorney fees will not be awarded. *Belle Terre Ranch, Inc. v Wilson* (2015) 232 CA4th 1468.

A plaintiff may also attempt to obtain attorney fees in a damages suit against an unlicensed contractor hired by a third party if the work performed required a license. CCP §1029.8. See *Rony v Costa* (2012) 210 CA4th 746.

§4.43 B. Doubling or Trebling of Damages

Code of Civil Procedure §733 and CC §3346 address damage to trees by trespassers:

- Damages are doubled if the trespass is casual and involuntary;
- Damages may be trebled if the trespass is willful and malicious; and
- Only actual damages apply if the trespasser relies on a survey prepared by a licensed surveyor. CC §3346(b); *Ostling v Loring* (1994) 27 CA4th 1731, 1742; *Drewry v Welch* (1965) 236 CA2d 159, 181.

Both statutes must be read and considered together. *Drewry v Welch, supra*. See also *Heninger v Dunn* (1980) 101 CA3d 858 (denying treble damages); *Swall v Anderson* (1943) 60 CA2d 825 (same). Increased damages may include the cost of planting replacement trees and aftercare. *Kallis v Sones* (2012) 208 CA4th 1274. Annoyance and discomfort damages resulting from injuries to trees may also be doubled or trebled under both CCP §733 and CC §3346. *Fulle v Kanani* (2017) 7 CA5th 1305. See also *Vieira Enters.,*

Inc. v McCoy (2017) 8 CA5th 1057, 1091 (holder of recorded easement has sufficient occupancy to recover for annoyance and discomfort damages); *Kelly v CB&I Constructors, Inc.* (2009) 179 CA4th 442, 456 (annoyance and discomfort damages limited to occupants of property).

Cutting roots located on a party's own property during construction, without any intentional crossing of the property line, was not trespassory damage to a tree located on a neighbor's property and therefore not subject to double or treble damages under CC §3346. *Russell v Man* (2020) 58 CA5th 530, 537.

PRACTICE TIP➤ These statutes refer not only to trees but to undergrowth. See *Heninger,* 101 CA3d at 868 (defining "underwood" and noting that neither statute nor case law excludes such plant growth from CC §3346).

Under CC §3346(c), the statute of limitations for an action is 5 years from the date of trespass, not the usual 3-year time limit (CCP §338(b)) from the date the property was damaged.

§4.44 1. Double Damages Are Mandatory

The awarding of double damages for mistaken or negligent trespass is mandatory, not discretionary. *Ostling v Loring* (1994) 27 CA4th 1731; *Heninger v Dunn* (1980) 101 CA3d 858; *Drewry v Welch* (1965) 236 CA2d 159.

A negligently caused fire that crossed a boundary was held to be a trespass entitling plaintiff to mandatory doubling of actual damages to trees. *Kelly v CB&I Constructors, Inc.* (2009) 179 CA4th 442. However, in *Scholes v Lambirth Trucking Co.* (2020) 8 C5th 1094, the California Supreme Court disapproved of *Kelly,* and held that CC §3346(c) does not apply to damages to trees caused by negligently set fires. *Kelly* had construed the "plain language" of CC §3346(c) for its holding, while *Scholes* referred to the legislative history of Health & S C §§13007 and 13008 as evidence of controlling statutory authority.

§4.45 2. Treble Damages Are Discretionary

The awarding of treble damages for willful and malicious trespass is discretionary and requires an intent to "vex, harass, annoy, or injure" a tree owner. *Crofoot Lumber, Inc. v Ford* (1961) 191 CA2d 238. Mere spite or ill will is not sufficient. *Caldwell v Walker* (1963) 211 CA2d 758. See also *Stewart v Sefton* (1895) 108 C 197; *Roche v Casissa* (1957) 154 CA2d 785. Willful and malicious intent must be alleged and proved to recover treble

damages. *Stewart v Sefton, supra*; *Fick v Nilson* (1950) 98 CA2d 683; *Swall v Anderson* (1943) 60 CA2d 825; *Butler v Zeiss* (1923) 63 CA 73.

§4.46 a. Treble Damages Require Willful and Malicious Action by Defendant

In *Roche v Casissa* (1957) 154 CA2d 785, evidence that the defendant knew that trees were not on his land but cut them anyway solely to improve his view supported a finding that his actions were wanton and willful. The award of treble damages was found to be properly within the discretion of the trial court. 154 CA2d at 788. In *Salazar v Matejcek* (2016) 245 CA4th 634, the owner of rural undeveloped property was awarded treble the cost of restoration of 225 trees willfully and maliciously destroyed, even if tree destruction had not necessarily reduced the property value.

Doubling or trebling of damages is "penal and punitive" in nature. *Baker v Ramirez* (1987) 190 CA3d 1123, 1138. The purpose of CC §3346, Pen C §602, and CCP §733 is to protect trees on private land, and the treble damage provisions must be treated as penal and punitive. When there is no showing of "an actual malevolent purpose," the trial court is empowered to deny the imposition of treble damages. *Swall v Anderson* (1943) 60 CA2d 825, 831. The need for deterrence is obvious in those torts (such as timber conversion) that involve wrongful gains to the defendant, because "compensatory damages will at most restore the wrongdoer to the *status quo ante* and may even leave him with a profit." *Drewry v Welch* (1965) 236 CA2d 159, 176.

§4.47 b. Necessity May Trump Damages

In *Altpeter v Postal Tel.-Cable Co.* (1917) 32 CA 738, a utility was authorized to sever tree branches along a street to the extent necessary for proper working of its wires but was liable to the adjacent landowner if trees were unnecessarily mutilated. The court found that the landowner failed to prove that the pruning was unnecessary for proper and efficient use of the wires. The damage caused by the pruning was necessary to the safe and proper operation of the wires and therefore could not form a basis for recovery. 32 CA at 747.

§4.48 C. Punitive Damages

The plaintiff may seek statutory treble damages, or punitive damages under CC §3294, but both may not be awarded for the same injury because statutory doubling or trebling of damages is already punitive in nature.

Baker v Ramirez (1987) 190 CA3d 1123, 1138 (when punitive damages awarded, additional award of double or triple damage amounts to punishing defendant twice).

and "its usefulness to defendants was subordinate and incidental." *Griffin v Northridge* (1944) 67 CA2d 69, 75.

The element of malice may be inferred from the height and location of the fence, the type of construction, and the circumstances surrounding erection and maintenance of the fence, including conduct of the neighbor that erected the fence evidencing ill will. *Bar Due v Cox* (1920) 47 CA 713, 715. In *Haehlen v Wilson* (1936) 11 CA2d 437, the trial court's grant of injunctive relief requiring removal of a 6½-foot fence was reversed because no evidence of malice had been produced. "The malicious intent must be so predominant as a motive as to give character to the structure, and it must be manifest and positive that the real usefulness of the structure will be clearly subordinate and incidental." 11 CA2d at 441.

This suggests that the outcome of spite fence cases will necessarily be heavily fact-based. For example, in *Griffin v Northridge*, *supra,* evidence that supported a finding of malice consisted of the defendants' campaign of harassment that included tearing up their neighbors' flower garden, placing malodorous garbage under their dining room window, throwing paint onto their home, and yelling epithets across the property line. Thus an otherwise legal fence may become a spite fence, justifying injunctive relief, damages, and even punitive damages, if its erection was part of a pattern of malicious harassment.

§5.15 4. Fence Versus Easement for Access

Sometimes a client will claim that a neighbor has constructed a fence (or other improvements) on the neighbor's own property that cuts off or interferes with the client's use of an easement for access to their own parcel. The access easement, sometimes denominated as an easement for ingress and egress, or a right-of-way easement, may have resulted from an express grant or reservation or may have arisen by prescription, implication, or necessity. On easements generally, including access easements, see chap 1. On fences or other obstructions interfering with easements for light, air, and views, see §5.9; chap 13.

§5.16 a. Self-Help

One injured by a private nuisance may abate it by removing or, if necessary, destroying the thing that constitutes the nuisance, without committing a breach of the peace or doing unnecessary injury. CC §3502. The duty to act reasonably always tempers the right to self-help. See *Booska v Patel* (1994) 24 CA4th 1786, 1791.

When a neighbor has fenced in a portion of the owner's property, the property owner is not permitted to use self-help to remove the fence, even if it is undoubtedly on the owner's property. *Daluiso v Boone* (1969) 71 C2d 484, 490. Trespass is a tort against peaceable possession of property, not a tort against the ownership of property. 71 C2d at 499. Therefore, a property owner who goes onto lands in the peaceable possession of another commits the tort of trespass and may be liable for damages. 71 C2d at 500.

Unfortunately, litigation over fences that block easements is often preceded, if not precipitated, by the assertion of self-help remedies such as removal of a lock with a bolt-cutting tool or unilateral destruction of the offending fence. When one neighbor enters the property of another and wrongfully destroys a fence attached to the other's property, the neighbor commits a trespass and the owner of the fence may bring an action for injunctive relief and for damages for its wrongful removal. *McCormick v Appleton* (1964) 225 CA2d 591; *Morrissey v Morrissey* (1923) 191 C 782. See also Pen C §602(i).

PRACTICE TIP➤ Counsel should advise the owner of the access easement to provide the neighbor with a written explanation of the problem and a reasonable opportunity to alleviate it voluntarily. It is also a good idea to document the offending structure's location with photographs, video, measurements, and third party declarations, perhaps including a surveyor.

Self-help actions may lead to physical confrontations. Sometimes law enforcement agencies are summoned. Unless the parties' conduct has gotten completely out of hand, the police response will usually be to advise the parties to seek legal counsel; sometimes they will refer the parties to a local mediation service if one exists.

PRACTICE TIP➤ Whether or not a physical confrontation between neighbors has taken place, if the word "trespass" is uttered in any communication, or alleged in any pleading, directed against the client, whether referring to the construction of a fence or its removal, counsel should consider a tender of defense under a homeowners policy or other general liability insurance.

For additional discussion of self-help abatement, see §9.19.

§5.17 b. Extinguishment of Easement by Adverse Possession

Regardless of whether the easement was created by an express grant or reservation or whether it arose by prescription, implication, or necessity, if the access way is entirely blocked by a fence installed by the owner of the servient tenement (including a fence with a locked gate that only that owner can open), and if that fence is maintained in place continuously for 5 years, the easement will be extinguished by adverse possession. *Glatts v Henson* (1948) 31 C2d 368, 370; *Masin v La Marche* (1982) 136 CA3d 687, 693; *Ross v Lawrence* (1963) 219 CA2d 229, 232.

Unless the easement is separately assessed, the owner of the servient tenement must also show timely payment of property taxes on the servient tenement in order to extinguish an easement by adverse possession. *McLear-Gary v Scott* (2018) 25 CA5th 145.

An easement created by grant, as distinguished from one established by use, cannot be lost by mere nonuse (CC §811; *Tract Dev. Servs., Inc. v Kepler* (1988) 199 CA3d 1374, 1384; but see CC §§887.010–887.090, concerning abandonment of easements), but nonuse may be considered as a factor in extinguishment by adverse possession. *Glatts,* 31 C2d at 371. See §1.17. Partial extinguishment is possible if the obstruction blocks part of the easement. *Glatts,* 31 C2d at 371. Thus, a non-boundary fence that runs along the center line of an easement could extinguish half of the easement if it prevents use of the easement on that half. But see *Scruby v Vintage Grapevine, Inc.* (1995) 37 CA4th 697, discussed in §§5.18–5.21. On the other hand, if the facts show that the use by the owner of the servient tenement was not "hostile" and adverse to the easement owner (*e.g.,* if assurances were given that the fence crossing the easement was not intended to extinguish access rights), then no termination will take place. *Vieira Enters., Inc. v McCoy* (2017) 8 CA5th 1057, 1078; *Clark v Redlich* (1957) 147 CA2d 500, 507; *Furtado v Taylor* (1948) 86 CA2d 346, 352.

For more on extinguishment of easements by adverse possession, see §§1.33, 2.45–2.47, 18.18. On adverse possession as a cause of action, see chap 16. On adverse possession as a defense, see chap 18.

§5.18 (1) Partial Extinguishment

Before the decision in *Scruby v Vintage Grapevine, Inc.* (1995) 37 CA4th 697 (see §5.19), the partial blocking of an access easement for the statutory period would result in pro tanto extinguishment of that easement. That is, when a nonexclusive easement for ingress and egress had been created by

express grant or reservation, with the precise location and dimensions of the easement established by a metes-and-bounds property description, by reference to a recorded map, or by other means, and the owner of the servient tenement prevented use of a part of the designated easement area for the prescriptive period, the access rights appurtenant to the dominant tenement would thereafter be restricted to that portion of the easement area that had not been so blocked. *Glatts v Henson* (1948) 31 C2d 368. See also *Ross v Lawrence* (1963) 219 CA2d 229, 232. Note, however, that, at least under the unusual facts presented in *Clark v Redlich* (1957) 147 CA2d 500, 506, erection of a fence around the servient tenement does not necessarily constitute prevention of use by the servient owner.

The fact that an expressly granted, specifically described, nonexclusive easement was wider than necessary for "reasonable" access to the dominant tenement did not enter into the analysis (*Tarr v Watkins* (1960) 180 CA2d 362, citing *Ballard v Titus* (1910) 157 C 673, 681):

> Where the way over the surface of the ground is one of expressly defined width, it is held that the owner of the easement has the right, free of interference by the owner of the servient estate, to use the land to the limits of the defined width even if the result is to give him a wider way than necessary.

See also *Haley v Los Angeles County Flood Control Dist.* (1959) 172 CA2d 285, 289 n1. This rule no doubt resulted in some uneconomic restrictions on use of the servient tenement when the easement was wider than necessary for reasonable access to the dominant tenement and the owner of the servient parcel was unnecessarily precluded from using parts of their land. Nevertheless, it offered the advantage of a brightline rule, enabling parties and their counsel to analyze a situation and predict outcomes. The parties could address the economics by agreement: If the servient owner wished to "buy out" part of the easement area, a price could be set and a deal struck.

§5.19 (2) *Scruby v Vintage Grapevine, Inc.*

In *Scruby v Vintage Grapevine, Inc.* (1995) 37 CA4th 697, the court decided an easement dispute on the basis of whether the use of the property by the owner of the servient tenement unreasonably interfered with the purpose of the easement. The plaintiff had a "nonexclusive easement, 52 feet in width, for road and utility purposes." The easement had been granted to provide access to a planned subdivision, but the subdivision was never built and the easement provided access only to plaintiff's property. The owner of the servient estate, a winery, had placed permanent, fixed obstructions such

CCP §1021.9 attorney fees will not be awarded. *Belle Terre Ranch, Inc. v Wilson* (2015) 232 CA4th 1468, 1476.

§5.29 b. Other Issues Related to Fencing for Animal Husbandry

Sometimes fences erected to constrain livestock from wandering can give rise to disputes in the absence of any damage caused by animals.

EXAMPLE➤ Harris is the owner of pastoral land in Fresno County. Harris gives his neighbor, Hollister, permission to graze goats, sheep, and other livestock on the land, from which Harris benefits by reason of "weed abatement" and the reducing of any fire hazard. Suppose that Hollister erects a fence to contain the animals, either enclosing an area exclusively on Harris's property or straddling the boundary and enclosing some property owned by each of them. As time passes, the friendly relationship of the neighbors sours. Hollister files a quiet title action asserting adverse possession (see §5.30), or alternatively a prescriptive easement (see §5.31), to which Harris responds with a cross-complaint for trespass, seeking injunctive relief and money damages.

§5.30 (1) Adverse Possession

When a person is claiming title by adverse possession not founded on an instrument, judgment, or decree, that person will be deemed to have possessed and occupied the land if, among other things, "it has been protected by a substantial enclosure." CCP §325. See *Palin v Sweitzer* (1937) 8 C2d 329, 330 (fences, together with natural barriers, constitute sufficient enclosures to establish adverse possession for cattle pasturage). Only the land so occupied, and no other, is deemed to have been adversely possessed. CCP §324.

Of course, no adverse possession will be established unless the land in question has been occupied and claimed for a period of 5 years continuously, openly or notoriously, and without permission, and the person or persons claiming adverse possession, or their predecessors and grantors, have paid all taxes levied and assessed on the land for that period. CCP §325. In the hypothetical situation described in §5.29, there would likely be an intense disagreement as to whether permission to use the land for grazing, constituting a license, had ever been properly revoked, and if so, when that happened. Moreover, because the land enclosed by the fence is not likely to have been

separately assessed, the requirement that the adverse user have paid all real property taxes is unlikely to be satisfied. On adverse possession and payment of property taxes, see §2.47.

§5.31 (2) Prescriptive Easement

The adverse possessor in the scenario described in §5.29 is also unlikely to prevail on a claim of prescriptive easement. Claims for prescriptive easement that preclude the fee title holder from making any use of the property (*i.e.,* "exclusive" easements based on adverse use) are viewed by the courts as a circumvention of the requirement that to acquire fee ownership by adverse use one must prove payment of property taxes. Unable to prove the elements of either prescriptive easement or adverse possession, the claimant will be denied either form of relief. See *Kapner v Meadowlark Ranch Ass'n* (2004) 116 CA4th 1182; *Harrison v Welch* (2004) 116 CA4th 1084; *Mehdizadeh v Mincer* (1996) 46 CA4th 1296, 1305; *Silacci v Abramson* (1996) 45 CA4th 558, 564. These cases generally involved the enclosure by one owner of a portion of a neighbor's property because of a misplaced boundary fence or other obstruction, and they arose in a residential context. Nonetheless, their logic would seem to apply in the case of a fence creating a pen for sheep, goats, llamas, ostriches, or other domesticated animals intentionally built to fence in a portion of a neighbor's property. The adverse user might claim entitlement to a prescriptive easement because the use was never exclusive (*e.g.,* because a gate in the fence was never locked, the fee owner could at any time have entered the pen to pet the animals), but such an argument's success appears doubtful. For additional discussion of prescriptive easements and unlikelihood of success, see §§1.21, 2.50, 16.63, 18.30.

The courts have consistently rejected attempts by claimants who cannot prove adverse possession (usually because they failed to timely pay all taxes assessed) to instead claim an exclusive prescriptive easement for such use. *Hansen v Sandridge Partners, L.P.* (2018) 22 CA5th 1020, 1032.

§5.32 (3) Actions Incurring Criminal Liability

It is a misdemeanor to enter on lands owned by another without the license of the owner or legal occupant "where signs forbidding trespass are displayed, and whereon cattle, goats, pigs, sheep, fowl, or any other animal is being raised, bred, fed, or held for the purpose of food for human consumption" and to damage, destroy, or remove any fences intended to designate the boundaries of those lands. Pen C §602(h)(1); *Messick v Superior Court* (1922) 57 CA 340, 341. Similarly, it is a misdemeanor to destroy

6

Domestic Animals

Mary Catherine Wiederhold

§6.1 I. SCOPE OF CHAPTER

This chapter discusses neighbor disputes that arise in connection with domestic animals. The majority of neighbor disputes involving animals concern dogs and cats; however, most of the case law in this area involves dogs. The issues that most attorneys will be consulted on include dog bites, treatment of guide and service dogs, and dog fighting. Although there are some rules that apply only to dogs, most of the principles discussed in this chapter can be applied to any domestic animal.

PRACTICE TIP➤ Many cases in this area result in unpublished decisions. Although generally not cited to in this book, unpublished cases may provide counsel with insight and further illustration of the arguments and theories discussed throughout this chapter.

§6.2 A. Animal Ownership and Injury

A pet is the personal property of the owner. *Kimes v Grosser* (2011) 195 CA4th 1556, 1559. As such, many general principles of tort law and much statutory law apply in this area. In particular,

- The ownership of domestic animals is covered in CC §655.
- The measure of damages for injury to or deprivation of property, including animals, is governed by CC §§3354–3355.
- Conversion, which may apply when an animal damages another's property or when the animal itself is injured, killed, or stolen, is governed by CC §3336.
- When an animal is injured by a willful or grossly negligent party, exemplary damages (also known as punitive damages) are allowed under CC §3340.
- Damages for the unlawful taking and detaining of an animal are allowed under CCP §667.
- Animal owners may obtain a protective order giving them exclusive care, possession, or control of an animal and ordering a restrained person to stay away from, and refrain from taking or harming, that animal. CCP §527.6(b)(6)(A).
- A family law court may include in a protective order a grant to the petitioner of the exclusive care, possession, or control of any animal in the household. Fam C §6320(b).
- A family law court, at the request of a party, may enter an order to require a party to care for the pet animal. Fam C §2605.
- Companion animals that a person keeps and provides care for as a household pet or for companionship, emotional support, service, or protection are personal property, and their value is to be ascertained in the same manner as the value of other property. Pen C §491. Theft of a companion animal valued at over $950 is grand theft. Pen C §487(b). See Pen C §491(b) for definition of companion animal.
- Cruelty to animals is governed by Pen C §§596–600.

§6.3 B. Animal Cruelty Laws

California's animal cruelty statutes (Pen C §§596–600) cover a number of different instances, from elephants (Pen C §596.5) to rodeo animals (Pen C §596.7). Pertinent to many neighbor disputes, Pen C §597.5(a)(1) prohibits the ownership, possession, or training of dogs for fighting. Nor may anyone encourage a dog to fight with another dog. Pen C §597.5(a)(2). Mere presence as a spectator or while preparations for dog fighting are being made is also punishable under the statute. Pen C §597.5(b).

PRACTICE TIP➤ Violation of the animal cruelty statutes is not enforceable through a private right of action. See *Animal Legal Defense Fund v Mendes* (2008) 160 CA4th 136, 142:

> In light of the overall statutory scheme effectively "deputizing" humane societies to aid local authorities in the enforcement of anticruelty laws, we think it clear that the Legislature did not intend to create a private right of action in other private entities, no matter how well intentioned the goals of such entities.

See *Animal Legal Defense Fund v California Exposition & State Fairs* (2015) 239 CA4th 1286 (animal rights group may not bring civil action based on taxpayers' private right of action under CCP §526a); *United Poultry Concerns v Chabad of Irvine* (9th Cir 2018) 743 Fed Appx 130 (unpublished opinion) (animals rights group lacks standing to sue synagogue for ritualistic use of live chickens). But see *Loy v Kenney* (2022) 85 CA5th 403 (nine different buyers who bought sick puppies granted preliminary injunction pending trial against seller on false advertising and other claims).

NOTE➤ Counsel should advise clients to report suspected animal cruelty to local law enforcement, humane society, or animal control services.

§6.4 C. Service Animals

Almost any type of animal trained to do work or perform tasks for the benefit of a disabled person is considered a "service animal" under the federal Americans with Disabilities Act of 1990 (ADA) (42 USC §§12101–12213). 28 CFR §36.104 (applies to state or local government activities, including housing counseling and referral, public housing, and housing planning). Many forms of disability or medical condition are considered a disability under the ADA. Dogs (and other animals) trained to assist the disabled are referred to collectively in the ADA as "service animals." 28 CFR §36.104. The ADA distinguishes between service animals and "a pet or support

animal … able to discern that the handler is in distress." 75 Fed Reg 56193 (Sept. 15, 2010). Support animals are not protected under the ADA. See 28 CFR §35.190.

NOTE➤ Generic use of the term "guide dog" is outmoded, but the term is still defined in California law, along with "signal dog" and "service dog." CC §54.1(b)(6)(C).

Civil Code §54.1 provides for full and equal access to housing, medical facilities, public buildings, modes of transportation, and more for a service dog that is individually trained to meet the special requirements of an individual with a disability, performing such tasks as protection, rescue, wheelchair guidance, or recovery of dropped items. The statute also recognizes guide dogs for the visually impaired and signal dogs for the deaf or hard of hearing (to alert them to intruders or sounds). CC §54.1(b)(6). The owner of a housing accommodation may establish terms in a lease or rental agreement that reasonably regulate the presence of guide dogs, signal dogs, or service dogs on the premises. CC §54.1(b)(6)(B). However, an owner of a guide dog is not required to pay an extra charge or security deposit for their dog although they are liable for any damage done to the premises by their service animal. CC §54.2(a). On service animals and landlords, see §6.25.

While animals are not usually allowed in a food facility, service animals that are controlled by a disabled person are allowed in areas that are not used for food preparation and that are usually open for consumers, as long as a health or safety hazard will not result from the animal's presence. Health & S C §114259.5(b)(4).

Anyone who wrongfully prevents a disabled person from exercising the right to use a service dog is guilty of a misdemeanor, punishable by a fine of up to $2,500. Pen C §§365.5–365.6. Anyone who wrongfully represents themselves as the owner or trainer of a service dog is guilty of a misdemeanor punishable by 6 months imprisonment and a fine of up to $1,000. Pen C §365.7.

It is a crime for any person to permit any dog that is owned, harbored, or controlled by them to cause injury to, or the death of, any guide, signal, or service dog, as defined by CC §54.1, while the guide, signal, or service dog is in discharge of its duties. The violation is an infraction punishable by a fine of up to $250, if the injury or death is caused by the person's failure to exercise ordinary care in the control of the dog. Pen C §600.2(a)–(b). If the injury or death is caused by the person's reckless disregard in the exercise of control over their dog, "under circumstances that constitute such a departure from the conduct of a reasonable person as to be incompatible with a proper

regard for the safety and life of any guide, signal, or service dog," the violation is a misdemeanor, punishable by up to 1 year in county jail, or a fine of between $2,500 and $5,000, or both. Pen C §600.2(c). In either case, the defendant must make restitution to the person with a disability who has custody or ownership of the guide, signal, or service dog for any veterinary bills and replacement costs of the dog if it is disabled or killed, or other reasonable costs deemed appropriate by the court. These costs are paid prior to any fines, and the court must consider the costs when determining the amount of the fine. The person with the disability may apply for compensation by the California Victim Compensation Board (see Govt C §13950), in an amount up to $10,000. Pen C §600.2(d).

California law allows a child witness or victim to have a therapy dog with them while testifying in court. Pen C §868.4. See *People v Picazo* (2022) 84 CA5th 778 (therapy dog allowed in court while adult victims testified).

II. PRACTICAL AND LEGAL ISSUES

A. Practical Issues

§6.5 1. Injured Client

Depending on the issue, counsel must consider cost, time, and the potential client's emotional state in deciding whether to accept representation of a dispute involving animals. For example, if the client has been bitten by another's pet, counsel should consider

- The seriousness of the injury or injuries;
- Whether the animal was vaccinated for rabies and, if not, whether the client has received appropriate medical attention;
- The relationship of the parties;
- Whether the injuries will require cosmetic surgery or long-term medical attention;
- Whether the client (especially if a child) will require long-term mental health treatment; and
- Whether the animal's owner has liability insurance, or significant assets to collect against.

§6.6 2. Checklist: Gathering Information From Client

___ 1. Ask the client to provide the following documents, as appropriate:

___ Medical bills

- ___ Projected costs of future medical treatment
- ___ Any reports to or from the local animal care and control agency or the local police department
- ___ Rabies vaccination records
- ___ Photographs
- ___ Therapist's reports
- ___ Wage or earnings reports and missed earnings calculations

___ 2. Have the client prepare a detailed account of the incident.

For example, in a dog bite case, the client should provide the following information:

- ___ Was anyone teasing the dog?
- ___ Was the victim trespassing on the pet owner's property?
- ___ Were there any posted signs?
- ___ Was there a history of biting or being bitten?
- ___ Does the dog have a history of aggressive behavior toward strangers?
- ___ Did the dog bite a salesperson or delivery person for whom the owner opened the door?
- ___ Did the victim bend down to pet the animal?
- ___ Did the animal escape from the owner's control?
- ___ Did the victim have any experience with the animal at issue?
- ___ Did the client obtain the identification and contact information of the dog's owner?

B. Legal Issues

1. Duty of Care to Prevent Harm

§6.7 a. Homeowners

A homeowner whose animal injures another may be liable under a premises liability theory for breaching the duty of care to prevent harm by allowing a dangerous condition to exist on the property. CC §1714; *Rowland v Christian* (1968) 69 C2d 108, 112. Homeowners can also be found responsible under other theories of liability, including negligence, negligence per

se, strict liability, nuisance, premises liability, and negligent infliction of emotional distress. See §§6.12, 6.35–6.39.

After filing the lawsuit, counsel should conduct discovery to find out if the animal's owner has a homeowners insurance policy. Certain dog breeds, such as American Staffordshire Terriers (pit bulls), Akitas, Chows, Rottweilers, Doberman Pinschers, Presa Canarios, wolves or wolf hybrids, German Shepherds, any dogs used or bred for fighting with other dogs, and dogs trained to attack persons or animals are sometimes excluded from coverage in a homeowners policy. Dogs with a prior bite history as established by court records, insurance records, law enforcement records, and statements obtained by the insurance company are also sometimes excluded from coverage. But see *Dua v Stillwater Ins. Co.* (2023) 91 CA5th 127, in which the court found that an insurance company was obligated to defend the insured against an underlying lawsuit alleging damages sustained as a result of pit bulls attacking the plaintiff's dogs on a public street.

§6.8 b. Landlords and HOAs

All landlords owe a duty of care to prevent harm to tenants, tenants' invitees, and other third parties. *Peterson v Superior Court* (1995) 10 C4th 1185, 1197.

Residential landlord must have actual knowledge of presence of vicious animal to be liable. This duty extends to animal attacks if a residential landlord has *actual knowledge* that the tenant's animal has vicious propensities. *Donchin v Guerrero* (1995) 34 CA4th 1832; *Uccello v Laudenslayer* (1975) 44 CA3d 504. The landlord's knowledge must be actual, not merely constructive, because "the harboring of pets is such an important part of our way of life and because the exclusive possession of rented premises normally is vested in the tenant." 44 CA3d at 514. Therefore, the plaintiff must provide evidence of the landlord's knowledge both of the presence of animals and that such animals had "vicious propensities." *Fraser v Farvid* (2024) 99 CA5th 760, 772–73 (landlord lacked knowledge required for third party liability; email from neighbor about "guard dogs" on its own did not constitute knowledge that tenants kept vicious dogs on property).

Homeowners associations (referred to throughout this chapter as HOAs) are held to the same standard of care as residential landlords. *Frances T. v Village Green Owners Ass'n* (1986) 42 C3d 490, 499.

If a tenant's pet attacks another tenant, the victim can allege contractual liability against a landlord or HOA as well as breach of the duty to prevent harm if the landlord knew about the dangerous animal. *Chee v Amanda*

Goldt Prop. Mgmt. (2006) 143 CA4th 1360, 1370. As of January 1, 2012, a landlord can give a tenant a 3-day notice to quit based on nuisance for conducting dog or cock fighting. See §6.38.

See also CC §798.33 (mobilehome park leases entered into after Jan. 1, 2001, shall not prohibit mobilehome owner from keeping at least one pet) and §4715 (governing documents shall not prohibit owner of separate

interest within common interest development (*i.e.,* tenancy in common or condominium) from keeping at least one pet).

NOTE➤ A landlord has no duty to warn prospective tenants that a vicious dog lives in the neighborhood. *Wylie v Gresch* (1987) 191 CA3d 412.

Commercial landlord need not have actual knowledge. A different rule applies when a landlord owns commercial property. A commercial landlord must exercise reasonable care in the inspection of the property and must remove or otherwise restrain a commercial tenant's animal, most often a guard dog. "It is reasonably foreseeable that a guard dog kept in a business open to the general public will injure someone; the purpose of such animals is to protect the premises and it is highly unlikely that they are docile by nature." *Portillo v Aiassa* (1994) 27 CA4th 1128, 1135.

§6.9 c. When Landlord May Be Exculpated

Courts have been reluctant to extend liability to a landlord when it is shown that the landlord had no knowledge of the animal's nature. For example, in *Chee v Amanda Goldt Prop. Mgmt.* (2006) 143 CA4th 1360, a condominium owner and the condominium association had no liability when the owner's tenant's dog injured another resident and the association and the owner had no notice of the dog's tendencies. See also *Yuzon v Collins* (2004) 116 CA4th 149 (landlord owes duty of care only if possessing actual knowledge of aggressive dog); *Lundy v California Realty* (1985) 170 CA3d 813 (same).

In *Martinez v Bank of America* (2000) 82 CA4th 883, 890, a bank that purchased a property at foreclosure owed no duty to a third party injured by dogs on the property. The possessors of the property were contesting the bank's unlawful detainer proceedings, and the bank lacked both actual knowledge of danger from the dogs and the ability to control them. Although the bank and the dog owners did not have a landlord-tenant relationship, the court analogized to a landlord-tenant relationship.

However, in *Davert v Larson* (1985) 163 CA3d 407, tenants in common of real property who delegated the control and management of the property to a separate legal entity nevertheless owed a duty of care to third parties. The plaintiffs alleged negligence after their automobile collided with a horse that had escaped from the defendant's property. The defendant owned a 1/2500th interest in the property and alleged that he owed no duty of care to plaintiffs because his interest in the property was subject to a recorded declaration of covenants, conditions, and restrictions (referred to throughout this chapters as CC&Rs) that delegated exclusive control over the property

to the property owners association. The court of appeal held that delegation of control and management of the property to a separate legal entity did not relieve tenants in common from liability to third parties.

§6.9A d. Public Entities and Public Employees

Tort liabilities and immunities of public entities and public employees are established in the Government Claims Act (also known as the California Tort Claims Act). Govt C §§810–996.6. The general rule is that public entities and public employees are immune from tort liability when acting in the scope of their work. *County of Santa Clara v Superior Court* (2023) 14 C5th 1034, 1045 ("Except as otherwise provided by statute … [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or any other person." (internal marks and citations omitted)). See Govt C §818.2 (public entities' immunity); Govt C §821 (companion section extending immunity to public employees). However, an exception to the Government Claims Act's immunity exists. Public entities can be liable for torts if they are found to have failed to discharge a mandatory duty imposed by an enactment. Govt C §815.6. The duty imposed must be nondiscretionary. *Haggis v City of Los Angeles* (2000) 22 C4th 490, 498. The determination of whether a mandatory duty has been enacted is a question of statutory interpretation. 22 C4th at 499.

While "cities and counties have broad powers to regulate and control dogs within the boundaries of their jurisdictions" (*San Diego County Veterinary Med. Ass'n v County of San Diego* (2004) 116 CA4th 1129, 1134), the enactments relating to the assessment, determination, and disposition of potentially dangerous animals as well as those relating to the vaccination and reproductive control of animals may have elements of discretion that take the duties out of the purview of Govt C §815.6. See, *e.g.*, *Danielson v County of Humboldt* (2024) 103 CA5th 1, 19 (despite numerous incidents and complaints putting county animal control on notice of dangerous dogs, county still entitled to qualified immunity).

For more on public entities' process for determining and managing vicious and potentially dangerous dogs, see §§6.18–6.24. For specific considerations relating to police dogs, see §6.16.

§6.10 2. Dangerous Animals

Food and Agricultural Code §§30503.5 and 30526 require animal shelters to disclose, in writing, that a dog bit a person before giving it away. Formerly, shelters had no such duty. Some animals may spend a lifetime as a

beloved pet, yet show aggression to outsiders. Some pets may show more aggressive tendencies as they age. For example, in 2009, a docile longtime pet chimpanzee inflicted serious bodily harm on a family friend. See *Nash v Herold* (Conn Super Ct, May 18, 2010) 2010 Conn Super Lexis 1237 (unpublished opinion).

If an animal is found to be a dangerous animal or one with dangerous tendencies, the owner is strictly liable for the injuries to another person. "California has long followed the common law rule of strict liability for harm done by a domestic animal with known vicious or dangerous propensities abnormal to its class." *Drake v Dean* (1993) 15 CA4th 915, 921. See also *Nash v Herold, supra*.

In *Drake,* the victim entered a property to hand out religious tracts when a 65-pound pit bull knocked her down, breaking her hip. She sued on **theories of strict** liability and negligence. The trial court refused to allow a negligence instruction unless it limited the defendant's duty to "the taking of ordinary care to avoid harm by a domestic animal with dangerous propensities of which defendants knew or should have known." 15 CA4th at 919. The plaintiff did not agree to the limitation, so the case went to the jury on strict liability alone. Although the jury found that the dog did not have "a particular vicious or dangerous propensity" and thus the defendant was not liable on strict liability, the court of appeal held that the plaintiff was entitled to her requested negligence jury instruction because the trial court's revisions impermissibly added principles of strict liability to the negligence instruction.

In *Thomas v Stenberg* (2012) 206 CA4th 654, the court upheld a judgment of nonsuit holding that the landowners did not owe a duty to a motorcyclist who was riding on an easement over the landowners' property and was hit by landowners' charging cow. There was no evidence that the cow was a dangerous animal. But see *Shively v Dye Creek Cattle Co.* (1994) 29 CA4th 1620 (cattle company had duty of care to motorists traveling on highway after their car collided with bull lying on roadway at night).

> The [trial] court could reasonably infer … from the fact that the pet store was located near a large shopping and parking area that the defendants should have believed or anticipated that persons might walk or trespass within the 15-foot radius where the watchdog was allowed to range, and where at times he was concealed from view in his shelter or behind crates, trash cans or the counter.

On premises liability generally, see CACI 1000, Premises Liability—Essential Factual Elements; CACI 1001, Basic Duty of Care.

§6.16 (d) Police Dogs

The strict liability standard set forth in CC §3342(a) does not apply to those bitten by a dog used in military or police work if the biting occurs while the dog is actually performing in a law enforcement capacity. CC §3342(b). See *Farnam v State* (2000) 84 CA4th 1448 (city police officer bitten by California Highway Patrol police dog at scene of arrest had claims dismissed).

It also does not apply if the bite occurred while the dog was "defending itself from an annoying, harassing, or provoking act." CC §3342(b). But see *Rosenbaum v City of San Jose* (9th Cir 2024) 107 F4th 919 (allowing police dog to continue to bite suspect for 20 seconds after full surrender constituted excessive force; officers not entitled to qualified immunity). and *Watkins v City of Oakland* (9th Cir 1998) 145 F3d 1087 (qualified immunity of police officer and police chief denied because continuation of canine attack after surrender of suspect was unconstitutional violation). But see *Lowry v City of San Diego* (2017) 858 F3d 1248 (city not liable to plaintiff who was sleeping in her office after night of drinking when she was attacked and bitten by police dog).

§6.16A (e) Public Dog Parks

The strict liability standard does not apply to public entities. Cities, counties, and special districts that own or operate dog parks are immune for injury or death of a person or pet resulting solely from the actions of a dog in the dog park. Govt C §831.7.5. Anyone who permits an animal to be in any enclosure, street, square, or lot of any city or county without proper care and attention is guilty of a misdemeanor. Pen C §597.1(a)(1).

§6.17 (2) Limited Civil Suit Available Under Dog Bite Statute

Any private person, district attorney, or city attorney may bring a limited civil case against a dog owner if the dog has bitten others on at least two separate occasions. CC §3342.5(b), (g). In addition, if the dog was trained to fight, attack, or kill, an action may be brought whenever the dog bites a person, causing substantial physical injury. CC §3342.5(c). The court may make any order it deems appropriate to prevent a recurrence. This can include the removal of the animal from the area or, if necessary, its destruction. CC §3342.5(b)–(c).

Limited civil cases are those in which the amount in controversy is less than $25,000 and is otherwise specified by statute. CCP §85.

PRACTICE TIP➤ The "amount in controversy" does not include attorney fees, interest, and costs. CCP §85(a). The first document filed in a limited civil case must identify the case as such and must state whether the amount in controversy is greater than $10,000. CCP §422.30(b); Cal Rules of Ct 2.111(9)–(10). See Govt C §70613 (filing fee lower when amount in controversy is under $10,000). If the amount in controversy is less than $10,000, the matter must be filed in small claims court. See §6.31.

§6.18 b. Vicious and Potentially Dangerous Dogs

In an infamous 2001 attack, a San Francisco resident was brutally mauled to death in the hallway of her apartment building by two Presa Canario dogs owned by her neighbors. The owners of the dogs were charged with second degree murder and involuntary manslaughter. See *People v Knoller* (2007) 41 C4th 139. Even before that case, the California State Legislature had enacted Food & A C §§31601–31683 in response to growing public demand for curbs on seemingly unprovoked dog attacks. The legislature declared that "potentially vicious dogs have become a serious and widespread threat to the safety and welfare of citizens" of California. Food & A C §31601.

There is no private right of enforcement under the statute. Counsel should advise clients to report dangerous dogs to the local law enforcement or municipal or county animal control facility.

The statute does not prevent municipalities from adopting their own laws regarding dangerous or vicious dogs. Food & A C §31683. For example, many localities have rules concerning the spaying and neutering of dogs. See, *e.g.,* San Francisco Health C, art 1, §43.1 (pit bulls). See *Concerned*

before the filing of litigation. CCP §2023.030(f); *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 12; *Hernandez v Garcetti* (1998) 68 CA4th 675, 680; see also *Silvestri v General Motors* (4th Cir 2001) 271 F3d 583, 591.

§7.8 3. Preliminary Investigation

Certain landowner rights and obligations are governed by CC §§818–855, and certain land uses (*e.g.,* gun ranges and agriculture) are governed by CC §§3479–3503, which are the statutes generally addressing nuisance. While these statutes warrant counsel's review at the outset of any case involving noise, odor, or light, it is also necessary to research local zoning and land use ordinances. Counsel must consider whether the use of the property in question is authorized by statute or is properly permitted. No action taken or maintained under the express authority of a statute may be considered a nuisance. CC §3482.

Even when a property use is properly permitted, there may be violations of permit conditions. As their name indicates, "conditional use permits" frequently impose conditions to minimize inherent nuisances to the community and neighboring landowners. As such, an investigation should be conducted to determine whether a property is or has been in violation of any relevant permit conditions or restrictive covenants.

In situations when problematic conduct or land use is planned or permitted under a new ordinance, counsel should promptly consider whether the permitting ordinance itself might still be subjected to a legal challenge. See, *e.g., King & Gardiner Farms, LLC v County of Kern* (2020) 45 CA5th 814, modified (Mar. 20, 2020, F077656) 2020 Cal App Lexis 234, rev'd on other grounds in *V Lions Farming LLC v County of Kern* (2024) 100 CA5th 412, in which a neighboring property owner and the Sierra Club successfully challenged a county permitting ordinance based in part on the county's inadequate analysis of impacts from noise and farmland conversion.

While most California counties offer easy online access to ordinances and land use regulations, counsel must be cautious when using these websites and should verify that they are relying on the most current version of applicable law.

On determining the permitted status of a property, see the discussion of public record requests in §§7.27–7.29.

B. Legal Issues

1. Common Law

§7.9 a. Common Law Nuisance

At common law, public nuisance covered a large and diversified group of minor criminal offenses, all of which involved some interference with the interests of the community at large. These interests were recognized as rights of the general public that were entitled to protection. Generally, the nature of the interference was deemed so unreasonable that it was held to constitute a criminal offense as well as a tort. *Leslie Salt Co. v San Francisco Bay Conserv. & Dev. Comm'n* (1984) 153 CA3d 605, 619.

In fact, the statutory definition of nuisance (originally enacted in California in 1872 and amended in 1873) includes "[a]nything which … *unlawfully* obstructs the free passage or use, in the customary manner, of any … public park, square, street, or highway." (Emphasis added.) CC §3479. "Under the common law, liability for a public nuisance may result from the failure to act as well as from affirmative conduct." (Emphasis omitted.) *Leslie Salt Co.,* 153 CA3d at 619.

The California Legislature effectively disposed of common law nuisance claims through the codification of nuisance under CC §§3479–3503. At least one California court has described the state's nuisance law as a "creature of statute." See *Mangini v Aerojet-Gen. Corp. (Mangini I)* (1991) 230 CA3d 1125, 1134.

§7.10 b. Common Law Trespass

A trespass may be committed by consequential and indirect injury as well as by direct and forcible injury. However, noise, odor, or vibrations alone, without actual damage to property, typically will not support a tort action for trespass. Instead, recovery in such cases has been predicated on the deposit of particulate matter on the plaintiffs' property or on actual physical damage to the property. See *Kornoff v Kingsburg Cotton Oil Co.* (1955) 45 C2d 265, 266; *Roberts v Permanente Corp.* (1961) 188 CA2d 526, 529; *Gallin v Poulou* (1956) 140 CA2d 638, 641; *McNeill v Redington* (1944) 67 CA2d 315, 316. Accordingly, an actionable trespass may not be predicated on nondamaging noise, odor, or light intrusion.

Liability for trespass will not be imposed unless the trespass was intentional, the result of recklessness or negligence, or the result of an extra-hazardous activity. *Smith v Lockheed Propulsion Co.* (1967) 247 CA2d 774, 784.

of tranquility in our otherwise oppressive urban environment." 7 CA4th at 977.

Whether information is sufficiently material to affect the value or desirability of residential property is a fact-specific determination. 7 CA4th at 977. See also *Lingsch v Savage* (1963) 213 CA2d 729, 737. On failure to disclose as a cause of action, see §§16.83–16.88.

§7.17 d. Local Ordinances, Land Use, and Zoning

Most local jurisdictions have their own ordinances and zoning laws limiting noise, odor, and light. Article XI, §7, of the California Constitution confers on each municipality the power to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." This "'police power' … is founded on the duty of the state to protect its citizens and provide for the safety, good order and well-being of society." *McKay Jewelers, Inc. v Bowron* (1942) 19 C2d 595, 600.

Therefore, while activities conducted on a neighboring property may not violate state law, they may implicate local land use, zoning, or other laws involving public health or safety. See, *e.g., King & Gardiner Farms, LLC v County of Kern* (2020) 45 CA5th 814, modified (Mar. 20, 2020, F077656) 2020 Cal App Lexis 234, rev'd on other grounds in *V Lions Farming LLC v County of Kern* (2024) 100 CA5th 412, in which a neighboring property owner and the Sierra Club successfully challenged a county permitting ordinance based in part on the county's inadequate analysis of impacts from noise and farmland conversion.

However, compliance with a local ordinance is not dispositive evidence that a nuisance does not exist when the local ordinance does not expressly authorize the nuisance activity. See, *e.g., Chase v Wizman* (2021) 71 CA5th 244, 254, in which a neighboring property owner successfully enjoined the operation and location of pool and air conditioning units even though the noise levels associated with the units were below the maximum level permitted by the city noise ordinance.

§7.18 e. Public Agency as Defendant—Inverse Condemnation

When excessive noise, light, or odor is caused by a public agency, the property owner may seek an action in inverse condemnation. Like direct condemnation, actions in inverse condemnation are based on Cal Const art I, §19, which requires that private property may not be taken or damaged for

public use without payment of just compensation to the owner. In inverse condemnation, the "or damaged" clause is the usual basis on which relief is sought.

To recover compensation in an inverse condemnation case, the plaintiff must allege and prove the following elements:

- An ownership interest in the property,
- The defendant's substantial participation in a public project (*Stoney Creek Orchards v State* (1970) 12 CA3d 903),
- A taking or damaging of the real property (*People ex rel Department of Pub. Works v Romano* (1971) 18 CA3d 63, 72 n4), and
- Causation (see, *e.g., Youngblood v Los Angeles County Flood Control Dist.* (1961) 56 C2d 603, 607).

For full discussion of inverse condemnation, see Condemnation Practice in California, chaps 13–16 (3d ed Cal CEB).

§7.19 (1) Is Damage Compensable?

Whether, and to what degree, harm resulting from a public project is compensable as damages is generally dependent on the specific circumstances of each case. See, *e.g., Pierpont Inn, Inc. v State* (1969) 70 C2d 282 (award of damages because hotel situated on owner's land suffered diminution of fair rental value from noise, dust, and vibrations during construction of public project).

Evidence of diminution in a property's value stemming from the noise of a freeway's operation is properly considered in determining damages. *People ex rel Department of Pub. Works v Volunteers of Am.* (1971) 21 CA3d 111. That holding is a departure from the traditional rule that recovery of severance damages is not allowed for noise, fumes, and annoyances that the postconstruction, daily use of a freeway entails. *People ex rel Department of Pub. Works v Presley* (1966) 239 CA2d 309, 317. The *Volunteers of Am.* court drew a distinction between disturbance during the construction phase (as in *Pierpont Inn, Inc. v State, supra*) and "normal" postconstruction disturbances. *Pierpont Inn* may also be distinguished from *Presley* in that the injury alleged in the former was apparently suffered only by the defendant, while the injury in the latter was an inconvenience "general to all property owners in the neighborhood, and not special to defendant." *City of Berkeley v Von Adelung* (1963) 214 CA2d 791, 793. Other earlier cases, however, show some recognition of noise as an element of damages. See *PG&E v Hufford* (1957) 49 C2d 545, 599 (effect on cattle of buzzing noise from electric

transmission lines); *City of Pleasant Hill v First Baptist Church* (1969) 1 CA3d 384, 430 (effect of traffic noise and hazards on church and school); *City of*

injury to himself of a character different in kind—not merely in degree—from that suffered by the general public." *Institoris v City of Los Angeles* (1989) 210 CA3d 10, 20, quoting *Venuto.*

In 2024, the California Court of Appeal eliminated a narrow exception that had allowed private parties to bring public nuisance claims for alleged municipal code violations without showing that they suffered any special injury. *Cohen v Superior Court* (2024) 102 CA5th 706. The *Cohen* court examined Govt C §36900, which authorizes civil litigation as a means to address municipal code violations. The court found that in enacting Govt C §36900, the legislature did not intend to create a new private cause of action; rather, only city authorities are empowered to act under the statute. 102 CA5th at 727.

STRATEGIES➤ *Cohen* overruled a line of cases to the extent that they allowed private claims under Govt C §36900 without a showing of special injury, including *Riley v Hilton Hotels Corp.* (2002) 100 CA4th 599, *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, and *Huntingdon Life Sciences, Inc. v Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 CA4th 1228. While private parties may still pursue public nuisance causes of action based upon a defendant's alleged municipal code violation, the Cohen decision serves as an important reminder that these claims will face challenge—and may ultimately fail—if the plaintiff is unable to establish that it has suffered a unique, special injury different from that which the general public would suffer from the code violation. See also CACI 2020 (essential element of public nuisance claim is for plaintiff to have "suffered harm that was different than the type of harm suffered by the general public").

§7.33 B. Private Nuisance

By statute, a private nuisance is any nuisance that does not fall within the definition of a public nuisance. CC §3481. To establish a private nuisance cause of action, a plaintiff must show that the defendant, by acting or failing to act, created or permitted to exist a condition that unreasonably interfered with the use and enjoyment of the plaintiff's property. CACI 2021. The interference with a person's use and enjoyment of a property right is the essence of a private nuisance claim. However, to be actionable, the interference must be unreasonable and the harm substantial. *Monks v City of Rancho Palos Verdes* (2008) 167 CA4th 263, 302.

To determine whether the subject conduct is unreasonable, the courts look to the totality of circumstances in order to balance the interests of the adverse parties. In addition, the gravity of the harm is weighed against the utility of the defendant's conduct. *Shields v Wondries* (1957) 154 CA2d 249, 255.

§7.34 C. Negligence Per Se and Nuisance Per Se

Evidence Code §669 creates a presumption of negligence (negligence per se) when, as in any negligence claim, the defendant owes the plaintiff a duty of care and has violated a statute, ordinance, or regulation, thereby harming the plaintiff in a manner that the law was designed to prevent. Evid C §669(a). The same principles are sometimes applied to substantiate nuisance per se causes of action, typically in public nuisance cases when private claims are not being pursued.

The application of this presumption indicates that the court has adopted the conduct prescribed by the statute as the standard of care for a reasonable person under the circumstances, and as such a violation of the statute is presumed negligence. To prevail, the plaintiff must still establish causation and damages, and the damages must result from an occurrence of the nature that the law was intended to avoid. Evid C §669(a)(2)–(3).

When negligence or nuisance per se is established, the defendant then has the burden of rebutting the presumption by demonstrating that they acted reasonably and with intent to obey the law. Evid C §669(b)(1).

§7.35 V. REMEDIES AND DAMAGES

The remedies available in actions arising from the interference with a neighboring landowner's use or quiet enjoyment of their property include injunctive relief and monetary damages.

However, it is important to note that not every inconvenience or annoyance will be compensable. "A reasonable person must realize that complete emotional tranquility is seldom attainable, and some degree of transitory emotional distress is the natural consequence of living among other people in an urban or suburban environment." *Schild v Rubin* (1991) 232 CA3d 755, 763, citing *Fletcher v Western Nat'l Life Ins. Co.* (1970) 10 CA3d 376, 397.

§7.36 A. Injunctive Relief to Abate Nuisance or Trespass

Injunction is a remedy for the torts of trespass and nuisance. See generally CCP §§525, 526, 731; CC §3501. If a nuisance is of a continuing rather than

a permanent nature (*i.e.,* it may be discontinued at any time), then injunctive relief is available. See *Renz v 33rd Dist. Agric. Ass'n* (1995) 39 CA4th 61, 67. See also *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 867.

In this regard, CCP §731 provides for injunctive relief to enjoin or abate the nuisance, as defined in CC §3479, as well as for the recovery of damages. Similarly, CC §3501 provides that "the remedies against a private nuisance are: 1. A civil action; or, 2. Abatement."

A person may abate a private nuisance by "removing, or, if necessary, destroying the thing which constitutes the nuisance, without committing a breach of the peace, or doing unnecessary injury." CC §3502.

Conversely, an injunction is a writ or order requiring a person to refrain from doing a particular act. See CCP §525. Thus, it may be granted at the commencement of the nuisance or trespass action (*e.g.,* a temporary

any statement or representation by the Parties or their representatives concerning the Dispute.

6. This Agreement, and any dispute arising hereunder, will be construed and enforced in accordance with, and will be governed by, the laws of the State of California.

7. Each of the Parties warrants that it has read the entire Agreement, understands it, and in addition has received or could receive independent legal advice from counsel to the extent it considers it warranted as to the advisability of executing this Agreement and with respect to all matters contained herein.

8. This Agreement was jointly drafted and is the product of bargained for, arm's-length negotiations between the Parties _ _[*and their counsel*]_ _ in good faith and without collusion, and it may not be construed for or against any Party or its representative(s).

9. This Agreement is binding on and inures to the benefit of the Parties and their respective successors and assigns.

[*Add the following if one or more parties to the agreement is a trust, estate, or public or business entity*]

10. Each person executing this Agreement warrants that _ _[*he is/she is/they are*]_ _ empowered and authorized to so execute and _ _[*has/have*]_ _ the authority to fully bind the entity in the manner herein described.

[*Continue*]

[**11.**] **Claimant and Respondent have made such investigation of the facts pertaining to this Agreement and all matters pertaining hereto as _ _[*he/she//they/it*]_ _ _ _[*deems/deem*]_ _ necessary and enters into this Agreement with full knowledge of those facts.**

[**12.**] **This Agreement may be executed in counterparts and together constitute one and the same instrument. True photocopies and/or facsimile copies of signatures hereof are deemed as effective as original signatures.**

[**13.**] **Any notice given hereunder must be deemed to have been given and received when one of the following occurs: (a) when delivered to the undersigned by courier or messenger; (b) 2 business days**

after the date it is served by overnight delivery; or (c) 5 days after the date it is served by regular U.S. mail.

For Claimant:	**For Respondent:**
_ _[*Name*]_ _	_ _[*Name*]_ _
_ _[*Address*]_ _	_ _[*Address*]_ _
_ _[*Phone*]_ _	_ _[*Phone*]_ _
_ _[*Email*]_ _	_ _[*Email*]_ _

IN WITNESS WHEREOF, THE UNDERSIGNED HEREBY ACKNOWLEDGE THAT THEY HAVE READ, UNDERSTAND, AND AGREE TO THE TERMS AND CONDITIONS SET FORTH IN THIS AGREEMENT.

Date: _ _ _ _ _ _	__[*Signature*]__ _ _[*Typed name*]_ _
Date: _ _ _ _ _ _	__[*Signature*]__ _ _[*Typed name*]_ _

sometimes placed on the top level of parking structures, providing shade for the structure and a large collecting area for the solar panels. In the commercial context, developers using land for solar power generation generally do not share property they have leased with other occupants because solar projects are land-intensive and typically require that the developer have exclusive use of the property. Easements can be used for rooftops and small-scale solar projects when the project developer and the project share a larger space with the landowner or third parties. For a discussion of easements generally, see chap 1.

§8.2 B. Wind Power

Wind turbines are primarily used to generate electricity, either directly to a utility grid or to a battery, although they can also be used for mechanical power, including to pump water. Wind power, even on a small scale, typically works only on large properties in rural or semirural areas because wind turbine towers typically run into height restrictions in urban areas. Further, safety concerns often require a minimum ratio between the height of the tower and the distance of the tower from inhabited structures in case the tower collapses or the turbine blades come off in a severe storm. To erect a wind turbine, a building permit is generally required.

§8.3 II. POTENTIAL LEGAL ISSUES IN HANDLING DISPUTES CONCERNING SOLAR AND WIND ENERGY SYSTEMS

Actions involving interference with or claimed damages caused by the installation of solar or wind systems are similar to other neighbor disputes. The intense emotions that often arise on both sides of any dispute from the parties' perceived inability to fully use and enjoy their property is something that attorneys must consider in counseling their clients. See *Yates v EPA* (D Or, Apr. 14, 2020, No. 6:17-cv-01819-AA) 2020 US Dist Lexis 65949 (suit by landowner against adjacent landowner for nuisance and trespass based on installation of a solar array). Both wind turbine and solar panels have become items of dispute for purposes of dissolution of marriage. See, *e.g., Lee v Smith* (Ind App 2013) 989 NE2d 844, *12.

When evaluating a case on either side of a dispute involving the installation of a wind or solar energy system, it is important to obtain all documents relating to the installation of the system, including

- All necessary building permits;
- Documents reflecting easements, if any;

- Homeowners association bylaws and covenants, conditions, and restrictions (referred to throughout this chapter as CC&Rs);
- Documents reflecting servitudes or restrictive covenants; and
- County or city ordinances pertaining to the installation of the systems.

III. LAWS RELATING TO INSTALLATION OF WIND AND SOLAR ENERGY COLLECTION SYSTEMS

§8.4 A. Legal Protection for Renewable Energy Systems

Across the United States, proponents of renewable energy systems are finding wider acceptance. For example, many states have enacted statutes that permit solar energy users to petition administrative review boards when adjoining landowners refuse to negotiate solar access easements. In addition, traditional case law and local statutes and ordinances can limit a property owner's rights if they interfere with access to light and air on a neighbor's property. For discussion of light and air disputes, see chap 13. One law firm publishes a helpful guide on renewable energy, *The Law of Solar* (6th ed 2022), available at https://www.stoel.com/lawofsolar. According to *The Law of Solar*, chap 1, p 11:

> Approximately 40 states have passed laws or taken measures to promote the installation and use of solar energy systems. The states have two primary mechanisms for ensuring that solar projects can access sunlight to operate the system:
>
> 1. Allowing neighboring property owners to voluntarily grant solar easements that, like any other property right, must be documented and recorded in accordance with local requirements; and
>
> 2. Outlawing the imposition of prohibitions on the placement of a solar power system in a community, or outlawing the imposition of unreasonable restrictions on the placement of solar facilities such that their installation, operation, or functionality is adversely impacted.
>
> Any grant of a property right must contain certain legal elements no matter where the property is situated. Many states require the grant of a solar easement to describe the dimensions (solar envelope) of the easement, the estimated amount of sunlight directed to the system, any permitted shading by vegetation and other plantings, the corresponding reduction in access to sunlight, the property benefitted and burdened by the easement, and, sometimes, the compensation to the grantor of

§8.14 b. Height and View Restrictions

Covenants containing height and view restrictions may be used to preclude the building of structures on neighboring land. Compare *Zabrucky v McAdams* (2005) 129 CA4th 618 (CC&Rs prohibited "any structure" from obstructing views of ocean) with *White v Dorfman* (1981) 116 CA3d 892 (restrictions did not apply to "other structures"). The application of these types of restrictions to solar collection systems would presumably be upheld if installation of a system was attacked under a valid height or view restriction.

Asserting breach of an implied covenant against obstruction of view is a possible remedy to enjoin the construction of structures that block a neighboring property owner's view. See *Martin v Floyd* (1984) 317 SE2d 133; Restatement of Property §405 (1944). However, implied covenants are not favored in the law. *Ben-Zivi v Edmar Co.* (1995) 40 CA4th 468, 473; *Clifford v Wild Dunes Assocs.* (4th Cir 1986) 803 F2d 713.

An action for damages can lie for breach of a restrictive covenant. *Barrows v Jackson* (1952) 112 CA2d 534. Injunctive relief, including a restraining injunction or a mandatory injunction directing the removal of buildings or structures already erected, is also available. *Ezer v Fuchsloch* (1979) 99 CA3d 849.

§8.15 3. Solar Easements

A solar easement may be placed as a burden or servitude on another party's land. CC §§801(18), 801.5. Any instrument creating a solar easement must include a description of the dimensions of the easement expressed in measurable terms, including vertical or horizontal angles measured in degrees or the hours of the day on specified dates during which direct sunlight to a specified surface may not be obstructed, as well as putting restrictions on vegetation, structures, and other objects that would impair or obstruct the passage of sunlight through the easement. CC §801.5(b).

If an easement for light or air is created by express agreement, prescription, or implication, an action may lie for interference with such an easement. *Seligman v Tucker* (1970) 6 CA3d 691. Various jurisdictions have statutory protections for property owner's rights to access sunlight coming across adjoining land. See, *e.g.,* Colo Rev Stat Ann §38-32.5-103; Minn Stat Ann §500.30(4). California law provides a list of "land burdens, or servitudes upon land" that can be attached to other land as incidents, appurtenances, or easements, including the right to receive sunlight. CC §801. However,

without such a servitude, a landowner is not entitled to an unencumbered right to light. CC §§801(18), 801.5.

§8.16 4. Use Permits

A city or county may not deny an application for a use permit to install a solar energy system unless it makes written findings, based on substantial evidence in the record, that the proposed installation would have a specific, adverse impact on the public health or safety and that there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact. Health & S C §17959.1(b). For more on use permits, see California Land Use Practice, chap 7 (Cal CEB).

§8.17 5. Required Disclosures

An independent solar energy producer must include in the disclosure to a buyer or lessee of that system a plain language explanation of operations and maintenance, as well as an explanation of the contract provisions regulating the disposition or transfer of the contract in the event of transfer of ownership of the residence. Pub Util C §2869.

E. Wind Energy Systems

§8.18 1. Former Regulations

In 2001, the California Legislature enacted former Govt C §65892.13 to create greater consistency among the various counties relating to the permitting process for installing wind energy systems. See Stats 2001, ch 562. However, former Govt C §65892.13 expired on January 1, 2006. Former Govt C §65892.13(k).

The stated purpose of the former legislation was that (former Govt C §65892.13(a)(5))

> any ordinances regulating small wind energy systems adopted by local agencies have the effect of providing for the installation and use of small wind energy systems and that provisions in these ordinances relating to matters including, but not limited to, parcel size, tower height, noise, notice and setback requirements do not unreasonably restrict the ability of homeowners, farms and small businesses to install small wind energy systems in zones in which they are authorized by local ordinance.

For a general discussion of the law governing installation of wind energy systems, see Stratton, *Chapter 404:Wind Energy Gets an Overhaul,* 41 McGeorge L Rev 626 (2010).

§8.19 2. Small Wind Energy Systems [Deleted]

This section has been deleted because the statutory provisions regarding Small Wind Energy Systems, former Govt C §§65893–65898, were repealed January 1, 2017, by the terms of former Govt C §65899.

§8.19A 3. Federal Regulatory Action

In *Protect Our Communities Found. v Lacounte* (9th Cir 2019) 939 F3d 1029, the Ninth Circuit upheld a summary judgment in favor of the Bureau of Indian Affairs (BIA) and entities seeking to approve an industrial-scale wind facility in Southern California. The plan was to construct 85 wind turbines on the reservation lands of the Ewiiaapaayp Band of Kumeyaay Indians (Tribe), requiring approval by the BIA, which serves as the trustee for the Tribe. The plaintiffs sought to prevent the project, asserting that there was an improper reliance on an environmental impact statement (EIS) based on the alleged failure of BIA to explain its decision not to implement one of the mitigation measures listed in the EIS. The court concluded that under the total circumstances of the case, the EIS analysis was sufficient to satisfy the National Environmental Policy Act (NEPA) (42 USC §§4321–4347). The case suggests that federal law is supportive of large scale wind projects, even against challenges based on claimed violation of various other environmental laws such as protections for migrating birds.

IV. HANDLING THE DISPUTE

A. Legal Challenges to Maintaining Solar and Wind Collectors

§8.20 1. CC&Rs Prohibitions

Solar energy systems are encouraged under the law, and CC&Rs prohibiting them are unenforceable. CC §714(a). However, a community association may provide for the maintenance, repair, or replacement of roofs and may require individual owners to obtain approval for installing solar energy systems and restrict their installation in common areas. CC §714.1. Reasonable restrictions that do not significantly increase the cost of the system or significantly decrease its efficiency are permitted. CC §714(b). See also CC §714(d)(1)(A) (defining "significantly" as an amount exceeding 10 percent of the

cost of the system, but in no case more than $1,000, or decreasing the efficiency of system by an amount exceeding 10 percent). See §§8.12–8.13.

NOTE➤ A drafter of CC&Rs for a condominium, townhouse project, or commercial or industrial common interest development in which the association maintains the roofs should consider providing that the owner of the residence, suite, or unit who desires to install solar panels is obligated to assume responsibility for repair of the roof and any damage to the roof caused by such installation, including penetration of the roof by the installation or failure to properly maintain and repair the solar panels. Additional requirements should be considered to keep the solar panels clean and prevent them from becoming unsightly.

§8.21 2. Zoning Limitations; Writ of Mandate

In general, a property owner may allege that a zoning ordinance arises to a deprivation of substantially all use of the subject property and is an excessive regulation in violation of the Fifth Amendment of the U.S. Constitution. See California Land Use Practice §8.9 (Cal CEB). To the extent that a zoning decision improperly limits the ability of a property owner to install and use a solar or wind energy system, the owner may challenge the validity of the ordinance by seeking a writ of mandamus against the appropriate public agency charged with enforcing the zoning regulation. CCP §1084. See *Center for Biological Diversity, Inc. v FPL Group, Inc.* (2008) 166 CA4th 1349. See also §§17.27–17.33; California Administrative Mandamus (3d ed Cal CEB). However, a petitioner may not compel, through traditional mandamus, an administrative agency with only advisory authority to provide that advice in a particular manner. *Center for Biological Diversity v Department of Forestry & Fire Protection* (2014) 232 CA4th 931, 951.

In *Center for Biological Diversity v FPL Group, Inc.,* environmental advocates relied on the public trust doctrine to assert that a wind turbine electric generator was killing and injuring raptors and other birds. The court concluded that the plaintiff's claims were invalid as they proceeded against the wrong party (the owner and operator of the turbine) and should have instead proceeded against the "County of Alameda, which has authorized the use of the wind turbine generators, or against any agency such as California's Department of Fish and Game that has been given the statutory responsibility of protecting the affected natural resources." Essentially, the court stated that the public trust doctrine is not available against private defendants but should be used to enforce the state's mandate and duty to protect the public's interest in natural resources. 166 CA4th at 1367. But see

9

Vacancy, Dangerous Conditions, and Blight

Teresa Buchheit Klinkner

I. ADDRESSING THE ISSUES

§9.1 A. Public Concern

Public policy generally disfavors vacant, unused, or abandoned property. See, *e.g.,* CC §§880.020–887.090 (Marketable Record Title Act). Neighbors often complain of property that appears unkempt or blighted. During the Great Recession (2008–2011), California communities dealt with foreclosures and properties left vacant by owners who simply walked away from properties due to "underwater" property values and increasing numbers of lender-owned properties which lenders were unwilling or unable to sell. Accordingly, vacancies in California communities increased, leading to blight in certain communities. Compounding the problem in some areas was a reduction in local government services caused by diminished tax revenues, such that local law and code enforcement was stretched thin. This chapter addresses some of the issues faced by neighbors and property owners of vacant or blighted property.

PRACTICE TIP➤ Many cases in this area result in unpublished decisions. Although generally not cited in this book, unpublished cases may provide counsel with insight and further illustration of the arguments and theories discussed throughout this chapter.

B. Definitions and Concepts

§9.2 1. Vacant or Abandoned Property

Vacant property is property that is uninhabited or unused by its legal owners of record. Vacant property may or may not contain improvements. In the context of residential property, a house could be completely vacant of furnishings or occupants or occasionally vacant of occupants, such as in the case of a vacation or rental home.

Abandoned property is usually discussed in the larger context of personal and real property that is unclaimed and in which title may escheat to the state. See generally CCP §1300(b). While vacant properties may also be abandoned, a discussion of escheat proceedings is beyond the scope of this book. For discussion of escheat proceedings, see California Real Property Sales Transactions §15.25 (4th ed Cal CEB).

§9.3 2. Squatters

Squatters are individuals who unlawfully occupy or reside in vacant real property without legal or equitable title or any good faith right or agreement

to possess or access the property. Squatters are essentially trespassers who settle on land or in buildings without the permission of the rightful owner. Squatters sometimes intend to claim title of the property on which they are trespassing by adverse possession; see §§2.45–2.47, 9.22, 16.70–16.72, 18.18–18.25.

Trespass to property is defined as an unlawful interference with possession. *Staples v Hoefke* (1987) 189 CA3d 1397. A person may gain entry to vacant property and take up residence, or a property owner may provide a key to a prospective tenant for viewing the premises and the person then moves in, in either event without the owner's permission. The law is unsettled on whether some type of notice must be given to the unauthorized intruder before the commencement of an unlawful detainer action. It is advisable that a property owner first attempt getting law enforcement involved. If, as is usually the case, law enforcement considers it a "civil" matter and will not remove the trespasser, then two other courses of action may be taken: The trespasser may be served with a 30-day notice followed by an unlawful detainer action (see California Landlord-Tenant Practice, chaps 9–13 (2d ed Cal CEB)). Alternatively, the property owner may treat the entry as a type of tenancy at sufferance and commence an unlawful detainer without notice. An action in ejectment (see §§17.34–17.39), forcible entry and detainer (see §§17.40–17.44), or quiet title (§§16.46–16.53) may also be available. See also §§9.21–9.22, 9.29.

3. Blight

§9.4 a. Under Local Ordinances

Local ordinances sometimes use the term "blight" to describe vacant property conditions that constitute a nuisance. See, *e.g.,* San Jose Mun C §17.72.040, which describes blight as including conditions that constitute public nuisance under CC §3480. What constitutes a public nuisance is discussed in §9.13. For discussion of zoning against blight, see §9.23.

§9.5 b. Under State Law

A "blighted area" is defined in the Community Redevelopment Law (Health & S C §§33000–33855) as property located in a "predominantly urbanized area" in which physical and economic conditions prevail that (Health & S C §§33030(b)(1), 33031(a)–(b))

> cause[ ] a reduction of, or lack of, proper utilization of the area to such an extent that it constitutes a serious physical and economic burden on the community that cannot reasonably be expected to be reversed or

> alleviated by private enterprise or governmental action, or both, without redevelopment.

Thus, under California law, a blighted area exists when private market forces alone are unable to restore real property to productive use.

In 2011, the California Legislature dissolved redevelopment agencies (see Health & S C §§34170–34191.6) in an effort to deal with the state's ongoing budget crisis. There is currently no comprehensive redevelopment tool authorized to remedy these problems. Local agencies are able to establish and undertake their own redevelopment projects, however. For discussion of the history of redevelopment agencies, including the dissolution of such agencies under *California Redev. Ass'n v Matosantos* (2011) 53 C4th 231, see §9.24. Under Health & S C §25403, local agencies have powers to clean up properties blighted by the presence of hazardous materials. Health & S C §§25403–25403.8. An examination of this law is beyond the scope of this treatise. See Burgaard, *Cleanup Act,* 37 Los Angeles Lawyer 20 (Apr. 2014).

§9.5A C. Dangerous Conditions

The concept of "dangerous" conditions generally arises in buildings or structures that pose a threat to life, health, property, or the safety of the public because of the unsafe condition. In general, these conditions may be covered by the 1997 Uniform Code for the Abatement of Dangerous Buildings, as may be adopted by the local city or county authority. All municipalities adopt, by reference, the California Building Code, the California Fire Code, and the other model codes adopted as part of the California Building Standards Code by the California Building Standards Commission (CBSC) and published in Title 24 of the California Code of Regulations, along with any local amendments. Health & S C §§17922, 17958. In order to protect life or property, the local authority may use its code enforcement and police powers to take action to abate the dangerous condition or cause the property owner to do the same. For a comprehensive discussion of code enforcement authority, see The California Municipal Law Handbook, chaps 12–13 (Cal CEB).

II. PRACTICAL AND LEGAL ISSUES

A. Practical Issues

§9.6 1. Identify Potential Conflicts

Blight cases sometimes involve suits against public entities or pit neighbor against neighbor. Before undertaking any representation involving neighbors

and a public process like code enforcement, counsel should undertake an extensive conflict search and consider the practical and political ramifications of the case.

For discussion of the client interview and initial consultation process, see chap 15.

§9.7 2. Client Guidance

The primary need of a potential client calling about a neighboring property that is vacant, blighted, or has squatters, is direction and guidance on how to seek recourse from local government agencies to ensure compliance with all applicable codes and regulations. If the property is in a planned community, then the home owners association (referred to throughout this chapter as HOA) is the first entity to consult after reviewing the covenants, conditions, and restrictions (referred to throughout this chapter as CC&Rs) governing the property. As long as vacant property is maintained according to city codes, applicable laws, and the CC&Rs, then there may be little that can be done. However, counsel can help the client organize and negotiate the maze of laws and regulations as well as the political element of local government, as well as negotiating a solution with neighboring landowners or an HOA.

§9.8 3. Defending Against Government Action

If counsel is contacted by a potential client for assistance with defending against a city enforcement or abatement action due to dangerous conditions, vacant property, or property occupied by squatters, then the primary consideration is time. The client may or may not have many options for dealing with the issue, but all options generally will require immediate attention to minimize the client's potential risk of fines, penalties, and additional claims.

§9.9 4. Checklist: Client Information

Counsel should obtain the following information and documentation from, or on behalf of, the client:

- ___ Name of the owner and address of subject property
- ___ Contact information for the city council members, code enforcement department, and city attorney or prosecutor
- ___ Title search to ascertain all legal owners and lienholders and to obtain copies of deeds and mortgages (this should include the legal description of the property wherever possible to best identify the actual property at issue)

- ___ Photographs and video documentation showing the condition of the property, either from the client or during counsel's visit to the site
- ___ Copies of records showing if taxes are being paid and by whom
- ___ Copies of applicable CC&Rs
- ___ Copies of applicable local land use ordinances, building codes, permits, and any other relevant publicly available documents or records
- ___ Records of all contact with the owner or city officials to date
- ___ Contact information of any other interested neighbors

A client defending an action should also be prepared to supply

- ___ Copies of all city or agency correspondence, citations, and abatement orders
- ___ Copies of any leases and licenses
- ___ Copies of any current or expired permits, with construction plans
- ___ Copies of any construction contracts
- ___ A survey of the client's property

NOTE➤ While obtaining a survey of a client's property is usually optional, in certain situations it may be preferable or even necessary. For example, counsel may elect to obtain a survey if an issue arises which appears to affect parcels not owned by the client, if it is unclear whether the issue actually exists on the client's property, or if apportioning liability for an issue is necessary to reduce a client's potential liability.

§9.10 B. Legal Issues

Offensive conduct by a neighbor and offensive conditions by a neighboring property may constitute actionable nuisance or trespass, or both. Entry onto an affected property is not a condition of liability for trespass to property. Liability for trespass to property may exist in connection with intentional, reckless, or negligent conduct, or the result of an extrahazardous activity. See *Smith v Lockheed Propulsion Co.* (1967) 247 CA2d 774, 784.

§9.11 1. Nuisance Law

Generally, everyone has the right to be secure in their own home and is protected from unreasonable government intrusion or taking of their private property. See US Const amends IV, V, XIV; Cal Const art XI, §7. However, these rights are subject to reasonable government action to protect the health and safety of the community through the exercise of the state's police power. The police power to regulate land use and alleviate dangerous conditions on a property is the underlying law to any action by local government seeking to enforce building codes and regulations. See The California Municipal Law Handbook, chaps 10 and 12 (Cal CEB); California Land Use Practice §1.1 (Cal CEB). These codes and regulations are often couched in the law of nuisance.

Permanent nuisance or continuing nuisance. A nuisance may be permanent (*e.g.,* an encroachment by a neighboring building) or continuing (*e.g.,* noise and debris from patrons of a nearby nightclub). If the nuisance is permanent, the plaintiff must bring one action for all past, present, and future damages. If the nuisance is continuing or temporary, then the plaintiff may bring successive actions for each instance of nuisance. *Mangini v Aerojet-Gen. Corp. (Mangini II)* (1996) 12 C4th 1087, 1097; *McCoy v Gustafson* (2009) 180 CA4th 56, 84. The statute of limitations (CCP §338) may be an issue to consider before filing suit. See §§1.53, 1.56, 2.66.

In *Benetatos v City of Los Angeles* (2015) 235 CA4th 1270, a fast-food restaurant's operations were held to constitute a nuisance. The property was covered with trash and graffiti, and gang and criminal activity was taking place at the property. The court upheld the city's findings that the property constituted a nuisance. For discussion of nuisance cause of action, see §§16.2–16.11.

§9.12 a. Nuisance Under CC §3479

Nuisance law is premised on the idea that owners of land are entitled to the full use and enjoyment of their land, but they must use their property in a way that does not interfere with either the general welfare of the community or others' right to the full enjoyment of their respective properties. *County of Contra Costa v Cowell Portland Cement Co.* (1932) 126 CA 267, 271; *Wolford v Thomas* (1987) 190 CA3d 347, 358.

A nuisance is defined generally in CC §3479 as anything injurious to health, including

- Anything "indecent or offensive to the senses";

- Any obstruction to the free use of property, "so as to interfere with the comfortable enjoyment of life or property"; or
- Anything that "unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway."

Neighbor disputes about blight, dangerous conditions, and vacancy often focus on issues of public nuisance (see §9.13) or nuisance per se (see §9.15).

§9.13 b. Public Nuisance Under CC §3480

Civil Code §3480 defines a public nuisance as

> one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

What constitutes a "considerable number of persons" is a fact-specific issue. A dairy farm was held to be a public nuisance when it affected 11 persons owning property near the farm. *Wade v Campbell* (1962) 200 CA2d 54, 59. A bar and restaurant that played loud amplified music, disturbing a rural neighborhood of about 33 homes, was found to be a public nuisance. *People v Mason* (1981) 124 CA3d 348, 354.

EXAMPLE➤ Hugh owns an adult bookstore and theater in Alameda. The city seeks to enjoin Hugh from offering lewd and obscene materials in the bookstore using a public nuisance argument. See, *e.g., People ex rel Busch v Projection Room Theater* (1976) 17 C3d 42.

It is a misdemeanor to maintain a public nuisance. Pen C §§370, 372. After a notice to abate a public nuisance has been served, each day that the nuisance continues constitutes a separate offense. Pen C §373a.

A city has the power to pass general police regulations to prevent and abate nuisances, which power is not limited to nuisances per se (see §9.15) within the meaning of CC §§3479 and 3480 and Pen C §370. *Benetatos v City of Los Angeles* (2015) 235 CA4th 1270; *People v Johnson* (1954) 129 CA2d 1.

A public nuisance can be abated by a civil, criminal, or government administrative action. CC §§3490–3496; Govt C §§38771–38773.5. See also The California Municipal Law Handbook §§12.2–12.28B (civil), §§12.29–12.66 (criminal), §§12.67–12.84 (administrative) (Cal CEB).

§9.14 c. Private Nuisance Under CC §3481

Any nuisance that is not included in the definition of nuisance in CC §3480 is a private nuisance. CC §3481.

EXAMPLE➤ As part of a new housing development on rural farmland, Greenfields Development builds a sewage treatment plant. After operations begin, the immediately adjacent neighbor, who runs a winery and vineyards, experiences sewage odors. The neighbor may seek to have the sewage treatment plant declared a private nuisance. See, *e.g., Varjabedian v City of Madera* (1977) 20 C3d 285.

Some nuisances are both public and private. See *Zack's, Inc. v City of Sausalito* (2008) 165 CA4th 1163 (city's impairment of property owner's access easement without following statutory procedures was both public and private nuisance). To establish standing for a single plaintiff, the public nuisance must be "specifically injurious" to the plaintiff. To be "specifically injurious," the damage suffered must be different in kind, not merely in degree, from that suffered by other members of the public. CC §3493; *Frost v City of Los Angeles* (1919) 181 C 22; *Koll-Irvine Ctr. Prop. Owners Ass'n v County of Orange* (1994) 24 CA4th 1036, 1040; *Brown v Petrolane, Inc.* (1980) 102 CA3d 720, 726.

§9.15 d. Nuisance Per Se

A legislative body, such as a city or county board of supervisors, may declare a certain item, conduct, or activity a nuisance by ordinance. Govt C §§38771–38775. When a public nuisance has been statutorily defined, it is considered a nuisance per se. *City of Claremont v Kruse* (2009) 177 CA4th 1153, 1163. Cities typically declare nuisances in zoning, building, environmental protection, grading, noise, fire protection, and other similar ordinances. See The California Municipal Law Handbook §12.4 (Cal CEB); California Real Property Remedies and Damages §11.3 (2d ed Cal CEB).

EXAMPLE➤ AJ, a resident of Costa Mesa, keeps several automobiles in various stages of disrepair in front of his home. The city's municipal code prescribes punishment for anyone convicted of storing inoperative vehicles. The city seeks to declare the vehicles a nuisance per se and files a complaint against AJ in superior court. See, *e.g., City of Costa Mesa v Soffer* (1992) 11 CA4th 378.

A determination of whether a nuisance exists generally requires consideration and balancing of a variety of factors, so when the law expressly

declares something to be a nuisance, then no further inquiry need be made. *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160. Therefore, when bringing an action for nuisance per se, the city has no burden of proof beyond showing that the condition actually exists. *Soffer,* 11 CA4th at 385 (city need only prove that defendant was storing inoperative vehicles in violation of ordinance).

PRACTICE TIP➤ Counsel should check local ordinances to determine whether the condition of concern has been identified as a nuisance. Additionally, a state or local statute may establish a nuisance per se. See, *e.g.,* Govt C §§39501–39502, 39560–39573 (municipal abatement of weed and rubbish nuisances); Health & S C §17980 (substandard residential buildings); Govt C §38660 (destruction of unsafe structures).

§9.16 e. Attractive Nuisance

The doctrine of attractive nuisance is often invoked when children are injured on abandoned property or construction sites, but it may also be useful in other situations. Historically, the doctrine was developed to impose liability on property owners for injuries suffered by minors, as an exception to the general rule that a landowner owes no duty of care to trespassers. *Woods v City & County of San Francisco* (1957) 148 CA2d 958, 961. In *Rowland v Christian* (1968) 69 C2d 108, however, the California Supreme Court repudiated the classic trespasser-licensee-invitee distinction and substituted an approach based on the foreseeability of injury to others.

Under the rule embodied in Restatement (Second) of Torts §339 (1965), owners and possessors of real property still have a special duty of care toward trespassing children, but the former rigid formula, which listed various attractive instrumentalities, has been abandoned. Under the Restatement rule, generally followed in California, an owner or possessor of real property is liable for harm to trespassing children caused by an "artificial condition" when

- The place is one on which children are likely to trespass;
- The condition involves an unreasonable risk of death or serious bodily harm;
- The children, because of their youth, do not discover the condition or realize the risk;
- The utility to the possessor of maintaining the condition and the burden of eliminating the condition are slight compared with the risk; and

- The possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children.

See *Crain v Sestak* (1968) 262 CA2d 478 (12-year-old fell from scaffolding); *Walker v Fresno Distrib. Co.* (1965) 233 CA2d 840 (child injured while swinging from 400-pound gate).

EXAMPLE➤ Winchester Unified School District is in the process of remodeling the local elementary school. Gaps in the construction fencing allow the neighborhood youngsters to play among the construction machinery, equipment, and supplies. Winchester is sued under an attractive nuisance theory when one of the children is injured from a fall on loose boards at the property. See, *e.g., Woods v City & County of San Francisco, supra*.

For further discussion of attractive nuisance, see §§16.12–16.15.

§9.17 f. Nuisance Abatement

Any public nuisance may be enjoined. CC §3491. Any city attorney, county counsel, or district attorney may bring an action to abate a public nuisance whenever directed by the appropriate legislative authority. CCP §731; Govt C §26528. A county board of supervisors may establish a procedure for the abatement of a nuisance. Govt C §25845. If a dangerous condition exists under the local building code, then the local authority may have the right to take immediate action to abate the threat to life or property.

§9.18 (1) Administrative Action

Municipal or county procedures for abatement of nuisances involving substandard buildings include giving the owner notice, a chance to repair, and a reasonable time to do so. Health & S C §17980; 25 Cal Code Regs §§48–70; *Hawthorne Sav. & Loan Ass'n v City of Signal Hill* (1993) 19 CA4th 148. See also California Real Property Remedies and Damages §11.20 (2d ed Cal CEB). Generally, under Health & S C §17980, unless an immediate threat exists to the health and safety of the public or occupants, the owner will have 30 days to abate the nuisance or violation. If the owner purchased a residential property in a foreclosure after January 1, 2008, and is diligently abating any violation, then no action may be commenced until 60 days after title is taken. Health & S C §17980(a). Cities may also provide for a treble-costs provision for entry, within a 2-year period, of a second or subsequent civil or criminal judgment for public nuisance because of

defacement of property by graffiti or other inscribed material. Govt C §38773.7. This does not apply to conditions abated under Health & S C §17980 (substandard buildings).

An administrative action involving vacant property that is a nuisance per se takes the form of an abatement order from the local governmental authority proceeding under its own ordinances. The California Municipal Law Handbook §§12.67–12.77 (Cal CEB). If the nuisance is not abated in the manner required or within the time allowed, then the property owner will receive an order to show cause why a complaint should not issue for maintaining the nuisance, which gives the owner an opportunity to be heard at an administrative hearing. Muni Law §§12.78–12.81.

If, after the administrative hearing, the nuisance is still unabated and of such a nature as to require remodeling or demolition of the building, then the local ordinance may allow the city to remodel or demolish the structure to abate the nuisance and place a lien against the property for all costs and expenses, including related administrative expenses. Health & S C §17980; Govt C §§38771–38773.7; *City & County of San Francisco v Jen* (2005) 135 CA4th 305 (owner of uninhabited building that endangered nearby residents ordered to pay costs and attorney fees). See, *e.g.,* Redondo Beach Mun C §4-10.07. Most ordinances will allow the city to foreclose the lien and collect its attorney fees. Muni Law §12.23.

A nuisance abatement order may impose specific operating conditions on a business. *Benetatos v City of Los Angeles* (2015) 235 CA4th 1270. In *Benetatos,* the city found a fast-food restaurant's operations constituted a nuisance because of deteriorated property conditions and excessive criminal activity. After an administrative hearing, 22 operating conditions were imposed on Mr. Benetatos, including reducing hours of operation, graffiti removal, hiring a security guard, and barring access to prostitutes and narcotics users. The conditions were upheld in the ensuing writ of mandate appeal.

§9.19 (2) Self-Help

Anyone injured by a private nuisance may abate it by removing or, if necessary, destroying whatever constitutes the nuisance, if this is done without committing a breach of the peace or doing unnecessary injury. CC §3502. If the nuisance results from a mere omission of the wrongdoer and cannot be abated without entering onto the land of another, reasonable notice must be given before the entry can be made. CC §3503. A person who has the right to self-help may forgo this option and elect to resort to judicial remedies, such as an abatement order. See *Parsons v Luhr* (1928) 205 C 193; *Bonde v Bishop* (1952) 112 CA2d 1, 6.

PRACTICE TIP➤ Courts often frown on self-help abatement, and review of the appropriateness of the action taken will be factually based. Compare *Bonde v Bishop, supra* (landowner can "take the law in his own hands" and remove offending branches and roots from neighbor's tree rather than go to court and prove private nuisance), with *Booska v Patel* (1994) 24 CA4th 1786 (landowner's right to remove branches and roots does not equate to absolute right to cause harm to neighbor; CC §3502 provides that self-help abatement is "at his own risk").

Counsel should advise clients in writing that self-help abatement, without court sanction, is rarely an appropriate remedy and may even result in criminal penalties. See, *e.g.,* Pen C §602 (defining acts of trespass and setting out punishment).

§9.20 2. Vacant Foreclosed Property

In 2008, SB 1137 (Perata Mortgage Relief Bill) addressed problems arising from residential properties that were vacated or abandoned in the course of foreclosure proceedings and were then owned by absentee lenders or investors (often called REO properties, for "real estate owned" by the lender after foreclosure). Stats 2008, ch 69, §1. See Swalwell & Iloulian, *The Pitfalls of Senate Bill 1137's Foreclosure Prevention Rules,* 31 Los Angeles Lawyer 16 (Jan. 2009); California Mortgages, Deeds of Trust, and Foreclosure Litigation §10.8A (4th ed Cal CEB).

Beginning January 1, 2021, under CC §2929.3, a city must provide 14 business days' notice to the property owner to commence the needed maintenance and repair after the date of the notice and allow 16 business days after that for the legal owner to correct the violation before any fine may be imposed (CC §2929.3(a)(2)), although less than the total 30 days is allowed if health and safety issues are involved (CC §2929.3(c)). The initial 14 business day period may be extended under certain circumstances by 10 days when the property owner needs clarification from the city as to the extent of the maintenance or repairs called for.

A "failure to maintain" property includes (CC §2929.3(b))

- Failing to care for the exterior, such as allowing excessive foliage growth;
- Failing to prevent trespassers or squatters;
- Failing to prevent mosquito larvae from growing in standing water (*e.g.,* in pools or ponds); and
- Other conditions that create a public nuisance.

Section 2929.3 only applies to residential property and does not preempt local ordinances. CC §2929.3(f)–(g). The mortgagee in possession must be given notice of any violation and an opportunity to correct, unless there is a specific condition of the property threatening public health or safety. CC §2929.4. Costs recoverable against property that is either under notice of default or acquired through foreclosure is limited to the actual and reasonable costs of nuisance abatement. CC §2929.45. Before the assessment of a lien, there must be a public hearing at which the costs that constitute the assessment are adopted by public officials. CC §2929.45(b).

A local ordinance may be more restrictive or punitive than CC §2929.3. See, *e.g.,* San Jose Mun C §§17.72.010–17.72.620 (San Jose Community Preservation Ordinance), which in turn refers to San Jose Mun C §1.15.030, providing for enforcement "[w]henever an enforcement officer charged with the enforcement of any provision of this code determines that a violation of that provision has occurred." This essentially means that an enforcement officer may impose fines on the first day that violation is observed, without warning. Fines cannot be imposed under both state law and a local ordinance. CC §2929.3(e).

Municipal codes may also give cities the right to put vacant properties into receivership to be repaired and sold. However, many cities do not have the resources to pursue the cases. In Los Angeles, the city attorney has worked with private law firms to handle the receivership proceedings, with sale proceeds paying for the legal fees and work. The City of Los Angeles has sought action against several large banks holding hundreds of vacant properties that requests relief under a myriad of laws, including the Unfair Competition Law (UCL) (Bus & P C §§17200–17210), and fines up to $2,500 per day. See *People v U.S. Bank N.A.* (Los Angeles Sup Ct, No. BC488436, July 16, 2012). The case settled in October 2016, with U.S. Bank paying $13.5 million and agreeing to maintain the properties in compliance with applicable laws. See https://www.latimes.com/business/la-fi-feuer-foreclosure-settlement-20160929-snap-story.html.

A court may issue an injunction to restrain a party in possession from causing injury to the property during a foreclosure action. CCP §745. The purchaser of property after a foreclosure sale may recover damages from the tenant in possession. CCP §746.

3. Squatters

§9.21 a. Trespass

Squatter activity is governed by trespass law and consists of possession of real property without permission or unlawful interference with the possession of the true owner. *Staples v Hoefke* (1987) 189 CA3d 1397. Penal Code §602(m) prohibits anyone from entering or occupying real property without the consent of the owner. The only intent required is the intent to enter the property, regardless of the actor's motivation. *Miller v National Broad. Co.* (1986) 187 CA3d 1463, 1480. See §§2.3, 16.6–16.23; California Real Property Remedies and Damages §§11.17–11.18 (2d ed Cal CEB). When the squatter was previously a tenant on the property, the activity may be governed by unlawful detainer law. See California Landlord-Tenant Practice, chaps 8–13 (2d ed Cal CEB). See additional discussion in §9.39.

It is not a violation of Pen C §602(m) to enter private property without consent unless the entry is followed by occupation without consent. To prove that a squatter has trespassed, actual "occupancy" by the squatter must be shown; merely sitting or sleeping overnight on someone's property is not enough. See *People v Wilkinson* (1967) 248 CA2d Supp 906, 909 (interpreting Pen C §602(*l*)); The California Municipal Law Handbook §9.163 (Cal CEB).

The penalty for trespassing at a residential property is generally a misdemeanor citation. Pen C §602. However, an unauthorized entry, or aggravated trespass when the lawful resident is also present, can result in a fine, imprisonment, or probation. Pen C §602.5. Unlawful possession of a residential dwelling without the owner's consent for the purpose of renting that dwelling to another can result in a misdemeanor punishable by jail or a fine. Pen C §602.9.

Trespassing on cultivated land that is posted or enclosed by a fence is generally an infraction. Pen C §602.8. A person who enters a residence with the intent to commit grand theft, petit larceny, or any felony is guilty of burglary. Pen C §459.

Besides violating trespass laws, squatters may also be guilty of vandalism statutes. See Pen C §594 (general vandalism), §603 (forcible entry and vandalism). Treble damages may be awarded in an action for forcible or unlawful entry. CCP §735. County and city ordinances may also provide for rules and penalties on trespass.

For discussion of distinction between trespass and nuisance law, see chaps 2, 16. For actions against trespassers, see discussions of ejectment (§§17.34–17.39), forcible entry and detainer (§§17.40–17.44), and quiet title

(§§16.46–16.53). For defense against adverse possession, see §9.22. See also §§9.3, 9.29.

§9.22 b. Adverse Possession

Some squatters may intend to establish an ownership claim to the real property they occupy under the theory of adverse possession. Generally, exclusive occupancy of property for a sufficient period of time may confer title. CC §§1000, 1006–1009.

To establish title to property by adverse possession, the following five elements must be proven (CCP §§321, 325):

- The possession must be held under claim of right or color of title;
- The possession must be an actual, open, and notorious occupation that constitutes reasonable notice to the record owner;
- The occupation must be exclusive and hostile;
- The occupation must be uninterrupted and continuous for at least 5 years; and
- The possessor must timely pay all of the property taxes for the same period.

For further discussion of adverse possession, see §§2.45–2.47, 16.70–16.72, 18.18–18.25.

4. Blight

§9.23 a. Local Zoning Ordinances

The word "blight" may be used and defined by local nuisance abatement ordinances for vacant properties in need of repair. See §9.4. See also, *e.g.,* San Jose Mun C §§17.72.500–17.72.585. Blight control and nuisance ordinances (and HOA CC&Rs) typically prohibit such things as the parking of construction and commercial vehicles in areas zoned for residential use; the parking of inoperable vehicles for more than a certain length of time in residential areas; and the parking of trailers, motor homes, and recreational vehicles in front yard setback areas (which may or may not include driveways) for more than a certain length of time. See *Sui v Price* (2011) 196 CA4th 933; *In re Scarpitti* (1981) 124 CA3d 434; *People v Tolman* (1980) 110 CA3d Supp 6; *Sechrist v Municipal Court* (1976) 64 CA3d 737. Zoning and building ordinances are part of a government's police power used to combat blight. They may include, among other things, prohibitions against substandard buildings and landscaping (*e.g.,* vegetation cannot block intersection sightlines or create fire hazard near structures). Zoning may also be used to

create an aesthetically pleasing neighborhood. See *Penn Cent. Transp. Co. v New York City* (1978) 438 US 104, 98 S Ct 2646 (city may use police power to preserve landmarks to enhance quality of life by preserving character and desirable aesthetic features); *Metromedia, Inc. v City of San Diego* (1980) 26 C3d 848, 860 (aesthetic reasons alone are sufficient justification of exercise of police power), reversed on other grounds in *Metromedia, Inc. v City of San Diego* (1981) 453 US 490, 507, 101 S Ct 2882.

§9.24 b. Redevelopment Agencies

California enacted its first blight law in 1945. See Stats 1945, ch 1326, §1. This statute eventually evolved into the Community Redevelopment Law (Health & S C §§33000–33855), which grants local governments rights to combat blight through a battery of tools such as eminent domain and infrastructure construction. Courts have consistently recognized that the function of a redevelopment agency is to restore to productive use properties suffering from blight. See *Emeryville Redev. Agency v Harcros Pigments, Inc.* (2002) 101 CA4th 1083, 1105; *Beach-Courchesne v City of Diamond Bar* (2000) 80 CA4th 388, 395.

To qualify as blighted, an area must contain physical conditions (as defined in Health & S C §33031(a)) and economic conditions (as defined in Health & S C §33031(b)) that cause blight. Health & S C §33030(b)(1). Code violations alone do not establish blight. See *Friends of Mammoth v Town of Mammoth Lakes Redev. Agency* (2000) 82 CA4th 511, 550. The redevelopment scheme was used over several decades to revitalize large portions of many cities, including the Uptown and Fruitvale areas of Oakland, the Gaslamp Quarter of San Diego, and 34 redevelopment project areas in Los Angeles.

NOTE➤ In February 2012, California redevelopment agencies ceased to exist after the decision in *California Redev. Ass'n v Matosantos* (2011) 53 C4th 231 upholding the state's dissolution of the agencies under AB 26 (2011 1st Extra Sess). See Stats 2011, ch 5. Despite the dissolution of the redevelopment agencies, local governments may still use their police powers to fight blight.

§9.25 c. Eminent Domain Post-*Kelo*

Eminent domain is one police power that cities and counties use to combat blight in large areas and encourage development. In 2008, in response to the U.S. Supreme Court's decision in *Kelo v City of New London* (2005) 545

US 469, 125 S Ct 2655, California voters amended the California Constitution by approving Proposition 99, the Homeowners and Private Property Protection Act. Under the Act, state and local governments are prohibited from using eminent domain to acquire a single-family residence for the purpose of transferring the property to a private person or business unless any of the following conditions apply (Cal Const art I, §19):

- The property owner does not live in the home or has lived there for less than 1 year;
- The property is being acquired for a public work or improvement; or
- The property is being acquired to
  - Abate a nuisance,
  - Protect public health and safety,
  - Prevent serious criminal activity,
  - Respond to an emergency, or
  - Remedy environmental contamination that poses a threat to public health and safety.

For additional discussion of eminent domain proceedings, Proposition 99, and *Kelo,* see Condemnation Practice in California (3d ed Cal CEB).

III. HANDLING THE DISPUTE

A. Before Litigation

§9.26 1. Evaluate Personal Injury to Client

Sometimes clients sustain physical or mental injuries caused by dangerous conditions on the property of others. When that is the case, counsel should ask the client to prepare a detailed account of the incident and provide the following documents, as appropriate:

- Medical bills,
- Projected costs of future medical treatment,
- Therapist's reports,
- Photos of the injury and of the property where the injury occurred, and
- Wage or earnings reports and missed earnings calculations.

NOTE➤ There are some instances in which injuries to clients also result in noneconomic damages, such as pain and suffering. Counsel should analyze these damages when investigating injuries caused by nuisances or dangerous conditions on properties, and consider the effects of those injuries on the client's life.

§9.27 2. Visit Site

Counsel should personally view the property to observe the physical conditions complained of, especially if someone has been injured there. If the neighbors are not hostile, a meeting at the property with both sides may prove productive. Depending on the nature of the underlying dispute, having an enforcement officer participate in the meeting may also improve the chances of resolution. If the boundary is unclear and the condition may affect multiple parcels, counsel should consider ordering a survey to identify exactly where the condition exists and against whom claims may be made. This may also increase the chances of a single, global resolution of claims.

§9.28 3. Organize Neighbors

Blighted or dangerous property. One of the first things counsel or the client should do to address blight or a dangerous condition is to talk with other neighbors about the property, review any neighbors' claims arising from or in connection with the property, and organize the neighbors to work together to present demands to the owner and, if necessary, the city or county. If the property owner's contact information is known, the neighborhood group should contact the owner to discuss the situation. If the owner is unwilling or unable to take any action to redress the problem, then the local authorities should be contacted. This may be done in conjunction with taking available legal action to seek relief.

Squatters and illegal activity. If squatters are occupying a vacant property, the owner of the property should be contacted and encouraged to take appropriate action. If the owner cannot be found or resists taking action, then the neighborhood group can contact the local police. However, unless the property owner is making the request, police may be reluctant to take action against the squatters, because it may be unclear if the squatters are tenants or occupying under some rightful claim from the property owner. If the squatters are engaged in other criminal activity (*e.g.,* drugs or prostitution), then the police are more likely to act on any complaint. On addressing criminal activity, see chap 10.

§9.29 4. Make Complaint to Local Authority

Blighted or dangerous property. A client who is determined to publicly address a problem arising from blighted property or dangerous condition should recruit all interested neighbors, or the local HOA, to call and write the city council persons or county supervisor with authority over the property in question, with copies sent to the city or district attorney.

PRACTICE TIP➤ Counsel should ensure that the client is comfortable with the publicity that may ensue before making any contact with the city. The client must be advised that any actions taken will be public, and any involvement may potentially be disclosed to the property owner and media.

At a minimum, the council member should refer the matter to the city attorney and local code enforcement agency for immediate investigation. The communication should request that a code enforcement officer meet with the interested neighbors to gain an understanding of the problems with the property and advise the neighbors or HOA of any action taken. If the city council or county supervisors do not, for any reason, reasonably conduct an investigation into the matter, as requested, counsel may have to seek injunctive and declaratory relief.

Squatters. A client whose property is occupied by squatters should call the police to remove them under trespassing laws. The client should meet the police at the property and be prepared to show proof of ownership and identity. After the squatters are removed, the client should secure the property, locking all doors and fences, and periodically inspect the property or obtain property management services. The client may also consider installing security cameras and alarms at the property to alert the client to any entry upon the property and to maintain a record of such entry for possible evidentiary purposes.

If the squatters are former tenants or otherwise claim a contractual or other right in the property, then other action may be needed, including ejectment (§§17.34–17.39), forcible entry and detainer (§§17.40–17.44), or quiet title (§§16.46–16.53). See also §§9.3, 9.21–9.22.

§9.30 5. Representing the Property Owner

When representing the property owner, counsel should determine in the initial consultation whether the client intends to bring the property into compliance with applicable codes, CC&Rs, or other standards to which the property is subject. The client may be unwilling or unable to spend the money necessary to bring the property up to code or to evict squatters. The client may have other reasons for not complying, such as a disagreement with code or CC&R requirements or application of the code or CC&Rs to the client's property.

Address neighborhood concerns. After determining the property owner's course of action, either counsel or the client may want to contact and meet with any neighbors affected by the vacant property. If the client intends

to take immediate action to remedy any concern, then simply relaying that information to the neighbors may dissuade them from taking any further action. If the problem involves squatters, the neighbors may be helpful in the future by keeping an eye on the property.

§9.31 B. Mediation

Local government may not always be able to offer a complete solution; in order to promote peace in the neighborhood, the parties involved should be counseled to mediate. The interested parties are often able to craft a more practical and cost-effective resolution than would be available through enforcement action. Neighbors can also address nonlegal issues in mediation, which cannot be resolved through litigation.

Many cities contract with mediation services, such as the San Francisco Community Boards (https://communityboards.org), to help resolve difficulties that can arise when people live together in densely populated urban spaces. Counsel may check with local bar associations, courts, or mediation trade organizations such as the Southern California Mediation Association (https://scmediation.org/) to research possible mediation services.

PRACTICE TIP➤ The California Department of Consumer Affairs maintains a list of local mediation programs on its website (https://www.dca.ca.gov/consumers/dispute_resolution_programs.shtml).

NOTE➤ Effective January 1, 2019, an attorney representing a client participating in a mediation or a mediation consultation must, before the client agrees to participate in the mediation or mediation consultation, provide the client with a printed disclosure containing the confidentiality restrictions described in Evid C §1119 and obtain a printed acknowledgment signed by that client stating that they have read and understand the confidentiality restrictions. A statutory form used to comply with this requirement can be found in Evid C §1129(d).

C. Civil Actions

§9.32 1. Administrative Hearing

Any abatement or enforcement action will be carried out by the local government authorities. Generally, the property owner will first receive an abatement order and be provided with a time frame in which to effect repairs. If effective repairs are not timely made, the city or county code enforcement agency will usually send an order to show cause at an administrative hearing, though in some jurisdictions, fines and/or penalties may

also be assessed against a property owner for failing to timely comply with an abatement order. Following the hearing and a determination that the abatement work is required, the governing body will decide whether to do the work and lien the property to recover costs.

§9.33 a. Communicating With Enforcement Agency

If representing a property owner subject to an abatement action, counsel should obtain a copy of the notice or letter from the code enforcement agency and advise the client to contact the agency and address the required actions immediately. This is particularly crucial in the case of foreclosed property because penalties can accrue at the rate of up to $1,000 per day. See §9.20. If the client is unable or unwilling to take all of the actions demanded, then it may be advisable for counsel to become the contact person for addressing the city's demands. A record of all written and oral communication with the enforcing agency should be maintained.

PRACTICE TIP➤ Counsel should be sure to have both a written fee agreement in place and documentation of the penalties and fines that the client may incur if the property is not brought into compliance. It is useful to include applicable deadlines, an acknowledgment by the client that they could act on their own behalf in all proceedings, and a list of the pitfalls of doing so. Counsel is well advised to highlight the potential high costs and expenses beyond attorney fees and costs, including for repairs, cleanup, and permits, and should consider a retainer fee relative to the projected cost.

§9.34 b. Complying With Abatement Order

In order to ensure that the client is complying with the abatement order, counsel should

- Monitor the client's attempts to bring the property to code,
- Document the work's progress and completion, and
- After the work is completed, request that the code enforcement officer or applicable agency issue a letter acknowledging completion of abatement, compliance of the property with applicable codes, and confirmation that no further action is needed.

Counsel should also consider whether client should informally contact neighbors to "mend fences" if they were involved in the complaints to the agency. If the client is willing to contact neighbors, they should share

contact information with them so that they can inform the client of problems with the property instead of code enforcement.

§9.35 c. Opposing the Abatement Action

If the client wishes to fight the abatement order rather than comply, then counsel should become the contact person for all correspondence with the agency and the city or county attorney. Counsel should make sure that the client works within the time frames established by the enforcement order or municipal ordinance. On administrative hearing proceedings for challenging an abatement order, see §§9.32–9.35.

The best defense to an abatement order or nuisance per se claim in an administrative hearing may be to argue that the statute on which the action is based does not apply. This could place a much greater burden on the agency bringing the case. For a comprehensive list of defense arguments, see *Beck Dev. Co. v Southern Pac. Transp.* Co. (1996) 44 CA4th 1160.

After the administrative hearing decision, municipal law provides the right to appeal to the governing body, such as the city council. See, *e.g., Benetatos v City of Los Angeles* (2015) 235 CA4th 1270. Following the final agency decision, counsel may consider appealing the decision in a writ of mandate proceeding. See §§9.43, 17.30.

§9.36 2. Receivership

If an owner fails to carry out the remedies on deteriorated property conditions required by an abatement order, a receiver may be appointed in a civil action to take the steps necessary to bring the property into compliance. Health & S C §§17980–17992. In *City of Crescent City v Reddy* (2017) 9 CA5th 458, a building owner failed to correct regulatory maintenance violations in a substandard motel following notice and a 30-day compliance order. After 18 months of noncompliance and entry of a judgment, the court properly appointed a receiver. On appeal, the court found that there was no abuse of discretion in the appointment of a receiver to oversee the property owner's compliance with directives to cure building code violations. The enforcing agency is entitled to a lien for the costs of abatement. Health & S C §17980.2. See also The California Municipal Law Handbook §§10.208, 12.28–12.28B (Cal CEB); Adams, *The Right Receiver,* 39 Los Angeles Lawyer 28 (June 2016). Counsel should advise the client of the possibility of the appointment of a receiver in any matter concerning property compliance and counsel the client to do what is necessary to bring the property into compliance, as the client may lose control of the property and may be

subject to substantial costs in connection with the receivership and remediation.

§9.37 3. Private Nuisance Action

A private party who has suffered injury may maintain an action for a public nuisance. CC §3493. For a private individual to bring an action to abate a public nuisance (see §9.13), the damage suffered by the individual must be different in kind, not merely in degree, from that suffered by other members of the public. *Koll-Irvine Ctr. Prop. Owners Ass'n v County of Orange* (1994) 24 CA4th 1036, 1040. See also CC §§3501–3503 (private nuisance remedies); *Kempton v City of Los Angeles* (2008) 165 CA4th 1344 (nuisance action against municipality). Private abatement in such a situation is also possible. CC §3495. On self-help abatement, see §9.19.

§9.37A 4. Government Code §36900

Government Code §36900(a) provides that "[t]he violation of a city ordinance may be prosecuted by city authorities in the name of the people of the State of California, or redressed by civil action." Interpreting the language of "redressed by civil action," courts have held that a private right of action exists under §36900(a) to redress violations of city ordinances; however, such public nuisance claims based on alleged municipal code violations may ultimately fail if the plaintiff is unable to establish that it suffered a unique, special injury (different from that which the general public would suffer). *Cohen v Superior Court* (2024) 102 CA5th 706. See also CACI 2020 (Public Nuisance – Essential Factual Elements).

NOTE➤ The California Court of Appeal in *Cohen v Superior Court* (2024) 102 CA5th 706 eliminated a narrow exception that had allowed private parties to bring public nuisance claims for alleged municipal code violations without showing that they suffered any special injury. The court found that the legislature did not intend to create a private cause of action in enacting Govt C §36900, and thus only city authorities are empowered to act under the statute. 102 CA5th at 706. In doing so, the court overruled *Riley v Hilton Hotels Corp.* (2002) 100 CA4th 599 and other cases not requiring special injury. See §7.32.

There is little case law on the §36900(a) cause of action, and its use primarily relates to the underlying municipal ordinance at issue, so counsel is advised to research and review its use carefully.

§9.38 5. Harassment Action Against Neighborhood Activists

If a property owner has been aggrieved by neighborhood or community protest and action, then a harassment case may be considered. A person who has suffered harassment may seek an injunction. CCP §527.6. The prevailing party in a harassment action is entitled to an award of attorney fees. CCP §527.6(s). See *Schraer v Berkeley Prop. Owners' Ass'n* (1989) 207 CA3d 719 (tenant subject of picketing by neighborhood group and media attention). Civil harassment actions are also discussed in §§2.39, 5.36, 10.30, 10.36, 16.32–16.35, 17.20–17.26.

NOTE➤ Parties considering harassment suits should consider possible adverse consequences, including attorney fee awards, that may result from a motion brought under the anti-SLAPP statute (CCP §425.16). Anti-SLAPP motions may be filed challenging petitions for injunctive relief against civil harassment. *Thomas v Quintero* (2005) 126 CA4th 635. See §17.25 and California Civil Procedure Before Trial, chap 24A (4th ed Cal CEB).

§9.38A 6. Injunctive Relief

A city attorney or district attorney may bring an action to enjoin any public nuisance and require its abatement. CC §§3490–3496; CCP §731; The California Municipal Law Handbook §12.3 (Cal CEB).

§9.38B D. Criminal Action

If a defendant fails to comply with the requirements of an injunction, a criminal contempt action may be brought as punishment for failure to comply. The California Municipal Law Handbook §12.19 (Cal CEB). A party that willfully disobeys a court order may be guilty of a misdemeanor. Pen C §166(a)(4). Violation of a city ordinance may be prosecuted as either a misdemeanor or an infraction. For a full discussion of the criminal enforcement of violation of city ordinances, see Muni Law §§12.29–12.66.

IV. LEGAL THEORIES AND CAUSES OF ACTION

§9.39 A. Trespass and Unlawful Detainer

An action for trespass may be brought against squatters or adverse possessors. See §9.21. Trespass consists of a physical entry on the land of another and taking possession under such circumstances as to indicate an

intention that the trespass will be permanent. *Kafka v Bozio* (1923) 191 C 746, 750. Trespass is also a criminal offense. Pen C §602(m).

§9.40 B. Quiet Title

A quiet title action may be brought against a squatter who is claiming a right to land by adverse possession. The rights of a party seeking to quiet title against a claim of adverse possession are subject to a 5-year limitations period as set forth in CCP §§318–320. This means that a client seeking to defeat the adverse possession must bring an action within 5 years from the end of the client's (or their predecessor's) possession or "seisin" of the property (*i.e.,* the time at which the adverse possession began). *Robertson v Superior Court* (2001) 90 CA4th 1319. For additional discussion of adverse possession and quiet title actions, see §§2.45–2.58, 9.21, 16.46–16.53.

§9.41 C. Nuisance

An action for nuisance may be brought against public or private owners of land for conditions on the land, including blight and dangerous conditions. See §§9.11–9.19, 9.23, 16.2–16.11.

§9.42 D. Breach of Contract

Often a residential development will be subject to a set of CC&Rs that have been recorded against the properties in the development. CC&Rs often contain rules on parking, landscaping, and visual blight. See, *e.g., Sui v Price* (2011) 196 CA4th 933 (HOA enforcement of rule against parking of inoperable vehicles). An HOA or a condominium board that allows such violations of the CC&Rs to continue may be sued under a breach of contract theory. In *Franklin v Marie Antoinette Condominium Owners Ass'n* (1993) 19 CA4th 824, the owner of a condominium unit alleged that the association was liable for damage to the owner's unit caused by the association's failure to maintain and repair central plumbing. The owner pleaded negligence, nuisance, and breach of contract. The lower court concluded that the association's actions did not constitute negligent behavior or a nuisance but did constitute a breach of contract, and it thus awarded the plaintiff $74,015 in damages and approximately $170,000 in costs and attorney fees.

§9.43 E. Writ of Mandamus

Generally, a proceeding for a writ of administrative mandate under CCP §1094.5 is the exclusive remedy for a person seeking judicial review of an

administrative action of a local agency. *City of Santee v Superior Court* (1991) 228 CA3d 713, 718.

Administrative mandate is applicable only when certain criteria are met:

- The agency's decision is final;
- The decision results from a proceeding in which by law a hearing is required to be given;
- Evidence is required to be taken; and
- Discretion in the determination of facts is vested in the agency.

See *Environmental Protection & Info. Ctr. v California Dep't of Forestry & Fire Protection* (2008) 44 C4th 459, 520; *Conlan v Bonta* (2002) 102 CA4th 745, 752. Review is limited to examining the administrative record to determine if the agency decision is supported by substantial evidence. *HPT IHG-2 Props. Trust v City of Anaheim* (2015) 243 CA4th 188. If the owner will be deprived of property or put out of business, the superior court may exercise its independent judgment in evaluating the agency action, but these circumstances are limited. For additional discussion, see §§17.27–16.33; California Administrative Mandamus (3d ed Cal CEB).

Private action to enforce zoning laws. Clients may choose to use a legal action to force a local government to enforce its own zoning ordinances or to overturn a governmental authority's grant of a zoning variance. See, *e.g., West Chandler Blvd. Neighborhood Ass'n v City of Los Angeles* (2011) 198 CA4th 1506 (overturning city council's grant of conditional use permit for additional parking at synagogue in residential area). See also *Mumaw v City of Glendale* (1969) 270 CA2d 454 (neighboring landowner attacked city's grant of variance on basis of failure to meet time limits in local zoning ordinance).

F. Personal Injury

§9.44 1. Public Property

Sometimes clients sustain physical injury because of conditions on property owned by others. Clients injured by nuisances or dangerous conditions of public property can recover for their personal injuries. *Day v City of Fontana* (2001) 25 C4th 268 (overgrown vegetation surrounding intersection caused automobile accident). In *Day,* the injured party was an uninsured motorist, so the court limited recovery against the public entity defendant to economic damages and held that noneconomic damages were barred under CC §3333.4, which applies specifically to noneconomic losses arising out of car accidents.

For additional information on personal injury actions, see California Tort Damages (2d ed Cal CEB).

§9.45 2. Private Property

A nuisance cause of action may also be alleged for personal injury caused by a dangerous condition on private property. See, *e.g., Birke v Oakwood Worldwide* (2009) 169 CA4th 1540 (minor claiming injury from secondhand smoke in common areas of rental complex). If the entry on the property was for recreational use, then CC §846, which immunizes property owners from liability for personal injuries arising from recreational use of property, may apply. See discussion of CC §846 in §9.55.

§9.46 G. Emotional Distress

An action may be brought for annoyance, discomfort, and mental suffering, without physical injury, resulting from a nuisance or trespass. *Acadia, Cal., Ltd. v Herbert* (1960) 54 C2d 328, 337 (plaintiff could recover for loss of wife's services when she received extensive medical treatment and hospitalization because of defendant's willful conduct); *Lew v Superior Court* (1993) 20 CA4th 866, 873. But see *Kelly v CB&I Constructors, Inc.* (2009) 179 CA4th 442, 459 (nonresident owners cannot recover damages for annoyance and discomfort). A cause of action for infliction of emotional distress is discussed in §§16.24–16.27. Damages for infliction of emotional distress are discussed in §§16.28–16.31, 17.24.

§9.47 H. Receivership

In addition to an enforcement agency's right to seek appointment of a receiver to implement repairs on a substandard building (see §9.36), a tenant or a tenant association may also do so. Health & S C §17980.7(c).

NOTE➤ An amendment of Health & S C §17980.7 effective January 1, 2020, added the requirement that notice of the petition for the appointment of a receiver be "posted in a prominent place on the substandard building." The amendment also eliminated the personal service requirement for persons with a recorded interest in the property. They may be served by first-class mail.

The owner is enjoined from collecting rent, interfering with the receiver, or transferring the property during the receivership. Health & S C §17980.7(c)(3). On the consequences of receiverships generally, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 6 (4th ed Cal CEB).

§9.48 V. DAMAGES AND COSTS

In addition to the usual damages and costs available in tort or breach of contract action, actions to remedy blight or dangerous conditions on vacant or uncared-for property may include the following:

- Property owners subject to a civil abatement and repair may not be allowed a tax deduction for interest, taxes, depreciation, or amortization paid or incurred in the taxable year that the action is taken. Health & S C §17980(e).
- Enforcement agencies may make the cost of abatement a special assessment on the property. The assessment may include attorney fees. Govt C §38773.5.
- Enforcement agencies may record a lien against the property to recover the costs of abatement and may foreclose the lien in an action for money judgment. Govt C §§38773–38773.1.
- HOAs and condominium boards may also assess costs of abatement and may levy the owner's separate interest for conditions that are breaches of the development's CC&Rs. CC §5650. See Advising California Common Interest Communities, chap 12 (2d ed Cal CEB).
- HOAs and condominium boards may suspend membership, rights, and privileges of owners who violate the CC&Rs. Common Interest Communities §§7.23–7.24.
- Abatement costs may include the cost to relocate tenants during the repair. Health & S C §17980.7.
- Local codes and ordinances may contain their own fines and penalties.
- Property owners may be subject to criminal "indictment or information." CC §§3490–3496.
- Private citizens bringing public nuisance actions may receive damages under the private attorney general theory (as codified in CCP §1021.5), which authorizes a court to award attorney fees to a successful party in an action that has resulted in enforcement of an important right affecting the public interest if
  - A significant benefit, pecuniary or nonpecuniary, is conferred on the general public or a large class of persons; and
  - The necessity and financial burden of private enforcement make the award appropriate.

NOTE➤ Such fees should not, in the interest of justice, be paid out of any recovery.

VI. ANSWERING THE COMPLAINT

§9.49 A. Available Choices: Comply or Fight?

A property owner subject to an abatement action must choose to either bring the property into compliance or fight the action. Defending against orders to bring property up to code is difficult and not likely to be successful if the objective conditions of the property do not meet properly adopted city or county ordinances.

B. Possible Defenses to Abatement Order

§9.50 1. No Nuisance Per Se

A client subject to an abatement order may argue that the local ordinance does not apply to their situation and therefore the condition complained of is not a nuisance per se. A successful argument places a greater burden on the plaintiff to prove that the condition represents a public or private nuisance. See §9.15.

EXAMPLE➤ Jennifer, a resident of Costa Mesa, keeps at least four automobiles in various stages of disrepair in front of her home. The city's municipal code prescribes punishment for anyone convicted of storing inoperative vehicles. The city seeks to declare the vehicles a nuisance per se and files a complaint against Jennifer in superior court. Jennifer successfully argues that she drives all of the vehicles at various times and that they are neither inoperative nor "stored." The city must instead prove that Jennifer's vehicles represent a public nuisance.

§9.51 2. Denial of Due Process

Both the U.S. and the California constitutions provide that a person may not be deprived of life, liberty, or property without due process of law. See US Const amend V, XIV; Cal Const art I, §7.

Substantive due process "guards against arbitrary and capricious government action, even when the decision to take that action is made through procedures that are in themselves constitutionally adequate." *Sinaloa Lake Owners Ass'n v City of Simi Valley* (9th Cir 1989) 882 F2d 1398, 1407. Procedural due process requirements have been held to include the provision of adequate notice and an opportunity to be heard before a governmental deprivation of an individual's life, liberty, or property. *Goldberg v Kelly* (1970) 397 US 254, 267, 90 S Ct 1011.

A client subject to an abatement order, for example, may claim that they were denied due process rights because

- The local ordinance was vague or overbroad (see *Coates v Cincinnati* (1971) 402 US 611, 91 S Ct 1686 (ordinance creating criminal penalty for three or more persons to congregate on sidewalk));
- The enforcement agency did not give proper notice or a reasonable opportunity to correct the situation (*Connally v General Constr. Co.* (1926) 269 US 385, 391, 46 S Ct 126 (ordinance must provide sufficient notice about what actions constitute prohibited activity));
- The agency did not provide an opportunity for the owner to be heard before making a determination about the property conditions (*Nightlife Partners, Ltd. v City of Beverly Hills* (2003) 108 CA4th 81, 90 (due process right to opportunity to be heard has been interpreted to encompass not only right to public hearing but also right to fair hearing)); or
- The ordinance is being applied in an arbitrary manner (*Weber v City Council* (1973) 9 C3d 950, 958 (equal protection requires laws to be enacted and enforced in a nonarbitrary manner against similarly situated people)).

NOTE➤ Even though a defendant may challenge an ordinance on equal protection grounds, allegedly "unequal" treatment from passive enforcement, laxity in enforcement, or the nonarbitrary selective enforcement of a law "has never been considered a denial of equal protection. … The equal protection guarantee simply prohibits prosecuting officials from purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis." *Murgia v Municipal Court* (1975) 15 C3d 286, 296.

For further discussion of due process and equal protection arguments, including notice requirements and statutory overbreadth, see California Land Use Practice, chap 19 (Cal CEB); The California Municipal Law Handbook §§9.71–9.74 (Cal CEB); California Administrative Hearing Practice (2d ed Cal CEB).

§9.52 3. Statute of Limitations

Five-year statute of limitations for recovery of real property. Under CCP §318, an action to recover real property (*e.g.,* to remove an adverse possessor) must be brought within 5 years of the loss of possession of the property (*i.e.,* the start of the adverse claim). See *Harrison v Welch* (2004)

116 CA4th 1084; *Safwenberg v Marquez* (1975) 50 CA3d 301. See also discussion in §§2.46, 2.67.

Three-year statute of limitations for other property-related actions. The limitation periods for the commencement of actions other than for the recovery of real property (*e.g.,* an action for nuisance or trespass) are set out in CCP §§335.1–349.4. In particular, the statute of limitations for an action for trespass or nuisance is 3 years. CCP §338(b). The availability of the defense may depend on the type of nuisance case being pursued—that is, whether the characterization of the nuisance or trespass is permanent or continuing. See CCP §338; *Wilshire Westwood Assocs. v Atlantic Richfield Co.* (1993) 20 CA4th 732 (action for continuing nuisance timely if brought within 3 years). See also discussion of CCP §338 in §§2.46, 2.66.

On statutes of limitations as a defense generally, see §§18.7–18.11.

§9.53 4. Takings

Depending on the nature and extent of the enforcement action, a client may have a takings claim if the declaration of nuisance is perceived as a pretext for the enforcement agency to acquire the client's property. *Hurwitz v City of Orange* (2004) 122 CA4th 835; The California Municipal Law Handbook §9.125 (Cal CEB). A regulatory action may rise to the level of a taking under inverse condemnation theory. For additional discussion of takings, see Condemnation Practice in California, chap 13 (3d ed Cal CEB).

§9.54 5. Consent

Consent may be a defense to a private nuisance claim (*Mangini v Aerojet-Gen. Corp. (Mangini I)* (1991) 230 CA3d 1125). Consent is a factual defense and cannot generally be resolved on the basis of demurrer. 230 CA3d at 1140. For the defense of consent to apply, the activity must have been lawful when it was done. *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 344. For further discussion of consent defense, see §§18.44–18.49.

§9.55 6. Recreational Use

Civil Code §846(a) provides a limited defense to property owners against claimants who entered the property for recreational purposes. Under the statute, the owner owes no duty of care to (1) keep the premises safe for entry or use by others for a recreational purpose or (2) give warning of "hazardous conditions, uses of, structures, or activities" on the premises. Three

exceptions exist; an owner can be liable for injuries to recreational users if (CC §846(d))

- A failure to warn or guard against a danger was "willful or malicious,"
- Consideration was paid in return for permission to enter the property, or
- The injured person was expressly invited onto the property by the owner or an authorized agent of the owner.

NOTE➤ In *Hoffman v Young* (2022) 13 C5th 1257, the California Supreme Court held that the mere fact that a child resides with a landowner and extends an invitation is not sufficient to impose liability under the express invitation exception without a showing that the child was acting with the landowner's knowledge and approval.

The provisions of §846 protect not only owners but also persons holding interests in real property created by easements and encroachment agreements. *Hubbard v Brown* (1990) 50 C3d 189; *Miller v Weitzen* (2005) 133 CA4th 732. However, it does not immunize public entities from liability for dangerous conditions of publicly owned recreational property left open for gratuitous use by the public. *Delta Farms Reclamation Dist. No. 2028 v Superior Court* (1983) 33 C3d 699. Further, if consideration is paid, then the statutory immunity will not apply, even to nonpossessory interest holders. *PG&E v Superior Court* (2017) 10 CA5th 563 (child injured by falling tree at county campground with entrance fee).

§9.56 7. Code Authority

In defending any code enforcement action, counsel should determine whether the code being enforced has been changed or modified. Under Health & S C §17958.7, in order to be effective or operative, any local modification or change requires an express finding by the governing body of the city or county and filing of the finding and modification with the California Building Standards Commission. Additionally, a property owner may argue for the use of original materials or methods of construction allowed under the applicable building code at the time of original construction of a building as long as the building does not continue to be substandard. Health & S C §17958.8.

§10.1 I. TYPICAL NEIGHBORHOOD ACTIVITIES THAT MAY BE CRIMINAL

When confronted with a neighbor suspected of engaging in criminal activity in the neighborhood, it is important to evaluate various options for dealing with the situation before contacting the authorities or taking similar types of steps to handle the problem.

A number of activities that neighbors engage in are criminal or otherwise in violation of either state or local laws. Some of those activities are discussed in this chapter. However, to better understand the seriousness of the activity under the criminal laws, a primer on what constitutes a crime is generally helpful. Further, much of the activity that is considered criminal may also be unlawful in a civil context, and perhaps actionable in a civil lawsuit.

In California, a given conduct may constitute a tort, a nuisance, an infraction, a misdemeanor, or even a felony. A crime is an act in violation of law that has a certain set of consequences that, generally, are distinct from the remedies available in the civil context (*i.e.,* abatement and monetary damages).

A. Criminal Activity

§10.2 1. California Penal Code

Crimes in California (and many other states) are categorized as felonies, misdemeanors, and infractions. Felonies are those crimes that can lead to a sentence of more than a year (16 months minimum), which sometimes must be served in state prison while other times can be served in the county jail. People convicted of felonies may be eligible for probation, and in those cases they will likely serve some custodial time in the county jail followed by a multiyear period of community supervision designed to ensure that they are abiding by the law and seeking rehabilitation for the risk factors that led to their criminality.

NOTE➤ As a result of state prison realignment, most nonviolent felons will serve their sentence in the county jail rather than in the California Department of Corrections and Rehabilitation. See, *e.g.,* Pen C §1170. These felony sentences, considered "prison priors," can be quite lengthy and are frequently followed by a period of community supervision by the probation department, known as Mandatory Supervision, which has terms and conditions designed to ensure the felon abides by the law and engages in rehabilitative activities.

Misdemeanors are punishable by a sentence of 1 year in the county jail and often include probation, fines, and other terms and conditions designed to prevent future criminality. Some crimes, known as "wobblers," may be prosecuted and punished as either misdemeanors or felonies. Pen C §17(b); *People v Williams* (1996) 49 CA4th 1632, 1639 n2. An example of a wobbler is the renting or leasing of a building or space for the unlawful manufacture, storage, or distribution of a controlled substance. Under Health & S C §11366.5(a), that conduct is punishable for up to 1 year in county jail as a misdemeanor or for 16 months, 2 years, or 3 years in county jail as a felony under Pen C §1170(h). A prosecutor has the discretion to file criminal charges as either a felony or misdemeanor, depending on the facts presented. An infraction, by contrast, cannot result in any type of imprisonment, but only in fines. Pen C §19.6. Generally, the maximum fine for any infraction is $250. Pen C §19.8(b). Some crimes may be alternatively punishable as an infraction or a misdemeanor. See, *e.g.,* Pen C §415.

may be considered in deciding whether to prosecute under this section or under one of the statutes prohibiting simple possession. See Health & S C §11350. A violation of §11351 is a felony.

A person may also be prosecuted for the actual sale of a controlled substance, or transportation for sale of a controlled substance, or for importing a controlled substance across state lines. Health and Safety Code §11352 is an example of a statute prohibiting the sale, import, furnishing (*i.e.,* supplying), or administering of certain controlled substances such as cocaine or heroin. A violation of §11352 is punishable as a felony.

§10.13 B. Cannabis

"Cannabis" refers to the flowers and leaves and other components of the plant Cannabis sativa L. The definition of cannabis includes all parts of the cannabis plant, all derivatives of the cannabis plant, such as "edibles," and any compound made from the resin, such as "hash" or "wax." Health & S C §11018.

Although cannabis is considered a controlled substance and hallucinogenic substance under Health & S C §11054(d) and thus subject to similar restrictions and punishment for violative conducts as other controlled substances, there are a number of distinctions applicable to cannabis that merit special treatment and discussion given the fact it is legal to use cannabis, both recreationally and medically, subject to certain limitations, some of which are particularly relevant to the topic of neighborhood disputes.

Activities related to cannabis that might otherwise be deemed illegal but that fall within the scope of "medical cannabis" are not generally subject to criminal liability, although there remains some ambiguity about the scope to which "medical cannabis" conduct is legal (see §10.17). Furthermore, the passage of Proposition 64 in 2016 by California voters legalized the recreational use and possession of small amounts of cannabis products and cultivation of up to six plants at a person's home by anyone over the age of 21 (whether or not a medical cannabis patient). Health & S C §11362.1(a). Consequently, when dealing with offensive conduct in the neighborhood pertaining to cannabis, one must be cognizant of the possibility that the conduct engaged in may be legal. See §§10.61–10.70. Nevertheless, there remain criminal consequences for exceeding those quality limitations, driving while under the influence of marijuana, or engaging in sales activity without a permit or license.

The definition of cannabis and the prohibitions that attach to it do not necessarily apply to what is known as "industrial hemp." Industrial hemp, generally, is a Cannabis sativa L. plant that contains less than 0.3 percent of

tetrahydrocannabinol (THC) in the flowering tops. Health & S C §11018.5. Proposition 64 exempted industrial hemp from the definition of cannabis. Health & S C §11018.5. More recently, SB 1409 (Stats 2017, ch 986), effective January 1, 2019, amended the definition of industrial hemp to include resin and other derivatives from the plant. Health & S C §11018.5(a). However, in California, industrial hemp may only be grown as part of an established agricultural research institution because the state has not yet created a registry or process for cultivators to become licensed growers. Food & A C §§81000(c), 81006(a). Hemp, cultivated in accordance with specified law, is an agricultural commodity for the purpose of the Williamson Act. Govt C §51201.

NOTE➤ Proposition 64 enacted the Control, Regulate and Tax Adult Use of Marijuana Act (commonly referred to as the Adult Use of Marijuana Act (AUMA)), which legalizes the possession and cultivation of certain amounts of cannabis products beginning November 9, 2016 (see Health & S C §§11018–11018.2, 11362.1–11362.45), and provides new criminal provisions for the possession, cultivation, transportation, and sale of excessive amounts of cannabis products (see Health & S C §§11357–11362.8). The AUMA also provides for commercial production and distribution of nonmedical cannabis products beginning January 1, 2018. Those products will be regulated by the Bureau of Cannabis Control, the Manufactured Cannabis Safety Branch of the California Department of Health, and the California Department of Food and Agriculture. See Bus & P C §§26000–26325.

§10.14 C. Methamphetamine

Methamphetamine, also commonly known as meth, crystal, speed, blow, or glass, is treated separately under Health & S C §11377 (possession), §11378 (possession for sale), and §11379 (actual sale, transport for sale, or transport across state lines). While possession of methamphetamine is a misdemeanor, possession for sale, actual sale, or transport for sale of methamphetamine are felonies.

§10.15 D. Crack Houses

Homes in residential neighborhoods can sometimes be used for the use and abuse of drugs by groups of persons. These crack houses are frequently populated by large numbers of people, usually strangers, and often result in an atmosphere of loud noise and disruptive partying. The premises are also

declare their allegiance to the gang, advertise the gang's status or power, or represent a challenge to rival gangs. Neighbors should report and immediately remove any graffiti in the neighborhood or on local park and school grounds.

Forming a Neighborhood Watch group may also help to keep a neighborhood from becoming labeled or perceived as turf for a particular gang. Many police departments have gang specialists who can assist with this process if gang activity is an issue in a client's neighborhood. A neighborhood that is united and dedicated in a spirit of cooperation toward stopping crime and violence will greatly hamper gang efforts to flourish. For more on Neighborhood Watch, see §10.34.

§10.21 B. Family Violence

Family violence encompasses three types of violence: domestic violence by one adult against another in a domestic relationship, child abuse, and elder abuse. California law criminalizes these offenses in particular sections of the Penal Code.

Counsel should advise clients that they have two choices if they are a witness to family violence: (1) Don't get involved, or (2) get involved. As a general rule, people are not required to report crimes that they observe or suspect. The only people who are legally obligated to make a report are those that are "mandated reporters."

PRACTICE TIP➤ The mandated reporter list is extensive and, when children are concerned, includes health care practitioners, teachers, instructional aides, teacher's aides, and assistants employed by any public or private school, classified employees of any public school, and many more. See the Child Abuse and Neglect Reporting Act (Pen C §§11164–11174.3). Similarly, the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) (Welf & I C §§15600–15675) requires health care practitioners and other mandated reporters who have observed or suspect abuse or neglect of an elder or dependent adult to report it to the appropriate agency. Welf & I C §15630(b). For additional information, see California Elder Law Litigation: An Advocate's Guide §8.6 (Cal CEB); California Child Custody Litigation and Practice §§9.108, 10.17 (Cal CEB).

PRACTICE TIP➤ The California Department of Social Services provides a list of regional advisors and agencies available to support mandated reporters. See https://mandatedreporterca.com (click on the Resources tab for More Information).

Even if a client is not a mandated reporter, it may be in their best interest and the best interest of the neighbors and community if the client chooses to get involved. Getting involved may be as simple as making an anonymous call to the nonemergency number for the local police department. From there, counsel can assist the client in making decisions about the extent of their involvement.

If the client hears or sees someone being assaulted, an emergency call to 911 is appropriate. If the client expresses fear of attack by the perpetrator, counsel should advise them to go inside, get in the car, or otherwise get out of sight and make the call in private. The client should remain out of sight rather than go out to watch. Multiple calls to the police may be helpful. The more calls police receive about the incident, the more likely they are to respond quickly. For specifics on what the client might be asked when the police are called, see §10.42.

§10.22 1. Checklist: Client-Witness Considerations

Before getting involved, the client may wish to consider the following factors:

- ____ Whether the client wishes to maintain anonymity in the situation
- ____ Whether it appears likely that the neighbors could become violent or otherwise retaliate against the client if their involvement is known or suspected
- ____ Whether the neighbors are permanent residents or tenants
- ____ The client's stake in the neighborhood and future plans to remain in the neighborhood
- ____ Whether there are other neighbors that may be enlisted to assist
- ____ The severity of the suspected abuse or neglect and whether the suspected victim may need to be removed from the home for their own safety before involving authorities
- ____ Whether there may be social programs available to assist the neighbor in distress (*e.g.,* shelters for victims of domestic violence; In-Home Supportive Services (IHSS) program for low-income elderly, blind, or disabled individuals who require assistance in the home; after-school programs available for children who require adult supervision while parents are working)
- ____ The amount of time the client wishes to invest in "someone else's problem"

§10.28A 6. Gun Violence Restraining Orders

A person subject to a gun violence restraining order may not have in their custody or control, own, purchase, possess, or receive any firearms or ammunition while that order is in effect. Pen C §§18100, 18120. All firearms and ammunition must be surrendered to a local law enforcement agency or sold to a licensed gun dealer. Pen C §18120(b).

An immediate family member or a law enforcement officer are among several classes of persons who may file an ex parte petition requesting that the court issue a gun violence restraining order. Pen C §18150(a). The court may issue the order if it finds that the subject of the petition poses a significant danger because of the possession of firearms and that the restraining order is necessary to prevent personal injury because less restrictive alternatives are inadequate or inappropriate. Pen C §18150(b).

The Judicial Council has prescribed forms for the necessary petition and court order. See, *e.g.,* Petition for Gun Violence Restraining Order, Judicial Council Form GV-100.

§10.29 C. Sex Offenders

In the age of reality shows that catch would-be sex offenders for entertainment, high-profile community leaders who are revealed to be child molesters, and online sex offender databases, it is worth noting that most sex offenses are committed within the context of close relationships or familiar acquaintances. "Stranger danger" is not the most common example of victimization. Still, no one can tell who is and who is not a sex offender. For additional discussion of neighborhood sex offenders, including information on the state's online database of registered sex offenders, see §§10.71–10.73.

§10.30 D. Harassment and Threats

A person who has suffered harassment may seek a temporary restraining order and an injunction prohibiting the harassing behavior. CCP §527.6(a). Harassment is unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person and serves no legitimate purpose. CCP §527.6(b); *Brekke v Wills* (2005) 125 CA4th 1400, 1412; *Byers v Cathcart* (1997) 57 CA4th 805, 807. The relief generally applies when the action is brought by someone not covered by a family relationship, which would be governed by restraining orders under the Family Code. Fam C §6320; *Oriola v Thaler* (2000) 84 CA4th 397, 403. The prevailing party in any action brought under CCP §527.6 may be awarded court costs and attorney fees, if

any. See CCP §527.6(s); *Elster v Friedman* (1989) 211 CA3d 1439, 1443 (applying former CCP §527.6(h)).

In the past, courts held that in addition to a threat of future harm, the conduct had to be ongoing because a single incident of harassment was not a "course of conduct" entitling the applicant to injunctive relief. See, *e.g., Leydon v Alexander* (1989) 212 CA3d 1, 4 (decided under earlier version of §527.6); *Russell v Douvan* (2003) 112 CA4th 399, 401 (attorney's following opposing counsel into elevator and forcefully grabbing his arm was single incident of battery without threat of future harm). However, in 2012, subsection (b) was revised to provide that a "credible threat of violence is *a knowing and willful statement or* a course of conduct." CCP §527.6(b)(2) (emphasis added). Thus, under current law, persons who are in reasonable fear for their safety need not wait for the defendant to act before seeking an injunction. CCP §527.6(b).

On obtaining a civil harassment restraining order, see §§10.36, 17.20–17.26.

IV. QUALITY OF LIFE

§10.31 A. Vandalism

Penal Code §594 makes it a crime to commit vandalism. Vandalism is defined as maliciously defacing with graffiti or other inscribed material, damaging, or destroying another person's property. Pen C §594. "Malice" or "maliciously" means with a wish to vex, annoy, or injure another person, or intent to do a wrongful act. Pen C §7(b)(4). Thus, accidental damages to others' properties will not impute criminal liability.

Subject to the discretion of a prosecutor, vandalism may be classified as an infraction, a misdemeanor, or even a felony depending on the dollar amount of the property damage. If graffiti damage is less than $250 and it is a first offense, it generally will be considered an infraction. Pen C §640.6. General vandalism damages of less than $400 but greater than $250 or committed by a person who has a prior conviction for vandalism will usually result in a misdemeanor. Pen C §594(b)(2). Any vandalism causing damages exceeding $400 can be charged as a misdemeanor or a felony, depending on the circumstances. Pen C §594(b)(1). Each classification carries different penalties.

§10.32 B. Disturbance of the Peace

"Disturbance of the peace" is a phrase often heard but less often defined. Under Pen C §415, any person who commits one of the following acts is subject to up to 90 days in county jail, a fine of up to $400, or both:

- Unlawfully fights or challenges another person to fight in a public place,
- Maliciously and willfully disturbs another person by loud and unreasonable noise, or
- Uses offensive words that are inherently likely to provoke an immediate violent reaction in a public place.

Practically speaking, actions under §415 are seldom prosecuted by themselves and are often overlooked or disregarded as minor offenses by criminal prosecutors. However, this does not take away from the fact that the law recognizes the potential criminal liability and, more importantly, gives local law enforcement the authority to prevent or punish such behavior.

Penal Code §415(2) requires that a disturbing noise must be not only loud but "unreasonable," a standard subject to a finding by a judge or jury. Further, the noise must have been made intentionally and with intent to either vex, annoy, or injure another or to do a wrongful act. Pen C §7(b)(4). Moreover, the noise must have disturbed another person, which is narrowly defined as either "communications made in a loud manner only when there is a clear and present danger of violence" *or* "communication ... not intended as such but ... merely [as] a guise to disturb persons." *In re Brown* (1973) 9 C3d 612, 619. Because of this rigorous standard and other priorities, law enforcement does not regularly arrest and prosecute for §415 violations. However, if a person or the police have already requested that a neighbor stop making loud noises, then law enforcement is more likely to act. They do issue citations, which can serve as a deterrent. It is important to note that loud music (see *Mann v Mack* (1984) 155 CA3d 666, 674) and even a loud human voice (see *Brown,* 9 C3d at 621) may provide probable cause to arrest someone for disturbing the peace.

Whether "offensive words" are likely to provoke an immediate violent response will be determined on a case-by-case basis. Generally, the context of the offensive words will be considered, particularly whether the words are stated in a provocative manner and whether there is a clear and present danger that violence would result. Rude or even vulgar or profane words alone are not subject to punishment under this section. *In re Alejandro G.* (1995) 37 CA4th 44.

The California Noise Control Act of 1973 (Health & S C §§46010–46080) encourages "the enactment and enforcement of local ordinances in those areas which are most properly the responsibility of local government." Health & S C §46060. Thus, many cities and counties have local noise ordinances that are enforceable by local police or other agencies and subject the violator to prosecution for a misdemeanor or civil penalty. For example, the noise ordinances contained in chapter XI of the Municipal Code of the City of Los Angeles are enforceable by the police department or the Department of Building and Safety, as applicable. See Los Angeles Mun C, ch XI, art I, §111.05. Such local noise ordinances can often be found on city websites, within the section listing the city's municipal code. A city website should have contact information for where to report code enforcement violations.

§10.33 C. Traffic and Speeding

Practically all traffic violations are considered infractions, subject to civil penalties rather than criminal penalties. See, *e.g.,* Veh C §40000.1. This includes speeding, even at speeds in excess of 100 miles per hour. See Veh C §22348(b). However, even under the Vehicle Code, certain traffic violations may result in criminal prosecution, such as those constituting reckless driving. Under Veh C §23103, a person who drives a vehicle on a highway (including any publicly maintained street under Veh C §360) or off-street parking facility in willful or wanton disregard for the safety of persons or property is guilty of reckless driving and is subject to county jail not less than 5 days nor more than 90 days or to a fine between $145 and $1,000. Driving under the influence of alcohol or drugs is generally a misdemeanor but may be a felony when, for example, it results in physical harm to another person or a fourth conviction for the same offense within 10 years. See Veh C §§23152, 23153, 23536, 23550, 23554.

V. PREVENTION AND COMPLAINTS TO LAW ENFORCEMENT

§10.34 A. Neighborhood Watch

Neighborhood Watch is a crime prevention program sponsored by the National Sheriffs' Association and is offered by more than nine out of every ten law enforcement agencies. It is composed of volunteers in the community, typically neighborhood residents, who work together in conjunction with local law enforcement to reduce crime and make their neighborhoods safer. Neighborhood Watch groups become additional eyes and ears for local law enforcement to observe and report criminal and suspicious behavior.

prohibition for persons convicted of a felony. See Pen C §29800. Certain misdemeanor offenses also carry the loss of the right to possess a firearm, but for a shorter term. A person convicted of a violation of Pen C §273.5 (domestic violence) may no longer own, purchase, receive, or possess firearms. See Pen C §29805.

Finally, criminal convictions may also result in adverse consequences to both legal and undocumented immigrants. For complete discussion of immigration status and criminal matters, see California Criminal Law Procedure and Practice, chap 52 (Cal CEB).

PRACTICE TIP➤ Counsel may wish to specifically research whether a person (*e.g.,* a client's neighbor) is prohibited from possessing a firearm, even after the offender's probation or parole has ended.

J. Victim's Rights (Marsy's Law)

§10.54 1. Who Is a "Victim" Under Marsy's Law

In November 2008, the voters of California passed Proposition 9, the Victims' Bill of Rights Act of 2008: Marsy's Law. The initiative added a victims' bill of rights to the California Constitution to provide all victims with rights and due process. A victim is defined as "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act." Cal Const art I, §28(e). The term also includes the person's spouse, parents, children, siblings, guardian, and a lawful representative of a victim who is deceased, a minor, or physically or psychologically incapacitated. "Victim" does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim. Cal Const art I, §28(e).

§10.55 2. Rights to Notice and to Be Heard

Under Marsy's Law, a victim has the right to request reasonable notice of, and be present at, (1) all public proceedings at which the defendant and the prosecutor are entitled to be present and (2) all parole or other postconviction release proceedings. Further, a victim may request to be heard at any proceeding involving a post-arrest release decision, plea, sentencing, postconviction release decision, or any proceeding in which a right of the victim is at issue. A list of local victim-witness offices is available from the State of California at https://victims.ca.gov/for-victims/get-help/; a list of local district attorney's offices is available at https://www.cdaa.org/about-us/lis

t-of-district-attorney-offices-by-county. Additional information on Marsy's Law can be found on the California Attorney General's website at https://oag.ca.gov/victimservices/marsys_law.

§10.56 3. Postconviction Notifications

Parties interested in parole notification, restitution, inmate status, parole hearings, and requests for special conditions of parole should contact the California Department of Corrections and Rehabilitation's (CDCR's) Office of Victim & Survivor Rights & Services. That office will provide information regarding an interested party's attendance at parole consideration hearings or notification concerning future hearings. The office may be reached during normal business hours at the toll-free telephone number, 1-877-256-OVSS (6877), or on the CDCR website, https://www.cdcr.ca.gov/victim-services/.

K. Client's Self-Help Options

§10.57 1. Threats of Civil or Criminal Suit

Attempting to settle the dispute informally is another preventive measure that counsel should strongly consider. This is particularly advisable when dealing with neighbors. Informing the offending neighbor of the more formal options for dealing with the issue can be effective. For example, the client may threaten to report the criminal activity to local law enforcement (see §§10.37–10.42), to sue civilly, or to obtain a restraining order against the neighbor (see §10.36).

WARNING➤ Counsel should be aware that threatening to bring criminal charges, if used to obtain an advantage in a civil dispute, is a violation of Cal Rules of Prof Cond 3.10 (former Rule 5–100).

In addition, counsel may suggest mediation as an alternative to civil or criminal suits. Many courts and government agencies maintain dispute resolution services for neighbor disputes. See, *e.g.,* County of Los Angeles Department of Consumer & Business Affairs Mediation Program, available at https://dcba.lacounty.gov/mediation/. Mediation may be a viable approach for more minor issues and when the neighbors will continue to live next to each other. For more serious criminal activity, however, mediation will less likely be a viable approach. Indeed, under certain circumstances, such as when a neighbor is suspected of engaging in the manufacture of illegal drugs, approaching the neighbor for purposes of engaging in a mediation, as

opposed to reporting the matter to police, is not advisable. Nevertheless, counsel should consider and discuss mediation with the client.

NOTE➤ Beginning January 1, 2019, an attorney representing a client participating in a mediation or a mediation consultation must, before the client agrees to participate in the mediation or mediation consultation, provide the client with a printed disclosure containing the confidentiality restrictions described in Evid C §1119 and obtain a printed acknowledgment signed by that client stating that they have read and understood the confidentiality restrictions. A statutory form used to comply with this requirement can be found in Evid C §1129(d).

2. Tenants and Crime

§10.58 a. Evicting Tenant Involved in Criminal Activity

If a landlord is faced with a tenant conducting criminal activity, the landlord may have the option of evicting the tenant. Generally, landlords can terminate a month-to-month tenancy by simply giving the tenant a 30-day or 60-day advance written notice. CC §§1946–1946.1. However, a landlord also has the right to terminate a tenancy by giving the tenant only 3 days' advance written notice if the tenant used the rental property for an unlawful purpose, including the manufacture, possession, sale, or use of a controlled substance on the premises, or for any unlawful conduct involving weapons or ammunition under CC §§3485–3486. CCP §1161(4). Local ordinances may define other offenses as nuisances allowing for the eviction of a tenant. See, *e.g.,* Oakland Mun C §8.23.100 (prostitution-related crimes, gambling, and illegal possession of ammunition as grounds for eviction of tenant).

If the tenant has not left the premises after the landlord has properly given the required notice to the tenant, a landlord can then evict the tenant by filing an unlawful detainer lawsuit in superior court. CC §§1943–1946.1; CCP §§415.46, 715.020, 1161–1179a. For further discussion of landlord-tenant and unlawful detainer issues, see California Landlord-Tenant Practice (2d ed Cal CEB); California Eviction Defense Manual (2d ed Cal CEB); and Handling Unlawful Detainers (Cal CEB Action Guide).

§10.59 b. Tenant Versus Tenant

Tenants who are facing issues with the criminal activities of other tenants may also have an avenue for relief. Specifically, CC §§3485(a) and 3486 allow city attorneys or county prosecutors to file unlawful detainer actions against a tenant for drug dealing or unlawful use, manufacture, or

possession of weapons and ammunition if the landlord fails to evict the tenant after 30 days' notice from the city. Standard residential and commercial leases contain provisions requiring tenants to obey all laws and not create a nuisance, which provides the landlord with a separate basis to terminate a lease and seek to evict the tenant. See California Landlord-Tenant Practice §8.58 (2d ed Cal CEB). See also §10.8. Consequently, a client may want to contact the landlord directly regarding another tenant's criminal activity.

§10.60 3. Vigilantism

California, as well as every other state, does not condone vigilantism. However, a private citizen does have the right to conduct a citizen's arrest. Still, clients should be advised to proceed with caution before acting in any sort of self-help. For more on citizen's arrest, see §10.35; on Neighborhood Watch initiatives, see §10.34.

VII. SPECIAL SITUATIONS

§10.61 A. Regulation of the Use of Cannabis

Conduct involving controlled substances is considered criminal conduct and likely also considered a nuisance, such that it may be criminally prosecuted or abated through an unlawful detainer action or civil injunctive action brought by a municipality. See §§10.8–10.17. Historically, cannabis was treated the same under the law as other controlled substances such as cocaine and methamphetamines. Indeed, Health & S C §§11007, 11018, and 11054(d), taken together, historically deemed cannabis (all parts of the plant, including seeds, buds, and derivatives) to be controlled substances, with certain narrow exceptions (*e.g.,* "industrial hemp" as defined in Health & S C §11018.5). Since 1996, however, California law has effectively decriminalized a range of conduct related to cannabis that previously was deemed not only criminal but felonious, when conducted by persons considered qualified medical patients, either individually or in groups, sometimes referred to as "collectives."

Proposition 64, which enacted the Control, Regulate and Tax Adult Use of Marijuana Act (commonly referred to as the Adult Use of Marijuana Act (AUMA)), went further than the medical cannabis laws and legalized the possession and cultivation of certain amounts of nonmedical, or recreational, cannabis products beginning November 9, 2016 (see Health & S C §§11018–11018.2, 11362.1–11362.45). AUMA also provides for commercial production and distribution of nonmedical cannabis products beginning January 1, 2018. Those products are regulated by the Bureau of Cannabis Control,

the Manufactured Cannabis Safety Branch of the California Department of Health, and the California Department of Food and Agriculture. See Bus & P C §§26000–26325. Cannabis is unique in this regard relative to other controlled substances.

WARNING➤ A tension exists between California and federal law when it comes to cannabis. While California voters and the California State Legislature continue to allow the cultivation and transportation (and, in some cases, sale) of cannabis, such activities remain illegal under federal law. See Warning in §10.62. This tension implicates the supremacy clause of the U.S. Constitution, as demonstrated in *JCCrandall, LLC v County of Santa Barbara* (2025) 107 CA5th 1135. In *JCCrandall*, a neighbor owning a servient tenement (created by private easement) petitioned for a writ of administrative mandate challenging their neighbor's conditional use permit allowing the cultivation and transportation of cannabis, because the only way for the neighbor to access the agricultural property—and thus transport the cannabis to and from—would be to travel across the plaintiff's property via the easement. The court of appeal held that the use of the easement for cannabis activities was prohibited by the terms of the easement deed and federal law. 107 CA5th at 1142 (plaintiff could not be "forced to allow his property to be used to transport cannabis, because such use exceeds the scope of uses allowed under the easement").

1. Medical Cannabis

§10.62 a. Compassionate Use Act

California's Proposition 215, also known as the Compassionate Use Act (CUA) (Health & S C §11362.5), allows persons who have received an oral or written recommendation or approval from a physician to grow, transport, use, and possess cannabis for their personal *medical* use. Persons falling into this category are held not to be criminally liable for violating the laws against simple possession and cultivation of cannabis. The CUA also provides a defense against charges of possessing or cultivating cannabis to "primary caregivers" (*i.e.,* persons designated by the medical cannabis user who have consistently assumed responsibility for the housing, health, or safety of the user).

NOTE➤ Beginning January 1, 2018, a qualified patient must possess a physician's recommendation that complies with Bus & P C §§2525–2525.5. Among other things, those statutes require physical examinations of

patients and prevent remuneration for recommending medical cannabis.

WARNING➤ The California medical cannabis provision is not a defense to federal cannabis charges. *Raich v Gonzales* (9th Cir 2007) 500 F3d 850, 860. Local governments, therefore, are left in the difficult position of regulating a land use for certain activities (*e.g.,* cultivation of cannabis) that, while not illegal under state law, remain illegal under federal law. In 2008, the California Attorney General's Office published Guidelines for the Security and Non-Diversion of Cannabis Grown for Medical Use. In addition to providing guidance for local agencies, the Guidelines state the Attorney General's position that no conflict exists between federal and state laws, because the CUA simply exercises the state's reserved powers to not punish certain cannabis offenses under state law in limited circumstances. However, in an August 29, 2013, memorandum entitled "Guidance Regarding Marijuana Enforcement" (available at https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf), Deputy Attorney General James M. Cole of the U.S. Department of Justice provided additional guidance to states that had legalized recreational or medical cannabis, so that those states and constituent municipalities, and their citizens, would be informed of the circumstances under which cannabis conduct that is legal under a particular state's law but nonetheless remains illegal under federal law might garner the prosecutorial attention of federal authorities. For further discussion of regulation of medical cannabis dispensaries, see The California Municipal Law Handbook §§9.47–9.52, 10.150 (Cal CEB). In recent years, Congress has passed budget appropriations legislation that includes a provision prohibiting the Department of Justice from using funds to prevent states "from implementing their own state laws that authorize the use, distribution, possession or cultivation of medical marijuana." See, *e.g.,* Consolidated and Further Continuing Appropriations Act, 2015 (Pub L 113–235, §501, 128 Stat 2130).

§10.63 b. Medical Marijuana Program Act

In 2003, the Medical Marijuana Program Act (MMPA) (Health & S C §§11362.7–11362.83) expanded and clarified the protections and immunities available to users of medical cannabis. The MMPA, in relevant part, authorizes medical cannabis patients to engage in "collective" or "cooperative" conduct on behalf of their constituent medical patients and still be entitled

to the same immunities available for their individual conduct when acting on their own behalf. Health & S C §11362.775. Thus, §11362.775 has been used to validate the legality of cannabis gardens (*i.e.,* cultivation sites) and even storefront dispensaries where cannabis is distributed to its constituent members who are qualified patients according to the Compassionate Use Act (Health & S C §11362.5); however, the issue of what constitutes a dispensary in compliance with state law remains somewhat unclear and is still being developed by the appellate courts.

A vast majority of cities and counties in California had, in wake of the MMPA, sought to restrict or ban dispensaries and cannabis gardens, particularly in residential and mixed-use zones. Until 2013, the California Supreme Court had not yet reconciled the rights of medical cannabis patients with the police powers of municipalities, generating a great deal of litigation concerning what conduct a local government may deem illegal or a nuisance in this context, and in turn what neighborhood conduct relating to medical cannabis an individual might challenge as a nuisance. The California Supreme Court and appellate courts have made a number of significant rulings clarifying the rights of the individual under the medical cannabis laws

and reconciling those rights with the powers and responsibilities of the municipality. See §10.65. However, certain questions still remain that affect potential neighborhood disputes. Significantly, real property used for the cultivation and dispensing of medical cannabis is still theoretically subject to federal forfeiture, and to an abatement action by state authorities, when there is a violation of local zoning ordinances.

NOTE➤ Under Health & S C §11362.775(d), conduct under the "collective" or "cooperative" model became authorized on January 9, 2019 (1 year after the Bureau of Cannabis Control (BCC) began issuing licenses). After that date, commercial cannabis activity (cultivation, manufacturing, distribution, testing, and retail sales) is limited to licensed operators under the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) (Bus & P C §§26000–26325). Personal use, possession, and cultivation is limited to the activity authorized under Proposition 64. Health & S C §11362.1(a).

§10.63A c. Medical Cannabis Regulation and Safety Act

The former Medical Cannabis Regulation and Safety Act (MCRSA) (former Bus & P C §§19300–19360), comprised of three bills (AB 243, AB 266, and SB 643), took effect January 1, 2016. See Stats 2015, ch 688, Stats 2015, ch 689, Stats 2015, ch 719. The MCRSA has been repealed and replaced by the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) (Bus & P C §§26000–26325). See §10.63C. Nonetheless, the portions of the MAUCRSA dealing with medical cannabis incorporated in large part what the legislature passed in 2015 in the MCRSA. The MCRSA provided for the issuance of state permits, beginning in 2018, for a variety of commercial activities related to medical cannabis, including cultivation, manufacturing, distribution, testing, and retail sale. Much of the MCRSA was beyond the scope of neighborhood disputes. What is relevant, however, is that under the MCRSA, before obtaining state licensure, an applicant had to first secure local permission for the activity. Former Bus & P C §19320. Each city and county had control over whether bans for such activities would remain in place, or whether permits would be issued, and if so, to what extent and for which activities. Former Bus & P C §§19315, 19321. Such issues were to be addressed on the local municipal level with input from the constituents. These regulations remain the case with the passage of MAUCRSA. See §10.63C.

§10.63B d. Recreational Cannabis

Proposition 64 enacted the Control, Regulate and Tax Adult Use of Marijuana Act (commonly referred to as the Adult Use of Marijuana Act (AUMA)). AUMA legalized the possession of small amounts of cannabis and cultivation of up to six cannabis plants, by persons 21 years of age and above. Health & S C §§11018–11018.2, 11362.1–11362.45. This legal use and cultivation exists separate and apart from medical usage and applies to all adult Californians. As with the former Medical Cannabis Regulation and Safety Act (MCRSA) (former Bus & P C §§19300–19360), AUMA also provides for commercial production and distribution of nonmedical cannabis products beginning January 1, 2018, to be regulated by the Bureau of Cannabis Control, the Manufactured Cannabis Safety Branch of the California Department of Health, and the California Department of Food and Agriculture. See Bus & P C §§26000–26325. The implications of such legalization are broad and are addressed herein to the extent they are potentially relevant to neighborhood disputes. Generally, however, while cannabis usage and cultivation is no longer a crime under certain circumstances, controls are in place to prevent nuisance activity, particularly in residential areas.

§10.63C e. Merging the MCRSA and the AUMA

Effective June 27, 2017, California enacted the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) (Bus & P C §§26000–26325). See Stats 2017, ch 27. The MAUCRSA repealed the MCRSA (former Bus & P C §§19300–19360), effectively merging into one set of statutes the two separate regulatory frameworks that previously existed under the former MCRSA and the Adult Use of Marijuana Act (AUMA) (adding Health & S C §§11018.1, 11018.2, 11361.1, 11361.8, 11362.1–11362.45, 11362.712–11362.713, 11362.84–11362.85; Bus & P C §§26000–26325; Lab C §147.6; Rev & T C §§34010–34021.5; and amending various other code sections). AUMA was approved by California voters as Proposition 64 in 2016. Similar to the former MCRSA, the MAUCRSA requires that before obtaining state licensure, an applicant must first secure local permission for commercial cannabis activity. See Bus & P C §26032(a)(2). Each city and county has control over whether bans on such activities will remain in place or whether permits will be issued, and if so, to what extent and for which activities. See Bus & P C §26200.

The Medicinal Cannabis Patients' Right of Access Act (MCPRA) (Bus & P C §§26320–26325) will become effective January 1, 2024. The Act will prohibit a local jurisdiction from prohibiting the retail sale by delivery of

medicinal cannabis to medicinal cannabis patients or their primary caregivers by medicinal cannabis businesses, or that otherwise has the effect of prohibiting the retail sale by delivery of medicinal cannabis to medicinal cannabis patients or their primary caregivers in a timely and readily accessible manner and in types and quantities that are sufficient to meet demand from medicinal cannabis patients. Bus & P C §26322. After January 1, 2024, the Act may be enforced by an action for writ of mandate brought by a medicinal cannabis patient or their primary caregiver, a medicinal cannabis business, the Attorney General, or any other party otherwise authorized by law. Bus & P C §26323.

2. Cultivation

§10.64 a. Personal and Collective Gardens

While it was previously a crime to cultivate cannabis in any amount, over the past several years the laws in California have evolved significantly, to the point where not only is it no longer a crime to cultivate cannabis for personal use, and it is absolutely protected conduct.

Californians have similar but different rights to cultivate cannabis under the recreational and medical cannabis laws, respectively. Under Proposition 64, as of November 9, 2016, the personal use, cultivation, possession, transportation, purchasing, or gifting of up to 28.5 grams (approximately one ounce) of cannabis or more than 8 grams of concentrated cannabis by persons over 21 years of age is legal. Health & S C §11362.1(a). Health and Safety Code §11362.1(a)(3) allows cannabis cultivation of up to six living cannabis plants at a person's home. The plants must be cultivated on the grounds of the residence and not visible from a public place. Health & S C §11362.2(a)(2). Although local municipalities may further reasonably regulate the way in which the cultivation, harvesting, drying and processing of plants takes place, and may even prohibit outdoor cultivation, cities and counties may not prohibit cultivation inside a private residence or a fully enclosed and secure structure on the grounds of a residence. Health & S C §11362.2(b).

EXAMPLE➤ Paso Robles has passed cannabis regulations prohibiting the cultivation of cannabis in outdoor areas and requiring permits for indoor cultivation. Paso Robles Mun C 21.33.030.

Apart from recreational cultivation, and notwithstanding Proposition 64, medical cannabis patients still enjoy rights to grow medical cannabis in amounts consistent with their personal needs and usage. Generally, the

number of plants the patient may grow varies with numerous factors, including how the cannabis is consumed and with what frequency.

The patient may, under certain circumstances, also have a garden that serves not only their own individual needs but those of persons with whom they grow cannabis collectively. This is known as a collective or cooperative garden. Accordingly, a large-scale neighborhood cannabis operation may not necessarily be criminal. Moreover, because the activity has some protection by state law, assuming compliance with the Compassionate Use Act (see §10.62) and Medical Marijuana Program Act (see §10.63), there may be no grounds for a municipality to bring a nuisance abatement action, as it could with respect to a methamphetamine lab or crack house. However, to the extent that someone's otherwise legal cannabis garden is causing damage to a neighbor's property, the neighbor would have resort to nuisance laws to mitigate the problem. Moreover, a number of cities and counties have banned medical cultivation or regulated the number of plants that may be grown. Additionally, the MAUCRSA eliminated this "collective" model and its protections on January 9, 2019—1 year after the Bureau of Cannabis Control began issuing licenses under the Act. See Health & S C § 11362.775(d). For discussion of nuisance, see §§10.5–10.9.

PRACTICE TIP➤ A client who wants to have a medical cannabis garden must take precautions to secure it against neighborhood children. This is a serious consideration, as it could be the basis of not only nuisance claims but also claims of child endangerment.

§10.65 b. What's a Neighbor to Do?

A client worried about or confronted with a nuisance cannabis cultivation or other nuisance cannabis activities is not without recourse. With the passage of the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) (Bus & P C §§26000–26325) and Proposition 64, and concerns about unregulated activities becoming pervasive, an extraordinary amount of municipalities have passed ordinances that either ban cultivation and dispensing activities in their entirety, or severely limit the manner in which and the number of plants that may be grown, particularly with respect to outdoor gardens. Although the California Supreme Court has not addressed the legality of complete bans of medical cannabis cultivation, several lower appellate courts have upheld such bans. See *Maral v City of Live Oak* (2013) 221 CA4th 975; *Brown v County of Tehama* (2013) 213 CA4th 704. Additionally, while the passage of Proposition 64 limits the ability of municipalities to ban personal cultivations of six plants in a person's

home, it allows the outright ban of outdoor cultivations. Health & S C §11362.2(b)(3). Thus, municipalities enjoy a great deal of authority to regulate and ban cultivation and dispensing activities related to cannabis.

In circumstances in which a neighbor is cultivating medical cannabis, assuming that the matter cannot be resolved amicably between neighbors, the garden may be subject to civil penalties and perhaps abatement under municipal law. Even when there are no local regulations governing cultivation of medical cannabis, and the conduct is otherwise authorized by state law, the cultivating neighbor is still subject to general civil nuisance principles and must take action to prevent the diversion of their medical cannabis for nonmedical use. For discussion of nuisance, see §§10.5–10.9; California Attorney General, Guidelines for the Security and Non-Diversion of Cannabis Grown for Medical Use. Depending on the particular circumstances, the garden may be required to be locked and secured by a fence so that children cannot gain access.

PRACTICE TIP➤ When confronted with a neighbor who is growing cannabis on their own property, it is recommended that before confronting the neighbor or even contacting law enforcement, the complaining party consult with the local municipal code or appropriate person in the city or county manager's office to learn whether there is any local ordinance governing cultivation of cannabis.

Moreover, Health & S C §11362.768(b) prohibits a medical cannabis collective or cooperative from cultivating or distributing medical cannabis within a 600-foot radius of a school. "School" for these purposes means "any public or private school providing instruction in kindergarten or any grades 1 to 12 inclusive, but does not include any private school at which education is primarily conducted in private homes." Health & S C §11362.768(h). This provision does not apply to individuals cultivating cannabis for their personal use, or for the personal use of other persons living in the same residence, but instead applies to a garden that is operating for the benefit of other persons who are part of the "collective" entity. Health & S C §11362.768(e).

In addition, under federal law, the possession of controlled substances with intent to distribute, or the manufacturing of a controlled substance, within 1,000 feet of schools or within 100 feet of youth centers or public swimming pools, subjects the actor to greater punishment under federal law. 21 USC §860(a). Although the general enforcement of federal cannabis law is a low priority in California, certain conduct such as that relating to children and minors remains a high federal law enforcement priority.

NOTE➤ Fundamental property rights, private easements, and federal law may also assist a neighbor with concerns about cannabis activities on neighboring properties. See *JCCrandall, LLC v County of Santa Barbara* (2025) 107 CA5th 1135 (grower may not use private easement across neighboring property for transportation of cannabis, despite approval of conditional use permit) and Warning in §10.61.

§10.66 3. Use

As of November 9, 2016, the possession and use of cannabis is legal under state law for persons 21 years of age and above. Health & S C §§11018–11018.2, 11362.1–11362.45. However, cannabis and cannabis products may not be smoked or ingested in a public place except on the premises of a licensed retailer. Health & S C §11362.3. Smoking of cannabis is also prohibited where smoking tobacco is prohibited and within 1,000 feet of a school, day care center, or youth center while children are present unless the cannabis is smoked within a private residence, as long as it is not detectable by persons at the school, recreation center, or day care center while children are present. Health & S C §11362.3(a)(3).

Generally, a person is authorized under state law to use medical cannabis in any place except where smoking is prohibited by law or within 1,000 feet of the grounds of a school, recreation center, or youth center, unless the smoking takes place within a private residence. Health & S C §11362.79.

Many municipalities have ordinances governing smoking generally, and as cannabis becomes more prevalent, municipalities may seek to pass ordinances regulating the smoking of cannabis specifically. Thus, if smoking is generally permitted on the client's neighborhood street, then it likely will be legal for a person to publicly use medical cannabis there. It is unlikely that a local ordinance seeking to regulate the consumption of medical cannabis inside a private residence or on its grounds will be found lawful. See, however, Pacifica Mun C 4–15.04—4–15.10 (prohibiting smoking, including cannabis, in a multi-unit residence). However, should the use create a genuine nuisance situation, then local authorities should be alerted and remedial action may be taken. For discussion of nuisance, see §§10.5–10.9.

§10.67 4. Retailers, Distributors and Dispensaries

In recent years, particularly in more populated urban areas, the medical cannabis "dispensary" has taken hold in California. Generally, this terminology is used to describe a storefront where persons who are qualified medical cannabis patients may obtain their medicine (*i.e.,* cannabis and

other consumables containing cannabis or a derivative). These dispensaries operated under the "collective" or "cooperative" model and utilized the protections under the Medical Marijuana Program Act (MMPA) (Health & S C §§11362.7–11362.83). For discussion of the MMPA, see §10.63. Those protections lapsed January 9, 2019, under the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) (Bus & P C §§26000–26325). See Health & S C §11362.775(d).

To replace those protections, MAUCRSA created a licensing framework for businesses engaging in the retail sale of cannabis to both adults over 21 years old and medical patients with a valid physician recommendation. Importantly, MAUCRSA expressly authorizes local jurisdictions to regulate or ban entirely commercial cannabis businesses, including retail dispensaries. Bus & P C §26200(a). Additionally, among the requirements to operate a retail cannabis dispensary, a business must be licensed by both the state and local jurisdiction. See Bus & P C §26032(a)(2) (actions of commercial cannabis licensees not unlawful if permitted under local authorization, license, or permit); see also Bus & P C §26055 (requirements for issuance of state license include proof of local authorization, license, or permit).

Both MAUCRSA and Proposition 64 (which enacted the Control, Regulate and Tax Adult Use of Marijuana Act—commonly referred to as the Adult Use of Marijuana Act (AUMA)—and legalized the possession and cultivation of certain amounts of cannabis products (see Health & S C §§11018–11018.2, 11362.1–11362.45)) provide for commercial production and distribution of medical and nonmedical cannabis products beginning January 1, 2018, and are regulated by the Bureau of Cannabis Control (distribution, testing, and retail sales), the Manufactured Cannabis Safety Branch of the California Department of Health (manufacturing), and the California Department of Food and Agriculture (cultivation). See Bus & P C §§26000–26325. Retailers and distributors must obtain state licenses from the Bureau of Cannabis Control and are subject to security and transportation safety requirements. Bus & P C §26070. State licensure by the Bureau of Cannabis Control requires that an applicant not be in violation of a local ordinance or regulation.

The Medicinal Cannabis Patients' Right of Access Act (MCPRA) (Bus & P C §§26320–26325) will become effective January 1, 2024. The Act will prohibit a local jurisdiction from prohibiting the retail sale by delivery of medicinal cannabis to medicinal cannabis patients or their primary caregivers by medicinal cannabis businesses, or that otherwise has the effect of prohibiting the retail sale by delivery of medicinal cannabis to medicinal cannabis patients or their primary caregivers in a timely and readily accessible manner and in types and quantities that are sufficient to meet demand from medicinal cannabis patients. Bus & P C §26322. After January 1, 2024, the Act may be enforced by an action for writ of mandate brought by a medicinal cannabis patient or their primary caregiver, a medicinal cannabis business, the Attorney General, or any other party otherwise authorized by law. Bus & P C §26323.

§10.68 a. Retailers, Distributors and Dispensaries in Residential Neighborhoods

Insofar as neighborhood issues are concerned, it is unlikely that a dispensary engaging in sales or distribution of cannabis would engage in such conduct in a residential community. Health and Safety Code §11362.768 prohibits the operation of a retailer, distributor, dispensary, or any form of medical cannabis collective within a 600-foot radius of a school (excepting licensed residential medical or elder care facilities). Business and Professions Code §26054(b) prohibits any licensed commercial cannabis business from being located within 600 feet of a school, daycare center, or youth center, unless the Department of Cannabis Control or a local jurisdiction specifies a different radius. Although there is not currently a similar state law banning operation of dispensaries within residential zones, most cities and counties have passed ordinances that do just that. See, *e.g.,* Los Angeles Mun C §104.02. Under Bus & P C §26200(a), local jurisdictions are authorized to enact such regulations (or complete bans) under their zoning or land use regulations.

What is more likely to occur in a residential area is that a group of patients come together to operate a small collective garden on one member's property within the neighborhood. Although that activity may be legal under state law, assuming compliance with relevant provisions, it may still violate a local ordinance (depending on the scope of the ordinance). For discussion of collective gardens, see §10.64. Moreover, the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) (Bus & P C §§26000–26325) contains provisions that will remove the collective cultivation defense in January 2019, leaving only personal cultivation rights. See Health & S C §11362.775(d). Similarly, Proposition 64 only authorizes individuals to grow up to six plants for themselves at their homes. Thus, large-scale growing in residential neighborhoods is illegal under Proposition 64, and likely to be illegal under local ordinances passed under MAUCRSA with respect to medical or adult-use cannabis.

NOTE➤ Under regulations of the Bureau of Cannabis Control (4 Cal Code Regs §§15000–17905), delivery is permitted to any jurisdiction in California, even those where cannabis businesses may be banned, unless delivery is to an address located on publicly owned land or any address on land or in a building leased by a public agency, or tribal land (unless permitted by tribal law). 4 Cal Code Regs §15416(d). Thus, it is likely that a delivery service may be operating within a residential neighborhood by making deliveries to the residence of a

California alone. See U.S. Comptroller General, *EPA's Inventory of Potential Hazardous Waste Sites Is Incomplete* (Mar. 26, 1985) (available at https://www.gao.gov/products/RCED-85-75). Since 1985, as technology and industry have become ever more concentrated, the severity and frequency of neighbor disputes arising from environmental pollution and contamination have dramatically increased.

The particular purpose of this chapter is to identify and summarize the practical and legal issues related to handling a toxic tort claim on behalf of a landowner or other occupier of land. Potential liability for toxic tort damages, like potential liabilities under environmental statutes, are a concern for agricultural, commercial, and industrial operations that are located in proximity to human habitation. For example, a hazardous waste generator that sends waste to a leaking disposal site, a mining company operating within ten miles of a residential subdivision, or a manufacturer of agricultural pesticides that contaminates neighboring wells may still be subject to tort liability even if they have fully complied with all applicable federal and state regulations.

This chapter will address private party remedies and "citizen suits" arising from the statutory obligations under governmental mandates for abatement of environmental pollution or contamination caused by responsible landowners and occupants and those cases in which an environmental statute does not provide adequate relief for personal injuries or property damage. In the latter cases, the application of common law tort doctrines—such as trespass, nuisance, strict liability, negligence, or liability for ultrahazardous activities—may provide the best or only remedy for plaintiffs exposed to toxic contaminants.

A. Definitions

§11.2 1. Toxic Tort

The term "toxic tort" generally refers to illness, injury, or property damage that is caused by exposure to a hazardous or toxic substance and that may be compensable under traditional common law tort theories.

§11.3 2. Hazardous Substances

The terms "hazardous substances or "toxics" include a broad range of substances that are injurious to human health or the property owner's environment. They include dangerous substances such as poison gases, lead, acids, polychlorinated biphenyls (PCBs), pesticides, and asbestos. They may

also include less dangerous substances such as gasoline, paint, diesel exhaust, tobacco smoke, and even dredged soil.

The Resource Conservation and Recovery Act of 1976 (RCRA) (42 USC §§6901–6992k), which regulates solid wastes that are hazardous to human health or the environment, defines "hazardous waste" as a solid waste that because of its quantity, concentration, or physical, chemical, or infectious characteristics may (1) cause or significantly contribute to an increase in mortality or serious illness or (2) pose a substantial hazard to health or the environment when improperly managed. 42 USC §6903(5). The RCRA specifically covers petroleum products and underground storage tanks. See 42 USC §§6991–6991m. "Petroleum products" is defined to include crude oil, or any fraction thereof, that is liquid at standard conditions of temperature and pressure. 42 USC §6991(6).

§11.4 3. Pollution and Nuisance

Under the Porter-Cologne Water Quality Control Act (Porter-Cologne Act) (Wat C §§13000–16201), "pollution" includes any change of the quality of state waters that unreasonably affects such waters for beneficial uses. Wat C §13050(*l*)(1)(A). A "nuisance" occurs under the Porter-Cologne Act when discharge (Wat C §13050(m))

- Is injurious to health, is indecent or offensive to the senses, or is an obstruction of the free use of property;
- Affects a community, a neighborhood, or a considerable number of persons; and
- Results from the treatment or disposal of wastes (defined in Wat C §13050(d) as sewage and all waste substances, whether human or animal).

§11.5 B. Sources of Hazardous Substances

Hazardous substances come from numerous sources and take many forms. Specific forms of toxics that are often the subject of neighborhood disputes arise from

- Water pollution (see chap 14),
- Air pollution (see chap 7),
- Noise (see chap 7),
- Hazardous waste,
- Solid waste,

involvement in the handling of wastes on the site. See *U.S. v Price* (D NJ 1981) 523 F Supp 1055, 1073.

§11.15 f. Unfair Competition Law

The Unfair Competition Law (UCL) (Bus & P C §§17200–17210) creates a private right of action for "unfair competition," which is defined as any unlawful, unfair, or fraudulent business act or practice in addition to false or misleading advertising. Bus & P C §17200. The remedies that may be sought by private parties include injunctive relief, the appointment of a receiver, or such orders or judgments "as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of unfair competition." Bus & P C §17203.

PRACTICE TIP➤ Section 17203 does not create a private right of action for a plaintiff to request damages but does allow a court to exercise its equitable power of restitution. *Bank of the W. v Superior Court* (1992) 2 C4th 1254, 1266. However, under §17203, a court may order restitution or disgorgement of illegal profits. *ABC Int'l Traders, Inc. v Matsushita Elec. Corp.* (1997) 14 C4th 1247, 1252. The amount of restitution awarded "must be supported by substantial evidence." *Colgan v Leatherman Tool Group, Inc.* (2006) 135 CA4th 663, 700. Injunctive relief is not a prerequisite to restitution under §17203. *ABC Int'l Traders,* 14 C4th at 1252.

§11.16 g. Other Potential Areas of Standing

The Hazardous Waste Control Law (HWCL) (Health & S C §§25100–25259) omits any mention of a private party action, which probably means that there is no private right of suit under the HWCL. While plaintiffs may argue that there is an implied private right of action under the statute, that issue has not yet been decided in any California toxic tort case.

Even in the absence of an express statutory right of review, private plaintiffs can sue for judicial review of public agency actions under the federal Administrative Procedure Act (APA) (5 USC §§500–596). See, *e.g., California v Watt* (9th Cir 1982) 683 F2d 1253 (plaintiffs included private environmental groups), rev'd in part on other grounds in *Secretary of Interior v California* (1984) 464 US 312, 104 S Ct 656; *Citizens for Hudson Valley v Volpe* (2d Cir 1970) 425 F2d 97, 104 (suit brought by private environmental group and citizens group). However, federal courts have rejected plaintiffs' damage claims or attempts to avail themselves of causes of action

not explicitly provided by the statutes under which they sued. See *California v Sierra Club* (1981) 451 US 287, 106 S Ct 1775; *Middlesex County Sewerage Auth. v National Sea Clammers Ass'n* (1981) 453 US 1, 101 S Ct 2615.

§11.17 2. Burden of Proof of Causation

In toxic tort cases, the most problematic element of proof may be causation. The plaintiff must overcome the difficult obstacle of proving that exposure to a particular hazardous substance caused the alleged health problems or property damage. In many toxic tort cases, the plaintiff may find that the illness or injury must be traced to an exposure that occurred years before its discovery. Conversely, the plaintiff may bring suit after discovering that they have experienced prior or ongoing exposure to a potentially hazardous substance, but before any cognizable harm has surfaced. In either of these situations, the causation element represents a major hurdle.

For example, in *Cottle v Superior Court* (1992) 3 CA4th 1367, approximately 175 owners and occupants of a residential subdivision claimed that they sustained a myriad of physical injuries, emotional distress, and property damage as a result of exposure to chemicals from a waste dump. Because the plaintiffs could not identify which chemicals they were exposed to, or the dose, and because they failed to identify any expert on the causation issue, the trial court made an in limine order excluding all evidence of personal injury claims.

For further coverage of causation issues in toxic tort cases, see Selmi & Manaster, California Environmental Law and Land Use Practice, chap 3 (*Toxic Torts & Environmental Litigation*) (Matthew Bender); Searcy-Alford, A Guide to Toxic Torts, chap 10 (*Proof of Causation*) (Matthew Bender).

III. HANDLING THE DISPUTE

§11.18 A. Claims for Future Physical Injury

If the client has been exposed to a toxic substance but has not yet sustained physical injury, the client's recovery may be limited by the California Supreme Court's decision in *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965. In these cases and absent unusual circumstances, the main remedy available to a plaintiff is a claim for medical monitoring costs. In addition, the client's ability to prove actual cellular injury may be the only method for successfully claiming emotional distress damages. On the need for epidemiologist and neuropsychologist experts, see §11.7.

§11.19 B. Exclusion of Defense Experts

Before entering litigation, plaintiff's counsel should consider whether a motion in limine is necessary to preclude the defendants from calling an expert witness to challenge a statutory or regulatory public health standard for exposure to a chemical. It is advisable to bring this kind of motion to challenge the admissibility of the expert testimony that is anticipated to be introduced.

In California, expert testimony is admissible if it is grounded in a scientific principle or theory that is generally accepted as reliable in the relevant scientific community. See *People v Kelly* (1976) 17 C3d 24 (adopting test from *Frye v U.S.* (DC Cir 1923) 293 F 1013). Because both parties in toxic tort cases rely heavily on scientific evidence and expert testimony to prove issues of exposure, causation, and damages, it is important that the results or tests relied on by the experts satisfy the *Kelly* rule.

For additional discussion of experts, *Kelly,* and *Frye,* see California Expert Witness Guide, chap 4 (2d ed Cal CEB); Scientific Evidence and Expert Testimony in California, chap 2 (Cal CEB).

§11.20 C. Identifying Potential Defendants

Identification of all of the defendant tortfeasors may be a formidable task in a toxic tort case if (1) the harm surfaces long after the use or exposure that triggered it or (2) the harm arises not from a single use or exposure but as a consequence of cumulative or incremental exposures over a lengthy period. In response to this difficulty, courts have adopted a range of theories to impose liability jointly and severally on all those who belong to the class of potential tortfeasors. One theory, the concept of "alternative liability," was first enunciated in *Summers v Tic*e (1948) 33 C2d 80, 199. Reliance on an alternative liability theory generally requires the joinder of all those whose conduct might have caused the plaintiff's harm. For example, in *Sindell v Abbott Labs.* (1980) 26 C3d 588, 603, the court found the application of alternative liability inequitable when only five of 200 manufacturers of a disputed drug were joined as defendants.

A few courts have applied the alternative liability concept to address the problem of apportioning liability among different generators who have contributed waste to a hazardous waste site. In the case of *Landers v East Texas Water Disposal Co.* (Tex 1952) 248 SW2d 731, which involved contamination of a fish-stocked lake by saltwater from one defendant's pipeline and oil from another defendant's well, the Texas Supreme Court held that alternative liability applied to indivisible injuries. Because all the tortfeasors

responsible for an indivisible injury were jointly and severally liable, the plaintiff was free to proceed "against any one separately or against all in one suit." Thus, the court ruled, if a plaintiff did not join all potential wrongdoers, any defendant could implead other alleged tortfeasors, but all would remain jointly and severally liable barring proof that they did not cause the injury. 248 SW2d at 734. The Fifth Circuit adopted the *Landers* burden-shifting approach in the case of *Borel v Fibreboard Paper Prods. Corp.* (5th Cir 1973) 493 F2d 1076, 1094.

PRACTICE TIP➤ Counsel for a plaintiff should consider using jury instructions that shift the burden to the multiple defendants who exposed the plaintiff to the hazardous substance.

In a difficult statute of limitations case, counsel should consider the use of continuing trespass and nuisance claims because of the extended period available to file a claim. On statute of limitations in continuing nuisance and trespass cases, see §11.44. Claims for indemnity may accrue at a later date, when remedial action is commenced. See *Carrier Corp. v Detrex Corp.* (1992) 4 CA4th 1522, 1528 (indemnity claim against manufacturer of degreasing unit that contaminated groundwater).

IV. LEGAL THEORIES AND CAUSES OF ACTION

§11.21 A. Relevant Statutes

A series of federal and state statutes governs the relationship between hazardous or toxic substances and real property. These statutes prohibit the disposal of toxics except as allowed by special permits (see *Hawaii Wildlife Fund v County of Maui* (2020) 590 US 165, 140 S Ct 1462), require notice to various persons and entities when contamination occurs, impose responsibility on landowners and others to clean up contaminated property, restrict the development of contaminated property, and provide remedies to parties injured by contamination. Owners or others holding real property interests are subject to various statutes requiring cleanup of contaminated properties. These include

- The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) (Health & S C §§25249.5–25249.13);
- The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 USC §§9601–9675);
- The Resource Conservation and Recovery Act of 1976 (RCRA) (42 USC §§6901–6992k);

- The Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA) (Health & S C §§78000–81050 (former Health & S C §§25300–25395.45));
- The Hazardous Waste Control Law (HWCL) (Health & S C §§25100–25259);
- The federal Clean Water Act (33 USC §§1251–1387); and
- The Porter-Cologne Water Quality Control Act (Porter-Cologne Act) (Wat C §§13000–16201).

While common law theories typically provide the grounds for toxic tort lawsuits, various federal and state statutes may serve as alternative potential bases for recovery. However, statutes may also serve to abrogate or exempt certain activities from judicially created tort doctrines. For example, the HSAA exempts damages caused by the normal application of pesticides. Former Health & S C §25321. See also 42 USC §6921(b)(2) (exempting from RCRA certain wastes generated by petroleum exploration and production), §9601(14) (excluding petroleum, crude oil, and natural gases from definition of hazardous substance under CERCLA).

For a more detailed discussion of liability for toxic cleanup under these statutes, see The California Municipal Law Handbook, chap 14 (Cal CEB Annual).

B. Negligence

§11.22 1. Basic Elements

The basic elements of a negligence cause of action in a private party toxic tort case are as follows:

- The defendant owes a duty to avoid foreseeable harm to the plaintiff (duty of care);
- The defendant breached that duty of care; and
- The breach was the proximate cause of damage to the plaintiff.

For example, the operation of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 USC §§9601–9675) may create a statutory basis for common law negligence liability, even when it does not lead to any statutory obligation to clean up. When a site is listed on the Environmental Protection Agency's National Priorities List (NPL), the property owner and any potentially responsible parties (PRPs) are not compelled by the statute to take any action. However,

being listed on the NPL is often the "spark" that leads to private nuisance litigation.

Further, because CERCLA does not permit recovery of punitive damages or damages for personal injuries, common law remedies may be the only remedies available to an aggrieved party that go beyond the environmental cleanup costs and health costs compensable under federal (42 USC §9607(a)(4)) or state (former Health & S C §25375) statutory law. See, *e.g., Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965; *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 347. Similarly, individual plaintiffs can use negligence theories combined with statutory causes of action to recover for personal injuries caused by exposure to harmful substances. See, *e.g., Mangini v Aerojet-Gen. Corp. (Mangini I)* (1991) 230 CA3d 1125, 1149. See also *Tosco Corp. v Koch Indus., Inc.* (10th Cir 2000) 216 F3d 886, 895 (defendant held liable under public nuisance theory and CERCLA for subsurface seepage of contamination).

§11.23 2. Negligence Per Se

If an environmental statute imposes a duty on a defendant, a plaintiff may invoke a rebuttable presumption of negligence (negligence per se) by asserting that

- The defendant violated the statute,
- The violation proximately caused harm to the plaintiff, and
- The law was intended to protect persons such as the plaintiff from the harm alleged.

This theory has broad applicability in the toxic tort context. See, *e.g., Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 347 (allegation of negligence per se based on discharge of hazardous substances in violation of Health & S C §5410).

Under Evid C §669(a)(1), a defendant's violation of a statute gives rise to a rebuttable presumption of negligence rather than establishing an element of a negligence per se action. Because the presumption of negligence is rebuttable, the defendant who violated the statute, ordinance, or regulation must show that they did what might be expected of a person of ordinary prudence acting under similar circumstances and attempting to comply with the law. The defenses of excuse or justification are usually left for the jury to decide. For additional discussion of negligence per se, see chap 10 (criminal activities).

MTBE-laden gasoline) after it had reached an ultimate consumer or user. Strict liability extends to products that have left the manufacturer's control and are placed on the market. *Nelson v Superior Court, supra*.

In addition, the doctrine of strict liability may support an action by neighboring landowners for diminished property values or health problems. *Smith v Carbide & Chems. Corp.* (6th Cir 2007) 507 F3d 372. At least two courts have held that there appears to be "no practical or legal distinction between the rights of a successor in title to use and enjoy its land and the rights of a neighboring property owner" with regard to the liability of the creators of abnormally dangerous conditions. See *T & E Indus. v Safety Light Corp.* (NJ Super App Div 1988) 546 A2d 570, 576; *Amland Props. Corp. v Aluminum Co. of Am.* (D NJ 1989) 711 F Supp 784.

§11.28 3. Product Liability

There are generally three types of product defects:

- A defect caused by a flaw in the manufacturing process,
- A design defect, and
- A defect in the warnings or instructions regarding the use of the product.

See *Brown v Superior Court* (1988) 44 C3d 1049, 1057. Toxic tort cases based on strict product liability may involve, for example, products such as asbestos or pesticides that expose the user to toxic or hazardous substances. See *Borel v Fibreboard Paper Prods. Corp.* (5th Cir 1973) 493 F2d 1076; *Villari v Terminex Int'l, Inc.* (ED Pa 1987) 663 F Supp 727. Persons potentially liable for a defective product or inadequate warning include virtually all parties involved in the stream of commerce or marketing enterprise for the product, including a landowner's application of pesticides on crops without proper warnings. See *Ferebee v Chevron Chem. Co.* (D DC 1982) 552 F Supp 1293. Any foreseeable user or consumer of the defective product may recover under the theory of strict products liability. Strict liability may even extend to injured third parties or "bystanders" who are technically nonusers of the product but still its victims. *Nelson v Superior Court* (2006) 144 CA4th 689, 694. For public policy reasons, the courts have recognized the "unavoidably unsafe product" defense (*i.e.,* a product whose "norm is danger") with regard to drugs, vaccines, and implanted medical devices. See *Brown,* 44 C3d at 1063; *Hufft v Horowitz* (1992) 4 CA4th 8, 19.

§11.29 D. Nuisance

Ordinarily, nuisance refers to interference with an individual's interest in the private use and enjoyment of land (private nuisance). A private nuisance action typically requires "real and appreciable interference" with the plaintiff's use or enjoyment of their land. *San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 937. A nuisance action may be based on conduct that is intentional or negligent or that gives rise to strict liability (*e.g.,* the creation of an abnormally dangerous condition) (see §11.27). Most nuisance actions are directed against property owners for maintaining a nuisance on their property.

When the defendant's activity interferes with private rights, it may be enjoined if

- Its value to society is outweighed by the gravity of the harm it causes, or
- The harm is serious and the defendant's activity would not be deterred by compensating the damaged parties.

Restatement (Second) of Torts §826 (1977). See *Concerned Citizens of Bridesburg v City of Philadelphia* (ED Pa 1986) 643 F Supp 713.

§11.30 1. Private Nuisance and Public Nuisance

Private nuisance is a claim for harm to property and cannot be used to address personal injuries caused by the nuisance. By contrast, a public nuisance, which is a nuisance affecting "any considerable number of persons, although, the extent of the annoyance or damage inflicted upon individuals may be unequal" (CC §3480; see also *Redevelopment Agency of City of Stockton v BNSF Ry. Co.* (9th Cir 2011) 643 F3d 668 (applying California law)), can support a claim for personal injuries and property damage as long as a plaintiff suing under this theory demonstrates special injury different in kind from that suffered by the general public. CC §3493. See also *Kempton v City of Los Angeles* (2008) 165 CA4th 1344, 1349 (granting leave to amend to plead private nuisance). Damages may not be awarded for annoyance, discomfort, sickness, emotional distress, or similar claim. *San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 937 (nuisance is nontrespassory interference with private use and enjoyment of land; interference must be substantial).

For further discussions of public nuisance and private nuisance, see §16.10.

§11.31 2. Establishing Nuisance

A nuisance claim may include activities that pollute neighboring land, even if the facility causing the pollution has complied with all applicable environmental laws. See, *e.g., International Paper Co. v Ouellette* (1987) 479 US 481, 107 S Ct 805. See also *Village of Wilsonville v SCA Servs., Inc.* (Ill 1981) 426 NE2d 824. Thus, the owner or operator of a business that involves the use or disposal of hazardous substances or creates considerable noise or dust may be liable to neighbors for contamination or pollution of their properties on a nuisance theory. See, *e.g., Wilson v Interlake Steel Co.* (1982) 32 C3d 229 (claims of noise, vibration, and dust constituted action for nuisance rather than trespass). Activities and harms that are separately actionable under direct hazardous substance liability or remediation laws (such as the Resource Conservation and Recovery Act of 1976 (RCRA) (42 USC §§6901–6992k) and the Clean Water Act (33 USC §§1251–1387)) may give rise to claims of continuing private nuisance even if the evidence shows only that the contamination remains uncontrolled, without any direct showing that it is moving or increasing the level of threat. See, *e.g., Mowrer v Ashland Oil & Refining Co.* (7th Cir 1975) 518 F2d 659 (statutory right of action for private nuisance upheld when oil production activities polluted neighboring well).

NOTE➤ One critical element of property-related nuisance claims is establishing the standing of the plaintiff. In general, nuisance claims may only be made by an owner or occupant who was in possession of the property at the time of the commencement of the lawsuit. *Wilson v Interlake Steel Co.* (1982) 32 C3d 229, 233; *Allen v McMillion* (1978) 82 CA3d 211, 218; *Williams v Goodwin* (1974) 41 CA3d 496, 508. See also *Parker v Scrap Metal Processors, Inc.* (11th Cir 2004) 386 F3d 993; *Briggs & Stratton Corp. v Concrete Sales & Servs.* (MD Ga 1998) 29 F Supp 2d 1372. Given the longevity of many hazardous substance cases and the transitory nature of property ownership, this limitation can create a considerable hurdle in the context of hazardous substance-related nuisance claims.

§11.32 E. Trespass

A trespass is a direct infringement on another's right to possess land and may be committed on or beneath the surface of the earth. See *Elton v Anheuser-Busch Beverage Group, Inc.* (1996) 50 CA4th 1301; *Polin v Chung Cho* (1970) 8 CA3d 673, 677 (subsidence, landslides, and other land

failures may be considered trespass on adjoining land). Trespass typically involves some physical intrusion by an activity or object, which can be even an invisible chemical.

Unlike nuisance, trespass claims are normally thought to require a showing of intent. Courts have held that under a trespass theory, a person cannot be found liable if the act in question was "an unintentional non-negligent entry, even if harm is done." See *Nissan Motor Corp. v Maryland Shipbuilding & Drydock Co.* (D Md 1982) 544 F Supp 1104, 1116. At a bare minimum, plaintiffs must establish that the defendant's negligence caused the toxic contaminant to enter plaintiff's land.

At least one court has held that a claim for intentional trespass could be asserted without a separate allegation of actual harm and that recovery in a contamination-based trespass claim could be possible if the plaintiffs could "prove a diminution in their property values" because of the trespass. See *Smith v Carbide & Chems. Corp.* (6th Cir 2007) 507 F3d 372, 378.

The plaintiffs must show harm to a specific property right as a necessary element for a cause of action alleging a trespass. Entry may be shown if the defendant caused the presence of a substance that caused harm—*e.g.,* if the defendant dumped a contaminant on their own property and it migrated through soil or water to the plaintiff's property. See, *e.g., City of Philadelphia v Stepan Chem. Co.* (ED Pa 1982) 544 F Supp 1135, 1152 (hazardous waste generators who hired independent contractors to dispose of their waste could be subject to trespass action by city, even though they did not enter city's site, if they knew that contractors were likely to illegally dump waste in landfill). Similarly, if a party conducts activities that emit airborne pollutants that settle on a neighbor's property and cause damage or interfere with the plaintiff's use of the land, an action for trespass may lie. See *Wilson v Interlake Steel Co.* (1982) 32 C3d 229 ("Recovery allowed in prior trespass actions predicated upon noise, gas emissions, or vibration intrusions has, in each instance, been predicated upon the deposit of particulate matter upon the plaintiffs' property or on actual physical damage thereto").

In *County of Santa Clara v Atlantic Richfield Co.* (2006) 137 CA4th 292, 315, the court held that a property owner who voluntarily places a product on their own property that turns out to be hazardous cannot prosecute a trespass action against the product's manufacturer because the owner consented to the entry of the product on the property.

See also discussion of trespass cause of action in §§16.16–16.23.

hazardous substance, pollutant, or contaminant released into the environment from a facility, the "federally required commencement date" applies if that date is later than the applicable state commencement date. 42 USC §9658(a)(1). The federally required commencement date is "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages … were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 USC §9658(b)(4)(A). CERCLA's rule for determining the accrual date preempts any state law that would apply a different rule, when the harm allegedly results from exposure to a CERCLA-related release. 42 USC §9658(a).

In *O'Connor v Boeing N. Am., Inc.* (9th Cir 2002) 311 F3d 1139, the Ninth Circuit held that the CERCLA "delayed discovery" rule, rather than the California rule, applied in an action by plaintiffs alleging injuries from releases of hazardous radioactive and nonradioactive substances from the defendants' nuclear and rocket testing facility.

NOTE➤ In *Lockheed Martin Corp. v Superior Court* (review dismissed Aug. 18, 2004, and remanded to court of appeal; superseded opinion at 109 CA4th 24), a California court held that widespread publicity regarding contamination of groundwater was sufficient to place a reasonable person who suffered injury on inquiry notice to trigger the statute of limitations. However, the supreme court, after initially granting review, dismissed review and remanded in light of the legislature's addition of CCP §340.8, which provides in part that (CCP §340.8(c)(2))

> [m]edia reports regarding the hazardous material or toxic substance contamination do not, in and of themselves, constitute sufficient facts to put a reasonable person on inquiry notice that the injury or death was caused or contributed to by the wrongful act of another.

§11.44 3. Nuisance and Trespass Claims

If a trespass or a nuisance can be enjoined or if it causes only temporary injury, the injured party can still recover damages resulting from the original wrong. See, *e.g.,* authorities cited in *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 868. The plaintiff must bring one action for all past, present, and future damages within 3 years after the permanent nuisance arises; if the plaintiff does not, the claim is barred by the statute of limitations. CCP §338(b). However, a plaintiff can bring separate and successive actions for damages caused by a continuing trespass or nuisance. *Kafka v Bozio* (1923) 191 C 746; *Bertram v Orlando* (1951) 102 CA2d 506.

Continuing nuisance and trespass theories have a unique impact on a statute of limitations defense. If a plaintiff elects to treat a hazardous waste problem as a continuing tort, damages are limited to those incurred within a 3-year period before filing. CCP §338(b). The plaintiff may thereafter file successive suits every 3 years. In comparison, under a negligence or strict liability claim, the plaintiff has the burden of proving all past, current, and future damages at trial and cannot seek subsequent relief.

If, however, a plaintiff fails to make an initial claim within the statute of limitations period, they will be prevented from filing subsequent continuing trespass or nuisance claims unless the plaintiff meets the burden of showing that the nuisance is "reasonably abatable." See *McCoy v Gustafson* (2009) 180 CA4th 56, 90 (because plaintiffs failed to establish that soil contamination from leaking fuel was reasonably abatable, nuisance was permanent and action was barred by 3-year statute of limitations for injury to real property).

For a more detailed discussion of the statute of limitations, see Selmi & Manaster, California Environmental Law and Land Use Practice, chap 3 (*Toxic Torts & Environmental Litigation*) (Matthew Bender).

§11.45 C. Contributory or Comparative Negligence

The doctrine of comparative negligence permits an allocation of responsibility between the plaintiff and defendant, with a corresponding apportionment of damages. See *Daly v General Motors Corp.* (1978) 20 C3d 725, 742. For example, in a toxic tort case, a plaintiff's smoking habit may reduce their recovery from a defendant who caused the contamination of the property. See *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 1011. The doctrine may be applied in strict liability as well as negligence actions (*Daly v General Motors Corp., supra*), particularly when the relative liability of several defendants is at issue. See *American Motorcycle Ass'n v Superior Court* (1978) 20 C3d 578.

D. Compliance With Applicable Law

§11.46 1. Negligence and Strict Liability Claims

A company's compliance with the environmental statutes and regulations applicable to its operation may not insulate it from toxic tort negligence or strict liability. At the same time, any failure on the defendant's part to comply with an applicable law (or government order, such as a cleanup order) may give rise to a presumption of negligence. Evid C §669(a). Subsection

negligent act of misleading the firefighters about the danger created liability to the extent that the injury suffered was from an enhanced risk of harm or a newly created risk of harm.

K. Sovereign Immunity

§11.54 1. State Immunity

Since the historic case of *Muskopf v Corning Hosp. Dist.* (1961) 55 C2d 211—striking sovereign immunity in a tort action against a public agency—governmental tort liability and its limitations are now wholly statutory. See Govt C §§810–998.3 (California Tort Claims Act of 1963, now known as the Government Claims Act); California Government Tort Liability Practice (4th ed Cal CEB).

The Government Claims Act provides that a public entity is not liable for an injury arising out of an act or omission of the public entity or public employee or any other person except as otherwise provided by statute (*i.e.,* a California statute or a federal or state constitution). Govt C §815; *Ellerbee v County of Los Angeles* (2010) 187 CA4th 1206, 1214; *Hoff v Vacaville Unified Sch. Dist.* (1998) 19 C4th 925, 932. See also *Eastburn v Regional Fire Protection Auth.* (2003) 31 C4th 1175, 1179; *Zelig v County of Los Angeles* (2002) 27 C4th 1112, 1127.

Public entities and certain designated public employees cannot be held liable for any personal injury or property damage caused by an act or omission to abate or attempt to abate hazards reasonably believed to be an imminent peril to public health and safety, such as those caused by the discharge, spill, or presence of a hazardous substance. See, *e.g.,* Health & S C §25400(b). This defense has been extended to a federal government contractor. *Boyle v United Technols. Corp.* (1988) 487 US 500, 512, 108 S Ct 2510; *McLaughlin v Sikorsky Aircraft* (1983) 148 CA3d 203, 210.

Immunity does not extend to an act or omission that was performed in bad faith or in a grossly negligent manner. *Macias v California* (1995) 10 C4th 844, 857. In *Adkins v State* (1996) 50 CA4th 1802, 1817, the court held that the state was not immune from liability under Govt C §8655, the immunity provision of the Emergency Services Act (Govt C §§8550–8669.87), for intentional concealment of known dangers of a chemical used to eradicate Mediterranean fruit flies that also caused injuries to humans.

§11.55 2. Federal Immunity

The Federal Tort Claims Act (FTCA) (28 USC §§2671–2680) permits private parties to sue the United States in a federal court for most torts

committed by persons acting on behalf of the United States. The FTCA constitutes a limited waiver of sovereign immunity and provides, "The United States [is] liable … in the same manner and to the same extent as a private individual under like circumstances, but [is not] liable for interest prior to judgment or for punitive damages." 28 USC §2674. Federal courts have jurisdiction over such claims but apply the law of the state "where the act or omission occurred." 28 USC §1346(b). Thus, both federal and state law may impose limitations on liability.

§11.56 VII. CROSS-COMPLAINT FOR APPORTIONMENT OF LIABILITY CONTRIBUTION AND INDEMNITY

The state has the right to seek monetary damages and abatement costs for injury to public resources, such as groundwater contamination, when the state has a "property interest which has been injuriously affected by a nuisance." See *Selma Pressure Treating Co. v Osmose Wood Preserving Co.* (1990) 221 CA3d 1601, disapproved on other grounds in *Johnson v American Standard, Inc.* (2008) 43 C4th 56, 70. *Selma* distinguishes between the state acting "in its representative capacity protecting the public interest generally," in which case it can seek only injunctive relief (and, under the trial court's reasoning, indemnity would not be available), and the state having "a property interest which has been injuriously affected by a nuisance," in which case it, like any property owner, can seek damages. 221 CA3d at 1613.

A landowner who is liable to the state for injury to public resources has a right to seek indemnity from third parties who are also responsible for the environmental injury. *Mangini v Aerojet-Gen. Corp. (Mangini I)* (1991) 230 CA3d 1125, 1155. Equitable indemnity allows one tortfeasor to seek full or partial indemnity from a joint tortfeasor on a comparative fault basis. If one joint tortfeasor pays more than its fair share of the damages, that tortfeasor ordinarily may seek contribution against the others, as long as the tortious conduct was unintentional. See *American Motorcycle Ass'n v Superior Court* (1978) 20 C3d 578, 598.

Under the principle of collateral estoppel, a plaintiff may seek to bar a defendant from litigating issues pertaining to its liability, on the ground that substantially identical issues were decided in a prior lawsuit in which the defendant was a party.

12

Neighborhood and Home Businesses

Peter A. Kleinbrodt

§12.1 I. WHAT IS A HOME BUSINESS?

A home may be a person's castle, but it cannot always be an office. The intent of this chapter is to familiarize the reader with the basic legal concepts involving neighborhood or home businesses. The ever-evolving digital age is spawning a greater tolerance for home-based businesses, not only because of tools such as groupware, virtual private networks, conference calling, videoconferencing, and voice over internet protocol (VoIP) that not only facilitate working from the home, but also because of the evolution of micro and small enterprises that have spurred the environment of working from home. In addition, the growth of cloud computing technology and smartphones has not only created more business mobility but also increased the acceptability of telecommuting. Thus, what may have been considered a commercial enterprise inconsistent with the residential ambiance of a neighborhood in years past may now be more acceptable. In 2010, the Telework Enhancement Act (5 USC §§6501–6506) was signed into law, culminating years of legislative activity to advance federal telework. While some people may still have concerns about commercial activity in their neighborhoods,

there is no denying the dramatic increase in and greater tolerance for home business enterprises.

When advising a client operating a home business or a client wishing to bring a claim against a neighbor operating a home business, it is important that counsel understand how that term has been defined by the courts. To begin with, a business is "any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect." *Union League Club v Johnson* (1941) 18 C2d 275, quoting the 1935 amendment of the Retail Sales Tax Act (Stats 1935, p 1256); *Los Angeles City High Sch. Dist. v State Bd. of Equalization* (1945) 71 CA2d 486, 488. The activity need not turn a profit. *Union League,* 18 C2d at 278. A home business is thus

- Something engaged in with the object of gain, benefit, or advantage;
- That has a continuity of service (see §12.2);
- That is more than merely incidental to the residential use of the premises (see §12.3); and
- That does not interfere with the character of the home or neighborhood (see §12.4).

As discussed further in §12.44, the housing "sharing economy" has exponentially exploded in certain areas through web-based sharing services and, oftentimes the threats to neighborhoods or the nuisances (whether perceived or actual) have often engendered responses, but not in any uniform or even predictable manner.

§12.2 A. Continuity of Service

A casual, irregular, or temporary arrangement does not constitute a business.

It has been held in a variety of contexts that a single day's act or a single transaction does not qualify as a business (except perhaps in the short-term rental market discussed in §12.44). There must be a continuity of service as opposed to a casual or isolated incident. See, *e.g., Long v City of Anaheim* (1967) 255 CA2d 191 (nonprofit political newspaper not required to obtain business license); *Mansfield v Hyde* (1952) 112 CA2d 133, 137 (childcare for compensation as casual accommodation versus business).

§12.3 B. More Than Incidental Use of Premises

Another element identifying a home business is whether the conduct is more than merely incidental to the use of the owner's premises. For example,

in *Child v Warne* (1961) 194 CA2d 623, 632, a court held that backyard avocado growers were not in the business of production (and thus not subject to regulation) because the avocado growing was an incidental, rather than primary, use of the premises.

§12.4 C. No Interference With Character of Neighborhood

And finally, a recurring theme is whether and to what degree the business activity interferes with the character of the neighborhood. In *City of Beverly Hills v Brady* (1950) 34 C2d 854, a court found that a physician writing a syndicated column from his home was not a home business even though he outfitted an office built over his garage with equipment, hired secretaries, and received and mailed pamphlets from there. As in *Child v Warne* (1961) 194 CA2d 623, 632, the mailing of pamphlets was determined incidental to the writing of the column and the pamphlets were not individually advertised or sold. More importantly, the court noted that the activities did not "interfere with the use or appearance of his home or premises as a residence, nor do they affect the residential or aesthetic character of the district." *City of Beverly Hills,* 34 C2d at 856. Compare *Child* with *Nelson v Avondale Homeowners Ass'n* (2009) 172 CA4th 857, in which the defendant saw up to eight patients a day for one-half hour at a time, 5 days a week, and was thus found to operate a home business. See discussion of *Nelson* in §12.38.

II. PRACTICAL AND LEGAL ISSUES

A. Practical Issues

§12.5 1. Checklist: Assessing Impact of Home Business

Regardless of legal definitions, practically speaking, a client who operates a business from their home would like to conduct it without interference from neighbors. On the other hand, homeowners seek to protect the residential character of their neighborhoods and protect their property values by limiting the impacts of neighborhood businesses. Representing either side requires thorough preparation. Thus counsel should

- ____ Review all relevant zoning ordinances and identify when these zoning ordinances were enacted
- ____ Visit the local county recorder's office to obtain copies of any covenants, conditions, and restrictions (referred to throughout this chapter as CC&Rs) or other deed restrictions

- ____ Obtain copies of relevant homeowners association (HOA) documents or the client's lease if a rental
- ____ Investigate local attitudes toward similar types of neighborhood businesses
- ____ Accumulate verifiable data on the imposition the business places on the neighborhood and counsel the client on the risks involved
- ____ Check on commercial activity that is already allowed in the locale

Often, involving neighbors in the start-up process may lead to a successful home business operation.

§12.6 2. Assess Relative Hardships

When representing a client who wishes to preliminarily enjoin a home business, counsel must (1) establish that the client's prevailing on the merits is reasonably probable and (2) compare the interim harm that the plaintiff is likely to sustain if the injunction is denied with the harm that the defendant is likely to suffer if the court grants a preliminary injunction (doctrine of relative hardship or balancing of the equities). *Weingand v Atlantic Sav. & Loan Ass'n* (1970) 1 C3d 806; *Continental Baking Co. v Katz* (1968) 68 C2d 512, 528. See also *IT Corp. v County of Imperial* (1983) 35 C3d 63, 72; *Fox v City of Los Angeles* (1978) 22 C3d 792, 799 n1 (concurring opinion of Bird, CJ).

§12.7 3. Visit Site

Whether seeking to enjoin a home business or to protect a client's nonresidential use of property, counsel will need specific information about the activity and its effect on the neighborhood. Counsel should conduct independent observations, noting traffic and other physical impacts (*e.g.,* number and pattern of customers, vendors, deliveries, and employees). Counsel should not rely solely on the client's interpretation or information; photos and videos are helpful. In *City of Los Altos v Barnes* (1992) 3 CA4th 1193, a municipality sought an injunction against a home business that had been operating for 17 years. The request was based on a neighbor's daily observations, videotape of vehicles being moved, and recorded license numbers. The court admitted this evidence, finding that it did not violate a right of privacy—the neighbor observed and recorded conduct occurring in plain view.

§12.8 4. Check for Licenses and Permits

Counsel should bear in mind that a client seeking to run a business from home may not have considered all of the necessary financial and legal requirements. Counsel should confirm whether any licenses and permits are required for the business activity, including under the California occupational safety and health regulations (Title 8 Cal Code Regs), federal Occupational Safety and Health Act (OSHA) (29 USC §§651–678), Americans with Disabilities Act of 1990 (ADA) (42 USC §§12101–12213), and local and state fire, safety, emergency access, and other commercial regulations. Practically all local communities require occupants who wish to conduct a business from a residential location to obtain a permit.

The Homemade Food Act (Stats 2012, ch 415) allows certain low-risk foods, known as cottage foods, to be made in private homes and sold to the public. See Stats 2012, ch 415, §1. The law provides structure and legal status for cottage industries for certain items produced in home kitchens. See Govt C §51035. Individuals who own and run these home-based businesses are referred to as "cottage food operators" (Health & S C §113758(b)(2)) and subject to statutory limits on gross annual sales (see Health & S C §113758(a)). Cottage food operations will need to comply with local ordinances and obtain appropriate permits. For further discussion of the Homemade Food Act, see §12.43.

§12.9 5. Review Information From Public Records and Proceedings

Counsel should review the relevant local zoning ordinances, paying particular attention to when they were enacted. The business may qualify as a nonconforming use; otherwise, unless expressly allowed, counsel will need to seek a conditional use permit. On nonconforming uses and conditional use permits, see §§12.24–12.34.

Enforcement of zoning ordinances varies from district to district. It is important to be familiar with the local agency's handling of home business issues. Counsel should determine the frequency of this issue and how many home businesses operate in the area and attempt to ascertain whether enforcement is a high priority. Are conditional use permits regularly granted? Are the impacts from the business only to the physical structure of the home, and therefore might a variance be more applicable than a conditional use permit?

PRACTICE TIP➤ Agendas and meeting minutes of hearings on applications for conditional use permits and variances are usually available on

local agency websites. In addition, use the property's address to search for other public information that may be available online. Counsel should also contact the local planning department for further information concerning enforcement of zoning ordinances. Long-term residents and experienced realtors often are good sources if they have interacted with a local zoning agency. The local chamber of commerce and other local trade and industry groups may also be a good source of information regarding home business issues.

§12.10 6. Checklist: Client Information

Counsel should obtain the following information and documentation from, or on behalf of, the client:

- ___ Business formation documents
- ___ All relevant licenses and permits relating to the operation of the planned business
- ___ A detailed business plan containing information about the business's operations, including type of activity, noise levels, use of noxious or dangerous chemicals, number of employees, number of residents involved, hours, whether customers will be coming to the home to buy services or products, signage on the property, additional vehicles to be used, and designated area of home to be used
- ___ Potential issues with parking, including available spaces and whether customers and employees will be taking up spaces that are normally used by neighbors
- ___ Homeowners association (HOA) agreements, CC&Rs, or any other rules governing the neighborhood
- ___ Homeowner insurance policies, commercial insurance policies, or any other insurance policies relating to the home business
- ___ Title insurance policies and deeds
- ___ The client's lease if the client rents the property
- ___ Documents relating to any improvements, upgrades, or alterations to the home required for the planned business
- ___ Documents relating to any special equipment required

§12.11 B. Legal Issues

Generally, home business disputes present in three different ways: (1) A local governmental entity, city, or county seeks to enforce its zoning ordinances either through administrative proceedings or through the courts; (2) private parties seek their remedies through the courts; or (3) a homeowners association (referred to throughout this chapter as HOA) seeks to enforce its regulations on a local homeowner. Ultimately, though the avenues may be different, the remedies are traditionally injunctive relief, damages, or both.

§12.12 1. Zoning Ordinances

From an economic perspective, property owners seeking to limit home business use are best served by resorting to local public agency enforcement. Zoning and other local ordinance requirements generally dictate whether a home business can be operated from a particular residence. Since the landmark case of *Euclid v Ambler Realty Co.* (1926) 272 US 365, 47 S Ct 114, the courts have acknowledged that, as a general matter, the application of comprehensive zoning ordinances does not infringe the constitutional rights of landowners as long as it is founded on valid and substantial considerations relative to the health, morals, safety, or general welfare of the public. See also *Hart v City of Beverly Hills* (1938) 11 C2d 343 (no loss of due process when city refused to grant license for auction of private goods in residential neighborhood).

§12.13 a. Zoning as Valid Use of Government Police Powers

Government Code §65850 provides the legislative mandate for local governmental entities to adopt ordinances. Cities and counties may regulate the use of buildings, structures, and land as between industry, business, residences, open space, and many other things. Govt C §65850(a). Courts have consistently held that using zoning to segregate industries, businesses, and residences is a proper and legitimate exercise of the police power, which bears a rational relation to the health, safety, and general welfare of a community. See *Fourcade v San Francisco* (1925) 196 C 655.

Note that while zoning laws are generally passed at the city or county level, statewide agencies also exercise mandates on matters of statewide concern, and in addition, certain regional entities may regulate use of coastlines, wetlands, and other sensitive areas. See, *e.g., Ross v California Coastal Comm'n* (2011) 199 CA4th 900, 911 (commission and neighbors'

dispute over habitat and views); *Orange County Air Pollution Control Dist. v PUC* (1971) 4 C3d 945, 950 (district acted in excess of jurisdiction).

In rare instances, federal laws may engage conflicting mandates, such as California's passage of Proposition 64 and the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) (Bus & P C §§26000–26325), which have legalized the cultivation, manufacture, distribution, and sales of marijuana. See Health & S C §§11018–11018.2, 11362.1–11362.45. The Bureau of Medical Cannabis Regulation, created in 2015, oversees the regulatory process along with the California Department of Food and Agriculture and Department of Public Health. Nevertheless, even if cannabis is legal at the state level, it is illegal at the federal level (Controlled Substances Act, 21 USC §811). In *Gonzales v Raich* (2005) 545 US 1, 125 S Ct 2195, the U.S. Supreme Court held that the federal government has the constitutional authority to prohibit marijuana for all purposes. Essentially, all the state marijuana programs exist because the federal government allows it. Nevertheless, federal cannabis laws are very serious, and punishment is frequently very steep, potentially including civil forfeiture actions. For a discussion of remedies related to the cultivation and sale of marijuana, see §§10.64–10.70.

NOTE➤ Ordinances that address use of a residence for business purposes often use the term "occupational use."

§12.14 b. Constitutionality of Ordinance

The ordinance is the first point of scrutiny. An examination of relevant California decisions discloses that ordinances that violate a person's right to privacy and freedom to associate with others will not be upheld. Ordinances that foster a balance between home occupational use and protections against commercial abuse of the integrity of residential areas will be upheld. See, *e.g., City of Santa Barbara v Adamson* (1980) 27 C3d 123 (ordinance defeated because it violated rights to privacy and freedom by restricting number of unrelated persons who could live in home); *City of Los Altos v Barnes* (1992) 3 CA4th 1193 (ordinance upheld because it only placed limits on commercial use of home and did not seek to regulate rights of privacy or association); *County of Butte v Bach* (1985) 172 CA3d 848 (ordinance upheld because exception restricting business use to family members was reasonable).

In *County of Butte v Bach, supra,* an ordinance that allowed occupational use of residences only by "members of the family residing on the premises" was enforced against an attorney who used a second home as a law office.

The court determined that the attorney's interpretation of the ordinance to include his, his wife's, and another employee's business use and occasional overnights at the property was too "elastic" and thus defeated the purpose of the ordinance's business use exemption. 172 CA3d at 865.

In *Jones v Robertson* (1947) 79 CA2d 813, an ordinance permitted incidental uses of residential property but restricted those involving "the maintenance of a store, shop or commercial enterprise; including home occupations and professional offices and studios maintained within dwellings." The trial court found that a real estate broker's home office was "incidental to and subordinate to" the residential use of his home. The appellate court disagreed, finding that the incidental nature was immaterial by itself because it also was a "commercial enterprise."

PRACTICE TIP➤ Zoning ordinances are often structured to balance the local values placed on preserving the character of neighborhoods with the individual rights of homeowners. While long-established case law is important, understanding the dynamic context of our changing times and their effect on "commercial" activity is also essential. For example, societal and political preferences to reduce traffic congestion by telecommuting might impact enforcement of local zoning restrictions on home commercial activity, and technological improvements continue to minimize impacts on neighborhoods from home business activities. The importance of evaluating the local impact of these changes cannot be underestimated.

§12.15 2. CC&Rs

Among the growing forms of home ownership are common interest developments, a category that includes planned unit developments of single-family homes, condominiums, and cooperative apartments. An HOA is incorporated by the developer before the initial sale of homes, and the development's legal CC&Rs are recorded when the property is subdivided. HOAs often have restrictions on business activity. See, *e.g., Biagini v Hyde* (1970) 3 CA3d 877 (enjoining operation of part-time beauty parlor even though business did not negatively impact neighborhood; CC&Rs restricted all business uses). Since a common enforcement remedy for HOAs (and private individuals) is enforcement of these restrictive covenants, it is important to both examine the CC&Rs and determine the character of the surrounding neighborhood. Courts have long held that when there has been a change in the neighborhood so that an area is no longer residential in nature and the change was brought about by conditions other than the use at issue, it would

be unjust, oppressive, and inequitable to give effect to the restrictions. See *Wolff v Fallon* (1955) 44 C2d 695; *Downs v Kroeger* (1927) 200 C 743, 747.

NOTE➤ The court does not follow a fixed formula in determining whether there have been changes in the neighborhood sufficient to render such restrictions unenforceable; the court considers factors such as increased levels of traffic and noise in the surrounding neighborhood, development of highways near the property, changes in the characteristic of the neighborhood, and suitability of the property for its originally intended use given the changes in the characteristic of the neighborhood. *Arrowhead Mutual Serv. Co. v Faust* (1968) 260 CA2d 567; *Wolff v Fallon, supra*.

On violation of covenants as a cause of action, see §§16.54–16.60. On HOAs and CC&Rs generally, see Advising California Common Interest Communities (2d ed Cal CEB).

§12.16 3. Nuisance

California interprets the concept of nuisance very broadly, which has made this tort the weapon of choice in state court not only for public agencies but also for private individuals. Civil Code §3479 broadly defines nuisance as

> anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or that unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway.

On nuisance causes of action, see §§16.2–16.11. See also California Real Property Remedies and Damages, chap 11 (2d ed Cal CEB).

§12.17 a. Public Nuisance

A public nuisance is one that affects an entire community or neighborhood, or any large number of people, although the extent of the annoyance or damage inflicted on individuals may be unequal. CC §3480. A governmental agency customarily asserts a public nuisance action to protect the health, safety, welfare, or comfort of the public in general. A home business may fall afoul of a local nuisance ordinance. See, *e.g., People v Johnson* (1954) 129 CA2d 1 (keeping of hogs on property represented nuisance); *City*

of Los Angeles v Gage (1954) 127 CA2d 442, 457 (business in residential area can be removed if it represents nuisance).

The remedies available to a government entity dealing with a business that may be deemed a public nuisance differ depending on the type of nuisance. Remedies include

- Criminal "indictment or information" (CC §§3490–3496);
- Civil action for abatement or repair (Health & S C §§11571–11581, 17980–17992); or
- Summary abatement administrative action (Govt C §§38771–38773.5).

For discussion of nuisance abatement and administrative actions, see §§9.17–9.18.

A private citizen has no direct remedy to enjoin a public nuisance unless it is "specifically injurious" to them. *Frost v City of Los Angeles* (1919) 181 C 22; *Cohen v Superior Court* (2024) 102 CA5th 706; *Koll-Irvine Ctr. Prop. Owners Ass'n v County of Orange* (1994) 24 CA4th 1036, 1040; *Brown v Petrolane, Inc.* (1980) 102 CA3d 720, 726. The civil jury instruction published by the Judicial Council is consistent with this rule. CACI 2020 (jury instruction regarding essential factual elements of public nuisance claim includes that plaintiff "suffered harm that was different than the type of harm suffered by the general public").

NOTE➤ In *Cohen v Superior Court* (2024) 102 CA5th 706, the court of appeal eliminated a narrow exception that had allowed private parties to bring public nuisance claims for alleged municipal code violations under Govt C §36900 without showing that they suffered any special injury. *Cohen* overruled the contrary holdings in *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, *Huntingdon Life Sciences, Inc. v Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 CA4th 1228, and *Riley v Hilton Hotels Corp.* (2002) 100 CA4th 599. For more discussion of *Cohen*, see §§7.32, 9.37A.

§12.18 b. Private Nuisance

Every nuisance not included in the definition of a public nuisance under CC §3480 is a private nuisance. CC §3481. To establish a legal nuisance, the plaintiff must suffer a disturbance of the enjoyment of the property that must be "substantial and unreasonable, and such as would be offensive or inconvenient to the normal person.'" *Koll-Irvine Ctr. Prop. Owners Ass'n v County of Orange* (1994) 24 CA4th 1036, 1041. An activity can be a public

nuisance, a private nuisance, or both. See *Zack's, Inc. v City of Sausalito* (2008) 165 CA4th 1163.

Enforcement by an individual for private nuisance differs from public enforcement. An individual may also assert a public nuisance but must show that (1) the harm to the individual was different from the type of harm suffered by the general public and (2) the defendant's conduct was a substantial factor in causing the plaintiff's harm. *Birke v Oakwood Worldwide* (2009) 169 CA4th 1540.

§12.19 (1) Damages and Injunction Available

A person who suffers damage from a nuisance has two causes of action and two remedies—a suit for damages (which is an action at law) and a suit to enjoin or abate the nuisance (which is an action in equity)—and they may pursue either or both by election and may prosecute separate actions concurrently or join both causes of action in one suit. CC §3501; CCP §731; *Katenkamp v Union Realty Co.* (1936) 6 C2d 765, 776.

Not every use of property constitutes a nuisance, regardless of whether it is public or private. To qualify, and thus be enjoinable or abatable, the offending use or activity must be both substantial and unreasonable. It is substantial if it causes significant harm, and it is unreasonable if its social utility is outweighed by the gravity of the harm inflicted. *County of Santa Clara v Atlantic Richfield Co.* (2006) 137 CA4th 292, 325.

§12.20 (2) Unreasonableness of Use or Activity

The property use or activity complained of must be unreasonable enough to be offensive to normal persons of ordinary sensibilities in the community. See *Carter v Johnson* (1962) 209 CA2d 589, 591. In making the determination of unreasonableness, the courts have considered the following factors:

- **Duration of the activity.** Many substantial and unreasonable interferences (such as those caused by construction) are short-term; the longer an interference lasts or the more often it reoccurs, the more likely it is to be unreasonable. See *Fendley v City of Anaheim* (1930) 110 CA 731; *McIntosh v Brimmer* (1924) 68 CA 770, 777.
- **Injury to the plaintiff**. The more extensive the harm to the plaintiff, the more likely it is unreasonable. See *San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 937; *Wilms v Hand* (1951) 101 CA2d 811.

- **Character of the surrounding neighborhood.** The more unsuitable the use is with respect to the other uses of the neighborhood, the more likely it is unreasonable. See *Anderson v Souza* (1952) 38 C2d 825.
- **Equities of the use versus banning the use**. The court will balance the gravity of the harm to the plaintiff against the utility of the defendant's activity. See *Sher v Leiderman* (1986) 181 CA3d 867, 877; *Carter v Johnson, supra*.
- **Compliance with all legal requirements**. A defendant who complies with all laws and regulations may still be liable for a nuisance, but compliance may decrease the likelihood of a finding of liability. See *Venuto v Owens-Corning Fiberglas Corp.* (1971) 22 CA3d 116, 129.

Examples of nuisance caused by neighborhood businesses can be found in dust, smoke, and noise from an asphalt mixing plant (*Eaton v Klimm* (1933) 217 C 362, 368); noise and odors from a refreshment stand (*Willson v Edwards* (1927) 82 CA 564, 568); and noise and vibration from machinery (*Fendley,* 110 CA at 736).

When a business is not a nuisance per se (*i.e.,* a use that is specifically prohibited by statute), it is important for the trial court to limit the scope of the injunction, taking only those measures that would afford the relief to which the neighborhood is entitled. *Morton v Superior Court* (1954) 124 CA2d 577, 582 (enjoining quarry, which was only use for which property was suited, should be employed only when no other means of protecting public exists).

For additional discussion of noxious odor, excessive noise, and vibration and nuisance actions, see chap 7. For discussion of neighborhood marijuana gardens and dispensaries, see chap 10. For discussion of neighborhood businesses that may cause toxic torts, see chap 11.

§12.21 4. Trespass

One of the basic premises of California law is that a person must use their own rights in a way that does not infringe on the rights of another. CC §3514. Generally, any unprivileged invasion of the property of another, whether direct or indirect, constitutes a trespass. At common law the action of trespass was limited to a direct invasion of property. In such action the defendant was held strictly liable for all damages regardless of negligence. In *Coley v Hecker* (1928) 206 C 22, 28, it was said that the "trend of the decisions of this court is generally in accord with the doctrine … that trespasses may be committed by consequential and indirect injuries as well as by direct and forcible injuries."

Even vibrations from a nearby commercial enterprise, under certain circumstances, can constitute a trespass. See, *e.g., McNeill v Redington* (1944) 67 CA2d 315 (24-hour-a-day metal forge in residential area). In *McKenna v Pacific Elec. Ry. Co.* (1930) 104 CA 538, 543, the plaintiff's property was damaged by vibrations caused by the defendant's blasting operations. The court stated, "We see no reason for differentiating between responsibility for damage done by physical projectiles or missiles and responsibility for damage done by vibration or concussion." See also *Colton v Onderdonk* (1886) 69 C 155 (rock blasts on adjacent land); *Robinson v Black Diamond Coal Co.* (1881) 57 C 412 (operation of nearby coal mine); *McGrath v Basich Bros. Constr. Co.* (1935) 7 CA2d 573 (construction blasting damage to nearby home).

For additional discussion of noxious odor, excessive noise, and vibration and trespass actions, see chap 7. For discussion of neighborhood marijuana gardens and dispensaries, see chap 10. For discussion of neighborhood businesses that may cause toxic torts, see chap 11. For additional discussion of trespass as a cause of action, see §§16.16–16.23 and California Real Property Remedies and Damages, chap 11 (2d ed Cal CEB).

III. HANDLING THE DISPUTE

A. Before Litigation

§12.22 1. Consider Informal Resolution and Agreement

A neighborhood business dispute involves, by its very nature, someone's neighbor. Daily contact means that few disputes are as heated or long simmering as those between neighbors. If an informal agreement can resolve issues such as parking, noise, light intrusion, or signage, then it should be explored before stronger measures are pursued. A home business operator would be well advised to operate within the confines acceptable to their neighbors whenever possible. This may allow the neighbors to continue residing in proximity without litigation and future hostility.

An often overlooked strategy is to get to know your neighbors on a more personal level. Not only may this result in greater tolerance from the neighbors but also could provide greater insight into neighbors' concerns and remedies. It is important to conduct these discussions in a courteous and pleasant manner. This may be all that's needed to work out a mutually acceptable solution. Neighbors may not acknowledge the business owner's attempts for resolution right away, but may change their behavior or address their concerns in a more receptive manner once they have thought any issues through. It may also be helpful to track any actions that may raise neighbors'

concerns and record any other observations that may be helpful. Issues may not manifest themselves as frequently as perceived and a record of occurrences will help to dispel fears.

The business owner and the affected neighbors should consider entering into an informal written agreement (sometimes called a good neighbor agreement) to help reduce misunderstandings, give the parties something to refer back to, serve as a reminder of what may remain to be done and when, provide a clear record of what was agreed to, and outline foreseeable issues arising from operation of the neighborhood business. This written agreement may include

- The common goals or objectives of the parties;
- The duties and responsibilities of the parties;
- When the actions will happen and what should happen if the agreed time frame cannot be met;
- Who will pay;
- Specific terms agreed on by parties regarding parking, traffic, noise, safety, and other concerns relating to the operation of the neighborhood business;
- Methods for routine communication, feedback, and monitoring of the written agreement;
- A process for handling future complaints or unforeseen issues not addressed in the written agreement; and
- An agreement to engage in alternative dispute resolution before pursuing litigation or other legal measures.

Recording this type of informal agreement is generally not necessary, especially if it involves a small home business. The parties may also be more willing to enter into such an agreement if the agreement is kept informal and is not binding on future residents of the neighborhood.

§12.23 2. Notify Local Authorities

An aggrieved neighbor's most cost-effective means of addressing an irresolvable offending neighborhood use is to simply notify the appropriate governmental agency. Local agency enforcement often avoids legal cost and expense to the individual.

Nevertheless, the will and ability of local agencies to enforce zoning laws or other ordinances vary. Sometimes, the subjective decisions of enforcement officers are not in line with the objectives of the complaining neighbor.

At other times, budget constraints may prevent the agency from taking action.

NOTE➤ Recently, the courts have allowed governmental agencies to pursue public nuisance actions using contingency fee-based arrangements with private counsel. See, *e.g., County of Santa Clara v Superior Court* (2010) 50 C4th 35 (allowing such actions to proceed when certain conditions are met). Given this tool, even a cash-strapped governmental agency may be able to engage in public nuisance actions that they would not otherwise pursue.

§12.24 3. Seek Administrative Approval of Nonpermitted Use or Activity

When a home business is at odds with an applicable zoning ordinance, the business owner can, in certain circumstances, seek a variance (see §§12.25–12.27), argue changed circumstances (see §§12.32–12.35), or seek a conditional use permit (see §§12.28–12.31).

§12.25 a. Obtain Variance

Under certain conditions, a prospective or existing home business operator may seek a variance from existing zoning or ordinance restrictions. While zoning ordinances are generally rigid in nature, there are situations that allow for individual properties to deviate. This is called a variance, and provisions for variances are a part of almost all zoning ordinances. Government Code §65906 provides the basic law under which local bodies may consider variance requests:

> Variances from the terms of the zoning ordinances shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.
>
> Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated.

§12.26 (1) Procedures Required for Consideration of Variance

The procedures for action on a variance are established in Govt C §§65900–65909.5. The local government may charge reasonable fees for processing variance applications, which fees may not exceed the amount reasonably required to administer the permit process. Govt C §65909.5. The applicant bears the burden of establishing that special circumstances exist to justify granting the variance. *PMI Mortgage Ins. Co. v City of Pac. Grove* (1981) 128 CA3d 724, 731.

Government Code §65905 requires a public hearing on any proposed variances, with advance notice of at least 10 days to the public and adjoining landowners. Govt C §65091. Further, variance requests are subject to the California Environmental Quality Act (CEQA) (Pub Res C §§21000–21189.89.91) and, unless exempt, the city or county must prepare a report on the environmental impact of the proposed variance. After a hearing the governmental agency is required to make written findings to support its action. *Topanga Ass'n for a Scenic Community v County of Los Angeles* (1974) 11 C3d 506.

On CEQA generally, see Practice Under the California Environmental Quality Act (2d ed Cal CEB).

§12.27 (2) Advising the Client

It is difficult to advise a client on variance outcomes. Each variance is based on the unique circumstances and has no value as a precedent for future applications. *Miller v Board of Supervisors* (1981) 122 CA3d 539.

Local ordinances almost never provide a comprehensive list of what actions can and cannot be taken in a residential area. Ordinances might list some prohibited actions, but most only provide a general provision which is customarily associated or incidental to residential use. A variance applicant generally must demonstrate that the zoning regulations, if strictly applied, would cause unnecessary hardship because of some special circumstances of the particular property, in contrast to other similarly situated properties. *Neighbors in Support of Appropriate Land Use v County of Tuolumne* (2007) 157 CA4th 997, 1007; *PMI Mortgage Ins. Co. v City of Pac. Grove* (1981) 128 CA3d 724, 731; *Tustin Heights Ass'n v Board of Supervisors* (1959) 170 CA2d 619, 626 (applicant must show hardship resulting from strict enforcement of zoning limitation).

PRACTICE TIP➤ It is important for variance applicants to review and comply with the local ordinance notice requirements. Some jurisdictions

permit or require the applicant to provide some of the notice, such as posting or providing the information and labels for mailing within a given radius for notice purposes.

In addition to granting a variance, a local agency can also revoke a variance for lack of compliance with the conditions. Before modifying or revoking a variance, the local agency must hold a noticed public hearing. Govt C §§65091, 65905.

For additional discussion of variances, see California Land Use Practice, chap 7 (Cal CEB). See also The California Municipal Law Handbook (Cal CEB).

§12.28 b. Obtain Conditional Use Permit (CUP)

For most home business operations, the route to deviate from the strict application of an ordinance is through conditional use permits, or CUPs. Planners may refer to them as "special use permits" or just "use permits." CUPs are discretionary administrative permission for certain uses, but a CUP must be consistent with the overriding land use regulations and general plans of the locality. Govt C §65860; *Sounhein v City of San Dimas* (1996) 47 CA4th 1181, 1187. This is an important element of any CUP application because a local agency may not approve a use of property that is otherwise disallowed by applicable zoning without amending the zoning or granting a variance (which, in any event, cannot grant permission to engage in an unauthorized use).

A CUP is typically required for uses with unusual site development features or operating characteristics so that they may be designed, located, and operated compatibly with neighboring properties. Thus, the CUP applies to a particular use only, may not be transferable with the property, and expires if the use is discontinued. Some types of uses that require review under the CUP provisions include care centers and businesses that sell or provide alcohol. A variance (see §12.25) is a limited exception to the usual requirements of local zoning based on findings related to physical hardships on a property.

NOTE➤ A client should apply for a CUP if certain proposed uses require special review and if the client needs to construct or use certain accessory structures. The variance process exists because the zoning ordinance must allow some reasonable use of a property, or a "regulatory taking" would occur. Thus, a client should apply for a variance if the property has unique conditions or the ordinance creates a hardship

for an individual property, and the spirit and intent of the ordinance would still be satisfied while varying from the ordinance.

§12.29 (1) Use Must Not Be Prohibited by Zoning Ordinance

In *Neighbors in Support of Appropriate Land Use v County of Tuolumne* (2007) 157 CA4th 997, 1008, which involved neighbors objecting to the county's approval of a landowner's request to open a business hosting weddings and other events, a court considered whether a county can use a CUP to permit a use of real property that is not allowed by its zoning ordinance if the exception is granted, for example, in a development agreement. The court firmly held that such an exception is invalid if the county has not rezoned the property, amended the text of the zoning ordinance, issued a CUP consistent with the ordinance, or granted a variance. The court noted that given the wide breadth of zoning authority granted by the California Constitution, the county could have granted an exception, but that power is restricted by Govt C §65852, which states that zoning regulations must be "uniform for each class or kind of building or use of land throughout each zone, but the regulation in one type of zone may differ from those in other types of zones." 157 CA4th at 1009. California courts have interpreted a zoning scheme as similar to a contractual relationship: Each property owner within a zone forgoes the right to use its property in certain ways in exchange for the assurance that neighboring property owners will be similarly restrained. 157 CA4th at 1009, quoting *Topanga Ass'n for a Scenic Community v County of Los Angeles* (1974) 11 C3d 506, 517. Thus, the uniformity requirement in §65852 allows property owners to contest unfair treatment. The county had treated neighboring property owners unfairly by allowing one owner to use its property to run a commercial business while other owners did not have that opportunity.

The *Neighbors* court also distinguished other cases that allow a city or county to require a property owner to fulfill certain conditions prior to rezoning the property, as long as all permissible uses are still available, or allow a city or county to create a consensual contract with a property owner that limits permissible uses. In those cases, the local agency had placed additional restrictions on the property owners in question rather than removing restrictions from one property owner but not others. 157 CA4th at 1010.

§12.30 (2) Procedures for Obtaining CUP

The same procedures that generally apply to variances also apply to CUPs. See §12.26. The local agency must provide notice to the neighboring property owners and residents and must hold a public hearing before taking final action on the application. Govt C §§65901, 65905; *Horn v County of Ventura* (1979) 24 C3d 605, 612. See also *American Tower Corp. v City of San Diego* (9th Cir 2014) 763 F3d 1035, in which the court applied *Horn,* holding that the due process component of "the public notice required by law" protects affected landowners' right to meaningful participation at a public hearing for approval of a CUP application. Thus, a lead agency must act on a CUP application within the time limits provided in the Permit Streamlining Act (Govt C §§65920–65964.5). This is not to say that applicants have to put up with unreasonable delay. The legislature enacted the Permit Streamlining Act to relieve applicants from protracted and unjustified governmental delays in processing their permit applications. *Bickel v City of Piedmont* (1997) 16 C4th 1040. To that end, an applicant may pursue two avenues of self-help:

- File an action in court to compel the lead agency to provide public notice and hold a public hearing (Govt C §65956(a)), or
- Provide its own public notice of the proposed action (Govt C §65956(b)).

Once a properly noticed hearing is held, the lead agency can actually decide the issue. The decision makers must explain their decision with findings. Such findings explain why the permit is or is not justified under the circumstances. If the lead agency then denies the CUP application, that is an end to the application process and the applicant may pursue any other available remedies. The decision (by a zoning administrator, board of zoning adjustment, or planning commission) may be appealed to a board of appeals or legislative body. Govt C §§65901–65903.

As with variances, applications for CUPs are subject to the California Environmental Quality Act (CEQA) (Pub Res C §§21000–21189.89.91) and, unless exempt, the city or county must prepare a report on the environmental impact of the proposed variance. Prior to the public hearing on the proposed CUP, the regulatory body must evaluate the proposal to determine whether or not it may have any significant adverse effects on the environment. If the proposal is not exempt from environmental review, the regulatory body is required to prepare either a negative declaration, indicating that the CUP will have no significant effect, or an Environmental Impact Report (EIR). However, the CEQA process does not necessarily guarantee an affected landowner a "meaningful" predeprivation hearing at which a property

owner's specific objections to the threatened interference with his property interests may be raised. *Horn,* 24 C3d at 619. For additional discussion of CEQA and EIRs, see Practice Under the California Environmental Quality Act (2d ed Cal CEB).

§12.31 (3) Advising the Client

A client landowner can apply for a CUP if the proposed use is authorized in that zoning category by ordinance. However, because approval of a CUP is a discretionary action, not a right, the local agency will grant the permit only if there are facts in the record to support the grant and the agency makes the required findings and follows the required procedures. Local ordinances typically provide standards to guide and limit the exercise of discretion in issuance of CUPs. California courts have held that very general zoning standards (*e.g.,* "consistent with the general health, safety, and welfare") may be sufficient, except in cases involving First Amendment rights. *SP Star Enters. v City of Los Angeles* (2009) 173 CA4th 459, 473.

PRACTICE TIP➤ It is important for CUP applicants to investigate and comply with the local ordinance notice requirements. Some jurisdictions permit or require the applicant to provide some of the notice, such as posting or providing the information and labels for mailing within a given radius for notice purposes.

The local agency will want to hear from those who have opinions or information on whether to approve a CUP. Therefore, obtaining supporting letters and other written materials for submission at the hearing is advisable. Choose the most important themes to emphasize and be able to address the agency's concerns. For example, parties making supportive submissions should state their position and their connection to the issue (*e.g.,* they live in the neighborhood), and conclude with their reasons for support. If possible, tie supportive interests to the larger community interests.

Prepare for hearings by obtaining the agency agenda and any staff reports. The agenda explains what issues are being discussed and may provide additional useful information. Staff reports may point out what the proponent needs to address at the hearing. At the hearing, the proponent should indicate a desire to make a presentation. Because the goal is to persuade the decisionmakers, the presenter should focus on the proponent's strengths and avoid questioning the public's motives or intelligence. The speaker should avoid exhibiting hostility and should act in a manner that reinforces credibility, thoughtfulness, and standing in the community.

For additional discussion of variances, see California Land Use Practice, chap 7 (Cal CEB). See also The California Municipal Law Handbook (Cal CEB).

§12.32 c. Establish Legal Nonconforming Use

A nonconforming use is a use of land or structure which was legally established according to the applicable laws of the time, but which later fails to meet changed regulations. Zoning laws look forward and are not retroactive. Consequently, even when a use is in contravention of a zoning ordinance, it may still be allowed under a nonconforming use theory. The general purpose of zoning ordinances is to achieve conformity in the uses permitted and to eventually terminate all nonconforming uses. Courts have defined a nonconforming use as "a lawful use existing on the effective date of the zoning restriction and continuing since that time in nonconformance to the ordinance." *City of Los Angeles v Gage* (1954) 127 CA2d 442, 453. See also *Hansen Bros. Enters., Inc. v Board of Supervisors* (1996) 12 C4th 533, 552; *Hill v City of Manhattan Beach* (1971) 6 C3d 279, 285; *County of Sonoma v Rex* (1991) 231 CA3d 1289, 1297 (differentiating between lawful nonconforming use and illegal nonconforming use).

NOTE➤ As a term of art, "nonconforming use" means that the use lawfully existed before a change in the zoning regulations. A use that did not comply with all applicable regulations when the use began does not constitute a true nonconforming use.

§12.33 (1) Procedures for Establishing Legal Nonconforming Use

A nonconforming use requires no special hearing or permit; however, many jurisdictions adopt regulations to eventually do away with nonconforming uses. Other jurisdictions allow the use to continue with a conditional use permit or variance. See, *e.g.,* Sacramento Mun C §17.232.090 (authorizing as long as the "proposed nonconforming use is similar to, or less intensive than, the existing nonconforming use").

Code enforcement officials need establish only a violation rather than disprove the existence of a nonconforming use or structure. The person asserting the nonconforming use must present evidence that the use or structure legally existed before the enactment of the zoning regulation prohibiting the use or type of structure. See *City & County of San Francisco v Board of Permit Appeals* (1989) 207 CA3d 1099, 1107.

Equitable estoppel claims have also been asserted against local agencies to establish an entitlement to an existing use of property. Under the doctrine of equitable estoppel, the public agency is barred, or "estopped," from asserting that an existing use of property is invalid if the property owner justifiably relied on the agency's representation that the use was consistent with prior applicable zoning ordinances. When evaluating equitable estoppel claims against a governmental entity, even though courts balance the interests of the property owner with those of the general public, they are reluctant to find equitable estoppel. In *Schafer v City of Los Angeles* (2015) 237 CA4th 1250, 1262, the court conducted this balancing test, giving heavy weight to the public's interest in the "enforcement of the land use laws enacted by its elected representatives," and found that economic hardship alone was an insufficient injustice and did not outweigh the public's interest. 237 CA4th at 1265.

§12.34 (2) Advising the Client

When a client's business (or the business the client complains of) has been ongoing, counsel should determine the operative date for the relevant zoning ordinance. If the business existed before the ordinance, it may qualify as a nonconforming use.

Each city, county, and state has a different interpretation for a nonconforming use. Counsel should check the ordinance in local jurisdiction that governs the area in which the property is located and investigate beyond the start date. If a jurisdiction requires evidence that the nonconforming use was continuous or not abandoned, evidence should be garnered to establish the continuity of the use. Because the objective of zoning is the elimination of nonconforming uses, courts have historically followed a strict policy against the extension or enlargement of such uses. *County of San Diego v McClurken* (1951) 37 C2d 683, 686; *Igna v City of Baldwin Park* (1970) 9 CA3d 909. Any change in the premises or the structure tending to make permanent or expand the nonconforming use is considered inconsistent with this goal. *Deinelt v County of Monterey* (1952) 113 CA2d 128, 131. Whether a use has expanded is a question of fact. *Sabek, Inc. v County of Sonoma* (1987) 190 CA3d 163, 166. See also *Hansen Bros. Enters., Inc. v Board of Supervisors* (1996) 12 C4th 533 (balancing general prohibition against expanding nonconforming use with "diminishing asset" doctrine).

For additional discussion of nonconforming uses, see California Land Use Practice, chap 8 (Cal CEB).

§12.35 (3) Is New Ordinance a Regulatory Taking?

The Fifth Amendment of the U.S. Constitution requires government to compensate citizens for the taking of private property. Under U.S. Supreme Court rulings, this constitutional takings clause can require government agencies to pay compensation to property owners for regulations that deprive owners in their economically beneficial use of their property. Beginning in 1987, the Supreme Court issued a series of decisions that strengthened these protections. Essentially, the rulings expanded private property owners' ability to seek compensation from government for these types of regulations. Some cases applied to exactions imposed on developers in conditions of approval for development projects. This has become an increasingly prominent issue as state and local governments assert themselves with the use of private property.

A zoning ordinance or regulation that effects unreasonable, oppressive, or unwarranted interference with an existing use or planned use for which substantial investment and development cost has been made may be invalid as applied to that property unless compensation is paid—that is, it may represent a regulatory taking. *Hansen Bros. Enters., Inc. v Board of Supervisors* (1996) 12 C4th 533. On the other hand, a zoning ordinance or land use regulation that operates prospectively is not invalid and does not bring about a compensable taking unless all beneficial use of the property is denied. 12 C4th at 553. The allowed nonconforming use must be similar to the use existing at the time the ordinance came into effect, and its intensification or expansion is not permitted. For more on regulatory takings and inverse condemnation actions, see Condemnation Practice in California, chaps 13–16 (3d ed Cal CEB).

§12.36 B. Mediation

Disputes between neighbors and neighborhood businesses may sometimes be more effectively resolved through mediation. Mediation avoids the significant time and expense involved with litigation. The parties are also more likely to comply with solutions mutually reached at mediation than with a decision imposed on them by a court.

PRACTICE TIP➤ The California Department of Consumer Affairs maintains a list of local mediation programs on its website.

The parties may consider engaging a private mediator experienced in neighborhood business-related disputes, especially if the dispute involves unique circumstances or technical issues requiring specialized expertise.

Otherwise, community organizations, law schools, local bar associations, or local agencies often offer mediation services to resolve neighbor disputes at little to no cost.

Some cities are incorporating mediation into the process of obtaining use permits. Berkeley, for example, usually refers matters to mediation before an initial hearing is held. The SEEDS Community Resolution Center (https://www.seedscrc.org/) is a volunteer nonprofit agency, available to help resolve differences between neighbors and applicants regarding proposed projects. Following a successful mediation, the board may incorporate recommendations from the mediation session as conditions of approval. In this context, the mediation process may be able to reduce the staff's workload and eliminate opposition during the formal hearing before the board. The mediated results may also reduce the chance of future litigation.

NOTE➤ Beginning January 1, 2019, an attorney representing a client participating in a mediation or a mediation consultation must, before the client agrees to participate in the mediation or mediation consultation, provide the client with a printed disclosure containing the confidentiality restrictions described in Evid C §1119 and obtain a printed acknowledgment signed by that client stating that the client has read and understands the confidentiality restrictions. A statutory form used to comply with this requirement can be found in Evid C §1129(d).

PRACTICE TIP➤ Although this procedure has not found a foothold with the ADR community and is appropriate only in very limited circumstances, counsel should be aware of *Bowers v Lucia* (2012) 206 CA4th 724. That case opened the possibility of "binding" mediation. *Bowers* provides that the parties can give the mediator the power to make a decision if they have been unable to reach agreement through the mediation process. The court held that, if the agreement is properly drafted, the mediator's subsequent decision becomes a binding settlement agreement that is enforceable by motion pursuant to CCP §664.6.

C. Litigation

§12.37 1. Preemptive Actions

If the agency declines to enforce its statute or budgetary constraints make enforcement unlikely, then a private cause of action lies for injunctive relief and/or damages under theories of nuisance (see §§12.16–12.20), trespass (see §12.21), and negligence.

Nuisance and negligence actions often arise from the same set of facts relating to a lack of due care. In such instances, a nuisance claim is a negligence claim. *El Escorial Owners' Ass'n v DLC Plastering, Inc.* (2007) 154 CA4th 1337. However, a nuisance may exist without any negligence, as the nuisance may be the result of skillfully directed efforts toward accomplishing the desired end without regard for the rights of others. *Sturges v Charles L. Harney, Inc.* (1958) 165 CA2d 306. Furthermore, in many contexts, while the same facts may underlie both nuisance and negligence claims, the analysis and elements of each claim differ (*e.g.,* whether a duty is owed is essential for a negligence claim, but not for nuisance). *Lynch v Peter & Assocs.* (2024) 104 CA5th 1181 (cautioning against using *El Escorial*'s reasoning that "a nuisance claim is a negligence claim" as shortcut for analyzing viability of nuisance claim).

§12.38 2. Difficulty of Success

Although some counsel subscribe to the belief that the best defense is a good offense, preemptive suits are generally not very successful. For example, in *Nelson v Avondale Homeowners Ass'n* (2009) 172 CA4th 857, a plaintiff filed a complaint in superior court, naming his HOA as defendant and seeking injunctive relief from the HOA's threatened suit to enforce their CC&Rs prohibiting running a business out of a home. The plaintiff, who claimed to be a "world renowned homeopathic nutritionist and religious counselor," operated out of his home because his physical condition restricted his ability to drive. He saw up to eight patients each day, 5 days a week, but argued, among other things, that he was not engaged in a home business. The plaintiff's various angles of attack were generally dismissed for a failure of evidence, but the case provides a good example of how complicated (and thus how expensive) litigation over a neighborhood business dispute can become when a creative party is involved. See *American Drug Stores, Inc. v Stroh* (1992) 10 CA4th 1446; *Hickey v Roby* (1969) 273 CA2d 752.

Another common concern is the speed with which agencies are able to issue and implement regulations. Regulatory schemes can be quite complex, and completing adjudications can sometimes require substantial agency delay. When an agency has delayed but does not have to act by any statutorily imposed deadline, courts are more deferential to the agency and are less willing to compel action. There is no strict rule on how long is too long and therefore it is important to look at the case law to determine how to treat delay in a variety of circumstances.

§12.39 3. SLAPPs

Another preemptive action that business owner plaintiffs sometimes take is the filing of a lawsuit intended to intimidate neighbors who oppose a business or a proposed zoning change. In 1992, the California Legislature found that there was "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." CCP §425.16(a); *Weinberg v Feisel* (2003) 110 CA4th 1122, 1126. To thwart the abuse of the judicial process by these meritless and punitive suits (known as SLAPPs, or strategic lawsuits against public participation), CCP §425.16, commonly known as the anti-SLAPP statute, was enacted. The statute allows a defendant to file a special motion to strike to challenge plaintiff's claims and, if successful, requires dismissal of the lawsuit (or causes of action subject to the SLAPP challenge) and exposes the plaintiff to a mandatory award of attorney fees. CCP §425.16(c).

PRACTICE TIP➤ In *Dixon v Superior Court* (1994) 30 CA4th 733, 741, the court noted that the SLAPP plaintiffs did "not intend to win their suits, rather they are filed solely for delay and distraction … and to punish activists by imposing litigation costs on them for exercising their constitutional right to speak and petition the government for redress of grievances." Given this interpretation, a preemptive action to squelch opposition should be pursued cautiously.

§12.40 4. Anti-SLAPP Protection

The anti-SLAPP statute (CCP §425.16) lists a number of acts that are protected from legal action. The list is not all-inclusive. *Averill v Superior Court* (1996) 42 CA4th 1170. In *Averill,* an organization sought to open a shelter for battered women in a residential neighborhood. Averill opposed the shelter and presented a letter to the city council signed by residents who lived near the organization's former location, describing noise and traffic problems created by the shelter. Averill also wrote to a local newspaper and her employer expressing her opposition to the project and questioning the credibility of the organization's director. The organization sued Averill for slander. The complaint was struck with the finding that the protection of free speech embodied in the anti-SLAPP statute must be broadly construed to include private conversations, not just comment at public forums.

The motion has several distinct procedural features. A defendant must file an anti-SLAPP special motion early in the litigation, within 60 days of service of the complaint or, in special circumstances, later if the court deems it

appropriate. CCP §425.16(f); *Du Charme v International Bhd. of Elec. Workers* (2003) 110 CA4th 107, 113. The motion is usually filed before there has been any discovery, and discovery is stayed until the motion is ruled on. CCP §425.16(g). Only on noticed motion and a showing of good cause may the court order specified discovery to proceed. CCP §425.16(g). Further, appellate courts have been steadfast in finding the plaintiff does not have the right to file an amended complaint. Allowing a party to amend a complaint once an anti-SLAPP motion is filed would be contrary to the legislative intent for resolving SLAPPs. See *Sylmar Air Conditioning v Pueblo Contracting Servs., Inc.* (2004) 122 CA4th 1049, 1052 (no right to avoid anti-SLAPP motion by filing amended complaint pursuant to CCP §472 prior to hearing on motion); *Navellier v Sletten* (2003) 106 CA4th 763, 772 (refusing leave to amend because plaintiff cannot use "eleventh-hour amendment" to plead around anti-SLAPP motion); *Simmons v Allstate Ins. Co.* (2001) 92 CA4th 1068, 1073 (no express or implied right in CCP §425.16 to be granted leave to amend complaint). Nonetheless, a few opinions have provided slight openings. See *M.F. Farming Co. v Couch Distrib. Co.* (2012) 207 CA4th 180, 186 n2 (amendment permissible when defendant failed to object), disapproved on other grounds in *Baral v Schnitt* (2016) 1 C5th 376, 396 n1; *Nguyen-Lam v Cao* (2009) 171 CA4th 858, 870 (plaintiff permitted to amend to plead actual malice when actual malice supported by evidence at hearing on motion to strike).

Attorneys should bear in mind that an anti-SLAPP motion may also be brought within 60 days of service of an amended complaint "if the amended complaint pleads new causes of action that could not have been the target of a prior anti-SLAPP motion, or adds new allegations that make previously pleaded causes of action subject to an anti-SLAPP motion." *Newport Harbor Ventures, LLC v Morris Cerullo World Evangelism* (2018) 4 C5th 637, 641 (internal quotation marks omitted). See also *Starview Prop., LLC v Lee* (2019) 41 CA5th 203, in which defendants filed an anti-SLAPP motion directed at three newly alleged claims within 60 days of the plaintiff's filing of an amended complaint. The trial court denied the motion as untimely, reasoning that the new claims were based on facts alleged in the original complaint, which was served more than 60 days prior. The court of appeal reversed, emphasizing that "[b]y its terms, the anti-SLAPP statute is directed at striking causes of action, not merely factual allegations." 41 CA5th 209. The plaintiff's three newly pleaded causes of action "plainly could not have been the target of a prior motion, even if they arise from protected activity alleged in the original complaint." 41 CA5th 206.

The anti-SLAPP statute is also applicable in the Ninth Circuit. See *Batzel v Smith* (9th Cir 2003) 333 F3d 1018, 1024. In *Batzel,* the Ninth Circuit construed the anti-SLAPP statute as California substantive law, thereby applicable to federal diversity cases under the *Erie* doctrine. Nevertheless, there is also a possible trend of resistance. In *Travelers Cas. Ins. Co. v Hirsh* (9th Cir 2016) 831 F3d 1179, 1182, Judge Kozinski stated in his concurrence that the anti-SLAPP statute has "no place in federal court," noting that "anti-SLAPP cases have spread like kudzu through the federal vineyards."

IV. ISSUES UNIQUE TO CERTAIN BUSINESSES

§12.41 A. Community Care Facilities

Certain business activities serve a greater public purpose and are therefore protected from ordinary residential neighborhood restrictions. The Community Care Facilities Act (Health & S C §§1500–1567.94) was enacted in 1973. Its purpose is to provide community care in residential facilities as an alternative to institutionalization of children and adults in need of nonmedical care. These entities, defined by statute as residential facilities that serve six or fewer persons, are immune to otherwise restrictive ordinances. Health & S C §1566.3. Foster homes are similarly exempt. Health & S C §1501. Community care facilities must be licensed by the Department of Social Services. A "community care facility" is a facility, place, or building that is maintained and operated to provide nonmedical residential care, day treatment, adult day care, or foster family agency services for children, adults, or children and adults, including, but not limited to, the physically handicapped, mentally impaired, incompetent persons, and abused or neglected children. Health & S C §1502(a). Small licensed facilities serving six or fewer residents must be treated by local governments identically to single-family homes. In other words, a licensed group home serving six or fewer residents must be permitted its use in all residential zones in which a single-family home is permitted. Welf & I C §5116. No conditional use permit, variance, or special permit can be required for a residential facility that serves six or fewer persons unless the same is required for single-family homes. Health & S C §1566.3. For example, no greater parking standards or other special design standards can be imposed. Homeowners associations and other residents cannot enforce restrictive covenants limiting uses of homes to "private residences" to exclude group homes for the disabled serving six or fewer persons. Govt C §12955; *Hall v Butte Home Health* (1997) 60 CA4th 308. The rule pertaining to facilities serving six or fewer persons appears to apply to virtually all licensed facilities. Included are facilities for

persons with disabilities and other facilities (Welf & I C §5116), residential health care facilities (Health & S C §§1267.8(g), 1267.9, 1267.16(a)), residential care facilities for the elderly (Health & S C §§1568.083–1568.0831, 1569.82–1569.87), community care facilities (Health & S C §§1518, 1520.5, 1566–1566.8, 1567.1), pediatric day health facilities (Health & S C §§1267.9, 1760–1761.8), and facilities for alcohol and drug treatment (Health & S C §11834.23(d)).

When group homes do not have spacing requirements, the Department has been willing to issue separate licenses for smaller drug and alcohol treatment facilities with separate addresses. Thus, licenses have issued for each apartment in a multifamily building, each single-family home in a multi-home compound, or each cottage in a hotel. No local effort to regulate these facilities as "large" residential care facilities has been successful in a published case and in other contexts, the courts have determined that the state has completely preempted local regulation of small residential care facilities. *City of Los Angeles v Department of Health* (1976) 63 CA3d 473, 479.

Many cities and counties restrict the location of facilities housing seven or more clients because the law only protects licensed facilities serving six or fewer residents. They do this through use permits, adopting special parking and other standards, or even outright bans in certain districts. However, some federal courts have found that requiring a conditional use permit for large group homes violates the federal Fair Housing Act. See *ARC of N.J. v New Jersey* (D NJ 1996) 950 F Supp 637; *Association for Advancement of the Mentally Handicapped v City of Elizabeth* (D NJ 1994) 876 F Supp 614. However, the Ninth Circuit has found that requiring a conditional use permit for a building atypical in size and bulk for a single-family residence does not violate the Act. *Gamble v City of Escondido* (9th Cir 1997) 104 F3d 300, 305.

The statute is a strong statement of public policy in favor of a broad interpretation for single-family residential use. *Welsch v Goswick* (1982) 130 CA3d 398, 407. But see *Barrett v Lipscomb* (1987) 194 CA3d 1524, 1531, in which the court held that the statement of public policy in Health & S C §§1566–1566.8 relates to prohibiting counties and cities from barring residential care facilities through the use of zoning and conditional permits.

§12.42 B. Right-to-Farm Laws

The preservation of ranch and farm lands and their protection from encroachment by residential neighborhoods is the subject of various right to farm laws. CC §3482.5. Right to farm protections apply to not only what is

considered "traditional" farming (*i.e.,* soil cultivation) but dairy farmers, timber, viticulture, raising and slaughtering of livestock, fish and poultry, as well as, delivery operations. CC §3482.5(e). Accordingly, ranchers and farm owners in some areas have a right to protect their existing farming use and to preserve ranch and agricultural operations. Civil Code §3482.5(a) sets the standards required by a defendant who seeks protection from being declared a neighborhood nuisance. This often has particular application to owners of vacation properties. As a part of real estate transactions, land sellers and agents must disclose whether the property is located within one mile of farmland as designated on the most recent Important Farmland Map. CC §1103.4. Any of the five agricultural categories on the map qualifies for disclosure purposes, including Prime Farmland, Farmland of Statewide Importance, Unique Farmland, Farmland of Local Importance, and Grazing Land. See the California Department of Conservation Farmland Mapping and Monitoring Program (https://www.conservation.ca.gov/dlrp/fmmp). The title of the law, "Right to Farm," may be deceptive in that it does not provide an unlimited right to agriculture businesses. Farm operations are still subject to local enforcement, or private party litigation, if they fail in meeting the law's criteria (*e.g.,* that operations be consistent with practices followed by other farms in the area). *Mohilef v Janovici* (1996) 51 CA4th 267, 306. For additional discussion of right-to-farm laws, see §§7.53–7.54.

NOTE➤ A change in a client's agricultural practice that causes damages to a neighbor (*e.g.,* changing from row crops to rice farming, resulting in water intrusion on adjoining land) will not likely be protected by CC §3482.5. See *Souza v Lauppe* (1997) 59 CA4th 865. *Souza* lays out seven requisites for application of the "Right to Farm Act" as a defense (59 CA4th at 874):

> The activity alleged to be a nuisance must be (1) an agricultural activity (2) conducted or maintained for commercial purposes (3) in a manner consistent with proper and accepted customs and standards (4) as established and followed by similar agricultural operations in the same locality; the claim of nuisance arises (5) due to any changed condition in or about the locality (6) after the activity has been in operation for more than three years; and the activity (7) was not a nuisance at the time it began.

§12.43 C. Homemade Food Act

The Homemade Food Act (Stats 2012, ch 415) became effective January 1, 2013, and was intended to stimulate the development, at the neighborhood

level, of homemade low-risk food products, referred to as "cottage food operations." See Stats 2012, ch 415, §1; Govt C §51035. Before the enactment of the Homemade Food Act, the California Retail Food Code (Health & S C §§113700–114437) provided for the regulation of health and sanitation standards for retail food facilities by the Department of Public Health but exempted private homes from the definition of a food facility, and prohibited food stored or prepared in a private home from being used or offered for sale in a food facility. Health & S C §§113789, 114021.

On September 18, 2018, then-Governor Brown signed Assembly Bill 626, establishing the "microenterprise home kitchen operation" (MHKO) as a retail food facility effective January 1, 2019. These are restaurants operated by the resident of a private home. Assembly Bill 626 permitted the production of a broad variety of food products that the Homemade Food Act did not allow.

Assembly Bill 626 established several restrictions on MHKOs, including that an MHKO could only sell foods from the permitted residence and to other businesses. They also are not allowed to produce milk or sell raw milk or raw milk products, sell or serve raw oysters, manufacture ice cream or other dairy products, or serve alcohol or food that contains alcohol.

Although AB 626 was the first of its kind, many saw the bill as so restrictive that it would not result in much of an impact on cottage food operations. In addition, many local health departments resisted creating ordinances for it.

Then, on October 7, 2019, AB 377 was approved by Governor Newsom. It was intended as clean-up legislation and modified the conditions for a city, county, or city and county to permit MHKOs within its jurisdiction, as well as applicable inspection and food safety standards. It allows counties to opt in, opt out, or make no response. If a county opts in, cities and municipalities within that county may not prohibit individuals from operating MHKOs. However, a county could opt out and thereby not allow these types of businesses to go forward. Note that Utah was the second state after California to legalize home cooking operations; legislation was signed into law in 2021 to permit home chefs to sell to the public in that state.

LEGISLATION ALERT➤ Effective January 1, 2024, the gross annual sales limit was increased from $50,000 to $100,000. Health & S C §113825.

Health and Safety Code §113825 provides that an MHKO must meet the following requirements:

1. It has no more than one full-time employee (family members and household members do not count);

2. Food must be prepared, cooked, and served on the same day;
3. Food must be either (a) consumed on site, or (b) consumed off site if the consumer picks up the food or it is delivered;
4. Food preparation does not involve anything requiring a Hazard Analysis Critical Control Point Plan or the production, sale, or service of raw milk or milk products (see Health & S C §114419);
5. The MHKO cannot sell or serve raw oysters;
6. No more than 30 meals per day or 60 meals per week can be prepared (local ordinances can specify a lower number);
7. The MHKO may not have more than $100,000 in annual gross sales; and
8. The MHKO may sell only to consumers and not to wholesalers or retailers (but MHKOs can sell their food via the internet, which counts as a sale to consumers).

Assembly Bill 377 also prohibits an internet food service intermediary or an MHKO from using the word "catering" or any variation of that word in a listing or advertisement of an MHKO's offer of food for sale. It requires an MHKO to include specific information, including its permit number, in its advertising and prohibits a third party delivery service from delivering food produced by an MHKO, except to an individual who has a physical or mental condition that is a disability that limits the individual's ability to access the food without the assistance of a third party delivery service.

Some of the concerns on the local level are that the standards for an MHKO kitchen are not comparable to those imposed on brick and mortar restaurants. Examples include no prohibition against pets, children, or ill family members being in the kitchen; inspections are limited to once a year; no surprise inspections are done; and there is no requirement for handwashing supplies. Inspectors are limited to inspecting only those areas that operators say are being used for the MHKO. MHKOs are also exempt from color-coded placard requirements and postings for public disclosure. (See Health & S C §114367.1(b) for the 26 exemptions an MHKO enjoys relating to, *e.g.,* having handwashing facilities, having clean dishes and cups for second servings, no smoking signs, etc.)

MHKOs can be subject to extensive regulation (*e.g.,* operating permits) by the city or county where they are located. Each city and county may be different. The law requires that each MHKO submit in writing its standard operating procedures, which will include descriptions of

- All types of food or food products that will be handled at the MHKO;

- Proposed procedures for food handling and preparation;
- Procedures, methods, and schedules for cleaning utensils and disposing of refuse;
- How food will be maintained at the temperatures specified by law to keep it safe and fresh; and
- Days and times the facility will be used as an MHKO.

The Homemade Food Act originally created the legal structure for small-scale food production industries, establishing limits and requirements for operations.

Throughout the evolution of the private residence as a place for the preparation of food for pick-up, delivery, or onsite dining, local county health departments have been and will remain responsible for compliance and for interpreting the law for purposes of permits and regulations. Government Code §51035(a)(2) provides for the creation of local ordinances through "reasonable standards, restrictions, and requirements" concerning concentration, traffic, parking, and noise control. Different counties have different rules. In some counties, different agencies may handle this aspect of the law.

NOTE➤ Local zoning laws still apply to these operations. Thus, other permits may still be required to operate these businesses from the home.

Persons considering opening a cottage food operation should make the following reviews:

- Locate the county's Department of Public Health website for licensing information and to determine requirements for home, kitchen, and storage facilities.
- Review the California Department of Public Health website that oversees the law.
- Contact their insurer for cost and any policy changes that may be required.

Regrettably, few permits have been issued because most counties have not adopted the Homemade Food Act. Riverside and Imperial counties, along with San Mateo, Santa Barbara, and the City of Berkeley, have adopted the Act but in many cases have not begun issuing permits.

§12.43A D. Sidewalk Sales

Sidewalk sales are common throughout urban and suburban areas in California. Under California law, a sidewalk vendor is a person who sells "food or merchandise" from any "non-motorized conveyance" on "a public

sidewalk or other pedestrian path." Govt C §51036(a). Sidewalk sales do not include food trucks or sales of wares from motor vehicles or on private property.

This form of enterprise also allows small-scale entrepreneurs to sell food and other merchandise with a lower cost burden than operating a traditional brick and mortar retail store. However, it can also create challenges as it may interfere with sidewalk access, or create problems with debris and rodents. Prior to current legislation, in some areas code enforcement elevated what would have been an administrative fine into deportation cases of undocumented aliens.

Under SB 946, after January 1, 2019, a city cannot entirely prohibit or criminalize sidewalk sales. The legislation expressly declares that such regulation shall be a purely civil matter, with fines set at specified maximum amounts. Violators can pay a lower fine if they demonstrate a lack of ability to pay the maximum fines. Govt C §51039. The legislation further required dismissal of all pending sidewalk vending criminal prosecutions and created a process for past convictions to be expunged. Senate Bill 946 expressly preempts any contrary local ordinance, instead requiring any city regulations to comply with Govt C §§51036–51039. Govt C §51037(a).

Municipalities can still require permits for such activities, restrict operating hours, impose location and zone restrictions, require registration and other impositions to protect disabled access and passage. They can also require health permits where the sale of food is involved. Government Code §51038(b)(1) requires that any regulations be "directly related to objective health, safety and welfare concerns."

In residential neighborhoods, municipalities may ban stationary sales but not mobile vendors. They may prohibit such vendors that are near certified farmers' markets or swap meets during the duration of the event. Govt C §51038(d)(1).

On adopting the bill, the legislature determined that sidewalk sales provide "important entrepreneurship and economic development opportunities to low-income and immigrant communities" and "contribute to a safe and dynamic public space." SB 946, §1. One can expect these enterprises to expand due to the low deterrence and challenging enforcement.

§12.44 E. Short-Term Rentals

The "sharing economy" has grown ever more popular, with consumers all over the world turning to a variety of services. Authorities have taken a greater regulatory approach. The on-demand marketplaces or sharing services have challenged such regulations and neighbors have often reacted

negatively to the perceived threats to property values or even nuisances from transient tenants caused by the "short-term" rental sharing economy, as well as perceived threats to property values.

The housing "sharing-economy" is no longer new and has in many areas exploded in growth. Nonetheless, participation is entirely acceptable in some communities and not in others. Even if regulated, in a particular situation participation may place the landowner in a legal entanglement, while in another it may appear perfectly acceptable.

Practitioners and potential participants should review the regulations in the applicable regulatory jurisdiction, be it a township, city, county, state, or homeowner association (rules for a condominium, co-op, or housing development are governed by restrictive covenants (including "timeshare" ownership rules)). California does not regulate short-term rentals at the state level, and therefore, regulation has been entirely at the local level. Accordingly, homeowners, local governments, and community groups continue to engage in wide-ranging debates on regulating or restricting such rentals.

One example of strict regulation is the City of Santa Monica. After maintaining a long-standing prohibition against short-term rentals in residential districts, in 2015 the city authorized residents who obtained a city license to host visitors for compensation for a period of less than 31 days, if the primary resident remained and the resident and visitor were both present in the home (home sharing). It made amendments in 2017 imposing regulations on businesses such as Airbnb, Inc., VRBO, HomeAway.com, and other businesses that book short-term rental transactions for profit. The city's ordinance prohibited such businesses from providing and collecting a fee for booking services. In 2017, an 80-year-old retired school teacher, who rented out her house on Airbnb when she and her husband traveled to visit with their seven grandchildren, sued the city to enjoin the ordinance, arguing violation of the commerce clause of the U.S. Constitution by directly and indirectly regulating and burdening interstate commerce. The district court dismissed the amended complaint without leave to amend, concluding that the plaintiff failed to allege a violation as a matter of law. The commerce clause affirmatively grants to Congress the power to regulate interstate commerce. The dormant commerce clause "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v Department of Envt'l Quality* (1994) 511 US 93, 114 S Ct 1345. The Ninth Circuit unanimously affirmed the district court and held that the complaint failed to allege a per se violation of the dormant commerce clause, because the ordinance did not directly regulate interstate commerce. At most, the ordinance has an interstate effect of making travel

lodging in Santa Monica less accessible, available, and affordable. The court found that the ordinance applied even-handedly and did not directly restrain interstate commerce (although it may regulate transactions with an interstate component) and that it did not discriminate against interstate commerce by favoring in-state over out-of-state interests. *Rosenblatt v Santa Monica* (9th Cir 2019) 940 F3d 439. The plaintiff appealed to the U.S. Supreme Court, where her petition for a writ of certiorari was denied. Santa Monica is still considered to have one of the strictest bans on short-term rentals in the country.

In *South Lake Tahoe Prop. Owners Group v City of S. Lake Tahoe* (2023) 92 CA5th 735, 762–63, a California court of appeal held that a personal resident exception to a short-term rental ban in South Lake Tahoe violated the dormant commerce clause and distinguished *Rosenblatt*:

> The City argues that in-state and out-of-state property owners are not substantially similar. The City relies on a statement by the *Rosenblatt* court that non-resident property owners were not similarly situated to resident owners because they could not personally serve as the primary resident. [Citation] The *Rosenblatt* court's statement was a secondary point, and the City ignores its context as well as the opinion's ruling in relying on it. The Ninth Circuit said the plaintiff's argument, that the ordinance allowed only Santa Monica residents to engage in home sharing, drew "a false equivalence" between residents and out-of-state property owners.

In *HomeAway.com, Inc. v City of Santa Monica* (9th Cir 2019) 918 F3d 676, Airbnb, Inc. and Homeaway.com argued that the city's ordinance ran afoul of the Communications Decency Act of 1996 (47 USC §230) and the First Amendment because it required platforms to monitor the content of third party listings on their sites and to remove listings for unlicensed properties. The court found that the ordinance only "prohibits processing transactions for unregistered properties" and does not proscribe, mandate, or even discuss the content of the listings that the platforms display on their websites. It requires only that transactions involve licensed properties. Santa Monica's "Home-Sharing Ordinance" thus will stand, absent action by the U.S. Supreme Court. It should be noted that the City of Santa Monica received amicus support from the following: San Francisco, Oakland, Sacramento, Santa Cruz, Seattle, Baltimore, Columbus and Dayton (in Ohio), Gary (Indiana), Somerville (Massachusetts), the District of Columbia, Cook County (Illinois), the League of California Cities, the California State Association of Counties, and others.

Some homeowner associations have also prohibited rentals of less than 30 days, while others may require the owner to provide tenant information to the HOA management company. Even then, homeowner association enforcement is very uneven and at times depends on who controls the board. A lessee needs not only to review the applicable lease but also should confer with the landlord before entering into such an arrangement. In *Chen v Kraft* (2016) 243 CA4th Supp 13, a landlord was granted summary judgment in an action to evict a tenant for engaging in an illegal purpose because the tenant was renting his residential unit as a bed and breakfast on a short-term basis in violation of the city's zoning law. The economic benefit for a lessee may be questionable because some jurisdictions prohibit tenants from charging short-term renters more rent than the tenants pay landlords each month. In addition, owners should make vacation renters aware of HOA rules and regulations because noncompliance can result in fines and other significant expenses enforced against the property owner.

Regulations to research and consider include those concerning

- **Type of structure.** Different regulations have defined the property subject to regulation by the number of rooms used for sleeping, whether it is advertised and is to be used by transients or guests. In other localities, regulations have encompassed the full gamut of possible rooms by defining the regulated rental property as shared rooms, multiple rooms, or even an entire property.
- **Length of stay.** Restrictive statutes are commonly exercised to avoid negative impacts on the quality of life in residential neighborhoods, to avoid disruption to residents, and even to prop up the local hotel industry. These restrictions are broad and proscribe length-of-stay terms anywhere from 1 to 30 days with a maximum number of rental days or rental occupants.
- **Zoning and definition.** Some cities have completely prohibited short-term rentals. In the City of Santa Barbara, short-term rentals are defined as "hotels" that can only operate in designated zones and then only if all necessary approvals are obtained. Santa Barbara Mun C §§28.04.020, 28.21.005. Cities and tourist destinations often place additional limits on the number of short-term rentals in any given zone or near other short-term rentals. Municipalities have also used sharing service providers (*e.g.,* Airbnb) to assist city enforcement officers in tracking down violations and complaints.
- **Licenses or permits.** The operation of any business, which can include the rental of property, may trigger a license or permit requirement. In

addition, a jurisdiction may also require a short-term rental license or registration (with a fee) and attestation that the property meets health and safety requirements (*e.g.,* smoke and carbon monoxide detectors, fire extinguishers), code compliance, zoning laws, minimum insurance requirements, and even requirements to give notice to adjoining properties. Additional compliance requirements may include that the property meet a "primary" residence standard (by defining the amount of days the owner must occupy a unit for it to qualify as a "primary" residence). Los Angeles requires owners to obtain a permit and they must also include the registration number on all advertising. Los Angeles Mun C, ch I, art 2, §12.22. Many permits limit the offering to no more than 120 days a year. In San Francisco, a homeowner is limited to no more than 90 days a year. San Francisco Admin C §41A.5. San Diego simply requires a transient occupant registration and the payment of taxes but is expected to substantially cut the number of short-term rentals allowed in the city and assign approval via a lottery. San Diego Mun C §§510.0104–510.0107.

- **Taxation.** Some regulatory properties impose short-term rental occupancy or "transient occupancy" taxes. A tax advisor should be consulted.
- **Residency.** Some cities require that the property have a primary resident in order to prevent investors who do not live on the property from renting out a unit or an entire property as a short-term rental.

As the sharing economy evolves, laws and regulations will change and evolve. One of the issues is that short-term rental housing depletes the rental housing inventory in a state experiencing a severe housing shortage. Neighborhoods with a higher density of short-term rentals also experience higher rent, reduction of rental housing availability, and increased pressure on long-term lower-income residents.

Recently the COVID-19 pandemic prevented this issue from being addressed in many areas. Nevertheless, the varied and uncertain legal landscape will continue to create a fluid situation that emphasizes the importance of legal review, communication with neighbors, and constant monitoring. Property owners should carefully consider that such rentals pose challenges to landlords due to the transient nature of short-term rentals. Vacationers want to enjoy the rental property and have few incentives to treat the community well or address the community's concerns caused by such occupancy. In some circumstances, renters have held large parties at the rental property regardless of neighborhood concerns, and landlords are sometimes complicit

and motivated by the potential profit. Time will tell if this is a consequence of the pandemic or a longer-term effect. Meanwhile, lessors can reduce many issues by careful screening and the education of vacation renters about property-specific concerns (*e.g.,* "quiet" hours, parking restrictions).

13

Light, Air, Views, and Open Space

Alice M. Graham

I. RIGHTS TO LIGHT, AIR, VIEWS, AND OPEN SPACE

A. Light, Air, and Views

§13.1 1. Source and Value of View Rights

English common law recognizes the doctrine of "ancient lights," under which a landowner could acquire an easement over adjoining property for the passage of light and air. The California Supreme Court rejected this doctrine in *Western Granite & Marble Co. v Knickerbocker* (1894) 103 C 111. See also *Katcher v Home Sav. & Loan Ass'n* (1966) 245 CA2d 425, 429 (landowner has no easement over adjoining land for light and air in absence of express grant or covenant). This rule was reiterated in *Boxer v City of Beverly Hills* (2016) 246 CA4th 1212. Plaintiff's home was located adjacent to a public park in which the city planted redwood trees that grew tall and eventually blocked plaintiff's view. Plaintiff filed an action for inverse condemnation claiming damages for loss of the view. The court found the interference with view to be an "intangible intrusion" potentially compensable in an inverse condemnation action, but the "intrusion," or interference with view, placed no "burden on the property that is direct [and] substantial." 246 CA4th at 1218. Citing the rule that a landowner has no right to a view over adjacent property, the court held that mere impairment of a view

does not constitute a taking or damaging of property. California courts' rejection of an implied or inherent right to a view or to light and air across another's property is based on a public policy that favors using real property over keeping it vacant for the sake of another's view. *Venuto v Owens-Corning Fiberglas Corp.* (1971) 22 CA3d 116, 127.

Nonetheless, a property owner in California may have view protection rights

- If the property is located in a municipality or area that provides them by local law or ordinance, *e.g.,* in a coastal area subject to the California Coastal Commission or in a city that has specific view protection laws (see chap 4 for discussion of view ordinances and trees);
- If the property is subject to conditions, covenants, and restrictions (referred to throughout this chapter as CC&Rs) or other types of servitudes that provide view rights, *e.g.,* by limiting the height or number of stories a house or other structure can have; or
- Under various other legal theories that depend on the specific facts of the matter, *e.g.,* by easement created by deed reservation (see, *e.g., Petersen v Friedman* (1958) 162 CA2d 245, discussed in §13.11), lease, or special laws such as building codes or setback requirements.

A good view can potentially add substantial value to property. *Zabrucky v McAdams* (2005) 129 CA4th 618. Disputes over view rights thus have been the subject of many court disputes and many reported appellate decisions. See, *e.g., Weiss v City of Del Mar* (2019) 39 CA5th 609.

NOTE➤ Counsel practicing in this area should have a good grasp of the basic law of easements. See chaps 1–2.

§13.2 2. Specific Terminology

Common easement terms (*e.g.,* dominant and servient tenements) are defined in chapter 1. The following concepts are specific to light, air, and view law:

- **View.** A view might refer to a generalized view from the dominant tenement, or it might be specifically described in a document creating the right.
- **Light, air, or view easement.** An easement that gives the dominant tenement the right to an unobstructed passage of light or air or an unobstructed view.

- **Solar easement.** The right to receive sunlight across the real property of another for a solar energy system. Solar easements are more specifically defined by the California Solar Rights Act of 1978 (Stats 1978, ch 1154). See chap 8.

§13.3 B. Open Space

Every California municipality must include an open-space element in the jurisdiction's general plan. Govt C §65302(e). The California Legislature has declared (Govt C §65561(a))

> [t]hat the preservation of open-space land … is necessary not only for the maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources.

"Open space" refers not only to undeveloped, natural land but also to farm and ranch land. See Govt C §65560 (defining "open space," for purposes of local planning, as including land "used for the managed production of resources, including … forest lands, rangeland, agricultural lands, and areas of economic importance for the production of food or fiber"). The legislature's express intent is "to assure that cities and counties recognize that open-space land is a limited and valuable resource which must be conserved wherever possible." Govt C §65562(a).

§13.4 1. Conservation Easements

A conservation easement is a permanent, recorded deed restriction that transfers certain property rights from the landowner to a public agency or other entity, such as a nonprofit organization. The purpose of the easement may be to protect agricultural resources or significant natural features, such as woodlands, creeks, scenic vistas, or historic landmarks. Some conservation easements aim simply to prevent development of open lands.

A conservation easement is defined as "any limitation in a deed or other instrument for the purpose of retaining land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition." CC §815.1. Conservation easements are endorsed by both California statutory law and federal tax law. See CC §§815–816; IRC §170(h).

Conservation easements are often granted in compliance with federal tax laws that provide benefits to the grantor. Accordingly, it is incumbent on the drafter of a conservation easement to have familiarity with federal tax law

issues to ensure that the easement will comply with those requirements. Federal tax law issues are beyond the scope of this chapter.

The public benefit from the preservation of open space is usually articulated in the recitals or purpose section of a conservation easement. For an example of public policy recitals (including open space), see California Easements and Boundaries: Law and Litigation §6.18 (Cal CEB). For sample form conservation easement recitals, see Easements and Boundaries §6.50. On recitals in conservation easements, see Easements and Boundaries §6.38.

For statutes facilitating or encouraging open space preservation, see the Open Space Easement Act (Govt C §§51050–51065); Open Space Easement Act of 1974 (Govt C §§51070–51097); Open Space Subventions Act (Govt C §§16140–16154); Open Space Maintenance Act (Govt C §§50575–50628); and California Recreational Trails Act (Pub Res C §§5070–5077.8). See also Cal Const art VIII, §8.

For full discussion, including forms for drafting conservation easements, see Easements and Boundaries, chap 6. On funding the acquisition of agricultural conservation easements, see the California Farmland Conservancy Program Act (Pub Res C §§10200–10264).

§13.5 2. Open-Space Zoning

Many neighborhood and citizens groups turn to private attorneys in an attempt to enforce municipal open space laws or create new open space. See, *e.g., City of Irvine v Irvine Citizens Against Overdevelopment* (1994) 25 CA4th 868. Some cases involve individuals who seek to either enforce or defeat the open-space zoning as it relates to their property. See, *e.g., Babcock v City of Laguna Beach* (Feb. 3, 2012, G044988; not certified for publication) 2012 Cal App Unpub Lexis 914 (private landowners seeking to overturn city's open-space zoning on adjacent recently purchased parcel). Many of these cases are unpublished or resolved at the municipal level without litigation.

"Notice of availability" (formerly referred to in the statute as "offers to sell or lease") of surplus property for park and recreation or open-space purposes must be sent to the park or recreation department of the city and county in which the property is located, any regional park authority having jurisdiction over the area in which the property is located, and the Natural Resources Agency. Govt C §54222(b).

§13.5A 3. Government's Right to Airspace

In *Powell v County of Humboldt* (2014) 222 CA4th 1424, the court held that a county had the right to enforce a building code provision requiring a private property owner to convey an overflight easement in airspace to the county as a prerequisite to the county granting a building permit. The easement was to grant the public, "to the extent and in the manner consistent with safe operating procedures as provided under applicable governmental regulations, the right to make flights, and the noise inherent thereto, in airspace over the property … in connection with landings, takeoffs, and general operation of the … Airport." 222 CA4th at 1440. Normally, ownership of land includes the airspace above it for an indefinite distance upwards, "subject to limitations upon the use of airspace imposed, and rights in the use of airspace granted, by law." CC §659. However, the court reasoned that federal and state laws allow aircraft to fly over private property. Therefore, the court found that the owners' "property rights do not include a right to exclude airplanes from using the navigable airspace above their property in accordance with applicable safety regulations." 222 CA4th at 1442.

II. PRACTICAL AND LEGAL ISSUES

§13.6 A. Practical Issues

Resolving an easement dispute before it becomes a full-fledged lawsuit saves time, money, energy, and uncertainty. When a seller conveys land to a buyer by deed, the land is transferred and the buyer and seller generally go their separate ways. However, in the case of an easement, the dominant estate and the servient estate enter into a relationship lasting as long as the easement, often in perpetuity. Disagreement, misunderstanding, and miscommunication can occur in the future, particularly after both estates have been conveyed to new owners, perhaps many years later. See, *e.g., Petersen v Friedman* (1958) 162 CA2d 245 (dispute arising several years after grant of easement and conveyance of one property).

§13.7 1. Avoiding Litigation

Careful drafting is essential to create, preserve, and protect an easement right, as well as the rights of the servient estate. Although the parties may be cooperative and agreeable today, there may come a day when subsequent owners dispute the grant or extent of the easement or the rights associated with it, and expensive, uncertain litigation may ensue.

Courts are poorly suited to resolve easement disputes. Often the best resolution is a compromise that both sides can live with. At the end of the day,

the parties to the dispute are usually neighbors who will have to continue living side by side. Therefore, alternative dispute resolution, and in particular mediation, is often a preferable means of resolution. Mediation allows both parties to have a say in the outcome and allows for compromise and creative solutions.

§13.8 2. Factors to Consider When Drafting Easement for Views or Open Space

Good drafting is the best way to try to avoid future disputes. The client must be interviewed in depth to fully reveal the goal of the easement:

- How will it be used?
- How can it not be used?
- Which party will have the duty of maintenance and repair?
- How is the easement area specifically described?

For additional drafting considerations, see §§13.9–13.11, 13.19.

§13.9 3. Description of Easement for Views or Open Space

Counsel must determine how to describe the easement and should consider factors such as the following:

- What is an unobstructed view?
- How will the easement be defined? If the easement relies on adjectives such as "reasonable" view rights or "material" obstruction, how will those terms likely be interpreted?
- Does the easement forbid any development of the servient estate?
- Does it limit landscape or construction to a particular height or material?
- Where will the easement be located? A surveyor may be needed to provide correct height measurements (including where the height is measured from) or to create a metes and bounds property description if necessary.

§13.10 a. Metes and Bounds Property Description

In some cases, it may be necessary to include a metes and bounds description of the easement. An example of this is *Petersen v Friedman* (1958) 162 CA2d 245, discussed in §13.11. The drafting attorney must work with a surveyor in order to obtain the correct description of the portion of the

servient tenement to be affected by the easement. Care should be taken in the drafting. Once such a view easement is signed and recorded, it remains in perpetuity.

§13.11 b. Precision of Description

In *Petersen v Friedman* (1958) 162 CA2d 245, the plaintiff successfully sought to enjoin interference with an express easement for light, air, and view. A neighbor had installed television aerials and antennas in the easement. The plaintiff's success was in part due to the very precise wording of the reservation of the view easement in the deed. The easement stated:

> Reserving, however, unto the first party, her successors and assigns, as and for an appurtenance to the real property hereinafter particularly described and designated as "Parcel A" and any part thereof, a *perpetual easement of right to receive light, air and unobstructed view over that portion of the real property hereinabove described,* to the extent that said light, air and view will be received and enjoyed by limiting any structure, fence, trees or shrubs upon said property hereinabove described or any part thereof, to a height *not* extending above a horizontal plane 28 feet above the level of the sidewalk of Franklin Street as the sidewalk level now exists at the junction of the southern and western boundary lines of the property hereinabove described. Any obstruction of such view above said horizontal plane except by a peaked gable roof extending the entire width of the front of the building referred to herein and extending 9 feet in an easterly direction from a point 1 foot 6 inches east of Franklin Street, the height of said peaked roof being 3 feet 2 inches together with spindles 3 feet in height on the peak of said roof, and except the necessary number of flues or vents constructed of galvanized iron and/or terra cotta not over 4 feet in height, shall be considered an unauthorized interference with such right or easement and shall be removed upon demand at the expense of second party, and his successors and assigns in the ownership of that real property described or any part thereof.

The court held that the deed clearly stated there was to be no obstruction of the easement, and this language remained effective even though it was written before the then-modern technology of television aerial antennas. The language of the easement made it clear that its purpose was "to avoid any type of obstruction of the light, air and view without regard to the nature thereof." 162 CA2d at 247.

PRACTICE TIP➤ Precise and specific language regarding an easement is paramount because it will help the client (or the far-future owner of

the easement) avoid violations of the easement that were unthought of at the time of drafting. On drafting considerations, see §§13.8–13.10, 13.19.

§13.12 4. Recordation; Title Issues

An easement is typically created in a deed, by grant or reservation. See chap 1. An easement may also be created by various other recordable documents. The writing must be recorded with the county recorder in the county in which the property is located. If a grantor has granted an easement, then any subsequent grant deed by that grantor must expressly refer to the transfer of the easement. Failure to do so may subject the grantor to liability for damages to a subsequent grantee or title company. See CC §1113, which provides that a grantor impliedly covenants that the estate granted is free from any encumbrances made by the grantor. The grantor may be liable even if the purchaser and the title company had knowledge of the existence of the easement. *Fidelity Nat'l Title Ins. Co. v Miller* (1989) 215 CA3d 1163.

In *Fidelity,* Miller granted a view easement to a third party and then sold the property to Gazzo, conveying title by grant deed that was silent as to the easement. Miller knew about the easement, because Miller was the grantor of the easement, but Miller did not know if the grantee recorded the grant of easement. Miller told Gazzo about the easement. The easement was not included in the preliminary title report or title policy. Gazzo asked the title company whether the easement was recorded. The title company did not find the easement in its records search and failed to exclude the easement from coverage in the title policy it issued to Gazzo. Gazzo thereafter learned of recordation of the easement and tendered a claim to the insurer, which paid $125,000 to Gazzo for diminution in value of the property caused by the existence of the view easement. The insurer then brought a subrogation claim against Miller to recover the amount it paid to Gazzo.

PRACTICE TIP➤ *Fidelity* illustrates the potential trap of implied warranties in a grant deed as provided in CC §1113. When in doubt, it may be best to use a quitclaim deed that contains no implied warranties. However, it is advisable to obtain approval from the title company before doing so.

PRACTICE TIP➤ When advising a seller who is selling property on which that seller granted an easement or other interest to a third party, the seller must reference the prior grant in the grant deed to the buyer. When advising a client about a dispute over an existing view or

open-space easement, it is essential to review all relevant documents affecting title to determine whether a party has any such right. A title search will generally reveal deeds, CC&Rs, and other documents. Any of these documents might contain contract or conveyance language affecting view or open-space rights. If there is no recorded easement, consider whether the facts support an easement by implication (see §§1.23–1.26, 16.67–16.69, 18.31–18.33) or another equitable theory such as after-acquired title or estoppel. However, it is unlikely a court will award a view easement that was not expressly granted or created in writing. See §13.13.

B. Legal Issues

1. Creation of Easement for View, Light, and Air

§13.13 a. By Grant

The right to a view or to light and air across another's property has traditionally been disfavored in the law. The law favors use of real property over keeping it vacant for the sake of another's view. *Venuto v Owens-Corning Fiberglas Corp.* (1971) 22 CA3d 116, 127. Easements for unobstructed views, light, and air cannot be created by implication. "It is well settled in California that easements for light and air cannot be created by implication but only by express grant or covenant." *Taliaferro v Salyer* (1958) 162 CA2d 685, 690. See generally *Posey v Leavitt* (1991) 229 CA3d 1236; *Pacifica Homeowners' Ass'n v Wesley Palms Retirement Community* (1986) 178 CA3d 1147, 1152. "Express grant or covenant" means that the transfer must be in writing. An easement is an interest in real property. *Coea v Higuera* (1908) 153 C 451; *Roth v Cottrell* (1952) 112 CA2d 621. Transfer of an interest in real property is subject to the statute of frauds and must be in writing to be valid. CC §1624(a)(3).

However, in rare circumstances, an easement may be created by estoppel or the doctrine of after-acquired title. See *Noronha v Stewart* (1988) 199 CA3d 485, 490 (privacy fence and gazebo that obstructed view). The right to a view cannot be obtained by prescription. *Katcher v Home Sav. & Loan Ass'n* (1966) 245 CA2d 425, 429.

Relatively modern statutory schemes and building code regulations have expressed policy considerations that temper the rule that easements for light and air are disfavored. Sometimes, they are actually favored; California law expressly favors solar easements, as discussed in chap 8. Local building codes may impose restrictions on the construction of fences on private property, including restrictions on the height of structures "for the purpose of

securing adequate sunlight to promote public health in general." *Taliaferro,* 162 CA2d at 691. See also *Pacifica Homeowners' Ass'n,* 178 CA3d at 1152. A city ordinance that sought to preserve views and sunlight by regulating tree growth has been held to be a constitutional exercise of the police power, and not preempted by state law. *Kucera v Lizza* (1997) 59 CA4th 1141. All of these laws and ordinances reflect a policy favoring open space or light and view rights. However, the rule as to the transfer of a right to a view of open space remains subject to the common law rule that such transfer must be expressly given in writing.

§13.14 b. Specific Recitation of Right Not Necessarily Required

View rights may not be defined as such but rather may be created by limitations on the use of the adjoining properties. For example, in *Hill v San Jose Family Hous. Partners, LLC* (2011) 198 CA4th 764, a billboard company obtained an easement to maintain a commercial billboard on the property of another. The easement granted the right "to do all things necessary and incidental to the operation of the business of a billboard," but it did not specifically state that the billboard must be viewable from the nearby street. 198 CA4th at 768. The landowner subsequently planned to construct a multiple-unit residential project that would obstruct the view of the billboard from the street. The court ruled that the landowner had no right to obstruct this view. Because the point of a billboard is to be visible to consumers, it was "clear" that the intent of the easement was to prohibit unreasonable interference with the visibility of the billboard.

NOTE➤ The result might be different in an inverse condemnation action against a governmental entity, if the interference with an easement is reasonable. See *Regency Outdoor Advertising, Inc. v City of Los Angeles* (2006) 39 C4th 507, 520. Note that both *Hill* and *Regency Outdoor* involved advertising easements.

PRACTICE TIP➤ Although the easement was enforced in *Hill,* clear drafting can avoid the need for legal action to enforce an easement. See §§13.8–13.11, 13.19.

§13.15 c. By Deed Restriction

An easement for unobstructed views, light, and air may be created by deed restrictions. *Mock v Shulman* (1964) 226 CA2d 263. In *Mock,* the right to light and air was granted by the original deeds to lots in a subdivision that

created mutual property rights that could be protected by equitable proceedings. When the defendant grew trees on his property that obstructed his neighbors' view, the neighbors brought suit. The court ordered the obstruction to be removed, enjoined the defendant from obstructing the view, and awarded damages to the neighbors. The trial court had based its ruling on both the deed restrictions and a local ordinance, but the court of appeal held that the particular obstruction at issue was not within the area of the property regulated by the ordinance, and it reversed that portion of the judgment. On view protection by ordinance, see §13.17.

§13.16 d. By Declaration of CC&Rs

Although easements are most commonly created by a grant, restriction, or reservation in a deed, they can be created by any writing that can be recorded with the county recorder. Thus, view easements can be created by a recorded declaration of CC&Rs and often are in residential developments. *Cohen v Kite Hill Community Ass'n* (1983) 142 CA3d 642. In *Cohen,* a condominium owner brought suit against a neighbor and the homeowners association (referred to throughout this chapter as HOA) to enjoin the neighbor from constructing a nonconforming fence that would have destroyed the owner's view. The CC&Rs provided that the HOA was required to protect the view of owners in approving architectural additions, and there were detailed specifications about the type of wall that could be built on a view lot so as not to disturb the view. The court of appeal held that the complaint stated a cause of action against both the neighbor and the HOA.

In *Zabrucky v McAdams* (2005) 129 CA4th 618, 628, the CC&Rs provided that no tree, shrub, or other landscaping could be planted or any structures erected that would obstruct the view from any other lot. The trial court interpreted the prohibition against erecting "any structure" as only prohibiting structures of the landscape type and not dwellings. Even though the trial court's construction was not illogical or unsupportable, the court of appeal was persuaded that a contrary reading was marginally more logical and supportable. The plain language of the CC&Rs prohibited the erection of "any structures" that obstructed views on an adjoining property. Including an addition of several rooms to an existing residence within the term "any structure" was consistent with the meaning the English language ascribed to the words used, was consistent with the understanding of neighboring homeowners, and was calculated to protect the views and property values of those residents. The court also read into the CC&Rs, however, a provision that no structure could "unreasonably" obstruct the view from any other lot. Dissenting, Justice Perluss objected to the majority's introduction of a

"reasonableness" test where none existed. That dissenting opinion was followed in a later unanimous decision, *Eisen v Tavangarian* (2019) 36 CA5th 626, authored by the dissenting justice in *Zabrucky*. The *Eisen* opinion analyzes the language of essentially the same CC&Rs and arrives at a different conclusion. The *Eisen* court declined to add a "reasonable" limitation when that language did not appear in the relevant portion of the CC&Rs.

CC&Rs affect only the subdivision for which they are recorded; an owner in a common interest development is subject only to CC&Rs recorded on their property's subdivision. CC&Rs of adjacent subdivisions do not bind the owner, even if the neighboring subdivision was created by the same developer to protect view rights. *Colyear v Rolling Hills Community Ass'n* (2024) 100 CA5th 110 (HOA improperly used tree trimming covenant to enter property and trim trees located in neighboring subdivision).

§13.17 e. By State and Local Law

The California Coastal Act (Pub Res C §§30000–30900) requires a coastal permit for development of any property within the coastal zone (which varies from a few blocks inland in the more urban areas of the state to about 5 miles in less developed regions). Any property within the coastal zone that is developed must protect views "to and along the ocean and scenic coastal areas." Pub Res C §30251.

Many local governments also protect views and provide for light and air through the adoption of ordinances imposing height limits for buildings and trees. See, *e.g.,* Rancho Palos Verdes Mun C §17.02.040; Tiburon Mun C ch 15. See also *Pacifica Homeowners' Ass'n v Wesley Palms Retirement Community* (1986) 178 CA3d 1147, 1152. On view ordinances and trees, see chap 4.

A local ordinance can dramatically alter view rights and remedies, creating a right and remedies when none would have existed at common law. In *Kahn v Price* (2021) 69 CA5th 223, plaintiff sued under the San Francisco Tree Dispute Resolution Ordinance, claiming that an overgrown Monterey pine tree was a continuing nuisance. The tree grew from a sapling in defendants' backyard until it obstructed plaintiff's view of the San Francisco Bay and Marin County, a right protected by the ordinance. Had defendants heeded complaints from plaintiff long before the tree grew into an overgrown nuisance, the tree could have been trimmed to grow in a way that would have maintained its character and not interfered with plaintiff's view rights. Because defendants failed to do so, the tree could no longer be trimmed in a way that accorded view rights while maintaining the integrity

of the tree, and the court upheld the trial court's ruling that the tree had to be removed entirely.

§13.18 f. Easement in Equity

Easements can be created in equity, when a court balances the relative hardships of the parties. *Hirshfield v Schwartz* (2001) 91 CA4th 749. Under this doctrine, once the court determines that a trespass has occurred, the court conducts an equitable balancing to determine whether to grant an injunction prohibiting the trespass or to instead award damages. 91 CA4th at 758. The *Hirshfield* court stated that to deny an injunction, three factors must be present:

- The defendant must be innocent. That is, the defendant's encroachment must not be willful or negligent. The court should consider the parties' conduct to determine who is responsible for the dispute.
- Unless the rights of the public would be harmed, the court should grant the injunction if the plaintiff "will suffer irreparable injury … regardless of the injury to defendant."
- The hardship to the defendant from granting the injunction "must be greatly disproportionate to the hardship caused plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant." 91 CA4th at 759.

This theory has not been applied to an easement for view, light, or air in the recorded cases in California.

§13.19 2. Drafting an Easement

No magic words or specific language must be used to establish a property right in a written instrument. See *Bello v ABA Energy Corp.* (2004) 121 CA4th 301, 317 (public right-of-way easement across private land). However, the provisions should be drafted carefully and specifically. Rules of contract interpretation apply to interpreting a written instrument creating a property right such as an easement. Courts will look to the intention of the parties as gathered from the instrument. Sometimes, the original parties are long gone; their actual intention may not be directly determined but can only be gleaned from the language of the instrument. It is not unusual in the case law to find an analysis of the intent of parties from a hundred years ago or more. See, *e.g., Claudino v Pereira* (2008) 165 CA4th 1282 (boundary set by 1867 field note description as running "in the gulch" and "down said gulch"). Less than careful drafting of a deed may result in expensive litigation in the future. See

City of Manhattan Beach v Superior Court (1996) 13 C4th 232 (terms of deed from 1888).

When drafting an easement for light and air, views, or open space, counsel should use the most specific language possible and include as many provisions describing, creating, and limiting rights under the easement as applicable to avoid having to rely on a court's future interpretation of rights that are not expressed in the grant (or reservation) of the easement. When a court finds a writing is "clear," it usually is not clear at all until the decision is issued. See, *e.g., Hill v San Jose Family Hous. Partners, LLC* (2011) 198 CA4th 764 (discussed in §13.14), in which the court found that because the point of a billboard is to be visible, it was "clear" that the intent of the parties was to prohibit unreasonable interference with the visibility of the billboard even though there was no express language to this effect. See also *Zabrucky v McAdams* (2005) 129 CA4th 618, 629 (court interpreted provision prohibiting structures and landscape that exceeded three feet in height that obstructed view as applying only to future *unreasonable* obstructions, although the term "unreasonable" did not appear in that section of CC&Rs). *Zabrucky* and *Eisen v Tavangarian* (2019) 36 CA5th 626 (reaching opposite conclusion) demonstrate the importance of drafting easement language as clearly as possible.

PRACTICE TIP➤ Instruments granting view or light and air easements should contain the specific elevation limits of the easement, as established by a professional survey or specific measurement. To the extent possible, a plat depicting horizontally the specific height measurements above existing grade or structures will help alleviate disputes regarding the scope and limits of the easement, thereby lessening the risk of such disputes and improving insurability as well as enforceability of the easement.

Counsel should consider the rights and duties of each party and draft language defining those rights and duties as clearly as possible.

- What is the scope of the right?
- Who has the duty to maintain and repair?
- What is the proper legal description?
- Is it necessary to hire a surveyor to draft a metes and bounds description?

On property descriptions, see §2.1.

III. HANDLING THE DISPUTE

A. Before Litigation

§13.20 1. Review Documents

The first step when a problem arises over an existing right to or claim for a view, light, or air is to determine if there are any deed provisions, covenants, or other documents of record that form the basis of the right. The language of the grant determines the extent of the right. If there is no recorded document, the claimant should consider negotiating a purchase of view rights from the neighboring owner. However, the putative servient estate is under no obligation to sell an easement or any other interest. In some cases, the best way (sometimes, the only way) to ensure a view over neighboring land is to purchase it in fee. See §13.24.

Counsel should carefully review the scope of the language in any grant of a right to a view or open space. If the language is vague or its intent is incapable of being determined, the right may not be enforceable. If the language is highly technical, it may be necessary to hire a land surveyor to measure and determine the location of the right granted.

§13.21 2. Review Title Insurance Policy; Tender Dispute to Insurer

In the vast majority of cases, the client will have title insurance. The purpose of title insurance is to insure that the owner has the interest in land that the owner thinks they have. If there is a dispute over a recorded easement or similar grant language in some other recorded document, it is prudent to tender the dispute to the title company. The title company has various options available to it to resolve a dispute, including, but not limited to, providing a defense in litigation. Counsel should review the policy to become familiar with the various steps the company may choose to take if the dispute is covered by the policy. For information relating to title policies generally, see California Title Insurance Practice (2d ed Cal CEB).

§13.22 3. Visit Site

An initial site visit will aid counsel in understanding the case and identifying the legal issues. Counsel should conduct the visit with the client present and bring a site map and any other available maps. Counsel should conduct a detailed inspection of the client's property, noting the location of property boundaries, the location of existing structures, and the easement conditions under review. Counsel should locate all deeded easements at the site and, if

applicable, all existing ingress, egress, and utilities not situated in a deeded easement. Counsel should also examine vegetation and slopes to determine what impacts might occur if structures or access ways were relocated. Counsel may wish to use a checklist to ensure that no item of importance is omitted from the inspection. Photographs and videos taken during the visit should document the existing condition of the site. This documentation may be used not only for informational purposes but also to preserve evidence for trial.

§13.23 4. Checklist: Client Information

Counsel should request that the client provide the following information, as appropriate:

- ___ Complete chain of title for client's property, including copies of the documents listed in the chain of title (*e.g.,* CC&Rs, maps, and deeds)
- ___ Client's title insurance policy
- ___ Client's purchase documents
- ___ Photographs of the land and the impacted view
- ___ Land surveys
- ___ All communications and other documentation regarding the dispute

§13.24 5. Purchase Dominant Estate

One way the servient estate can extricate itself from the effect of the easement is to purchase the dominant estate. The parcels would then be owned by the same party, and the easement would be extinguished through the doctrine of merger. CC §811(1). The act of severance of common ownership alone will not revive the easement, but other circumstances, such as those creating an implied easement, might. See *Zanelli v McGrath* (2008) 166 CA4th 615. For added caution, if one of the parcels might later be sold separately, it is prudent to record a document expressly terminating the easement so that no viable claim of its continued existence can be made in the future.

§13.25 B. Mediation

Generally, disputes between neighbors are emotionally fraught. It is always best if the parties can resolve a dispute between themselves by negotiating and settling an agreement. The agreement resolving the dispute can be recorded if it affects real property. If the parties are unable to resolve

their differences on their own, mediation is often a wise course of action. Mediation is a facilitated settlement negotiation led by a neutral mediator. In mediation, each party has a say in the outcome. Resolution is reached only if all parties agree. The parties are free to come up with any creative solution they can all agree on. If a lawsuit is brought, a judge (likely after sending the parties to mediation) will decide the case on the basis of the law and facts presented, there will be a winner and a loser instead of a compromise, and the result might not satisfy either party. In mediation, the parties can compromise, be creative, and potentially arrive at a solution they could not obtain by trying the case in court, which will better serve all parties concerned.

PRACTICE TIP➤ The California Department of Consumer Affairs maintains a list of local mediation programs on its website. There are also a number of private mediators and mediation firms whose information is searchable online.

NOTE➤ Beginning January 1, 2019, an attorney representing a client participating in a mediation or a mediation consultation must, before the client agrees to participate in the mediation or mediation consultation, provide the client with a printed disclosure containing the confidentiality restrictions described in Evid C §1119 and obtain a printed acknowledgment signed by that client stating that the client has read and understands the confidentiality restrictions. A statutory form used to comply with this requirement can be found in Evid C §1129(d).

§13.26 C. Arbitration

As another alternative to litigation, the parties can stipulate to arbitration of the dispute before an agreed-on neutral arbitrator(s). Arbitration may provide a faster means to resolve the dispute than litigation. Another advantage is that arbitration is private; there is no public record of the dispute, as there is with litigation. At the same time, it carries significant disadvantages. Arbitration may be more expensive than litigation because the arbitrator must be paid, usually in advance. This burden may be onerous for some disputants. There is generally no appeal from an arbitration decision. Also, unless required by the submission agreement, arbitrators are not required to follow the law, and the decisions of arbitrators are not subject to judicial review except on limited grounds. *Moncharsh v Heily & Blase* (1992) 3 C4th 1. Counsel should consider carefully whether the nature of the client's dispute

would be better served by arbitration award or litigation in the court system.

D. Civil Actions

§13.27 1. Preliminary Steps

When an easement dispute cannot be resolved by the parties themselves or through alternative dispute resolution, litigation may be necessary. Preliminary steps include the following:

- **Identify potential parties.** Because an action is only binding on the parties that are named and served, it is essential to determine the identity of all necessary parties. A litigation guarantee, which can be obtained from a title company, will name all potential parties of record. The cost of the guarantee is usually related to the value of the real property interest involved. The owners of any off-record interests in the property should be researched and named as well. If a lender of record or the owner or lienholder of the subject property is not named or is named incorrectly, a great deal of time and money may be spent to obtain a judgment that may not be effective.
- **Obtain legal description of the properties.** It is also important to have the correct legal description of the properties that are the subject of the complaint. This information can be obtained from public records or a title company.

PRACTICE TIP➤ Counsel should take care if a government entity is to be named as a defendant, as different rules may apply in an action against a government entity or agency. Typically, time periods for notice, filing, and even service are shortened. While an analysis of administrative law is beyond the scope of this book, the outcome of *Weiss v City of Del Mar* (2019) 39 CA5th 609 provides a word to the wise. In that case, the plaintiff failed to file and serve the defendant city within the 90-day period mandated by Govt C §65009. As a result of that failure, the statute of limitations ran and judgment for defendant was affirmed.

§13.28 2. Use of Lis Pendens

The Latin term "lis pendens" is still commonly used to refer to the recordation of a notice when a lawsuit is filed concerning ownership or possession of real property, although the term is no longer used in the statutes (CCP §§405–405.61), which instead refer to a "notice of pending action." See also discussion of lis pendens in §§2.40, 5.42, 13.28, 17.2–17.5.

The purpose of a lis pendens is to give constructive notice of an action affecting real property. *Bishop Creek Lodge v Scira* (1996) 46 CA4th 1721, 1733. A lis pendens should be recorded in the office of the county recorder where the real property is located when an action is filed that affects title to or possession of real property (CCP §405.20), including an action involving an easement (CCP §405.4).

In order for the notice to be fully effective, specific requirements must be met concerning serving and filing a notice of pending action. See CCP §§405.20–405.24. Under CCP §405.22, the notice must be served "by registered or certified mail, return receipt requested, to all known addresses of the parties to whom the real property claim is adverse and to all owners of record of the real property affected by the real property claim" *before* the notice is recorded. Failure to comply with this section results in the notice being void and invalid as to any adverse party or owner of record. CCP §405.23.

A defendant can move to expunge a lis pendens, and the court will grant it if the court does not find that it is more likely than not that the plaintiff will prevail in the action. CCP §405.32. The plaintiff has the burden of proof in an expungement motion. CCP §§405.30, 405.32. An expungement motion allows for a mini-trial on the merits of the case. See CCP §405.30. A successful movant can recover costs and attorney fees. CCP §405.38.

NOTE➤ Filing a quiet title action (see §13.29) sets a trap for the unwary. In some cases, such as an action for specific performance, a plaintiff can file suit and choose not to record a lis pendens if the plaintiff feels less than confident. But in a quiet title action, the plaintiff *must* record a lis pendens. CCP §761.010. A plaintiff must therefore be reasonably sure of prevailing when bringing a quiet title action and recording the lis pendens because of the risk of an expungement order along with an order to pay attorney fees and costs.

§13.29 IV. LEGAL THEORIES AND CAUSES OF ACTION

Various causes of action are available to a plaintiff in a view or open-space dispute with a neighbor or local government. These include actions for

- Declaratory relief requesting that the court determine the rights and duties of the parties. See CCP §1060.
- Injunctive relief seeking an order that a particular act be done or not done. See CCP §§525–534. See also §§17.13–17.26.

- Interference with easement. See §§16.61–16.73. See also, *e.g., Kazi v State Farm Fire & Cas. Co.* (2001) 24 C4th 871.
- Trespass or nuisance (see §§1.53–1.56, 2.2–2.4, 16.2–16.11, 16.16–16.23); to enjoin an encroachment (see §§2.52–2.56); for slander of title (see §§16.36–16.40); or for damages (see §§17.45–17.53).
- Breach of contract, depending on the specific facts of the case and the nature of the violation. A covenant running with the land may constitute a contract. Similarly, terms in a recorded easement or deed may also be subject to contract law.
- Violation of CC&Rs of a common interest development, with the possibility of an award of attorney fees. See CC §5975. See also, *e.g., Clear Lake Riviera Community Ass'n v Cramer* (2010) 182 CA4th 459 (court applied doctrine of relative hardships to uphold mandatory injunction requiring removal of portion of structure that exceeded height guideline adopted by HOA's architectural committee). See also §§16.54–16.60.
- Quiet title. See CCP §§760.010–765.060. Quiet title actions are typically used to resolve the existence and extent of an easement. There are specific pleading requirements for a quiet title action. See CCP §§761.010–761.040. The complaint must be verified. CCP §761.020. The plaintiff in a quiet title action must record a notice of pending action (lis pendens). CCP §761.010(b). See §§2.40, 13.28, 17.2–17.5.
- Abandonment of easement through nonuse. See §§1.34–1.35. While difficult to prove, an easement may be deemed abandoned when there is nonuse coupled with an expressed intent not to use the easement in the future. *People v Ocean Shore R.R., Inc.* (1948) 32 C2d 406, 417. Abandonment may arise in a view context if, for instance, the dominant tenement removes the structure and replaces it with a building containing windows, all of which face the opposite way. While this precise issue has not been litigated, it is a potential approach under the right set of facts.
- Fraud in promising a view. In *Lacher v Superior Court* (1991) 230 CA3d 1038, the court considered whether a developer could be liable in damages for fraud for promising a homeowner that a new development would not obstruct the homeowner's view. After the promise was made, the homeowner withdrew opposition to the project, the city approved it, and the development was built, blocking the homeowner's view. The homeowner brought suit. The appellate court, amid much dissent and infighting, held that the homeowner had stated

a cause of action for fraud and could seek damages. The issue of whether the homeowner was also entitled to an injunction against construction of the development, which would effectively serve the same purpose as a view easement, was not before the court and was expressly left undecided.

- Spite fence. A "spite fence," which is a private nuisance, is a fence or a structure in the nature of a fence that (1) unnecessarily exceeds 10 feet in height and (2) was erected maliciously to annoy an adjoining property owner or occupant. Injunctive relief is available to the plaintiff. CC §841.4. A row of trees can be a spite fence. *Vanderpol v Starr* (2011) 194 CA4th 385, 389; *Wilson v Handley* (2002) 97 CA4th 1301, 1311. While this is not directly an issue of view rights, a spite fence often interferes with the view of another. See §§4.14–4.16, 5.12–5.14.

V. REMEDIES, DAMAGES, AND ATTORNEY FEES

§13.30 A. Remedies

View-related disputes often arise when a neighboring property owner announces or starts construction of a new or expanded building. Although a court can order the removal of a completed structure, the practical likelihood of that happening is not great. Thus, the best strategy in many view-related cases is to immediately seek an injunction to stop the threatened view obstruction. Counsel will need to prove that (1) it is likely that the plaintiff will prevail on the merits at trial and (2) the interim harm that the plaintiff is likely to sustain if the injunction is denied is greater than the harm that the defendant is likely to suffer if the preliminary injunction is issued. *White v Davis* (2003) 30 C4th 528, 554. Seeking injunctive relief is costly, and the client must post a bond for the defendant's probable delay and damages, which could be significant. CCP §529.

Nevertheless, in a proper case, courts will order the removal of a structure violating a valid restriction. In *Warsaw v Chicago Metallic Ceilings, Inc.* (1984) 35 C3d 564, the supreme court upheld an order to remove from an easement a structure on which construction commenced after the filing of the underlying action.

On injunctions generally, see §§17.6–17.21.

§13.31 B. Damages and Attorney Fees

The main damages sought in view-related cases are for the decrease in market value caused by the loss of the view or obstruction. *Kitzman v Newman* (1964) 230 CA2d 715, 726. However, the plaintiff can also recover damages for the loss of use and enjoyment of the property up to the time the equitable remedy is made available. *Mock v Shulman* (1964) 226 CA2d 263.

Although a property owner can offer opinion evidence on value, evidence is usually provided by an expert real estate appraiser. Additionally, expert opinions from photographers and land surveyors are often required or recommended.

For general discussion of damages available in easement disputes, see chaps 1–2. On damages generally, see chap 17.

Attorney fees may be awarded if there is a statute that authorizes them or a contract that provides for them. In this context, recorded CC&Rs are considered a contract. These documents often include a provision providing for an award of attorney fees to the prevailing party in litigation arising out of the obligations set forth in the CC&Rs. In addition, an award of attorney fees to the prevailing party in an action to enforce the governing documents is authorized by statute. CC §5975(c). It is important to carefully review the specific section of the document on which the action is based and the scope of the language in the provision allowing for an award of attorney fees. If the property is in a common interest development (as defined by the Davis-Stirling Common Interest Development Act (CC §§4000–6150), a homeowner enforcing a restriction may be able to recover attorney fees. CC §5975(c); *Mount Olympus Prop. Owners Ass'n v Shpirt* (1997) 59 CA4th 885. Also, if a defendant successfully argues that the CC&Rs do not apply, or the property is not subject to the Davis-Stirling Act, the prevailing defendant may recover attorney fees, because CC §5975(c) is intended to be a reciprocal statute. *Tract 19051 Homeowners Ass'n v Kemp* (2015) 60 C4th 1135. Code of Civil Procedure §1021.9 (covering certain types of trespass) is just one example of other statutes that provide for an award of attorney fees.

§13.32 VI. ANSWERING THE COMPLAINT

The answer to a complaint must either generally or specifically deny each material allegation of the complaint and also contain relevant affirmative defenses, which will vary depending on the facts of each case. CCP §431.30. In a quiet title action or any action in which the complaint is verified, the answer must also be verified and must contain specific denials of each paragraph in the complaint, as appropriate. CCP §446.

In determining the existence and scope of an easement, the court will generally balance the hardships between the parties. See *Herzog v Grosso* (1953) 41 C2d 219. See also discussion of the doctrine of relative hardship in §§2.52–2.56, 16.64–16.66, 18.37–18.39. Accordingly, in answering a complaint involving a claim of easement, counsel should consider equitable defenses when drafting the affirmative defenses.

Affirmative defenses to consider, depending on the facts of the case, include the following:

- Overburden of the easement. See *Wall v Rudolph* (1961) 198 CA2d 684, 686 (overburdening of access easement caused by paving shared driveway). See also §18.40.
- Change of conditions. See *Fletcher v Stapleton* (1932) 123 CA 133, 136. See also §1.33.
- Merger. See CC §811(1); *Leggio v Haggerty* (1965) 231 CA2d 873, 883 (easement extinguished when ownership of dominant and servient estates held by one person).
- Public policy. See *Venuto v Owens-Corning Fiberglas Corp.* (1971) 22 CA3d 116, 127 (law favors utilization of real property over vacancy).
- Laches or unclean hands. See *Frabotta v Alencastre* (1960) 182 CA2d 679 (although successful on other issues, plaintiffs were guilty of laches by unreasonably delaying suit while defendants continued work on properties). See also §§18.13–18.16.
- Waiver or acquiescence. See *Westlake v Silva* (1942) 49 CA2d 476, 478 (release of easement).
- Estoppel. See *Feduniak v California Coastal Comm'n* (2007) 148 CA4th 1346 (unsuccessful attempt to assert that regulatory inaction as to nonpermitted golf course estopped government from restoring property). See also §§18.54–18.56.
- Abandonment of easement. See *Tract Dev. Servs., Inc. v Kepler* (1988) 199 CA3d 1374 (easement created by grant is not lost by mere nonuse but only when clear intention to abandon is shown). On abandoned easements, see CC §§811(4), 887.010–887.090. See also §§1.34–1.35.
- Incompatible acts by the owner of the easement. CC §811(3). See *Reichardt v Hoffman* (1997) 52 CA4th 754 (incompatible act must affect both properties).
- Destruction of the servient tenement. CC §811(2). See *Walner v City of Turlock* (1964) 230 CA2d 399, 404.

- Extinguishment by prescription or adverse possession. See *Masin v La Marche* (1982) 136 CA3d 687, 693 (express easement may be terminated by adverse possession of servient owner). See also §1.33.
- Extinguishment by owner's incompatible act. See *Tract Dev. Servs., Inc. v Kepler, supra* (clear intention to abandon must be shown).
- Extinguishment due to end of necessity. See CC §1007; CCP §321; *Daywalt v Walker* (1963) 217 CA2d 669, 676.
- Failure to comply with statute of frauds. CC §1624.
- Modification or termination of covenant. See, *e.g., Lincoln v Narom Dev. Co.* (1970) 10 CA3d 619, 627 (covenant terminated in accordance with terms of easement).

§13.33 VII. CROSS-COMPLAINT

It is not unusual to find that a cross-complaint has been filed in an action involving easement rights. A defendant will likely file a cross-complaint to quiet title, even if the plaintiff has done so, so that the defendant can also seek affirmative relief. The same causes of action available to the plaintiff are available to the cross-complainant. On causes of action, see §13.29; chap 16. Counsel for the defendant should also consider whether there are other parties that should be brought into the action. Certain affirmative defenses can also be pled as causes of action in a cross-complaint, including abandonment, destruction, or overuse of the easement. See §13.33. On affirmative defenses and cross-complaints generally, see chap 18.

VIII. UNIQUE ISSUES

§13.34 A. Residential Properties

View and light easement disputes are more frequent in residential settings, where the parties generally have greater concern for the aesthetics of their surroundings. If a claim is being made that the easement exists through estoppel or other equitable means, the physical attributes of the properties may be of utmost importance. Photographs or videos are useful to convey the reality of the situation. It may also be important to obtain statements or take depositions of any third party percipient witnesses.

§13.35 B. Commercial Properties

View and open space issues may arise in a commercial setting where the view of city lights, water, or some other aesthetic feature is involved (*e.g.,* a

restaurant). Commercial properties may also involve disputes that are more directly business-oriented in nature, such as interfering with a billboard easement by obstructing potential consumers' view of the billboard. See *Hill v San Jose Family Hous. Partners, LLC* (2011) 198 CA4th 764, discussed in §13.14.

§13.36 C. Rural Properties

In a rural setting, the client may be more likely to be accustomed to open space or a scenic view, so estoppel issues may arise. It is important to determine whether the owner of neighboring property made any promises or representations or took action that might indicate that open space or a view would remain as such. It is also important to determine whether the client has made any changes to their own property based on any such representation from or action by the neighbor. There may be prescriptive rights if a neighbor has used the land and fulfills the criteria for a prescriptive easement.

§13.37 D. Common Interest Developments

Common interest developments (as defined in the Davis-Stirling Common Interest Development Act (CC §§4000–6150)) are governed by a recorded declaration of CC&Rs, bylaws, and often, rules. The HOA is charged with enforcing the governing documents and acting in a reasonable, fair, and nonarbitrary manner. *Ironwood Owners Ass'n IX v Solomon* (1986) 178 CA3d 766, 772. A violation of the governing documents may expose the HOA to an award of costs and attorney fees under CC §5975(c) and possibly under the terms of the CC&Rs. The CC&Rs may include various easements and other rights affecting light and view. It is important to carefully review the governing documents to determine the duty of each individual owner to abide by them and the duty of the association to enforce them.

The principle governing the enforcement of a recorded restriction has been stated as follows (*Lamden v La Jolla Shores Clubdominium Homeowners Ass'n* (1999) 21 C4th 249, 263):

> [A]n equitable servitude will be enforced unless it violates public policy; it bears no rational relationship to the protection, preservation, operation or purpose of the affected land; or it otherwise imposes burdens on the affected land that are so disproportionate to the restriction's beneficial effects that the restriction should not be enforced.

If the association has not properly discharged its duties, as set forth in *Lamden,* and has allowed interference with a protected view or protected a

view without authority in the governing documents, the plaintiff may have a cause of action against the association.

On enforcing CC&Rs, see chap 16. On common interest developments generally, see Advising California Common Interest Communities (2d ed Cal CEB).

1914, locating evidence of the existence and scope of a pre-1914 right can prove difficult. When such evidence exists, however, the appropriative right generally has a high priority relative to other appropriators on a stream.

§14.16 4. Riparian Rights

A riparian right gives the owner of land contiguous to a natural watercourse a right to beneficially put the water to use on the riparian land. A riparian owner does not have the right to the full flow of stream in its natural course through the land, however, but only a right to a reasonable use of water on the riparian land. *Turner v James Canal Co.* (1909) 155 C 82, 94.

§14.17 a. Riparian Rights Are Correlative Rights

Holders of riparian rights must exercise their rights in a "correlative" manner, with a prorata cutback when sufficient water is not available to satisfy all water users. *Tehachapi-Cummings County Water Dist. v Armstrong* (1975) 49 CA3d 992, 1001. When there are both riparian and appropriative rights on a water course and the supply is insufficient to satisfy all users, the riparian right is paramount as long as the riparian's use of water is reasonable and beneficial. *Joslin v Marin Mun. Water Dist.* (1967) 67 C2d 132, 137.

§14.18 b. No Loss Through Disuse

Unlike an appropriative right, a riparian right is not lost through disuse. *Lux v Haggin* (1886) 69 C 255, 390 ("Use does not create the right, and disuse cannot destroy or suspend it"). A riparian right can be severed from property, however. If the property was subdivided at any point in time, the riparian right attaches only to the smallest parcel still contiguous to the water source unless the right was expressly reserved in the chain of title. *Rancho Santa Margarita v Vail* (1938) 11 C2d 501, 529; *Copeland v Fairview Land & Water Co.* (1913) 165 C 148, 161.

§14.19 5. Groundwater Rights

As explained in §14.7, percolating groundwater is water that flows under the surface of land in unknown channels. Courts have identified three basic types of rights of percolating groundwater: overlying, appropriative, and prescriptive. *Pasadena v Alhambra* (1949) 33 C2d 908, 925. A property owner whose land overlies a groundwater basin has a right to withdraw percolating groundwater from the basin. *Katz v Walkinshaw* (1903) 141 C 116, 136. The rights of overlying owners are, like the rights of riparians, correlative. *Katz*

v Walkinshaw, supra; *Antelope Valley Groundwater Cases* (2021) 62 CA5th 992, 1023; *Tehachapi-Cummings County Water Dist. v Armstrong* (1975) 49 CA3d 992, 1001.

Percolating groundwater can also be appropriated for use on land outside the watershed, but only to the extent that such water serves no useful purpose to the overlying landowners. *Peabody v City of Vallejo* (1935) 2 C2d 351, 372. A water user can also obtain groundwater rights through prescription, as discussed in §§14.21–14.23.

Overlying water rights can be subject to limitations if the groundwater basin has been adjudicated (see §§14.49–14.50) or a watermaster has been appointed by the court. If a basin has been adjudicated, the adjudicated decree generally identifies specific terms applicable to each recognized right. If the adjudicated decree does not specifically recognize an overlying right, it is very challenging to acquire a new right to pump water from the adjudicated basin. For additional discussion of groundwater adjudications, see §14.50.

In 2014 California adopted the Sustainable Groundwater Management Act (SGMA) (Wat C §§10720–10738), which represents the state's first groundwater management planning program. Under the SGMA, local agencies must develop groundwater sustainability plans and then achieve sustainable levels of groundwater extraction over a 30-year horizon. Compliance with the SGMA, particularly in groundwater basins struggling with overdraft issues, could result in a substantial reduction of groundwater extractions by overlying landowners. Implementation of the SGMA could, therefore, impact any particular landowner's right to extract groundwater in the future.

§14.20 6. Contractual Rights to Water

Typical water rights are property-based and can be classified as appropriative, riparian, or groundwater rights, as described in §§14.12–14.19. In addition to these real property rights to water, there are also contract-based rights to water. For example, contract-based rights include agreements for delivery of water from the California State Water Project, the federal Central Valley Project, or local water districts. The terms of the contract identify the respective rights and responsibilities to receive or pay for water deliveries.

___ 18. Copies of any internet or other research by the client or any advice from another attorney that the client has consulted (see §15.10)

While counsel may not review all of the documents listed on this checklist at the initial client meeting (particularly if the initial consultation is free), having the documents can help counsel evaluate the probable scope of the work and assist in advising the client on the appropriate courses of action and estimated legal costs that may be involved.

§15.6 C. Review Prior Litigation

When the client has been involved in prior litigation over the disputed matter, counsel should check the court's website to ascertain the status of the case and print out the docket index. Clients don't always give accurate statements of what has gone on in past litigation, and counsel should verify the status by checking the docket.

§15.7 D. Review CLETS Rulings

The California Law Enforcement Telecommunications System (CLETS) allows a restraining order followed by an injunction after hearing to be issued to protect an individual and that person's family members from courses of conduct involving credible threats of violence or harassment that seriously alarms, annoys, or harasses the party initiating the proceeding. Counsel should be aware of any CLETS ruling for or against the client.

§15.8 E. Review Damage Repair Estimates

Often, the standard for damages recoverable in property damage cases is the cost of repair or the diminution in value of the property, whichever is less. The general tort measure of damages for trespass and nuisance, which are common claims involving neighbors when there is property damage, is the amount that will compensate the plaintiff for all detriment proximately caused by the tort, whether or not it could have been anticipated. CC §3333. A plaintiff in a suit for damages to real property due to negligence may recover either the cost to repair or the diminution in value, but not both; however, the plaintiff cannot generally recover diminution in value if that amount exceeds the cost of repair. *Safeco Ins. Co. of Am. v J & D Painting* (1993) 17 CA4th 1199, 1202. Similarly, one cannot generally recover the cost of repair when it is greater than the diminution of value; however, there are exceptions. For example, the "personal reason" exception allows a plaintiff to recover the reasonable costs of repair in excess of the diminution in value

when there are genuine personal reasons for repairing the damages. See, *e.g., Kelly v CB&I Constructors, Inc.* (2009) 179 CA4th 442, 450. See also *Safeco Ins. Co.,* 17 CA4th at 1203. For discussion of damages, see chaps 16–17.

§15.9 F. Review Property Sales Disclosures

The disclosures provided to the client on purchase of property may be helpful in identifying whether there are possible claims for nondisclosure of problem neighbors; drainage issues; disputes over boundaries, easements, fences, trees, or encroachments; and other similar problems that lead to neighbor disputes or costly repairs. In cases involving water intrusion, spread of fire, or subsidence from activity on neighboring property, counsel may also want to obtain copies of the Natural Hazard Disclosure Statement required under CC §§1103–1103.15. For further information on typical residential property disclosures required in California, see California Real Property Sales Transactions, chap 6 (4th ed Cal CEB).

§15.10 G. Review Client's and Prior Counsel's Research

Reviewing internet and other research conducted by the client may help counsel identify areas and matters that might not necessarily come to light at the initial meeting. These materials may also help counsel in understanding the client's questions as well as any preconceptions that the client may have about applicable law before the consultation. Often, these materials deal with jurisdictions outside California, in which the law may be different than in this state.

§15.11 II. INITIAL INTERVIEW

Each attorney has their own style in handling clients, but there are certain issues that every attorney should cover in the initial consultation. Clients are often deeply and emotionally involved in neighbor disputes because disputes can impinge on the peaceful enjoyment of the client's home. As a result, these matters can be quite contentious and attorneys can end up spending a great deal of time on the issues, including at the initial consultation. When handling a neighbor dispute, counsel should plan on spending at least a half-hour, but block out as much as an hour or two. Counsel should avoid disruptions as much as possible; a primary purpose of the initial interview is to enable the client to decide whether to hire the attorney and for counsel to decide if they want to represent the client. Interruptions can leave the

wish to explore limited scope services for a flat fee. Limited scope representation could include, for example, such actions as preparing pleadings and other court papers for the client to file in pro per. If counsel is to appear in the case, but only on limited matters, the client and counsel may provide notice of the extent of the limited scope representation using the Notice of Limited Scope Representation (Judicial Council Form FL-950) form.

If it becomes necessary during the case for counsel to substitute in as counsel of record under a full service agreement, using the form Substitution of Attorney—Civil (Without Court Order) (Judicial Council Form MC-050) is mandatory.

For sample forms and checklists, see Fee Agreement Forms Manual, chap 9 (2d ed Cal CEB).

§15.18 B. Determine Client's Motivation and Objectives

Generally, counsel needs to know why the client is seeking representation: Has the client been injured? Has the client's property been damaged? Is someone interfering with the client's peaceful enjoyment and use of the client's home? Is someone making a claim against the client? Has the client been sued?

Counsel should also ascertain the client's goals. What does the client want to happen? Is the client seeking damages, an injunction, or both? Is the client open to informal neighborhood resolution or mediation?

Often clients have unrealistic preconceptions of what can be achieved as a result of learning about a spectacular jury verdict. Because clients tend to be emotionally involved in neighbor disputes, the disputes are frequently litigated aggressively and result in high legal costs. However, the outcome of litigation is highly uncertain because disputes are so driven by individual facts and personalities.

Most neighbor dispute cases settle, but only after substantial amounts of time and money have been expended. When parties settle, no one typically recovers what they wanted or expected. If the case does move to trial, the cost could be increased substantially by the possibility of appeal. If there is a judgment, it may not be collectible in the current real estate environment. Many neighbor dispute cases require expert witnesses such as soil engineers, surveyors, real estate appraisal experts, contractors, and acoustical engineers. As a result, there is a substantial likelihood that even if a client prevails at trial, the client will not be made whole. Further, should the client lose, there is the possibility of paying costs, including attorney fees, of the opposing side.

PRACTICE TIP➤ Counsel should be careful to dispel grandiose expectations or steer clear of a potential client who expects to get rich in a neighbor dispute case.

§15.19 C. Ascertain Relevant Facts and Parties

Counsel should obtain a chronological description of the events leading up to the consultation in order to address whether there are statute of limitations issues or approaching deadlines. This may also help counsel consider the client's insurance coverage, if any, to either pay a judgment or pay for the attorney fees and court costs of defense.

Counsel should broadly identify potential parties. On obtaining a list of individuals who are potentially involved in the dispute or who might be witnesses, see checklist in §15.5. Getting as complete a list as possible is essential for identification of both conflicts and potential liability. Typical parties are listed in §§15.20–15.25.

§15.20 1. Neighbors

Clients often only know their neighbors' first names. Counsel must determine the full names and addresses of the neighbors. This information is necessary for sending written communications, preparing witness lists, and naming them in an action.

§15.21 2. Children

Similar information should be obtained in regard to the neighbors' adult children, who may be witnesses or may need to be individually named in the lawsuit. Counsel should also ascertain the ages of any minor children. Different theories of liability may apply if minor children are the source of the dispute. See, *e.g., Bauman v Beaujean* (1966) 244 CA2d 384, 389 ("A child may be a trespasser even though too young to be capable of contributory negligence").

If the client has minor children who have been affected by the dispute, claims may need to be asserted on their behalf, and a guardian ad litem may need to be appointed in any litigation. On guardians ad litem generally, see California Juvenile Dependency Practice (Cal CEB).

§15.22 3. Homeowners Association (HOA)

Counsel should be sure to get the full correct name of any HOA involved and the proper address for notifications. Many HOAs have property

management companies or on-site managers, and they are potential parties and witnesses as well. On occasion, a particular board member or agent for the board who has a personal interest or vendetta may also be a potential party.

§15.23 4. Previous Owners

Civil Code §§1102–1102.19 impose statutory duties on sellers to disclose all facts materially affecting the value or desirability of their home. As a result, failure to disclose a neighborhood nuisance, a property line dispute, an easement dispute, an encroachment by a neighboring structure or by the seller's structure, a fence that is not on the property line, or numerous other issues can lead to claims by a new owner of the property against the previous owner. For additional discussion, see California Real Property Sales Transactions, chap 6 (4th ed Cal CEB).

§15.24 5. Real Estate Brokers and Agents

Real estate brokers and salespersons (agents) and the companies that employ them or retain them as independent contractors also have statutory duties to disclose all facts known to the broker or salesperson, or apparent on a reasonable visual inspection, materially affecting the value or desirability of the one-to-four-unit residential property they are involved in selling, whether the person is the listing agent or the selling agent representing the buyer. See CC §§2079–2079.25. These real estate professionals also have the duty to conduct a reasonably competent and diligent visual inspection of residential property and to disclose all facts materially affecting the value or desirability of the property. CC §2079(a). These duties also arise under the common law. *Assilzadeh v California Fed. Bank* (2000) 82 CA4th 399, 410.

PRACTICE TIP➤ It is important to review the real estate transfer disclosure statement and, if applicable, the Seller Property Questionnaire, to determine if there are claims against the brokers for nondisclosure of neighborhood issues involved in the purchase of the property. For more information on claims against brokers, see California Real Estate Brokers: Law and Litigation (Cal CEB) and California Real Property Remedies and Damages, chap 3 (2d ed Cal CEB).

§15.25 6. Neighbors as Coplaintiffs

Other neighbors may be adversely affected by the same issues affecting the client. For example, more than one downhill neighbor may be affected by a water discharge or soil movement issue caused by an uphill neighbor; neighbors on both sides of a noisy neighbor may be adversely affected by the noise; and many neighbors on a street might be affected by a nuisance caused by one resident, such as drug dealing. These neighbors may come together and hire an attorney to represent the whole group, or they may proceed together in small claims court to multiply the damages that can be obtained against the defendant and thus have a bigger impact on the behavior. However, if counsel represents these multiple parties, as discussed in §15.16, counsel must fully disclose potential conflicts that might arise from the multiple representation and obtain informed written consent from each of the parties. See Cal Rules of Prof Cond 1.7 (former Rule 3–310).

§15.26 D. Ascertain Client's Understanding of Law

Many clients have already done research on an issue on the Internet before setting foot in an attorney's office. This may either be helpful to the attorney's analysis of the case or result in the client's misunderstanding about the likely outcome of litigation. Either way, obtaining the client's understanding of the law applicable to the situation in the initial interview is important so that counsel and client can reach a common course of action and strategy to pursue.

§15.27 E. Advise About Experts

If the client has not already retained experts to determine damages or repair costs (or in noise cases, the level of noise), counsel should advise the client that such experts should be retained by the attorney (usually at the client's cost) so that the experts are deemed the attorney's consultants. For litigation purposes, this makes the expert's report privileged from disclosure to the opposing party, until and unless the expert is designated as an expert witness for purposes of testifying at trial.

§15.28 F. Discuss Alternatives to Litigation

There are many alternative methods for pursuing claims involving neighbors. In the initial consultation, it is a good idea to go over the range of alternative procedures. These include, depending on the situation, the methods discussed in §§15.29–15.36.

16

Common Causes of Action

Todd W. Baxter

§16.1 I. INTRODUCTION TO CAUSES OF ACTION

After deciding to proceed to litigation, counsel must determine the appropriate causes of action and draft the complaint. In doing so, counsel must evaluate all possible theories of recovery and consider all potential

defendants. Knowing and understanding all elements necessary to the causes of action are critical to counsel's drafting of the complaint. There are two key reasons for this: First, counsel must ensure that the facts of the case meet the requisite elements; second, counsel must ensure that the case will survive a motion to dismiss for failure to state a claim. In addition, counsel must determine whether there is a statutory basis for bringing a cause of action. It is also essential to understand the statute of limitations for each cause of action and to marshal the facts such that counsel is aware of whether any claim is time-barred.

This chapter addresses the various alternatives available to claimants in common types of neighborhood disputes, including claims based on

- Nuisance (see §§16.2–16.11);
- Attractive nuisance (see §§16.12–16.15);
- Trespass (see §§16.16–16.23);
- Intentional infliction of emotional distress (see §§16.24–16.31);
- Civil harassment (see §§16.32–16.35);
- Slander of title (see §§16.36–16.40);
- Negligence (see §§16.41–16.45);
- Quiet title (see §§16.46–16.53);
- Covenants, conditions, and restrictions (referred to throughout this chapter as CC&Rs) violations (see §§16.54–16.60);
- Adverse possession (see §§16.70–16.72);
- Monuments and fences (see §16.74);
- Agreed boundary doctrine (see §§16.75–16.77);
- Inverse condemnation (see §§16.78–16.80);
- Zoning and code violations (see §§16.81–16.82); and
- Failure to disclose (see §§16.84–16.88).

II. NUISANCE

A. Nuisance Defined

§16.2 1. Statutory Definition

A nuisance may be a public nuisance, a private nuisance, or both. *Venuto v Owens-Corning Fiberglas Corp.* (1971) 22 CA3d 116, 124; *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 341 (citing *Venuto*). Civil Code §3479 defines nuisance as follows:

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

§16.3 2. Case Law Interpretation

Generally, a person's unreasonable, unwarrantable, or unlawful use of their own property that interferes with the rights of others is a nuisance. *Hutcherson v Alexander* (1968) 264 CA2d 126, 130. However, California courts have held that whether a lawful use of property can be deemed a nuisance depends on a number of circumstances, including (*McIntosh v Brimmer* (1924) 68 CA 770, 777)

- The locality and surroundings;
- The number of people living there;
- The prior use, and whether it is continual or occasional; and
- The nature and extent of the nuisance and the injury it causes.

Whether a particular use is a nuisance cannot be determined by any fixed rule; it depends on the facts of each case, such as the nature of the use, the extent and frequency of the injury, the effect on the enjoyment of health and property of others, and similar factors. *Shields v Wondries* (1957) 154 CA2d 249, 255. The duration or recurrence of the alleged interference with property rights is merely one, and not necessarily conclusive, factor in determining whether the purported damage is so substantial as to amount to nuisance. *Ambrosini v Alisal Sanitary Dist.* (1957) 154 CA2d 720, 727. "The law of nuisance is not sensitive to purely esthetic preferences. … [T]he test of liability for nuisance with regard to personal discomfort is the effect of the alleged annoyance on … persons of ordinary sensibilities." *Carter v Johnson* (1962) 209 CA2d 589, 591. To be enjoinable, a nuisance must be both substantial and unreasonable. *People ex rel Burns v Wood* (2024) 103 CA5th 700, 712.

"[A]ny unwarranted activity which causes substantial injury to the property of another or obstructs its reasonable use and enjoyment is a nuisance which may be abated." Even a lawful use of property may constitute a nuisance if it is "part of a general scheme to annoy a neighbor and if the main purpose of the use is to prevent the neighbor from reasonable enjoyment of his own property." *Hutcherson v Alexander, supra*. To be considered a

"nuisance per se," the object, substance, activity, or circumstance at issue must be expressly declared to be a nuisance by its very existence by some applicable law. *People ex rel Burns v Wood, supra*, 103 CA5th at 711.

However, where it is clear that the noise emanating from a neighbor is simply part of general activities on the neighbor's property, and the noise is not unreasonably disturbing, the court will not find a nuisance. In *Mendez v Rancho Valencia Resort Partners, LLC* (2016) 3 CA5th 248, 262, the court held that even though noise emanating from a public address system was clearly audible to the plaintiffs and other neighbors in the area, the noise was not unreasonably disturbing within the meaning of the county noise ordinance. See *Wilson v Southern Cal. Edison Co.* (2018) 21 CA5th 786 (in private nuisance claim defendant's conduct may be reasonable but still result in unreasonable interference with plaintiff's use and enjoyment of her property).

§16.4 a. Examples of Nuisance Activities

Examples of various activities that can constitute a nuisance are plentiful throughout California case law, including allowing or causing

- Growth of the roots of trees onto adjoining land, thereby withdrawing the moisture and food required by a neighbor's crops (*Stevens v Moon* (1921) 54 CA 737, 740);
- A tree to shed branches, leaves, and litter onto a neighbor's gutters, porch, lawn, and roof, causing damage (*Parsons v Luhr* (1928) 205 C 193, 197); and
- Water to flow wrongfully and unnaturally on another's land (*Learned v Castle* (1889) 78 C 454, 461).

§16.5 b. No Nuisance Found

On the other end of the spectrum are situations that at first blush seem to constitute a nuisance but do not ultimately support the claim. For example, the projection of trunks of trees a few inches onto the property of a neighbor, but not enough to prevent that neighbor from cultivating the land, does not constitute a nuisance. See *Grandona v Lovdal* (1889) 78 C 611. Similarly, a row of trees alleged to be a spite fence that did not interfere with a neighbor's comfortable enjoyment of life or property is not a nuisance. See *Vanderpol v Starr* (2011) 194 CA4th 385, 388.

§16.6 B. Continuing Nuisance Versus Permanent Nuisance

California nuisance statutes have been construed to allow an owner of property to sue for damages caused by a nuisance created on the owner's property; it is not necessary that a nuisance have its origin in neighboring property. *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 343. The available remedies and limitations periods for private nuisance claims differ according to whether the nuisance is classified as continuing or permanent. *Santa Fe P'ship v ARCO Prods. Co.* (1996) 46 CA4th 967, 975.

§16.7 1. Permanent Nuisance Defined; Recovering Damages

The classic example of a permanent nuisance is a building or other structure that encroaches on a neighbor's property. If the nuisance has inflicted a permanent injury on the land, the plaintiff generally must bring a single lawsuit for all past, present, and future damages within 3 years of the creation of the nuisance. *Madani v Rabinowitz* (2020) 45 CA5th 602, 608; *Santa Fe P'ship v ARCO Prods. Co.* (1996) 46 CA4th 967, 975; see CCP §338(b). See also *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 869 ("Damages are not dependent upon any subsequent use of the property but are complete when the nuisance comes into existence"). The limitations period begins to run when damage first occurs, not when the condition giving rise to the nuisance is initially created. *Shamsian v Atlantic Richfield Co.* (2003) 107 CA4th 967, 979. When a nuisance is permanent, the injured party may seek both accrued and prospective damages. *Baker,* 39 C3d at 869; *Madani*, 45 CA5th at 608; *Renz v 33rd Dist. Agric. Ass'n* (1995) 39 CA4th 61, 65. But see *California v Kinder Morgan Energy Partners, L.P.* (SD Cal, Mar. 24, 2016, No. 07cv1883-MMA) 2016 US Dist Lexis 40551 (holding that *Renz* eliminated any practical distinction between permanent and continuing nuisances, eviscerating doctrine of permanent nuisance and disregarding applicable statute of limitations).

§16.8 2. Continuing Nuisance Defined; Recovering Damages

There is no all-purpose test for determining whether a particular nuisance is continuing or permanent. Whether the statute of limitations applies to a cause of action depends on the particular facts and circumstances of each case. See *Madani v Rabinowitz* (2020) 45 CA5th 602; *Beck Dev. Co. v*

Southern Pac. Transp. Co. (1996) 44 CA4th 1160. A nuisance is continuing if the condition is "abatable," meaning that it can be remedied at a reasonable cost by reasonable means. *Mangini v Aerojet-Gen. Corp. (Mangini II)* (1996) 12 C4th 1087, 1093; *Madani*, 45 CA5th at 609. See also *Starrh & Starrh Cotton Growers v Aera Energy LLC* (2007) 153 CA4th 583, 592. The classic example of a continuing nuisance is an ongoing disturbance caused by noise, vibration, or foul odor. See *Vowinckel v N. Clark & Sons* (1932) 216 C 156, 158. Further, deflection of rainwater and emission of noxious odors and fumes from a neighbor's pipes and furnace may be a continuing nuisance. *Tracy v Ferrera* (1956) 144 CA2d 827, 828. If the nuisance is one (*Santa Fe P'ship v ARCO Prods. Co.* (1996) 46 CA4th 967, 976, quoting *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862)

> "which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated." [Citation] "Recovery is limited, however, to actual injury suffered prior to commencement of each action. Prospective damages are unavailable."

See also *Mangini II,* 12 C4th at 1093; *Starrh & Starrh Cotton Growers,* 153 CA4th at 592. If a private nuisance is deemed a continuing nuisance, the plaintiff may bring successive actions for damages (except for future or prospective diminution in value) incurred before the commencement of each successive action until the nuisance is finally abated. Because a continuing nuisance can be abated at any time, granting damages for both diminution in value and the cost of remediation would unjustly enrich the plaintiff. Once the nuisance is eliminated, the cause of the diminution in value will also be eliminated, thereby making an award of damages for future harm unnecessary and unjust. *Santa Fe P'ship,* 46 CA4th at 977. See also *Capogeannis v Superior Court* (1993) 12 CA4th 668, 679 (recovery of future damages would be inconsistent with theory of continuing nuisance); *Alexander v McKnight* (1992) 7 CA4th 973, 978 (equitable relief ordering abatement plus award of damages for future harm would unjustly enrich plaintiffs).

§16.9 3. Which Type to Claim?

The distinctions between permanent nuisance and continuing nuisance can be difficult to discern. Courts that have discussed the two forms of nuisance often do so interchangeably with the tort of trespass. For example, courts have held that the two primary characteristics of a continuing nuisance or trespass are (1) the nuisance or trespass is abatable and/or (2) the damages from the nuisance or trespass may vary over time. See, *e.g., Kafka*

v Bozio (1923) 191 C 746, 751 (encroachment by defendant's building progressively leaning over plaintiff's adjacent property line was abatable and therefore continuing nuisance and trespass). Cases that have found the nuisance complained of to be permanent in nature have involved solid structures, such as a building encroaching upon the plaintiff's land. See, *e.g., Rankin v DeBare* (1928) 205 C 639 (building encroached by 1.5 inches); *Field-Escandon v DeMann* (1988) 204 CA3d 228 (buried sewer line running through plaintiff's property); *Troeger v Fink* (1958) 166 CA2d 22 (encroachment by adjacent buildings).

Nevertheless, it is difficult to classify a nuisance as either continuing or permanent, particularly if it is uncertain whether the nuisance can actually be abated. The California Supreme Court recognized this difficulty in *Spaulding v Cameron* (1952) 38 C2d 265, 267:

> In early decisions of this court it was held that it should not be presumed that a nuisance would continue, and damages were not allowed for a decrease in market value caused by the existence of the nuisance but were limited to the actual physical injury suffered before the commencement of the action. [Citations] The remedy for a continuing nuisance was either a suit for injunctive relief or successive actions for damages as new injuries occurred. Situations arose, however, where injunctive relief was not appropriate or where successive actions were undesirable either to the plaintiff or the defendant or both. Accordingly, it was recognized that some types of nuisances should be considered permanent, and in such cases recovery of past and anticipated future damages were allowed in one action.

PRACTICE TIP➤ The bottom line is that if a defendant is not privileged to continue the nuisance and is able to abate it, they cannot complain if the plaintiff elects to bring successive actions under a continuing nuisance theory until abatement takes place. "On the other hand, if it appears improbable as a practical matter that the nuisance can or will be abated, the plaintiff should not be left to the troublesome remedy of successive actions." 38 C2d at 268. There seems to be a preference in the case law for finding a continuing nuisance. See, *e.g., Mangini v Aerojet-Gen. Corp. (Mangini I)* (1991) 230 CA3d 1125, 1146. It is likely to protect the plaintiff from "contingencies" such as unforeseen future injury and the statute of limitations itself and to encourage abatement of nuisance. The courts have consistently adhered to *Spaulding*'s rule that in a case in which the distinction between permanent and continuing nuisance is close or doubtful the plaintiff will

be permitted to elect which theory to pursue. See, *e.g., Spar v Pacific Bell* (1991) 235 CA3d 1480, 1487. Therefore, pleading a continuing *and* permanent nuisance may be the best approach if it is not possible to classify the type of nuisance.

§16.10 C. Public Nuisance and Private Nuisance

Under CC §3480, a public nuisance is "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." See *Mendez v Rancho Valencia Resort Partners, LLC* (2016) 3 CA5th 248, 262. Every other nuisance is private. CC §3481. A private nuisance claim is a claim for "a nontrespassory interference with the private use and enjoyment of land." *Wilson v Southern Cal. Edison Co.* (2018) 21 CA5th 786, 802. However, a private person may maintain an action for a public nuisance "if it is specially injurious to himself, but not otherwise." CC §3493. A private nuisance is a civil wrong "based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large." *Venuto v Owens-Corning Fiberglas Corp.* (1971) 22 CA3d 116, 124. Thus, a plaintiff may maintain a private nuisance action based on a public nuisance when the nuisance causes "an injury to plaintiff's private property, or to a private right incidental to such private property." 22 CA3d at 125. Further, when "the nuisance is a private as well as a public one, there is no requirement that the plaintiff suffer damage different in kind from that suffered by the general public." 22 CA3d at 124.

Nuisances may be both public and private, the distinction being not in the number of persons affected but in the special injury that results to a particular individual. *Biber v O'Brien* (1934) 138 CA 353, 357. In *Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, a court held that a resident of an apartment complex pleaded a cause of action for public nuisance sufficient to withstand a demurrer when she alleged that the presence of secondhand smoke interfered with her use and enjoyment of the outdoor facilities in the complex by aggravating her allergies and asthma. The court found that a special injury under §3493 was shown, and although the resident was a minor, she had the right to enjoyment of the premises as a member of a tenant's family.

Public nuisance may also be a private one when it interferes with enjoyment of land. *Freitas v City of Atwater* (1961) 196 CA2d 289, 294. For example, a landowner's use of irrigation waters to such an extent that it

interferes with the use of the water by adjacent owners is a public nuisance. *Ex parte Elam* (1907) 6 CA 233. See *Oppen v Aetna Ins. Co.* (9th Cir 1973) 485 F2d 252 (private party could not maintain nuisance action for damages based on oil spill when claim, although stylized as one for loss of use of pleasure boats, actually involved loss of navigation rights in channel and when plaintiff, whose claim sought redress of "public" nuisance, alleged no "specially injurious" results peculiar to himself).

The distinction between public nuisance and private nuisance is also discussed in §§5.13–5.14 (on fences), §6.38 (on animals), §§7.3–7.4 (on noise, odors, and light), §8.7 (on wind and solar), §§9.13–9.14 (on blight and vacancy), §§10.5–10.6 (on neighborhood crime), §11.30 (on toxic torts), and §§12.17–12.18 (on home businesses).

§16.11 D. Attorney Fees

Under CCP §1021, attorney fees are not recoverable in California unless authorized by statute or contract. It has been long held that there is no statutory provision that allows for attorney fees in tort actions. *Falk v Waterman* (1874) 49 C 224. Civil Code §3496 provides for the recovery of costs—including costs of investigation and discovery—and reasonable attorney fees to a prevailing party in certain public nuisance cases brought by a governmental agency (*e.g.,* under §3496(a), when an agency seeks to enjoin the sale, distribution, or public exhibition for commercial consideration of obscene material).

Under Govt C §38773.5(b), any ordinance that allows for recovery of attorney fees in a public nuisance abatement action must also allow for recovery of attorney fees by a prevailing party and not just the prevailing municipality. See *City of Monte Sereno v Padgett* (2007) 149 CA4th 1530, 1536 (ordinance providing that city could recover attorney fees incurred in pursuing remedies to abate nuisance was invalid due to conflict with statute requiring abatement ordinances to permit recovery of fees by prevailing party).

III. ATTRACTIVE NUISANCE

§16.12 A. General Rule Regarding Trespassers

As a general rule, the owner of land is under no duty to keep the premises safe for trespassers. *Peters v Bowman* (1896) 115 C 345. A trespasser is anyone who enters or remains on the premises without the owner's consent or a privilege to do so. *Boucher v American Bridge Co.* (1950) 95 CA2d 659, 668 (subcontractor's employee went to another part of building); *Demmer v City*

of Eureka (1947) 78 CA2d 708, 711 (child paddled floating log over defendant's flooded premises). The landowner must exercise only ordinary care for the safety of others the landowner knows or should expect will be on the property. *Staggs v Archison, Topeka & Santa Fe Ry. Co.* (1955) 135 CA2d 492, 500.

§16.13 B. Exception to General Rule: Attractive Nuisance

The exception to this general rule is usually referred to as the attractive nuisance doctrine and is generally applied when children are injured on the property of others. See, *e.g., Barrett v Southern Pac. Co.* (1891) 91 C 296. The conditions necessary to bring this doctrine into play, as stated in Restatement (Second) of Torts §339 (1965), have been adopted as the law of California. *King v Lennen* (1959) 53 C2d 340, 343; *Garcia v Soogian* (1959) 52 C2d 107, 110.

§16.14 1. Attractive Nuisance Defined

Under Restatement (Second) of Torts §339 (1965), which is generally followed in California, an owner or possessor of real property is liable for harm to trespassing children caused by an "artificial condition" when

- The place is one on which children are likely to trespass;
- The condition involves an unreasonable risk of death or serious bodily harm to children;
- The children, because of their youth, do not discover the condition or realize the risk;
- The possessor's utility of maintaining the condition and the burden of eliminating the condition are slight compared with the risk; and
- The possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children.

See *Crain v Sestak* (1968) 262 CA2d 478 (fall from construction scaffolding). This doctrine has been applied in a wide variety of circumstances. See, *e.g., King v Lennen* (1959) 53 C2d 340 (swimming pool); *Courtell v McEachen* (1959) 51 C2d 448 (burning embers); *Helguera v Cirone* (1960) 178 CA2d 232 (building under construction); *Woods v City & County of San Francisco* (1957) 148 CA2d 958 (school under construction). The California Supreme Court has stated several times that the "question of liability must be decided in the light of all the circumstances and not by arbitrarily placing

cases in rigid categories on the basis of the type of condition involved." See *King,* 53 C2d at 343; *Garcia v Soogian* (1959) 52 C2d 107, 110.

§16.15 2. *Rowland v Christian:* Standard of Ordinary Care

In *Rowland v Christian* (1968) 69 C2d 108, the California Supreme Court abolished distinctions in the duty of care owed by a landowner to trespassers, licensees, or invitees (*Beard v Atchison, Topeka & Santa Fe Ry. Co.* (1970) 4 CA3d 129, 135):

> Under *Rowland* … , the liability of a possessor of property to trespassing children is no longer limited by the conditions set out in Restatement Second Torts, §339 … , or by the terms of other special doctrines and theories created as exceptions to a general rule barring trespassers from recovery for negligence, but is governed by Civil Code, section 1714, which imposes general liability on every person for injuries occasioned to others by want of ordinary care in the management of his property. … The possessor's duty of ordinary care extends to invitees and trespassers alike, although the foreseeability of injury, and hence the degree of care required of a possessor, continues to be influenced by the likelihood that persons will be present on the property at a particular time and place, a likelihood normally considerably greater for invitees than for trespassers. … The former gradations of degree in the possessor's duty of care, which varied with the status of persons on the property, have been superseded by a generic duty owed to all persons on the property based on the reasonable foreseeability of harm to them. Under *Rowland* … the extent of a possessor's duty is controlled by the foreseeability of the risk and not by the status of the person injured.

See *Silva v Union Pacific R.R. Co.* (2000) 85 CA4th 1024, 1028.

IV. TRESPASS

§16.16 A. Trespass Defined

"A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. … A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession." *Wilson v Interlake Steel Co.* (1982) 32 C3d 229, 233, quoting Restatement (Second) of Torts §821D, Comment d (1979); *McBride v Smith* (2018) 18 CA5th 1160 (trespass is an invasion of plaintiff's interest in exclusive possession of land). The essence of the cause of action

for trespass is an "unauthorized entry" onto the land of another. Thus, in order to state a cause of action for trespass, a plaintiff must allege an unauthorized and tangible entry on the land of another, which interfered with the plaintiff's exclusive possessory rights. *McBride,* 18 CA5th at 1173, citing *Wilson*.

California adheres firmly to the view that "[t]he cause of action for trespass is designed to protect *possessory*—not necessarily ownership—interests in land from unlawful interference." *Smith v Cap Concrete, Inc.* (1982) 133 CA3d 769, 774.

§16.17 1. Continuing Trespass Versus Permanent Trespass

A trespass may be continuing or permanent. *Madani v Rabinowitz* (2020) 45 CA5th 602; *Field-Escandon v DeMann* (1988) 204 CA3d 228. A permanent trespass is an intrusion on property under circumstances that indicate an intention that the trespass be permanent. In these cases, the law considers the wrong to be completed at the time of entry and allows recovery of damages for past, present, and future harm in a single action, generally the diminution in the property's value. The cause of action accrues and the statute of limitations begins to run at the time of entry. See *Kafka v Bozio* (1923) 191 C 746, 751; *Madani,* 45 CA5th at 608. As an example, it has been stated that the clearest case of a permanent trespass "is the one where the offending structure or condition is maintained as a necessary part of the operations of a public utility." *Spaulding v Cameron* (1952) 38 C2d 265, 267.

In contrast, a continuing trespass is an intrusion under circumstances that indicate that the trespass can be discontinued or abated. In these circumstances, damages are assessed for present and past damages only; prospective damages are not awarded because the trespass may be discontinued or abated at some time, ending the harm. *Field-Escandon,* 204 CA3d at 233. As with nuisance, the distinctions between the two forms of trespass can be difficult to discern. See *Starrh & Starrh Cotton Growers v Aera Energy LLC* (2007) 153 CA4th 583, 592, for a discussion regarding the two forms of trespass.

PRACTICE TIP➤ As discussed in §16.9, pleading a continuing *and* permanent trespass may be the best approach if it is not possible to classify the type of trespass.

For additional discussion of permanent and continuing trespass, see §§1.54–1.55.

§16.18 2. Physical Entry Not Required

For trespass, the interference need not take the form of the wrongdoer's physical entry onto the property; it can occur by causing the entry of material objects or inanimate substances. *Wilson v Interlake Steel Co.* (1982) 32 C3d 229. For instance, a trespassory invasion may take the form of ginning lint (*Kornoff v Kingsburg Cotton Oil Co.* (1955) 45 C2d 265) or cement dust (*Roberts v Permanente Corp.* (1961) 188 CA2d 526).

§16.19 3. Intangible Intrusions

Intangible intrusions such as noise and vibrations may constitute a trespass if they cause actual physical damage (*Wilson v Interlake Steel Co.* (1982) 32 C3d 229, 232) as opposed to merely a diminution in market value (*San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 937). Even damaging electronic signals sent by a computer hacker can constitute a trespass to personalty. *Thrifty-Tel, Inc. v Bezenek* (1996) 46 CA4th 1559, 1566 n6.

However, a distinction is perceived between noise-caused vibrations resulting in damage or injury and noise waves that are merely bothersome and not damaging; the latter do not constitute a trespass but must be dealt with as a nuisance (see §§16.2–16.10). See *Gallin v Poulou* (1956) 140 CA2d 638, 641; *McNeill v Redington* (1944) 67 CA2d 315, 319.

§16.20 B. Whom to Name in Trespass Action

The proper party in an action for trespass to real property is the person in actual possession of the property when the incursion occurred. *Lightner Mining Co. v Lane* (1911) 161 C 689, 694; *Williams v Goodwin* (1974) 41 CA3d 496, 508. In the context of a trespass action, "possession" is synonymous with "occupation" and connotes a subjection of property to one's will and control. The simple elements of a cause of action for trespass or injury are the plaintiff's lawful possession or right to possession, as the owner or otherwise, of described property. Even one in peaceable though wrongful possession of real property may sue in tort for forcible interference with that possession, even in the absence of injury to their person or goods. *Veiseh v Stapp* (2019) 35 CA5th 1099, 1105.

A lessee has the right to occupy the land to the exclusion of the landowner. *Corson v Brown Motel Invs., Inc.* (1978) 87 CA3d 422, 426. Thus the landowner and any agent of the landowner may be deemed trespassers. *Yee Chuck v Board of Trustees of Leland Stanford Jr. Univ.* (1960) 179 CA2d 405, 411.

§16.21 C. Recovering Damages

As with a private nuisance action, the plaintiff in a trespass case is entitled to be made whole in damages for the detriment caused, whether or not the defendant could have anticipated the detriment. CC §3333. If the trespass is permanent (*e.g.,* a structural encroachment), the plaintiff sues for all past and prospective damage in a single action with a single statutory period of limitations beginning with the original entry. If the trespass is continuing (*e.g.,* intrusion of runoff water from neighboring property after storms), the landowner can bring successive actions as the injuries occur and the damages accrue; each invasion gives rise to a separate cause of action with its own statute of limitations and damage recovery. See *Mangini v Aerojet-Gen. Corp. (Mangini II)* (1996) 12 C4th 1087, 1093. For further discussion of trespass damages, see §17.51.

§16.22 D. Treble Damages for Unlawfully Cutting or Carrying Away Trees or Timber

California law allows for an action for trespass for cutting or carrying away trees or timber from another's land. Treble damages are allowed as part of any recovery. CCP §733. A much higher standard of proof is necessary to establish treble damages for wrongful injury to trees or unlawful removal of timber. The damages may only be awarded when the wrongdoer acted willfully or maliciously with the intent to vex, harass, annoy, or injure the plaintiff. *Crofoot Lumber, Inc. v Ford* (1961) 191 CA2d 238, 246. See *Isom v Rex Crude Oil Co.* (1903) 140 C 678; *Stewart v Sefton* (1895) 108 C 197. See also chap 4 (on trees).

§16.23 E. Attorney Fees for Trespass on Agricultural Lands

Attorney fees are recoverable in trespass actions in very limited circumstances detailed in CCP §1021.9, which provides:

> In any action to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended or used for the raising of livestock, the prevailing plaintiff shall be entitled to reasonable attorney's fees in addition to other costs, and in addition to any liability for damages imposed by law.

The "trespassing" on agricultural lands relates to both surface and subsurface property rights. *Starrh & Starrh Cotton Growers v Aera Energy LLC*

(2007) 153 CA4th 583, 606 (involving subsurface migration of groundwater onto plaintiff's property).

There is no requirement in §1021.9 that the property be used at the time of the wrong for raising livestock—the statute requires only that the property be "intended" for such use. *Kelly v CB&I Constructors, Inc.* (2009) 179 CA4th 442. Accordingly, in *Kelly,* the jury found that the defendant negligently sparked a brush fire that caused significant damage to the plaintiff's ranch, which the "plaintiff intended to use … for raising livestock, entitling plaintiff to an award of attorney fees" under §1021.9. 179 CA4th at 447. The fact that the plaintiff had used the property for livestock purposes in the past was probative of the plaintiff's intended use. 179 CA4th at 465. See also *Elton v Anheuser-Busch Beverage Group, Inc.* (1996) 50 CA4th 1301 (negligent invasion by fire causing damage to real property is trespass, so attorney fees are appropriate; attorney fees are not damages).

Under CCP §1021.9, if there are only nominal damages, and not any actual or compensable injury to real or personal property as a result of the trespass, attorney fees will not be awarded. *Belle Terre Ranch, Inc. v Wilson* (2015) 232 CA4th 1468 (award of $1 in nominal damages for past trespass did not warrant award of attorney fees).

V. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (IIED)

§16.24 A. Background

California first recognized intentional infliction of emotional distress (IIED) as an independent tort in 1952. See *State Rubbish Collectors Ass'n v Siliznoff* (1952) 38 C2d 330, 336; *Marlene F. v Affiliated Psychiatric Med. Clinic, Inc.* (1989) 48 C3d 583, 593. The California Supreme Court has stated (*State Rubbish Collectors,* 38 C2d at 337, quoting Restatement of Torts §46, Comment d (1948 Supplement)):

> "The interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it. … In the absence of a privilege, the actor's conduct has no social utility; indeed it is anti-social. No reason or policy requires such an actor to be protected from the liability which usually attaches to the willful wrongdoer whose efforts are successful."

§16.25 B. IIED Defined

The elements of a cause of action for IIED are well established and must include allegations of (*Agarwal v Johnson* (1979) 25 C3d 932, 946, overruled on other grounds in *White v Ultramar, Inc.* (1999) 21 C4th 563, 574 n4; *Wilson v Southern Cal. Edison Co.* (2015) 234 CA4th 123, 152; *Newby v Alto Riviera Apartments* (1976) 60 CA3d 288, 297)

- Outrageous conduct by the defendant;
- The defendant's intention to cause, or reckless disregard of the probability of causing, emotional distress;
- Severe emotional suffering by the plaintiff; and
- The defendant's conduct being the actual and proximate cause of the emotional distress.

Damages are not recoverable for distress resulting from "mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities, or threats … [that] amount to nothing more than mere annoyances" (*Yurick v Superior Court* (1989) 209 CA3d 1116, 1128, disapproved on other grounds in *Carmichael v Alfano Temp Personnel* (1991) 233 CA3d 1126, 1130). However, such conduct may be subject to a civil harassment injunction. See §§16.32–16.35.

§16.26 1. Outrageous Conduct

The test of extreme and outrageous conduct in a claim for IIED is an objective one: Would the conduct involved outrage the average member of the community—that is, is it conduct "exceeding all bounds usually tolerated by a decent society?" *Newby v Alto Riviera Apartments* (1976) 60 CA3d 288, 297. See also *Wilson v Southern Cal. Edison Co.* (2015) 234 CA4th 123, 154. The outrageousness of the conduct may arise instead from the defendant's knowledge of the plaintiff's particular susceptibility. 60 CA3d at 297.

In the context of neighbor disputes, as in other contexts, the existence of difficult issues "in determining the kind and extent of invasions that are sufficiently serious to be actionable [does not] warrant the denial of relief altogether." *State Rubbish Collectors Ass'n v Siliznoff* (1952) 38 C2d 330, 338.

§16.27 2. Outrageous Conduct and Neighbor Disputes

Generally, courts conclude that disputes between neighbors fail to meet the required threshold of outrageousness. For example, the trial court in

Schild v Rubin (1991) 232 CA3d 755 dissolved an injunction prohibiting a neighbor's children from playing basketball on their own property (232 CA3d at 763):

> From our review of the record, we suspect that the bulk of any emotional distress suffered by the Rubins has been generated by the litigation in this case rather than by the noise from the Schilds' basketball playing. … A reasonable person must expect to suffer and submit to some inconveniences and annoyances from the reasonable use of property by neighbors, particularly in the sometimes close living of a suburban residential neighborhood.

Moreover, California courts have not hesitated to decide this question as a matter of law in cases when no reasonable person could find the requisite degree of outrageousness. See, *e.g., Cochran v Cochran* (1998) 65 CA4th 488, 497; *Yurick v Superior Court* (1989) 209 CA3d 1116, 1128, disapproved on other grounds in *Carmichael v Alfano Temp Personnel* (1991) 233 CA3d 1126, 1130.

In regard to the issue of severe emotional suffering, California courts have held that the similar phrase "severe emotional distress" means highly unpleasant mental suffering or anguish "from socially unacceptable conduct" (*Thing v La Chusa* (1989) 48 C3d 644, 648), which entails such intense, enduring, and nontrivial emotional distress that "no reasonable [person] in a civilized society should be expected to endure it" (*Fletcher v Western Nat'l Life Ins. Co.* (1970) 10 CA3d 376, 397).

§16.28 C. Recovering Damages

The right to recover damages for the intentional infliction of mental distress that results in physical injury has long been recognized in California. See *State Rubbish Collectors Ass'n v Siliznoff* (1952) 38 C2d 330, 336; *Richardson v Pridmore* (1950) 97 CA2d 124, 130. However, physical injury is not always a prerequisite for recovery of damages for IIED. In *Molien v Kaiser Found. Hosps.* (1980) 27 C3d 916, 922, the California Supreme Court held that a plaintiff may recover damages for serious emotional distress that proximately results from the wrongful conduct of a defendant who should have foreseen that the conduct would cause such distress. The broad language of *Molien* suggests that a showing of physical injury is not required in any emotional distress case. See *Hedlund v Superior Court* (1983) 34 C3d 695, 706 n8 (bystander plaintiff need not show physical injury to recover).

§16.29 1. Special Damages

Emotional distress may give rise to other harm and recoverable loss, such as

- Medical and incidental expenses,
- Lost wages and loss of earning capacity, and
- Loss of services.

§16.30 2. Punitive Damages

Punitive damages may be recovered for IIED on a showing of malice, oppression, or fraud. See *Slaughter v Legal Process & Courier Serv.* (1984) 162 CA3d 1236. Malice exists when the defendant intends to cause injury to the plaintiff or engages in despicable conduct with willful and conscious disregard of the rights and safety of others. CC §3294(c)(1).

§16.31 D. Attorney Fees Generally Not Available

Attorney fees are not generally available for claims of IIED. In California, attorney fees are not recoverable unless authorized by statute or contract. CCP §1021. It has long been held that there is no statutory provision that allows for attorney fees in tort actions. *Falk v Waterman* (1874) 49 C 224.

VI. CIVIL HARASSMENT

§16.32 A. Background

Sometimes neighbor disputes escalate into emotional campaigns of harassment. A person who suffers harassment from a neighbor may seek a temporary restraining order and an injunction prohibiting the harassment. CCP §527.6. The statute authorizes a "person who has suffered harassment" to use an expedited procedure to obtain the injunction. *Diamond View Ltd. v Herz* (1986) 180 CA3d 612, 616; *Byers v Cathcart* (1997) 57 CA4th 805, 811. The legislative history reveals that the impetus for the statute was the intimidating experience suffered by a woman who was hounded day after day by a male admirer who constantly followed the woman, incessantly telephoned her, and bombarded her with letters, clippings, and strange, unwanted gifts. *Diamond View Ltd.,* 180 CA3d at 619.

For additional discussion of civil harassment, including defenses and forms, see California Civil Procedure Before Trial, chap 32 (4th ed Cal CEB). See also §§2.39, 5.36, 9.38, 10.30–10.36, 17.20–17.26.

§16.33 B. Harassment Defined

The elements of unlawful harassment are as follows (CCP §527.6(b)(1), (b)(3)): a knowing and willful pattern of conduct entailing a series of acts over a period of time, however short, evidencing a continuity of purpose

- That is directed at a specific person;
- That seriously alarms, annoys, or harasses the person;
- That serves no legitimate purpose;
- That would cause a reasonable person to suffer substantial emotional distress and actually causes substantial emotional distress to the petitioner; and
- That is not a constitutionally protected activity.

See *E.G. v M.L.* (2024) 105 CA5th 688, 699; *Luo v Volokh* (2024) 102 CA5th 1312, 1322.

PRACTICE TIP➤ The prevailing party in a harassment suit may be awarded court costs and attorney fees. CCP §527.6(s). See also *Krug v Maschmeier* (2009) 172 CA4th 796; *Schraer v Berkeley Prop. Owners' Ass'n* (1989) 207 CA3d 719.

§16.34 C. Examples of Harassing Conduct

Code of Civil Procedure §527.6 was passed (*Grant v Clampitt* (1997) 56 CA4th 586, 591)

> to supplement the existing common law torts of invasion of privacy and intentional infliction of emotional distress by providing quick relief to harassment victims threatened with great or irreparable injury. [Citation] It was enacted to protect the individual's right to pursue safety, happiness and privacy as guaranteed by the California Constitution.

Section 527.6 has been used when a victim has been stalked, threatened, or seriously harassed. 56 CA4th at 591. Examples of the type of behavior that triggers §527.6 protections (56 CA4th at 591):

- Defendant hired detective to follow her neighbor, threatened neighbor's family members, threatened neighbor with legal action and physical harm, and falsely accused neighbor of having AIDS and causing failure of defendant's marriage. *Kobey v Morton* (1991) 228 CA3d 1055.
- Defendants (downstairs neighbors) played their stereo at extremely high volume, made false reports to animal regulation officers that upstairs neighbors were harming defendants' dogs, parked in

neighbors' parking spaces, broke into neighbors' storage shed to remove their bicycles, and repeatedly rang neighbors' doorbell. *Ensworth v Mullvain* (1990) 224 CA3d 1105; *Elster v Friedman* (1989) 211 CA3d 1439.

- Defendant wrote "vile and vitriolic" letters to family of his girlfriend, which included a "credible threat of violence." *Brekke v Wills* (2005) 125 CA4th 1400.
- Defendant verbally abused and cursed at neighbors. *Malatka v Helm* (2010) 188 CA4th 1074.
- Defendants cursed and yelled racial and homophobic slurs at neighbors, threw liquid onto neighbors' property, scared neighbors' 3-year-old child, and ordered their dogs to attack neighbor. *Burchmore v Linare* (Dec. 9, 2011, A129852, A129853, A129854, A129855; not certified for publication) 2011 Cal App Unpub Lexis 9432.
- Defendant physically intimidated board member of homeowners association (referred to throughout this chapter as HOA), including blocking her path at meetings, swinging his arms near her, peering into the windows of her home, frequently walking outside her home, and looking through her garbage. *Meyer v Tatham* (May 3, 2012, G045546; not certified for publication) 2012 Cal App Unpub Lexis 3378.
- Minor defendant posted videos on social media accusing her mother's former partner of supporting her mother's sexual abuse and neglect of defendant and her sibling. The videos included the former partner's identity, including personal and professional contact information. *E.G. v M.L.* (2024) 105 CA5th 688.
- Code of Civil Procedure §527.6(b)(6)(A) was amended by Stats 2015, ch 401, §1, to allow animal owners to obtain protective orders giving them exclusive care, possession, or control of an animal, and an order for the respondent or restrained person to stay away from, and refrain from taking or harming, that animal.

PRACTICE TIP➤ Many civil harassment cases are unpublished and, pursuant to Cal Rules of Ct 8.1115, cannot be cited as authority. Nevertheless, they present fact patterns that may be illustrative to counsel crafting or defending a request for a civil harassment injunction.

For additional discussion of civil harassment, including defenses and forms, see California Civil Procedure Before Trial, chap 32 (4th ed Cal CEB). See also §§2.39, 5.36, 9.38, 10.30–10.36, 17.20–17.26.

§16.35 D. Attorney Fees

Under CCP §527.6(s), a person seeking a temporary restraining order or injunction in an effort to prohibit harassment may be awarded costs and attorney fees if deemed the prevailing party. See *Alder v Vaicius* (1993) 21 CA4th 1770, 1777.

VII. SLANDER OF TITLE

§16.36 A. Slander of Title Defined

Slander of title is a false and unprivileged oral or written statement disparaging someone's title (or other interest, such as a leasehold, easement, or deed of trust) in property that results in actual pecuniary damage. *Gudger v Manton* (1943) 21 C2d 537, disapproved on other grounds in *Albertson v Raboff* (1956) 46 C2d 375, 381; *La Jolla Group II v Bruce* (2012) 211 CA4th 461, 473; *Stalberg v Western Title Ins. Co.* (1994) 27 CA4th 925, 929. The elements of the tort are the following (*Seeley v Seymour* (1987) 190 CA3d 844, 858):

- Publication of a false and disparaging statement,
- Absence of justification for the statement, and
- Direct pecuniary loss.

What makes conduct actionable is not whether a defendant succeeds in casting a legal cloud on the plaintiff's title but whether the defendant could reasonably foresee that the false publication might determine the conduct of a third person buyer or lessee. 190 CA3d at 858; *Wilton v Mountain Wood Homeowners Ass'n* (1993) 18 CA4th 565, 568.

A cause of action for slander of title is frequently joined with a quiet title action. See *Fearon v Fodera* (1915) 169 C 370. Quiet title actions are discussed in §§16.46–16.53.

§16.37 B. Differences From Defamation

There are important differences between a slander of title claim and one for defamation. A defamation claim seeks to vindicate personal interests; thus defamation is a personal injury. *O'Hara v Storer Communications, Inc.* (1991) 231 CA3d 1101, 1118. The thrust of the tort of disparagement or slander of title is protection from injury to the salability of real property. *Howard v Schaniel* (1980) 113 CA3d 256, 264. Unless some interest in property is involved, a plaintiff has no cause of action.

A slander of title action is assignable because it arises from the violation of a property right; a defamation cause of action, arising from the purely

personal right of the reputation of the one injured, is not assignable. CC §954; *Goodley v Wank & Wank, Inc.* (1976) 62 CA3d 389, 393. A slander of title cause of action survives the death of the plaintiff (or the defendant). *Smith v Stuthman* (1947) 79 CA2d 708, 709. By contrast, a defamation cause of action does not survive the plaintiff's death. *Flynn v Higham* (1983) 149 CA3d 677, 680.

A defamation cause of action, involving a personal injury, can form a basis for prejudgment interest. CC §3291; *O'Hara,* 231 CA3d at 1117. By contrast, a slander or disparagement of title cause of action, which seeks to vindicate a property interest, does not qualify for §3291 prejudgment interest. See *Continental Ins. Co. v Superior Court* (1995) 37 CA4th 69, 86; *Holmes v General Dynamics Corp.* (1993) 17 CA4th 1418, 1436.

In California, the 1-year statutory limitations period (CCP §340(c)) applies to defamation causes of action as infringements of personal rights, while the 2-year period (CCP §339(1)) applies to injurious falsehood causes of action (including slander of title) as infringements of property rights. *Guess, Inc. v Superior Court* (1986) 176 CA3d 473.

§16.38 C. When Act Is Privileged

When a defendant's conduct is justified by the application of an absolute privilege, the cause of action for slander of title is defeated. *Wilton v Mountain Wood Homeowners Ass'n* (1993) 18 CA4th 565, 569 n1 (recording lis pendens in action affecting title or possession to property in court of competent jurisdiction is absolutely privileged under CC §47(b)(4)). However, there are certain requirements that must be met under CC §47(b)(4) for the absolute privilege to apply. Civil Code §47(b)(4) provides:

> A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.

See *La Jolla Group II v Bruce* (2012) 211 CA4th 461, 472 (quiet title action was proper basis for lis pendens); *Alpha & Omega Dev., LP v Whillock Contracting Inc.* (2011) 200 CA4th 656, 665 (mechanics lien was proper basis for lis pendens).

When a defendant's conduct is conditionally privileged, however, proof of malice is required to maintain an action for slander of title. *Spencer v Harmon Enters.* (1965) 234 CA2d 614, 622. Although the existence of a privileged publication is usually raised by an affirmative defense, when the allegations in a complaint reveal the application of a qualified privilege, the

plaintiff must also allege malice to state a cause of action. *Smith v Commonwealth Land Title Ins. Co.* (1986) 177 CA3d 625, 630. Recording a document with knowledge that it contains false information is sufficient to support a finding of implied malice. *Contra Costa County Title Co. v Waloff* (1960) 184 CA2d 59, 66.

PRACTICE TIP➤ In *Palmer v Zaklama* (2003) 109 CA4th 1367, the court seemingly added a third requirement in dicta, concluding that the litigation privilege does not apply to a lis pendens if the underlying action is lacking in evidentiary merit. The court in *La Jolla Group II v Bruce, supra,* dismissed the argument that there is a third requirement under CC §47(b)(4). The court rejected the holding that the availability of the litigation privilege to a recorded lis pendens depends upon whether the claimant is able to make a certain evidentiary showing of merit to support the real property claim. The court held that "the dicta in *Palmer* that is relied upon by appellants was in error and we decline to follow it." 211 CA4th at 477. The *La Jolla Group II* court relied extensively on *Alpha & Omega Dev., LP v Whillock Contracting Inc.* in coming to its conclusion.

§16.39 D. Recovering Damages

Unless a disparaging statement causes damage, it is not actionable. *Burkett v Griffith* (1891) 90 C 532, 537. For a property owner to obtain damages for slander of title, the owner must show that the alleged loss was proximately caused by the slander. See, *e.g., Frank Pisano & Assocs. v Taggart* (1972) 29 CA3d 1, 25.

The plaintiff need not show that any particular buyer rejected the property as a result of the slander. It is enough that the plaintiff was deprived of a market in which, but for the disparagement, the property might "with reasonable certainty" have found a buyer. *Glass v Gulf Oil Corp.* (1970) 12 CA3d 412, 424.

Compensatory damages are awarded as in any other tort claim under CC §3333—that is, damages are restricted to (1) the loss directly and immediately resulting from the impairment of the salability of the property caused by the publication and (2) reasonable litigation expenses required to remove the doubt cast on the property by the disparaging publication. *Frank Pisano & Assocs. v Taggart, supra*. Compensatory damages specifically include

- The difference in the market price of the property interest before and after the disparagement (*i.e.,* depreciation). *Gudger v Manton* (1943) 21 C2d 537, disapproved on other grounds in *Albertson v Raboff* (1956)

46 C2d 375, 381; *Contra Costa County Title Co. v Waloff* (1960) 184 CA2d 59.

- The actual cost of removing a slanderous claim, such as expert fees, court costs, and attorney fees incurred in removing the cloud on title. *Contra Costa County Title Co. v Waloff, supra*; *Ezmirlian v Otto* (1934) 139 CA 486.
- The real estate broker's commission on a resale and the seller's rental expenses incurred in order to give the buyer possession. *Contra Costa County Title Co. v Waloff, supra*.
- The owner's increased cost of construction after a delay caused by the defendant's slander of title. *Appel v Burman* (1984) 159 CA3d 1209.
- General damages for the time spent and inconvenience suffered by the plaintiff in removing the doubt cast on the title to the property. *Seeley v Seymour* (1987) 190 CA3d 844.

§16.40 E. Attorney Fees Not Available

Attorney fees for prosecuting a slander of title action are not recoverable. *Contra Costa County Title Co. v Waloff* (1960) 184 CA2d 59. Likewise, emotional distress damages and damages for the loss of use of money that would have been realized from the sale of the property are not recoverable. *Seeley v Seymour* (1987) 190 CA3d 844.

VIII. NEGLIGENCE

§16.41 A. Negligence Defined

Civil Code §1714, which codifies the common law dichotomy of intentional torts and negligence (see *Mahoney v Corralejo* (1974) 36 CA3d 966, 972), sets forth the grounds for responsibility for willful acts or negligence. Specifically, the statute provides that everyone is responsible for injuries to another caused by want of ordinary care or skill in the management of their property.

§16.42 1. Precondition to Finding Negligence: Duty of Care Owed

While CC §1714 provides that a person is liable for injuries caused by the failure to exercise ordinary care in the management of property, the law requires more than a failure to exercise care and a resulting injury. There must be a legal duty to exercise care owed to the person injured and a breach

of that duty as the proximate cause of the resulting injury. The determination that a duty of care exists "is an essential precondition to liability founded on negligence." *Hooks v Southern Cal. Permanente Med. Group* (1980) 107 CA3d 435, 443; see also *Union Pac. R.R. Co. v Superior Court* (2024) 105 CA5th 838, 852–53.

Whether an individual owes a duty of care in a particular case depends on several factors (*Christensen v Superior Court* (1991) 54 C3d 868, 885; *Portillo v Aiassa* (1994) 27 CA4th 1128, 1135; *Union Pac. R.R. Co. v Superior Court* (2024) 105 CA5th 838, 858–59):

- The foreseeability of harm to the plaintiff,
- The degree of certainty that the plaintiff suffered injury,
- The closeness of the connection between the defendant's conduct and the injury suffered,
- The moral blame attached to the defendant's conduct,
- The policy of preventing future harm,
- The extent of the burden on the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and
- The availability, cost, and prevalence of insurance for the risk involved.

§16.43 2. Negligence and Neighbor Disputes

An example of a negligence claim involving neighbors can be found in *Booska v Patel* (1994) 24 CA4th 1786. The plaintiff brought an action for negligence against his neighbor, alleging that the neighbor negligently severed the roots of the plaintiff's tree that extended into the neighbor's yard, causing the tree to become unsafe and subsequently requiring removal. The trial court granted summary judgment for the defendant neighbor based on the ground that the neighbor had an absolute right to sever any roots that entered his property. The appellate court disagreed, holding that a triable issue of fact existed as to whether the neighbor acted negligently; he did not have an absolute right to sever the tree roots regardless of the consequences. Whatever rights the neighbor had in the management of his own land were tempered by his duty to act reasonably and to use his property in such a manner as to not cause foreseeable damage to others. The court cited CC §3514 (providing that one must use one's own rights so as not to infringe on the rights of another) and CC §1714 (imposing a duty on landowners to exercise reasonable care).

§16.44 B. Lateral and Subjacent Support

In regard to neighbor boundary disputes, claims can be brought for negligent damage to lateral and subjacent support under CC §832. At common law every owner of land was entitled to lateral support of their land from every coterminous owner, and the coterminous owner who excavated on adjoining property was compelled to protect the property in its natural state from sliding into the excavation. *Wharam v Investment Underwriters, Inc.* (1943) 58 CA2d 346, 349. A landowner who failed to take any precautions to sustain adjoining land while excavating on his own land, or to give notice that the work was to be done, was liable for a cave-in on the adjoining owner's land. *Charles F. Harper Co. v DeWitt Mortgage & Realty Co.* (1931) 115 CA 15. Liability for subsidence damage resulting to property from excavations on a noncontiguous tract must rest on negligence. *Puckett v Sullivan* (1961) 190 CA2d 489, 495.

For specific discussion of earth movement, landslides, and subsidence, see chap 3.

§16.45 C. Recovering Damages and Attorney Fees

As a general rule, under CC §3333, a party is entitled to recover as follows:

> For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

Although the scope of damages recoverable under §3333 is broad, it is not limitless and does not allow for recovery simply because a tortious act was the cause in fact ("but for causation") of the harm suffered. Rather, in a negligence action, it requires that the detriment be proximately caused by the act. *Chidester v Consolidated People's Ditch Co.* (1878) 53 C 56; *Safeco Ins. Co. of Am. v J & D Painting* (1993) 17 CA4th 1199, 1205.

There is no set formula for determining the type of damages one can recover as the result of a neighbor's negligence. It depends on the circumstances, the type of injuries, and the value of property at the time of loss or destruction. Were there personal injuries? Can the property no longer be sold? Does the property need to be repaired? As potential examples, damages could include, but are not limited to, the following: cost of making repairs, increased operating expense pending repairs, reasonable rental value of pasturage destroyed, loss of use of property, diminution in value of

property, value of property at time of loss or destruction, lost profits, medical expenses, and pain and suffering.

Section 3333 does not authorize recovery of attorney fees as damages. *Pederson v Kennedy* (1982) 128 CA3d 976; *Woodward v Bruner* (1951) 104 CA2d 83. The only exception is if recovery of fees is allowed under the provisions of a contract. CCP §§1021, 1033.5(a)(10); *Santisas v Goodin* (1998) 17 C4th 599, 607 n4.

IX. QUIET TITLE

§16.46 A. California Statutes

In California, actions to quiet title are governed by CCP §§760.010–765.060. The purpose of a quiet title action is to establish or "quiet" title to or an interest in real property as between adverse claimants. CCP §760.020(a); *Deutsche Bank Nat'l Trust Co. v McGurk* (2013) 206 CA4th 201, 210; *Western Aggregates, Inc. v County of Yuba* (2002) 101 CA4th 278, 305; *Castro v Barry* (1889) 79 C 443. The ultimate fact to be found is the ownership of the disputed property or of an interest in it. *Rahlves & Rahlves, Inc. v Ambort* (1953) 118 CA2d 465. See *Caira v Offner* (2005) 126 CA4th 12, 24 (quiet title action "akin" to declaratory relief action).

PRACTICE TIP➤ A quiet title action can be a preemptive act: the plaintiff need not wait until they have been disturbed in possession of the property or sued to bring a quiet title action. *Curtis v Sutter* (1860) 15 C 259. The client can beat their adversary to the punch by filing first.

The statutes and rules applicable to general civil actions apply to quiet title actions, unless they are inconsistent with the specific quiet title provisions. CCP §760.060. Judgments in quiet title actions are governed by CCP §§764.010–764.080.

The quiet title statutes require the plaintiff to name as defendants all persons having adverse claims to the property that are of record or who are known to the plaintiff. CCP §§762.010, 762.020, 762.060(b). In addition to the persons required to be named as defendants in the action, the plaintiff may name as defendants "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud upon plaintiff's title thereto." CCP §§762.020(a), 762.060(a). A plaintiff that files an action to quiet title must immediately record a lis pendens. CCP §761.010(b). Because the statute refers to "filing" a lis pendens, it is clearly referring to recordation with the recorder's office, not filing with the court. *Deutsche Bank,* 206

CA4th at 210 n11. Any person who has a claim to the property may appear as a defendant, whether or not that person is named in the complaint. CCP §762.050.

A plaintiff who does not have title at the time the plaintiff commences an action for quiet title or seeks to quiet title will be unable to prove the claim. *Pacific States Sav. & Loan Co. v Warden* (1941) 18 C2d 757, 759.

An action to quiet title has been held to have res judicata effect on a subsequent action for damages. *McNulty v Copp* (1954) 125 CA2d 697, 704.

An action to quiet title, based on the theory that a deed is void ab initio, is subject to a statutes of limitations such as the 3-year statute of limitations for an action for relief on the ground of fraud or mistake, or the 4-year catch-all statute of limitations. See *Walters v Boosinger* (2016) 2 CA5th 421, 432 (certain documents gave ex-boyfriend notice that his ex-girlfriend asserted that real property was being held in joint tenancy, thus starting the 3-year statute of limitations for relief on the ground of fraud or mistake).

§16.47 1. Making Quiet Title Claim

A complaint for quiet title must be verified and include the following (CCP §761.020):

- A description of the property that is the subject of the action, and in the case of real property, its legal description and street address or common designation, if any;
- The title of the plaintiff as to which a determination is sought and the basis of the title;
- The adverse claim to the title against which a determination is sought;
- The date as of which the determination is sought; and
- A prayer for the determination of the title of the plaintiff against the adverse claims.

A plaintiff in a quiet title action bears the burden of proof and must stand on the strength of their own title. *Mandel v Great Lakes Oil & Chemical Co.* (1957) 150 CA2d 621, 626. A lessor in possession of the property may maintain an action to quiet title. *Langstaff v Mitchell* (1931) 119 CA 407, 411. The court may not enter a judgment by default, but must examine and determine the plaintiff's title against the claims of all the defendants. CCP §764.010.

A court may grant quiet title to a defendant in a legal action or to a cross-complainant or in answer to a prayer for affirmative relief. A defendant may show title merely by denying plaintiff's claim to title in their answer.

Taliaferro v Crola (1957) 152 CA2d 448, 451. The answer to a complaint for quiet title must also be verified and set forth the following (CCP §761.030):

- Any claim to the property that the defendant has,
- Any facts tending to controvert any material allegations of the complaint the defendant does not wish to be taken as true, and
- A statement of any new matter constituting a defense.

Two statutes set forth the breadth of a quiet title judgment:

- Code of Civil Procedure §764.030: The judgment in the action is binding and conclusive on all of the following persons, regardless of any legal disability: (a) All persons known and unknown who were parties to the action and who have any claim to the property, whether present or future, vested or contingent, legal or equitable, several or undivided. (b) Except as provided in Section 764.045, all persons who were not parties to the action and who have any claim to the property which was not of record at the time the lis pendens was filed or, if none was filed, at the time the judgment was recorded.
- Code of Civil Procedure §764.045: A quiet title judgment does not affect a claim in the property of any person who was not a party to the action if any of the following conditions is satisfied: (a) The claim was of record at the time the lis pendens was filed or, if none was filed, at the time the judgment was recorded, and; (b) the claim was actually known to the plaintiff or would have been reasonably apparent from an inspection of the property at the time the lis pendens was filed or, if none was filed, at the time the judgment was entered.

See *Deutsche Bank Nat'l Trust Co. v McGurk* (2013) 206 CA4th 201 (court reversed and remanded for completion of bench trial to determine whether mortgage company's deed of trust was valid encumbrance). A quiet title judgment does not bind a nonparty whose interest was of record and known before the recording of the lis pendens.

PRACTICE TIP➤ A statutory action to quiet title is not an exclusive remedy, but it is cumulative to other remedies, such as partition actions, actions to remove cloud on title, and declaratory relief actions. However, a trial court may, on a motion by any party, require that the quiet title statutory provisions be utilized in these other actions. See CCP §760.030(b).

§16.48 2. Obtaining Default Judgments

Code of Civil Procedure §764.010 is frequently referred to as a prohibition against default judgments in quiet title actions; however, the section simply provides that a plaintiff does not have a right to entry of judgment as a matter of course following entry of the defendant's default in a quiet title action without showing proof of plaintiff's own title. See *Winter v Rice* (1986) 176 CA3d 679. The statute does not preclude entry of the defendant's default. 176 CA3d at 683. See CCP §585(b).

§16.49 3. Prove-Up Hearing

Under CCP §764.010, judgment may not be entered by the normal default prove-up methods; the court must require evidence of the plaintiff's title. If properly served defendants have not appeared, their default may be entered by the clerk, and judgment entered after a default prove-up hearing. All of the proof that the plaintiff would have presented at trial must be presented at that hearing; a declaration or other summary procedure will not be permitted. Live witnesses must testify, and complete authentication of the underlying real property records is essential. See California Real Property Remedies and Damages §7.50 (2d ed Cal CEB).

§16.50 B. Quiet Title and Probate Actions

The Probate Code has other provisions that may impact actions to quiet title. The probate court has authority to determine a defendant's claim to title pursuant to Prob C §§850–859. Section 850(a) provides that a "guardian, conservator, or any claimant" may "file a petition requesting that the court make an order under this part" when "the guardian or conservator or the minor or conservatee is in possession of, or holds title to, real or personal property, and the property or some interest therein is claimed to belong to another."

§16.51 C. Attorney Fees Generally Not Available

Attorney fees are not generally available in quiet title actions. In California, attorney fees are not recoverable unless authorized by statute or contract. CCP §1021. It has been long held that there is no statutory provision that allows for attorney fees in tort actions. *Falk v Waterman* (1874) 49 C 224. An exception to this general rule may be applicable when a person is forced to bring or defend an action based on the tort of another. See, *e.g., Stevens v Chisholm* (1919) 179 C 557, 564 (recovery of attorney fees allowed in action to defend against patently false claims of malicious prosecution); *Contra*

Costa County Title Co. v Waloff (1960) 184 CA2d 59, 67 (recovery of attorney fees allowed in interpleader and quiet title action brought by title company due to false claims of purchaser of real property); *Prentice v North Am. Title Guar. Corp.* (1963) 59 C2d 618, 620 (recovery of attorney fees allowed when escrow holder's negligence required plaintiffs to file quiet title action against third parties).

§16.52 D. Boundaries Involving Water

There is a separate statutory section that applies to issues related to boundaries involving water and the right to quiet title. Civil Code §830 provides as follows:

> Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide-water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

§16.53 E. Federal Quiet Title Act

The Quiet Title Act (28 USC §2409a) is the exclusive means by which adverse claimants may challenge the title of the federal government to real property. Two conditions must exist before a district court can exercise jurisdiction over an action under the Quiet Title Act (28 USC §2409a(a), (d)):

- The United States must claim an interest in the property at issue; and
- There must be a disputed title to real property.

X. VIOLATION OF COVENANTS

§16.54 A. Covenants That Run With the Land

Agreements and promises about the use of land are usually formalized and recorded in deeds, easements, CC&Rs, or other documents that grant an estate in real property. Many covenants are appurtenant to the estate being granted and bind the future assigns of the covenantor and vest in the future assigns of the covenantee, just as if they had personally entered into them. These covenants are said to "run with the land." See CC §§1460–1468; *Self v Sharafi* (2013) 220 CA4th 483, 489 (building restriction is covenant running with land under CC §1462). Covenants that run with the land are binding on all subsequent purchasers of the covenantor's property, including

a foreclosure sale purchaser. *Soman Props., Inc. v Rikuo Corp.* (1994) 24 CA4th 471, 483.

In *Heinly v Lolli* (1969) 2 CA3d 904, 911, a court held that "restrictions on the use of land will not be read into a restrictive covenant by implication; restrictive covenants are to be strictly construed against limitations upon the free use of property, and where subject to more than one interpretation, that construction consonant with the unencumbered use of the property will be adopted." See also *Biagini v Hyde* (1970) 3 CA3d 877, in which the court stated, "Restrictive covenants will be construed strictly against persons seeking to enforce them, and in favor of the unencumbered use of the property," but upheld a restrictive covenant that prohibited use of property for other than residential purposes.

§16.55 B. Limits on Who Can Bring Enforcement Action

There are limitations regarding who can bring an action to enforce a covenant or restriction on real property. Generally, restrictions may not be enforced by anyone other than the owner of land that was intended to benefit by the covenant or restriction. *Alexander v Title Ins. & Trust Co.* (1941) 48 CA2d 488, 492. Similarly, restrictive covenants that were made for the benefit of other property that was retained by the grantor cannot be enforced by the grantor after the grantor no longer owns any property benefited. *Kent v Koch* (1958) 166 CA2d 579. A lot owner who did not own property fronting or abutting on the same street of a subdivision as that of the defendant could not enforce building restrictions against the defendant. *Collani v White* (1940) 38 CA2d 539.

§16.56 C. Additional Actions

Potential actions may not only seek enforcement of a covenant or restriction but may also include

- A claim for damages due to the breach of a covenant or restriction, or
- A request for declaratory relief to establish enforcement (or unenforceability) of a particular covenant or restriction.

See, *e.g., Coppotelli v Dawson* (1969) 269 CA2d 731 (plaintiffs sought damages for violation of building height restriction after neighboring residence was built); *Ross v Harootunian* (1967) 257 CA2d 292 (plaintiffs sought declaration that deed restriction was unenforceable by reason of changed conditions).

§16.57 D. Common Interest Communities

Many declarations of CC&Rs for common interest communities contain mandatory arbitration or mediation requirements. Review of any CC&Rs applicable to the property in dispute should be a preliminary step in determining whether the claim must be handled through alternative dispute resolution (ADR) or may be litigated without first pursuing ADR. In limited situations, such provisions may be unenforceable. For example, several cases have refused to allow developer-drafted CC&Rs to preclude homeowners (or the HOA) from prosecuting an action in court against the developer for construction or design defect damages. See, *e.g., Treo @ Kettner Homeowners Ass'n v Superior Court* (2008) 166 CA4th 1055 (general judicial reference not appropriate in resolving dispute over equitable servitudes created by CC&Rs). However, the California Supreme Court has held that a developer in a construction defect dispute can enforce an *arbitration* provision in CC&Rs that are recorded before the HOA was formed. See *Pinnacle Museum Tower Ass'n v Pinnacle Mkt. Dev.* (2012) 55 C4th 223.

For additional discussion of internal enforcement of CC&Rs, see Advising California Common Interest Communities, chap 7 (2d ed Cal CEB).

§16.58 1. Homeowners Association (HOA)

A homeowners or community association (HOA) has standing to sue to enforce covenants in the governing documents. CC §§5975(a), 5980. Under §5980, an HOA has standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings pertaining to enforcement of the governing documents, in its own name as real party in interest, without joining the individual owners.

For additional discussion of enforcement of CC&Rs by HOAs, see Advising California Common Interest Communities, chap 7 (internal enforcement), and chap 12 (judicial enforcement; litigation) (2d ed Cal CEB).

§16.59 2. Owners

Typically, the owners of separate interests in a common interest development (*i.e.,* lots or units) look to the HOA as the principal enforcer of the covenants. However, owners may sue to enforce the covenants in the governing documents, unless the declaration provides otherwise. CC §5975(a). In addition, if the association fails to act to enforce a covenant, an owner may do so. See CC §5980; *Posey v Leavitt* (1991) 229 CA3d 1236.

For additional discussion of enforcement of CC&Rs, see Advising California Common Interest Communities §12.15 (2d ed Cal CEB).

§16.60 3. Attorney Fees

The prevailing party in an action to enforce CC&Rs is entitled to recover reasonable attorney fees as a matter of right. CC §5975(c). See also CC §5960.

XI. EASEMENTS AND ADVERSE POSSESSION ACTIONS

§16.61 A. Prescriptive Easements

Prescriptive easements (see §§1.17–1.21, 2.48–2.50, 5.31, 18.27–18.30) are created in accordance with CC §1007, which states:

> Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all, but no possession by any person, firm or corporation no matter how long continued of any land, water, water right, easement, or other property whatsoever dedicated to a public use by a public utility, or dedicated to or owned by the state or any public entity, shall ever ripen into any title, interest or right against the owner thereof.

A prescriptive easement is limited to the use under which it was acquired; no different or greater use can be made of the easement without the consent of the owners of the servient tenement. *Sufficool v Duncan* (1960) 187 CA2d 544, 550.

§16.62 1. Establishing Prescriptive Easement

To establish a prescriptive easement, a plaintiff must show, by clear and convincing evidence, that use of the land has been (*Silacci v Abramson* (1996) 45 CA4th 558, 563; *Applegate v Ota* (1983) 146 CA3d 702, 708)

- Open, notorious, and uninterrupted;
- Hostile to the true owner;
- Under the claim of right; and
- For the statutory period of 5 years. See *Hansen v Sandridge Partners, L.P.* (2018) 22 CA5th 1020, 1032.

See also §§1.18, 2.48–2.50, 18.28.

Whether the use of the property of another is hostile or is merely a matter of neighborly accommodation "is a question of fact to be determined in light of the surrounding circumstances and the relationship between the parties." *Warsaw v Chicago Metallic Ceilings, Inc.* (1984) 35 C3d 564, 572. In

addition, "continuous use of an easement over a long period of time without the landowner's interference is presumptive evidence of its existence and in the absence of evidence of mere permissive use it will be sufficient to sustain a judgment." 35 C3d at 571. Moreover, "once a prima facie case is shown by the party asserting the easement, the burden of proof shifts to the landowner to show the use is permissive rather than hostile." *Applegate,* 146 CA3d at 709.

Although the elements of adverse possession and prescriptive easement are very similar, proving a prescriptive easement does not require that the party claiming the right paid property taxes on the disputed land. See, *e.g., Harrison v Welch* (2004) 116 CA4th 1084.

§16.63 2. Prescriptive Easement Not Available for Typical Backyard Disputes

Generally, the scope of a prescriptive easement is determined by the actual use of the easement during the statutory period. *Thomson v Dypvik* (1985) 174 CA3d 329, 340. Courts may increase the scope of a prescriptive easement when the easement allows necessary use by the party seeking the easement without the imposition of a substantially greater burden on the owners of the property. *Applegate v Ota* (1983) 146 CA3d 702, 711.

When a prescriptive easement completely prohibits the true owner from using their land and thus amounts to an ownership interest or a fee simple estate, it becomes an exclusive prescriptive easement. *Silacci v Abramson* (1996) 45 CA4th 558, 564. An exclusive prescriptive easement will not be granted in a case "involving a garden-variety residential boundary encroachment." *Harrison v Welch* (2004) 116 CA4th 1084, 1093. "It is the exclusivity of the use of the surface of the land in the encroachment area that is determinative" of whether a prescriptive easement amounts to the prohibited exclusive prescriptive easement. 116 CA4th at 1094. For example, when landowners encroached on the property of their neighbors by building part of the driveway to their home and installing utility lines, a lawn, fences, shrubs, fruit trees, and other landscaping on the neighbors' land, the appellate court ruled that granting a prescriptive easement under the circumstances would "create the practical equivalent of an estate." *Raab v Casper* (1975) 51 CA3d 866, 877. See also *Hansen v Sandridge Partners, L.P.* (2018) 22 CA5th 1020, 1033 (plaintiffs were not entitled to exclusive prescriptive easement because that could only be obtained by adverse possession and elements of adverse possession (including paying taxes) were not met).

Similarly, an appellate court reversed a trial court's judgment granting a prescriptive easement for landscaping and recreation when a 10-foot area of

the encroachment, covered with trees and shrubs, was fenced off so that the landowners were barred from accessing their own property. *Mehdizadeh v Mincer* (1996) 46 CA4th 1296, 1304. The court emphasized that the trial court granted an interest that amounted to adverse possession "under the guise of a 'prescriptive easement'" because it excluded the owners from using, occupying, or enjoying the property in any meaningful way. 46 CA4th at 1304. Likewise, when landowners fenced in and used as a backyard 1600 square feet of their neighbors' property, an appellate court found that the easement amounted to an exclusive prescriptive easement, which was prohibited in "a simple backyard dispute like this one." *Silacci,* 45 CA4th at 564.

For additional discussion of prescriptive easements, see §§1.21, 2.50, 5.31, 18.30.

§16.64 B. Equitable Easements

In appropriate cases in which the requirements for traditional easements are not present, California courts have exercised their equity powers to fashion protective interests in land belonging to another, sometimes referring to such an interest as an "equitable easement." See, *e.g., Hinrichs v Melton* (2017) 11 CA5th 516, 522 (trial court may grant equitable easement for access to landlocked parcel without there being preexisting use by landowner seeking easement); *Linthicum v Butterfield* (2009) 175 CA4th 259 (roadway easement); *Field-Escandon v DeMann* (1988) 204 CA3d 228, 237 (sewer line encroachment); *Donnell v Bisso Bros.* (1970) 10 CA3d 38, 46 (access road); *Christensen v Tucker* (1952) 114 CA2d 554, 563 (encroachment by cement abutment, garage, badminton court). "[T]he courts are not limited to judicial passivity as in merely refusing to enjoin an encroachment. Instead, in a proper case, the courts may exercise their equity powers to affirmatively fashion an interest in the owner's land which will protect the encroacher's use." *Hirshfield v Schwartz* (2001) 91 CA4th 749, 765.

For additional discussion of equitable easements, see §§1.27, 2.52–2.56, 18.37–18.39.

§16.65 1. Establishing Equitable Easement: Doctrine of Relative Hardship

A court will consider three factors before creating an equitable easement (*Hirshfield v Schwartz* (2001) 91 CA4th 749, 759):

- The defendant must be innocent—that is, the encroachment must not be willful or negligent. The court will consider the parties' conduct to

determine who is responsible for the dispute. See *Hansen v Sandridge Partners, L.P.* (2018) 22 CA5th 1020, 1031 (farm landowner's encroachment onto neighboring property, through planting of pistachio trees and installment of irrigation system, was negligent, and thus encroachment could not be subject of equitable easement, even though there was evidence that such encroachment was not intentional).

- Unless the rights of the public would be harmed, the court will grant the injunction if the plaintiff "will suffer irreparable injury … regardless of the injury to defendant."
- The hardship to the defendant from granting the injunction "must be greatly disproportionate to the hardship caused plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant."

This review has come to be known as the doctrine of relative hardship. For additional discussion of this doctrine, see §§2.53, 18.38.

§16.66 2. When Equitable Easement Is Appropriate

The courts have enforced equitable easements in a wide variety of circumstances. In *Bradley v Frazier Park Playgrounds, Inc.* (1952) 110 CA2d 436, a court held that plaintiff lot owners in a subdivision had an equitable easement to use recreational facilities in the subdivision because they had relied on the representations of the original developer and salespeople that the recreation area would be maintained for their use. The successor owner of the recreation area knew or should have known of the representations and the reliance placed on the representations by the lot owners, so the successor could be restrained from interfering with the lot owners' right to use the recreational facilities as promised.

In *Miller v Johnston* (1969) 270 CA2d 289, the plaintiffs successfully sued to establish a right of ingress and egress to their property over a portion of the defendants' property. Acknowledging that in previous decisions applying the doctrine of relative hardship, "the courts were dealing with fixed structures which encroached on the property of another," the court concluded that "[t]here is no difference in principle, only in degree, between a driveway which cuts across a corner of lands of another and so encroaches 24 hours a day, and the transitory passage of vehicles which intermittently invade such lands." 270 CA2d at 306. The court held that the relative hardship test was properly applied to "adjust the equitable rights" of the parties by awarding the plaintiffs an easement for ingress and egress over the defendants' property. 270 CA2d at 292.

In *Tashakori v Lakis* (2011) 196 CA4th 1003, an appellate court held that declaratory relief under CCP §1060 was properly granted to create an equitable easement, even though the owners of a landlocked lot raised the issue affirmatively as plaintiffs. This was the first instance of an affirmative use of equitable easement in a California case; the court felt that an equitable remedy was appropriate because the defendants had threatened a lawsuit against the plaintiffs and this satisfied the "actual controversy" requirement necessary to grant declaratory relief. 196 CA4th 1012.

§16.67 C. Implied Easements

Courts apply the doctrine of implied easements to effectuate the intention of the parties as manifested by the facts and circumstances of the transaction. *Romero v Shih* (2024) 15 C5th 680, 692–93. Easements by implication arise when two adjoining parcels were previously held under common ownership. To sustain an easement by implication, the parties' intent to create such easement must be clear. *Thorstrom v Thorstrom* (2011) 196 CA4th 1406, 1420; *Peet v Schurter* (1956) 142 CA2d 237, 242. Strict necessity does not have to exist to create an easement by implication; all that is needed is reasonable necessity, and it is not required that the claimed easement be the only means of access. *Marin County Hosp. Dist. v Cicurel* (1957) 154 CA2d 294, 302. For additional discussion of implied easements, see §§1.23–1.25, 2.51, 18.31–18.33.

§16.68 1. Establishing Implied Easement

To establish an easement by implication, the claimant must show that (*Romero v Shih* (2024) 15 C5th 680, 698)

- There has been separation of title of the previously united parcels;
- Before the separation of title, the use on which the claim of easement is based was so long continued and obvious as to show intention of permanency; and
- An easement is reasonably necessary to beneficial enjoyment of the separated parcel.

§16.69 2. When Implied Easement Is Appropriate

In *Thorstrom v Thorstrom* (2011) 196 CA4th 1406, an appellate court found substantial evidence supporting an implied easement under CC §§806 and 1104 for the use of well water on adjoining parcels; however, it also found that the trial court erred in finding that the easement was exclusive.

Nor was the easement limited to the previous minimal use of water by the dominant tenement; both parties were entitled to a reasonable residential use of the water.

In *Kytasty v Godwin* (1980) 102 CA3d 762, a quiet title action, a trial court found that real property purchased by the plaintiff was subject to an access easement that arose by implication in favor of the prior purchaser of the adjoining property from the same grantor. The plaintiff was well aware of the existence of the road in question, having used it herself. Although she had not traveled its full length, she knew it was passable and was thus put on notice that an easement existed as a servitude on the property she was buying. "The implied easement or quasi-easement authorized by Civil Code section 1104 is reciprocal; hence, if a burden has been imposed on a parcel of land sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude on it." 102 CA3d at 770.

In *Muzzi v Bel Air Mart* (2009) 171 CA4th 456, the court held that a grocery store tenant's contention that its use of parking spaces for storage purposes was permissible under an implied easement theory was untenable because there was no preexisting use to give rise to an implied easement.

§16.70 D. Adverse Possession

Adverse possession is governed by CCP §322, which provides:

> When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

For additional discussion of adverse possession, see §§2.45–2.47, 18.18–18.25.

§16.71 1. Establishing Adverse Possession

The elements of adverse possession are well established and include the following:

- Possession must be by actual occupation under such circumstances as to constitute reasonable notice to the true owner of the property;
- Possession must be hostile to the owner's title;
- The adverse possessor must claim the property as their own, under either color of title or claim of right;
- Possession must be continuous and uninterrupted for 5 years; and
- The adverse possessor must pay all of the taxes levied and assessed on the property during the period.

Unless each of these elements is established by the evidence, the plaintiff has not acquired title by adverse possession. *West v Evans* (1946) 29 C2d 414, 417; *Estate of Seifert* (2005) 128 CA4th 64, 67. See also CC §1007; CCP §322.

§16.72 2. Defeating Adverse Possession

A property owner can interrupt the continuous possession element of adverse possession by filing an action for trespass or ejectment. *Carpenter v Natoma Water & Mining Co.* (1883) 63 C 616, 617; *California Md. Funding, Inc. v Lowe* (1995) 37 CA4th 1798, 1803. Actions for declaratory relief and to quiet title can also be brought. See *Western Title Guar. Co. v Sacramento & San Joaquin Drainage Dist.* (1965) 235 CA2d 815, 824. But the owner must initiate an action within 5 years of the adverse claimant's beginning continuous occupation of the property; if the property owner does not, they may neither maintain an action to recover the property nor defend against an action brought by the adverse possessor to quiet title. CCP §§318, 319; *Fugl v Witts* (1950) 97 CA2d 495, 496. See also §2.47.

Even a property owner who has no actual notice of the possessor's claim or occupancy may nonetheless be presumed to have notice of an adverse claim if it is sufficiently open and notorious. As one California appellate court colorfully wrote, an adverse user "must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest." *Wood v Davidson* (1944) 62 CA2d 885, 890. When an adverse claimant is "in open … possession … and the true owner fails to look after his interests and remains in ignorance of the claim, it is his own fault." 62 CA2d at 890. See *Unger v Mooney* (1883) 63 C 586, 595; *Lobro v Watson* (1974) 42 CA3d 180, 187.

§16.73 E. Attorney Fees

Attorney fees may be recoverable in an easement or adverse possession case only if authorized by contract. CCP §1021. Counsel should carefully review relevant documents, including any preexisting easement agreement, to determine whether they contain attorney fee provisions.

XII. MONUMENTS, FENCES, AND BOUNDARIES

§16.74 A. The Good Neighbor Fence Act of 2013

Effective January 1, 2014, the Good Neighbor Fence Act of 2013 (CC §841) repealed former CC §841, putting in its place a new CC §841. The Act creates a rebuttable presumption that adjoining landowners share equally in the cost of maintenance of boundaries and monuments between them. Under the prior law, coterminous owners were mutually bound to equally maintain the boundaries and monuments between them. The prior law also required coterminous owners to maintain fences between their properties. The new law instead requires adjoining landowners to share equally, with certain exceptions, the responsibility for maintaining the boundaries and monuments between them. The new law establishes a rebuttable presumption that adjoining landowners share an equal benefit from any fence dividing their properties and, absent a written agreement to the contrary, are equally responsible for the reasonable costs for the fence.

There are very few cases under the former CC §841. Under the prior law, liability arose from contract rights. *Bliss v Sneath* (1894) 103 C 43, 45. This provision, however, would not apply when one party wrongfully damages property of a neighbor by removing a preexisting boundary fence. *McCormick v Appleton* (1964) 225 CA2d 591. A division fence between adjoining properties located on the property line is allowed by CC §841. See *Meade v Watson* (1885) 67 C 591, 594. It is presumed that if the requirements of CC §841 are met, these cases would still apply to determine the rights of the parties.

The Good Neighbor Fence Act of 2013 establishes a procedure for a landowner to give notice to neighbors when intending to incur costs in maintaining a fence. The landowner must give 30 days' notice to the neighbor of the intent to incur costs and the presumption of equal responsibility for the costs of construction. CC §841(b)(2). The notice must provide a description of the nature of the problem, the proposed solution, the estimated costs, the proposed cost-sharing approach, and a proposed timeline for addressing the problem. CC §841(b)(2). See §16.74A. The presumption of

shared costs may be overcome by a demonstration that imposing equal responsibility for the costs would be unjust. CC §841(b)(3).

§16.74A B. Notice of Intent to Incur Costs for a Fence

_ _[*Date*]_ _

_ _[*Neighbor's name and address*]_ _

Re: Notice of Intent to Incur Costs for Fence Maintenance

Dear _ _[*Neighbor's Name*]_ _**:**

This constitutes a 30-day written notice in accordance with California Civil Code §841(b)(2) of my intent to incur costs regarding the maintenance of the fence between our properties. As adjoining landowners, under Civil Code §841(b)(1), we are presumed to share equal benefit from any fence dividing our properties. Further, under California Civil Code §841(b)(2), there is a presumption of equal responsibility for the reasonable costs of construction, maintenance, or necessary replacement of the fence between our properties. The following details the reasons behind my intent to incur costs regarding our shared fence:

Our shared fence is in need of _ _[*repair/replacement*]_ _ **because of** _ _[*describe the nature of the problem facing the shared fence. (e.g., dry rot, instability)*]_ _**.**

I intend to instigate repairs in the following manner: _ _[*Detail the proposed solution to resolve the issue (e.g., I intend to hire ABC Construction to replace, construct, or maintain the fence)*]_ _**.**

I have received an estimate totaling _ _[*dollar amount of estimate*]_ _ **for the cost to** _ _[*repair/replace*]_ _ **the fence. A copy of the estimate is attached hereto.**

I propose that we share in the costs of the repairs by _ _[*detail the proposed cost-sharing approach (e.g., splitting the costs equally)*]_ _**.**

I suggest that the problem be addressed as soon as reasonably possible. In any event, I suggest we begin _ _[*repair/replacement*]_ _ **by** _ _[*date*]_ _ **because it is anticipated that it will take** _ _[*number of days or weeks*]_ _ **to complete the project.**

I look forward to working with you to resolve the issues involving our shared fence. If you have any questions, suggestions, or concerns, please contact me.

Sincerely,
By: __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title*]_ _

Comment: This form is a sample letter that may be used to give notice to a neighbor that the client will be incurring costs in maintaining a fence. The notice must be provided to the owner of each property that shares the fence that is in need of maintenance. See CC §841. Because there is a rebuttable presumption that adjoining landowners share equally in the cost of maintenance of boundaries and monuments between them, the notice should propose equitable cost-sharing between the affected neighbors.

§16.75 C. Agreed Boundary Doctrine

The agreed boundary doctrine constitutes a firmly established exception to the general rule that the description of land contained in a deed is of determinative legal effect. One early case explained that the doctrine was established so that (*Young v Blakeman* (1908) 153 C 477, 481)

- When coterminous landowners, who were uncertain of the true position of the common boundary described in their respective deeds,
  - Agreed on a location for the boundary;
  - Marked the boundary, built up to it, or occupied each side of the boundary up to the agreed place; and
  - Continued this agreed boundary for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position; then
- This agreed boundary would become the true line called for by the respective deed descriptions, regardless of the accuracy of the agreed location or as it may appear by subsequent measurements.

The object of the rule is (153 C at 482)

> to secure repose, to prevent strife and disputes concerning boundaries, and make titles permanent and stable. … If a measurement is made and the line agreed on and acquiesced in as required by this rule, it is binding on and applicable to all parties to the agreement and their successors by subsequent deeds.

See also *Mello v Weaver* (1950) 36 C2d 456, 459 (when description in deed is uncertain, division of coterminous land in accordance with deed descriptions and mutual acquiescence of owners over long period of time establishes true boundary as called for by deed). For additional discussion of agreed boundary doctrine, see §§2.42–2.44.

§16.76 1. Legal Description of Boundary Must Be Unclear

Courts of appeal have held that (*Bryant v Blevins* (1994) 9 C4th 47, 55)

> the doctrine should not be applied broadly to resolve boundary disputes where there is no evidence that the neighboring owners entered into an agreement to resolve a boundary dispute and where the true boundary is ascertainable from the legal description set forth in an existing deed or survey.

See, *e.g., Martin v Van Bergen* (2012) 209 CA4th 84, 89 (doctrine of boundary by agreement in defense of plaintiffs' quiet title action did not apply, because there was no evidence of agreement of location for boundary); *Armitage v Decker* (1990) 218 CA3d 887, 902; *Finley v Yuba County Water Dist.* (1979) 99 CA3d 691, 698. The common theme of these decisions is (*Bryant,* 9 C4th at 55)

> a deference to the sanctity of true and accurate legal descriptions and a concomitant reluctance to allow such descriptions to be invalidated by implication, through reliance upon unreliable boundaries created by fences or foliage, or by other inexact means of demarcation.

The decisions show a deference to accurate legal descriptions and a reluctance to allow such descriptions to be invalidated by implication through reliance on boundaries created by fences, foliage, or other inexact means of demarcation.

§16.77 2. Fence Generally Not Manifestation of Agreed Boundary

Simply fencing off a parcel without satisfying the other elements of the doctrine will not create an agreed boundary. As courts of appeal have found, barriers are built for many reasons, only one of which is to act as a visible boundary between parcels of real property; other considerations include aesthetics, the control of livestock, and the need to constrain young children from wandering too far from a residence. See *Staniford v Trombly* (1919) 181 C 372, 375 (because fence had been built to control cattle, and not as agreed

boundary, court rejected defendant's claim to ownership of land based on agreed boundary doctrine); *Dooley's Hardware Mart v Trigg* (1969) 270 CA2d 337, 339 (agreed boundary does not apply when fence was erected to comply with local ordinance and did not result from agreement to fix uncertain boundary). See also §2.44.

XIII. INVERSE CONDEMNATION

§16.78 A. Mounting Action for Inverse Condemnation

An inverse condemnation action, in contrast to a condemnation action initiated by a public agency, is an eminent domain action initiated by a party whose property was taken for public use or damaged through a public improvement action. The principles of eminent domain law apply to inverse condemnation proceedings. *Simple Avo Paradise Ranch, LLC v Southern Cal. Edison Co.* (2024) 102 CA5th 281, 289–90; *Belmont County Water Dist. v State* (1976) 65 CA3d 13, 19 n3. A successful inverse condemnation claimant must prove that a public entity has taken or damaged its property for a public use. *San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 939. However the proceedings are not identical. See *Weiss v People ex rel Department of Transp.* (2020) 9 C5th 840. In that decision, the court noted that eminent domain actions typically focus on the amount of compensation owed the property owner, since by initiating the proceeding the government effectively acknowledges that it seeks to take or damage the property in question, while in an inverse condemnation action, the property owner must first clear the hurdle of establishing that the public entity has, in fact, taken or damaged the property before reaching the issue of just compensation. 9 C5th at 853.

Article I, §19, of the California Constitution has been interpreted by the California Supreme Court to mean that "any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed is compensable … whether foreseeable or not." *Albers v County of Los Angeles* (1965) 62 C2d 250, 263. Damage caused by the public improvement as deliberately conceived, altered, or maintained may be recovered under inverse condemnation. In *City of Pasadena v Superior Court* (2014) 228 CA4th 1228, 1233, a city-owned tree that fell on a private residence during a windstorm, damaging the structure, was part of a work of public improvement such that the city could be held liable for inverse condemnation. The city's motion for summary adjudication was denied because the city's forestry program, of which the tree was a part, was the result of a deliberate governmental action serving a public purpose. In

People ex rel Department of Transp. v McNamara (2013) 218 CA4th 1200, the constitutional requirement of just compensation did not require the Department of Transportation to pay precondemnation damages to owners of residential property for the diminution in the value of their property from the time the final environmental impact report for a construction project was approved until the statutory valuation date. The landowners had continued to live on their property throughout the precondemnation period and there was no evidence that the property's value was damaged as a result of the Department's actions or evidence of a de facto taking of the property. See also *Barham v Southern Cal. Edison Co.* (1999) 74 CA4th 744, 755.

See generally Condemnation Practice in California, chaps 13–16 (3d ed Cal CEB).

§16.79 B. Partial Interest in Damaged Property Sufficient to Provide Standing

An action for inverse condemnation is "an action to recover damages for injuries to private property caused by a public improvement." *Simple Avo Paradise Ranch, LLC v Southern Cal. Edison Co.* (2024) 102 CA5th 281, 290. Courts have not limited recovery in inverse condemnation to owners of a fee simple interest. To be constitutionally entitled to compensation, the plaintiff must show that they owned a property interest that has been taken by the state. *County of San Diego v Miller* (1975) 13 C3d 684, 687. Plaintiffs whose interests have been deemed sufficient to give standing include the holder of an unexercised option to purchase property (*County of San Diego v Miller, supra*), a mortgagor whose interest has been foreclosed (*Klopping v City of Whittier* (1972) 8 C3d 39), and the executor of an estate in which the decedent held a property interest with a spouse (*Blau v City of Los Angeles* (1973) 32 CA3d 77). See also *Travelers Indem. Co. v Ingebretsen* (1974) 38 CA3d 858, 864 (acknowledging insurer-subrogee's right to seek recovery in inverse condemnation either in insurer's own name or in name of its insured). See discussion of ownership interests in Condemnation Practice in California §13.3A (3d ed Cal CEB).

§16.80 C. Attorney Fees

Attorney fees are available in an inverse condemnation action (CCP §1036):

> In any inverse condemnation proceeding, the court rendering judgment for the plaintiff by awarding compensation, or the attorney representing the public entity who effects a settlement of that

> proceeding, shall determine and award or allow to the plaintiff, as a part of that judgment or settlement, a sum that will, in the opinion of the court, reimburse the plaintiff's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of that proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding.

XIV. ZONING AND CODE VIOLATIONS

§16.81 A. Right to Regulate Found in Government Police Powers

Under the California Constitution, a "county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal Const art XI, §7. This authority is often referred to as the police power. 75 Ops Cal Atty Gen 239, 240 (1992). See, *e.g., Candid Enters., Inc. v Grossmont Union High Sch. Dist.* (1985) 39 C3d 878, 885.

The police power is broad. As the California Supreme Court has stated (39 C3d at 885),

> [u]nder the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. (Cal. Const., art. XI, §7.) Apart from this limitation, the "police power … is as broad as the police power exercisable by the Legislature itself."

It is from this fundamental power that local governments derive their authority to regulate land through planning, zoning, and building ordinances, thereby protecting public health, safety, and welfare. *Fonseca v City of Gilroy* (2007) 148 CA4th 1174, 1181.

For additional discussion of the police power and local zoning ordinances, see California Land Use Practice, chap 4 (Cal CEB).

§16.82 B. Enforcement Actions

When there is a failure to comply with a zoning ordinance by a failure to comply with a condition of a variance, the city or county establishing the zoning ordinance may bring an action seeking to specifically enforce performance of the condition of the variance. See The California Municipal Law Handbook, chap 10 (Cal CEB); California Land Use Practice §1.1 (Cal

CEB). The right to bring the action depends on the violation of the local zoning scheme, not on the residency or nonresidency of the parties benefited or on whether a property outside the city receives a benefit. *City of Santa Clara v Paris* (1977) 76 CA3d 338, 342.

On the use of administrative mandamus and traditional mandamus as challenges to municipal zoning and code decisions, see §§17.27–17.33.

§16.83 XV. NONDISCLOSURE AND MISREPRESENTATION

Claims of nondisclosure and misrepresentation in property sales transactions are often couched as claims of fraud. "Fraud may be either actual or constructive. The suppression of that which is true, by one having knowledge or belief of the fact, is actual fraud." *Snyder v Security-First Nat'l Bank* (1939) 31 CA2d 660, 664. See CC §1572. "Deceit may be negative as well as affirmative; it may consist in suppression of that which it is one's duty to declare, as well as in the declaration of that which is false." *Barder v McClung* (1949) 93 CA2d 692, 697.

§16.84 A. Seller's Nondisclosure or Misrepresentation of Facts

A claim of fraud based on mere nondisclosure of facts by the seller of real property may arise when there is a confidential relationship between the buyer and seller; when, absent a disclosure, the seller has made a representation that is likely to mislead; when there is active concealment of an undisclosed matter; or "when one party to a transaction has sole knowledge or access to material facts and knows that such facts are not known to or reasonably discoverable by the other party." *Goodman v Kennedy* (1976) 18 C3d 335, 347. When the seller "knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer." *Lingsch v Savage* (1963) 213 CA2d 729, 735. See also *Alfaro v Community Hous. Improvement Sys. & Planning Ass'n* (2009) 171 CA4th 1356, 1382.

For additional discussion of a seller's duty to disclose, see California Real Property Sales Transactions, chap 6 (4th ed Cal CEB).

§16.85 B. Broker's Nondisclosure of Facts

When a seller's real estate agent or broker is aware of material facts undisclosed by the seller, the agent or broker is under the same duty of disclosure as the seller. *Lingsch v Savage* (1963) 213 CA2d 729, 736. A real estate agent or broker may be liable "for mere nondisclosure since [their] conduct in the transaction amounts to a representation of the nonexistence of the facts which [they have] failed to disclose." 213 CA2d at 736. For additional discussion of brokers' duties and obligations, see California Real Estate Brokers: Law and Litigation (Cal CEB).

§16.86 C. What Should Be Disclosed?

There is also a statutory duty to disclose deed restrictions in a real estate transfer disclosure statement. See CC §1102.6; California Real Property Sales Transactions, chap 6 (4th ed Cal CEB). It is fraud to suppress a fact with the intent to induce a person to enter into a contract to acquire realty. CC §§1572(3), 1710(3); *Lingsch v Savage* (1963) 213 CA2d 729, 735; *Curran v Heslop* (1953) 115 CA2d 476. "A breach of the duty to disclose gives rise to a cause of action for rescission or damages." *Karoutas v HomeFed Bank* (1991) 232 CA3d 767, 771.

What must be disclosed by a seller is the fact or facts affecting the property's value. However, the seller is not required to explain to the buyer why that fact affects the property's value. *Assilzadeh v California Fed. Bank* (2000) 82 CA4th 399 ("The material fact that had to be disclosed was the fact that there was a lawsuit for defects, not each and every allegation contained within the court file"); *Stevenson v Baum* (1998) 65 CA4th 159, 165 (once seller disclosed that mobile home park was subject to recorded easements, seller was not required to disclose location of oil pipeline easement or how he had accommodated it); *Sweat v Hollister* (1995) 37 CA4th 603 (once seller disclosed that residence was in floodplain, seller was not required to disclose effect of local ordinance on rebuilding or improving property), 608, disapproved on other grounds in *Santisas v Goodin* (1998) 17 C4th 599, 609 n5.

§16.87 D. Buyer's Duties

Reasonable or justifiable reliance on the seller's nondisclosure is an element of fraud. *Lingsch v Savage* (1963) 213 CA2d 729, 739. "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable

is a question of fact." *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 1239.

Whether an independent investigation is conducted by the buyer does not affect the right to sue for fraud for failure to disclose. An independent investigation or an examination of property does not preclude reliance on representations when the falsity of the statement is not apparent from an inspection, or the person making the representations has superior knowledge, or the party relying on the representation is not competent to judge the facts without expert assistance. *Hobart v Hobart Estate Co.* (1945) 26 C2d 412, 435; *Shearer v Cooper* (1943) 21 C2d 695, 702; *Rothstein v Janss Inv. Corp.* (1941) 45 CA2d 64, 68; *Clauser v Taylor* (1941) 44 CA2d 453.

It is well established that a plaintiff is not bound by constructive notice of a public record that would reveal the true facts. *Seeger v Odell* (1941) 18 C2d 409, 415 ("The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations but to bona fide purchasers for value").

For additional discussion of a buyer's due diligence duties, see California Real Property Sales Transactions §§6.71–6.79 (4th ed Cal CEB).

§16.88 E. Attorney Fees

Attorney fees may be available in an action for nondisclosure or misrepresentation of facts but must be based on a contract that includes a provision for recovery of attorney fees. CCP §§1021, 1033.5(a)(10). See, *e.g., Nara Bank v Pho (In re Pho)* (Bankr ND Cal, Apr. 20, 2016, No. 07-52664 ASW) 2016 Bankr Lexis 1792 (after defending adversary proceeding seeking nondischargeability of debt based on fraud, bankruptcy debtor was not entitled to attorney fees because bankruptcy court did not interpret loan documents in reaching its decision regarding dischargeability; case did not involve "action on a contract" under CC §1717). Attorney fee provisions are standard in purchase and sale agreements. See, *e.g., Santisas v Goodin* (1998) 17 C4th 599, 607. Whether a contract provides for recovery of fees incurred on a particular cause of action is a question of contract interpretation. With an enforceable attorney fee provision and a clear prevailing party on a contract claim, the court must award fees under CC §1717. *Hsu v Abbara* (1995) 9 C4th 863. But see *Cussler v Cru-Sader Entertainment, LLC* (2012) 212 CA4th 356 (trial court did not abuse its discretion in ruling there was no prevailing party for purposes of attorney fees under CC §1717 when, after years of litigation, both sides had recovered nothing).

> to supplant normal injunctive procedures applicable to cases concerning issues other than "harassment" as statutorily defined.

Conduct that serves a legitimate purpose is not considered harassment and cannot be enjoined under §527.6, even if the conduct might ultimately be enjoinable after full development of the facts and law. 57 CA4th at 812.

PRACTICE TIP➤ The prevailing party in a harassment suit may be awarded court costs and attorney fees. CCP §527.6(s). See also *Krug v Maschmeier* (2009) 172 CA4th 796; *Schraer v Berkeley Prop. Owners' Ass'n* (1989) 207 CA3d 719.

For additional discussion of civil harassment, see §§2.39, 5.36, 9.38, 10.30–10.36, 16.32–16.35; California Civil Procedure Before Trial, chap 32 (4th ed Cal CEB).

§17.21 1. Conduct Constituting Harassment

Harassment consists of (CCP §527.6(b)(3))

> unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be that which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner.

See *E.G. v M.L.* (2024) 105 CA5th 688, 699; *Luo v Volokh* (2024) 102 CA5th 1312, 1322.

For specific examples of harassing conduct, see §16.35.

§17.22 a. Unlawful Violence or Credible Threat of Violence

Unlawful violence is any assault or battery (or stalking as prohibited in Pen C §646.9) but does not include lawful acts of self-defense or defense of others. CCP §527.6(b)(7).

A credible threat of violence is "a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose." CCP §527.6(b)(2).

§17.23 b. Course of Conduct

A course of conduct as defined in CCP §527.6(b)(1) is "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." See *Leydon v Alexander* (1989) 212 CA3d 1 (single incident involving abusive language was insufficient to meet requirement of "course of conduct" under §527.6). A course of conduct might include following, stalking, making harassing telephone calls to, or sending harassing correspondence to an individual. *Brekke v Wills* (2005) 125 CA4th 1400 (defendant wrote "vile and vitriolic" letters that included credible threat of violence). "Course of conduct" does not include constitutionally protected activity. CCP §527.6(b)(1).

The courts have created an exception regarding the issue of whether a single incident can constitute a "course of conduct." In *Russell v Douvan* (2003) 112 CA4th 399, the court found that issuing an injunction based on a single act of past violence was inconsistent with the purpose of §527.6 and held that an injunction serves to prevent future injury and is not applicable to wrongs that have been completed. In reversing the trial court, finding that a single act of past violence did warrant issuance of an injunction, the appellate court stated, "There may well be cases in which the circumstances surrounding a single act of violence may support a conclusion that future harm is highly probable." Any such finding must be made by the trial court if it is to rely on a single act of unlawful harassment to issue an injunction. 112 CA4th at 403; see *Harris v Stampolis* (2016) 248 CA4th 484, 499 (determination of whether it is reasonably probable that unlawful act will be repeated rests upon nature of unlawful violent act evaluated in light of relevant surrounding circumstances of its commission and whether precipitating circumstances continue to exist so as to establish likelihood of future harm).

PRACTICE TIP➤ Note that §527.6(b) was amended in 2010 to authorize an injunction if a defendant makes a single, knowing, and willful statement that would place a reasonable person in fear for their safety or the safety of their immediate family.

§17.24 2. Obtaining TRO and Injunction

To obtain a CCP §527.6 injunction, the plaintiff must show by clear and convincing evidence that they have been harassed (*Nebel v Sulak* (1999) 73 CA4th 1363, 1369):

> Section 527.6 was passed to supplement the existing common law torts of invasion of privacy and intentional infliction of emotional distress

by providing quick relief to harassment victims threatened with great or irreparable injury. It was enacted to protect the individual's right to pursue safety, happiness, and privacy as guaranteed by the California Constitution … [and it] has been used where the victim has been stalked, threatened, or otherwise seriously harassed.

cost of removal was the measure of damages because it was the lesser and more appropriate recovery. *Smith v Cap Concrete, Inc.* (1982) 133 CA3d 769, 778. See also *City of San Jose v Superior Court* (1974) 12 C3d 447, 464 (damages recoverable in nuisance action for injuries to real property include not only diminution in market value but also damages for annoyance, inconvenience, discomfort, injuries to land, and costs of minimizing future damages); *More v City of San Bernardino* (1931) 118 CA 732, 741 (in action for sewage overflow, plaintiffs entitled to damages for odor, stench, and water supply pollution). For further discussion of real property damages, see California Real Property Remedies and Damages (2d ed Cal CEB).

§17.49 2. *Kelly v CB&I Constructors*

During the trial phase of *Kelly v CB&I Constructors, Inc.* (2009) 179 CA4th 442, a jury found that the defendant had negligently sparked a fire (the Copper Fire) that caused significant damage to the plaintiff's ranch and awarded restoration damages in excess of the property's value. The appellate court ruled that the award was not unreasonable or excessive as a matter of law when there was substantial evidence that the plaintiff had no meaningful alternative to restoration, as the property was now unmarketable due to the damage caused by the defendant. 179 CA4th at 450. Moreover, the damage to the property's trees caused by the Copper Fire was a wrongful injury to trees caused by a trespass and thus subject to mandatory doubling of damages under CC §3346. 179 CA4th 460. For further discussion of tree issues, including damages, see §17.50. See also chap 4.

NOTE➤ The Ninth Circuit also held this defendant responsible for nearly $30 million in tort damages for "intangible, noneconomic environmental damage" to the Angeles National Forest caused by the Copper Fire. See *U.S. v CB & I Constructors* (9th Cir 2012) 685 F3d 827.

§17.50 D. Tree Injury

California law allows for a separate measure of damages when there has been an injury to timber, trees, or underwood. CC §3346. Damages may be doubled or trebled in appropriate cases. CC §3346(a); *Kelly v CB&I Constructors, Inc.* (2009) 179 CA4th 442, 463 (trial court properly awarded double damages for injury to plaintiff's trees proximately caused by fire); *Kallis v Sones* (2012) 208 CA4th 1274 (trial court properly doubled amount of damages assessed against neighbor who cut down boundary tree). See, however, *Russell v Man* (2020) 58 CA5th 530, 537 (home builders not liable

to neighboring property owners for actual or treble damages under statutes prohibiting wrongful injuries to trees or timber, even assuming trench dug by builders that cut roots and killed large pine tree located on property line was common law trespass, when builders did not commit "timber trespass" involving intentional crossing of boundary lines into land of another to injure timber).

Section 3346(a) provides:

> For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except that where the trespass was casual or involuntary, or that the defendant in any action brought under this section had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, the measure of damages shall be twice the sum as would compensate for the actual detriment, and excepting further that where the wood was taken by the authority of highway officers for the purpose of repairing a public highway or bridge upon the land or adjoining it, in which case judgment shall only be given in a sum equal to the actual detriment.

The measure of damages for injury to or removal of mature, non-fruit-bearing trees (*i.e.,* timber), without injury to the real property, is the value of the trees without consideration of the value of the real property. *Doak v Mammoth Copper Mining Co.* (ND Cal 1911) 192 F 748. The destruction of growing forest trees is treated as an injury to the land, and the measure of damages is the difference between the value of the land before destruction of the trees and its value after such destruction. *Doak v Mammoth Copper Mining Co., supra*. This is also the measure of damages in the case of injury to or destruction of fruit trees. *Montgomery v Locke* (1887) 72 C 75. See *Hill v Morrison* (1928) 88 CA 405.

For detailed discussion of tree disputes between neighbors, see chap 4.

§17.51 E. Trespass Damages

If a trespass can be enjoined or if it causes only temporary injury, the injured party can recover damages resulting from the original wrong. The plaintiff can bring separate and successive actions for continuing damages caused by the trespass. *Kafka v Bozio* (1923) 191 C 746.

Civil Code §3334 sets out the measure of damages of a trespass resulting in wrongful occupation of real property. The detriment includes the value of the use of the property during the wrongful occupation, the reasonable cost

§17.57 C. Civil Code §1354(c): Enforcement of Covenants, Conditions, and Restrictions (CC&Rs)

In any action by a homeowners or condominium association or by an owner of a separate interest in an association to enforce the governing documents, the prevailing party *must* be awarded reasonable attorney fees and costs. CC §5975(c). See also *Arias v Katella Townhouse Homeowners Ass'n, Inc.* (2005) 127 CA4th 847, 852. The issue is whether the gravamen of the action brought by the plaintiff was one "to enforce the governing documents." See *Kaplan v Fairway Oaks Homeowners Ass'n* (2002) 98 CA4th 715.

In *Tract 19051 Homeowners Ass'n v Kemp* (2015) 60 C4th 1135, the court held that it was proper to award attorney fees to a homeowner as the prevailing party in an action filed by a homeowners association and its members to enforce alleged governing documents of common interest development, even though it was determined that the common interest documents did not exist. The action was understood to be one to enforce governing documents of the common interest development, regardless of whether the association and its members were ultimately successful in establishing that the documents relied on were in fact governing documents of a common interest development. To deny a homeowner an attorney fee award under the circumstances when he was the prevailing party would violate the reciprocal nature of CC §5975(c) and would defeat the legislative intent behind the statute.

§17.58 1. Broad Construction by Courts

Courts construe CC §5975(c) broadly. In *Kaplan v Fairway Oaks Homeowners Ass'n* (2002) 98 CA4th 715, homeowners challenged the election of a homeowners association (referred to hereafter as HOA) board and lost. Although the complaint did not on its face purport to enforce the governing documents, a §5975(c) (former CC §1354(c)) attorney fees award was granted to the association. The plaintiffs objected, claiming that the sole theory of their complaint was a breach of the Corporations Code and that it was not an action to enforce the association's governing documents under the statute. The court disagreed, finding that the gist of the action was an "adversarial action" to enforce voting rights under the bylaws. 98 CA4th at 720.

§17.59 2. Standing to Bring Suit

In *Farber v Bay View Terrace Homeowners Ass'n* (2006) 141 CA4th 1007, the court found that the essence of a condominium unit seller's claim

was that the HOA's CC&Rs required the association to fix the roof of the unit that the plaintiff sold and that her suit could not be considered anything other than an attempt to enforce the CC&Rs. However, since the seller was attempting to enforce the CC&Rs when she no longer owned a unit in the association, she had no standing to bring the suit. 141 CA4th at 1012. Moreover, the court held that because the suit was an action to enforce CC&Rs under CC §5975(c) (former CC §1354(c)) and the case was properly dismissed, the association was the prevailing party entitled to fees and costs. 141 CA4th at 1014.

In *Martin v Bridgeport Community Ass'n* (2009) 173 CA4th 1024, the court affirmed a judgment in favor of an HOA on causes of action brought by occupants (who were relatives of the unit owners) arising from a lot line dispute and affirmed the award of attorney fees and costs to the association. The occupants did not have standing to bring the claims to enforce the CC&Rs. 173 CA4th at 1038. In affirming the award, the court held that the mandatory attorney fees and costs award under §5975(c) (former CC §1354(c)) "applies when a plaintiff brings an action to enforce such governing documents, but is unsuccessful because he or she does not have standing to do so." 173 CA4th at 1039.

§17.60 D. Civil Code §1717: Reciprocal Contractual Rights

Civil Code §1717 provides that in any action based on a contract, when the contract specifically provides that attorney fees and costs that are incurred to enforce the contract are to be awarded to the prevailing party, the party who is determined to be the party prevailing on the contract is entitled to reasonable attorney fees in addition to costs. CC §1717(a). Section 1717 was enacted to provide mutuality of remedy when a contract provision limits recovery of attorney fees to one party only, to prevent oppressive use of one-sided attorney fees clauses. *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084. See also *Mountain Air Enters., LLC v Sundowner Towers, LLC* (2017) 3 C5th 744, 756 (though defendant's assertion of option agreement as affirmative defense was not an action or proceeding, under language of option agreement pertaining to attorneys' fees, defendants could recover fees because plaintiffs suit was an action for purposes of attorneys' fees provision).

In determining attorney fees under §1717, a court should give more weight to the substance of an action than to its form. In other words, in determining whether the action is on a contract for purposes of §1717, the court should look beyond the parties' characterization of whether an action is on a

contract. See *Boyd v Oscar Fisher Co.* (1989) 210 CA3d 368, 377. This is also true in an action for statutory attorney fees under CC §5975(c) (former CC §1354(c)) (see §§17.57–17.59). See *Kaplan v Fairway Oaks Homeowners Ass'n* (2002) 98 CA4th 715, 720 (discussed in §17.58). But see *Manier v Anaheim Bus. Ctr. Co.* (1984) 161 CA3d 503, 508 (whether party is entitled to attorney fees under §1717 depends not on evidence adduced at trial or interim proceeding but on pleadings); however, see *Cussler v Cru-Sader Entertainment, LLC* (2012) 212 CA4th 356 (trial court did not abuse its discretion in ruling there was no prevailing party for purposes of attorney fees under §1717 when, after years of litigation, both sides recovered nothing). To determine whether a party prevails on the contract (*Boyd v Oscar Fisher Co., supra*),

> the court should consider the pleaded theories of recovery, the theories asserted and the evidence produced at trial, if any, and also any additional evidence submitted on the motion in order to identify the legal basis of the prevailing party's recovery.

See also *Lerner v Ward* (1993) 13 CA4th 155, 158 (when action sounds primarily in tort, CC §1717 does not apply, but CCP §1021, relating to allocation of attorney fees by agreement of parties, may apply).

§17.61 1. CC&Rs

Recorded CC&Rs may be considered a contract for the purposes of awarding attorney fees under CC §1717. See, *e.g., Harbor View Hills Community Ass'n v Torley* (1992) 5 CA4th 343.

In *Harbor View Hills,* an HOA sued to enforce the CC&Rs relative to prohibitions against making exterior additions or alterations to homes without the written consent of the association's architectural committee. The homeowner defendants filed a cross-complaint for declaratory relief and damages for breach of the CC&Rs and CC §5600 (former CC §1366), and they requested attorney fees. 5 CA4th at 345. However, the association prevailed at trial and was awarded attorney fees under CC §1717. 5 CA4th at 346. On motion for reconsideration, the court denied the motion for attorney fees, finding that a recent amendment to §1717, stating that an attorney fees provision in a contract applies to the whole contract unless otherwise stated, was not retroactive. On appeal, the appellate court found that the amendment to §1717 was appropriately applied to the case because the amendment occurred while the case was pending. 5 CA4th at 347. It therefore reversed the denial of attorney fees based on the recorded restrictions. 5 CA4th at 348. The court also noted that an amendment to CC §5975 (Davis-Stirling

Act attorney fee provision; see §§17.57–17.59) *mandated* an award of attorney fees to the prevailing party in an action to enforce a declaration, thus providing a second basis in support of the attorney fee award. 5 CA4th at 350.

In *Deane Gardenhome Ass'n v Denktas* (1993) 13 CA4th 1394, an HOA brought an action against two homeowners for injunctive relief and damages, alleging that the defendants had painted their house in violation of the CC&Rs. The trial court ultimately entered judgment in favor of the homeowners but denied their request for attorney fees, even though the CC&Rs contained an attorney fees provision. 13 CA4th at 1396. The appellate court held that in view of CC §1717 and the attorney fees provision in the CC&Rs, the defendants were entitled to the fees because they were the prevailing party. 13 CA4th at 1397. Indeed, when the contract (recorded restrictions) provides for the prevailing party to recover reasonable attorney fees and there is a prevailing party, the judge is *required* to award reasonable attorney fees. 13 CA4th at 1398.

§17.62 2. Nonsignatory Parties

Civil Code §1717 has been interpreted to ensure mutuality of remedy for attorney fee claims. See *Sessions Payroll Mgmt., Inc. v Noble Constr. Co.* (2000) 84 CA4th 671, 678. Thus, under certain circumstances, in an action on a contract, a defendant may be entitled to recover attorney fees against even a nonsignatory plaintiff when the defendant is found to be the prevailing party. See *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 128. Indeed, "the signatory defendant is entitled to attorney fees … if the nonsignatory plaintiff would have been entitled to its fees if the plaintiff had prevailed." *Sessions Payroll Mgmt., Inc.,* 84 CA4th at 679.

A nonsignatory plaintiff may be liable for attorney fees to a prevailing defendant if the plaintiff would have been entitled to attorney fees as a third party beneficiary had it prevailed on its contract claims. See *Blickman Turkus, LP v Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 897; *Loduca v Polyzons* (2007) 153 CA4th 334, 341; *Sessions Payroll Mgmt., Inc.,* 84 CA4th at 680. Thus, the right of a third party beneficiary to enforce an attorney fees clause in a contract depends on the contracting parties' intent. *Sessions Payroll Mgmt., Inc. v Noble Constr. Co., supra*. When the contracting parties did not intend a third party beneficiary to enforce the attorney fees provision, a prevailing defendant cannot recover attorney fees from the third party beneficiary. See *Green Tree Servicing LLC v Giusto* (ND Cal 2016) 553 BR 778, 781 (appellant's motion to lift stay was not action on contract that triggered reciprocity under CC §1717(a)).

18

Defenses and Cross-Complaints

David M. Majchrzak

I. INTRODUCTION TO DEFENSES AND CROSS-COMPLAINTS

§18.1 A. Overview

This chapter is designed to provide a broad overview of the more common defenses available in neighbor dispute actions. As evidenced by the preceding chapters of this book, the large variety of disputes that may arise

between neighbors precludes a comprehensive analysis of all possible defenses.

Counsel will ultimately need to analyze further to determine whether any given defense is appropriate under the circumstances presented by the client. Some of the general rules and policies discussed in relation to these defenses will likely be impacted by the specific facts of the dispute.

Although multiple defenses may be available in any given case, the chapter is organized by categorizing common defenses under general conceptual umbrellas, including excessive passage of time (see §§18.6–18.16), property usage (see §§18.17–18.43), consent (see §§18.44–18.49), deceptive acts (see §§18.50–18.56), and necessity (see §§18.57–18.60). Litigants and counsel should not feel bound by these headings, because certain defenses can be applied outside these general headings.

§18.2 B. Practical Approaches to Defense

Although not technically "affirmative defenses" to claims, the approaches discussed in §§18.3–18.5 may well serve counsel defending clients against actions brought by their neighbors.

§18.3 1. Battle of the Deeds

A vast majority of disputes between neighbors involve land usage. Thus, the logical first step in assessing any claim should be a determination of who owns what land. Although historical usage could potentially impact rights, that impact is usually limited because of the need in most cases to show payment of taxes. See, *e.g.,* §18.25. It behooves counsel to make sure that the plaintiffs really have a right to use (or control the use of) the property they claim has been overburdened or damaged.

The first step of this process is to conduct a comparison of the ownership deeds to ensure that the property descriptions are uniform, tracing back to the original subdivision of the property. If an error has occurred, tracing backward should enable the parties to ascertain who has proper title.

Once review of title is complete, counsel should determine whether the purported boundaries coincide with the description in the deeds. More specifically, counsel should arrange to have a survey conducted to determine, for example, whether a fence is actually built on the property boundary. Depending on what is learned, it may result that the plaintiff is complaining about the defendant's use of their own property.

Of course, in cases when the intrusion on the neighbor's property is so pervasive that even a legitimate boundary line dispute would make no real

difference, defendants may find little to no value in undertaking these steps. That said, there may be other reasons peculiar to the particular claim to merit doing so.

§18.4 2. Turning the Tables—Using Affirmative Claims to Negate Attacks

Once counsel is relatively certain that the plaintiff is making a claim regarding property to which the plaintiff has colorable title, then the various defenses outlined in this chapter will come into play. Often, these will take the form of not merely a defense but also an affirmative claim. For example, in response to a claim for encroachment, a defendant may allege that the court should impose a prescriptive easement or find that the property has transferred through adverse possession.

Given the proliferation of contingency fee agreements, litigation plaintiffs often have nothing to lose except their time investment. Having some "skin in the game" (*i.e.,* a potential cross-claim) may dissuade those plaintiffs with unviable claims from continuing the action.

§18.5 3. Negating Elements of Causes of Action

Counsel should remember that even when no affirmative defenses such those discussed in this chapter seem to apply, counsel can still do plenty to prevail. Ultimately, the plaintiff in any action must prove a number of elements to obtain any relief. Philosophically at least, the defense has a relatively easier burden in that it need only negate one of the elements to preclude relief. Although that may be easier said than done, a careful review of each cause of action, each element that needs to be met, and the legal authority addressing the standards for meeting those elements will often prove the best initial investment of time.

§18.6 II. DEFENSES BASED ON EXCESSIVE PASSAGE OF TIME

An unreasonable delay in pursuing remedies may act as a bar to recovery. In most circumstances, a statute of limitations will set the standard for determining what a reasonable time is for bringing a claim or action. See §18.7. However, in some circumstances, factors other than a statutory limitation period may result in the conclusion that the plaintiff should be barred from obtaining relief due to an excessive passage of time (*e.g.,* tolling or laches; see §§18.12–18.16).

should not be limited. To defeat a finding of laches, the plaintiff must show that the delay involved in the case was excusable and rebut the presumption that the delay resulted in prejudice to the defendant. See *Jarrow Formulas, Inc. v Nutrition Now, Inc.* (9th Cir 2002) 304 F3d 829, 837 (when claim is filed "within the analogous state limitations period, the strong presumption is that laches is inapplicable; if the claim is filed after the analogous limitations period has expired, the presumption is that laches is a bar to suit").

§18.17 III. DEFENSES BASED ON USE OF PROPERTY

A common defense in land disputes between two neighbors is that one neighbor has used the property for so long and in such a manner that they have obtained a legal right to its continued use. Thus, the argument goes, any claims based on the improper use of the property should be defeated by this entitlement. Typically, this defense takes the form of a claim of adverse possession (see §§18.18–18.25) or nonexpress easement (see §§18.26–18.39).

§18.18 A. Adverse Possession

The proponent of a claim of adverse possession may be either a plaintiff or a defendant in an action to, for example, quiet title to a property. See, *e.g.,* quiet title statutes (CCP §§760.010–765.060). In *Dimmick v Dimmick* (1962) 58 C2d 417, the California Supreme Court set forth the elements to a claim of adverse possession (58 C2d at 421):

- Possession must be by actual occupation under such circumstances as to constitute reasonable notice to the owner (see §18.19);
- Possession must be hostile to the owner's title (see §18.20);
- The adverse possessor must claim the property as their own, under either color of title or claim of right (see §§18.21–18.23);
- Possession must be continuous and uninterrupted for 5 years (see §18.24); and
- The adverse possessor must pay all the taxes levied and assessed on the property during the period (see §18.25).

See CCP §§321–325. Adverse possession as a cause of action is discussed in §§16.70–16.72. See also discussion of adverse possession and boundaries in chap 2; adverse possession and fences in chap 3; adverse possession and squatters in chap 9.

Please note, however, that adverse possession may not provide a defense, even if the elements may be established, if the property is acquired through

unlawful, unfair, and fraudulent acts. See, *e.g.*, *People ex rel Harris v Aguayo* (2017) 11 CA5th 1150, 1167 (adverse possessor is trespasser who may eventually become legitimate possessor under certain circumstances).

§18.19 1. Occupancy

Mere occupancy of real property is not a sufficient interest to enable an occupant to quiet title unless it has ripened into title by adverse possession. CC §1006; CCP §§322–325. See *Langstaff v Mitchell* (1931) 119 CA 407. The adverse possessor's use must be exclusive—that is, the owner of record does not or cannot use the disputed property. See *Mehdizadeh v Mincer* (1996) 46 CA4th 1296, 1305; *Raab v Casper* (1975) 51 CA3d 866, 876; *Welsher v Glickman* (1969) 272 CA2d 134, 137.

§18.20 2. Hostility

Possession of property is hostile and satisfies the second element of adverse possession (see §18.17) when the adverse possessor's actions and use invade the right of the holder of legal title. This usually means that the client had an actual, continued occupation of the land, under a claim of title, exclusive of any other right. *Sorensen v Costa* (1948) 32 C2d 453, 459 (in determining hostility, court required only that claimant's possession be adverse to and without recognition of any right of record owner). However, "hostile" possession may also be acquired through an error. In *Sorensen,* the California Supreme Court relied on an established rule to confirm that title by adverse possession "may be acquired through the possession or use commenced under mistake." 32 C2d at 460.

Most defenses based on the adverse possessor's original mistake have failed to defeat the element of hostility; however, one exception has been recognized. To show that the mistaken possession was neither hostile nor adverse, counsel must establish by substantial evidence that the adverse possessor recognized the potential claim of the true legal owner and expressly or impliedly manifested some intent not to claim the occupied land if someone else held the recorded title. See *Gilardi v Hallam* (1981) 30 C3d 317, 323 (possession based on mistakenly placed surveyor stakes).

PRACTICE TIP➤ This exception is rarely invoked due to the high threshold that the defendant must meet to satisfy this burden of proof. However, the burden is not unsustainable. For example, in a boundary dispute, if substantial evidence shows that the adverse possessor recognized the potential claim of an adjoining property owner or was unsure whether their fence was in the right position and that they had not

Applegate v Ota (1983) 146 CA3d 702, 713. No easement of necessity can be found when other access to the property is available, even if such access is inconvenient, difficult, or costly. *Kripp v Curtis* (1886) 71 C 62, 65; *Smith v Skrbek* (1945) 71 CA2d 351, 360. Moreover, an easement by necessity survives only for the duration of the need. *Kripp v Curtis, supra*; *Irvin v Petifils* (1941) 44 CA2d 496, 499. Thus an easement by necessity may end, for example, when the two adjoining parcels are merged back into one through common ownership or when the owner of the property for which an easement is claimed acquires another, adjacent parcel that is not landlocked.

NOTE➤ It is rare for a transfer of the subservient property (the one subject to the easement) to extinguish an easement by necessity. Rather, as with most easements, the burden "runs with the land"—that is, an easement by necessity usually passes with each transfer of the property to the new owner. The only transfers that extinguish the right are those that effectively end the necessity for the easement.

For further discussion of easements by necessity, see §1.25.

§18.37 4. Equitable Easement

Under certain circumstances when facts do not indicate that other easements have been created, courts may exercise their powers in equity to fashion protective interests in land belonging to another. These interests are sometimes referred to as equitable easements. Most of these cases involve the determination of whether a defendant should be ordered to remove physical encroachments erroneously and innocently placed on the property of an adjoining landowner. The courts "are not limited to judicial passivity as in merely refusing to enjoin an encroachment. Instead, in a proper case, the courts may exercise their equity powers to affirmatively fashion an interest in the owner's land which will protect the encroacher's use." *Hirshfield v Schwartz* (2001) 91 CA4th 749, 765 (encroachment by extensive and permanent landscaping, including concrete wall, stone deck, pond, waterfalls, putting green, and sand trap allowed to stand).

EXAMPLE➤ In a case of first impression in California, the plaintiffs raised an *affirmative* claim for equitable easement along with their request to quiet title on the disputed property. See *Tashakori v Lakis* (2011) 196 CA4th 1003 (dispute over access driveway), discussed in §16.66.

§18.38 a. Doctrine of Relative Hardship

To determine whether to create an equitable easement or grant an injunction against an encroachment on a neighboring property, courts apply the relative hardship doctrine. Under the doctrine the court considers three elements (*Hirshfield v Schwartz* (2001) 91 CA4th 749, 759):

- Whether the encroachment is willful or negligent,
- Whether the plaintiff will suffer irreparable injury if injunctive relief is not granted, and
- Whether the hardship to the defendant if the injunction is granted will be *greatly disproportionate* to the hardship caused the plaintiff if the encroachment continues. "[T]his fact must clearly appear in the evidence and must be proved by the defendant."

This relative hardship test has been applied not just in cases involving physical encroachments on another's property but also in those involving disputed rights of access over a neighbor's property. *Tashakori v Lakis* (2011) 196 CA4th 1003, 1009.

PRACTICE TIP➤ Courts often reject the argument that the prior use of the property must be longstanding as a condition for granting an easement in equity. See, *e.g., Donnell v Bisso Bros.* (1970) 10 CA3d 38, 47. Nevertheless, the duration of the encroachment may be a factor in evaluating the relative hardship of the parties. For example, if an encroachment began only recently, then it would be difficult to argue that the absence of the encroachment would create a hardship.

For additional discussion of doctrine of relative hardship, see §§2.53, 16.65.

§18.39 b. Money Damages Still Available to Plaintiff

Counsel seeking an equitable easement should keep two things in mind:

- The scope of an equitable easement should not be greater than is reasonably necessary to protect the defendant's interests. *Linthicum v Butterfield* (2009) 175 CA4th 259, 268.
- A plaintiff denied injunctive relief in favor of an equitable easement may still be entitled to monetary damages in exchange for the defendant's use of their land. *Linthicum v Butterfield, supra.*

For further discussion of equitable easements, see §§1.27, 2.52–2.56, 16.64–16.66.

should consider the ease with which they could defend against later claims. Because it is simple to show which document was filed with the county recorder, a §813 recordation should be admissible at any stage of litigation as a public record. However, compliance with §1008 can be disputed on many levels, including whether the signs were actually posted, whether the verbiage was adequate, and whether spacing was indeed every 200 feet or less.

§18.50 V. DEFENSES BASED ON PLAINTIFF'S DECEPTIVE ACTS

California public policy generally disfavors those who benefit at the expense of others by engaging in trickery or dishonest behavior. See, *e.g.,* CC §§1572–1573, 1709, 1710, 3294. Thus, a number of legal theories, including fraud and estoppel, may prove useful tools for defendants whose conduct was a product of a neighbor's deception.

§18.51 A. Fraud

As with most claims, generally applicable defenses such as fraud, duress, or unconscionability may be applied to many types of neighbor disputes arising out of contract. California law distinguishes between fraud in the execution (or fraud in the inception) and fraud in the inducement of a contract. *Rosenthal v Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 415.

PRACTICE TIP➤ In either case, counsel raising a defense of fraud should keep in mind that a cardinal rule of contract law is that a party's failure to read a contract before signing it cannot constitute part of the backdrop for a fraud claim. That is, parties may not seek to deny enforcement of a contract by saying that they simply relied on someone else's description of the contract's terms rather than reading the document themselves. See, *e.g., Powers v Dickson, Carlson & Campillo* (1997) 54 CA4th 1102, 1109; *Izzi v Mesquite Country Club* (1986) 186 CA3d 1309, 1318.

A necessary element of the defense of fraud is reasonable reliance on a fraudulent statement or acts, but "[g]enerally, it is *not reasonable* to fail to read a contract; this is true even if the plaintiff relied on the defendant's assertion that it was not necessary to read the contract." *Brown v Wells Fargo Bank, NA* (2008) 168 CA4th 938, 959.

§18.52 1. Fraud in the Inception

Fraud in the inception is so intertwined with the contract that the defendant is deceived as to the nature of their act, does not know what they are signing, and does not even intend to enter into a contract. In such cases, mutual assent is lacking, and the contract may be disregarded without the necessity of rescission. See *Bland v Kelley* (1945) 69 CA2d 116 (finding fraud in inception of transfer such that grantor did not understand nature of deed).

Fraud in the inception will render a contract "wholly void, despite the parties' apparent assent to it, when, without negligence on his part, a signer attaches his signature to a paper assuming it to be a paper of a different character." *Rosenthal v Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 420. "To make out a claim of fraud in the execution," parties "must show their apparent assent to the contracts … is negated by fraud so fundamental that they were deceived as to the basic character of the documents they signed and had no reasonable opportunity to learn the truth." 14 C4th at 425.

PRACTICE TIP➤ When fraud in the inception is present, there is no mutual assent to enter into any form of agreement, so any clauses involving resolution of the dispute (including forum selection, choice of law, and arbitration clauses) are not enforceable. See 14 C4th at 416 (if entire contract is void ab initio because of fraud, parties have not agreed to arbitrate).

§18.53 2. Fraud in the Inducement

Fraud in the inducement is based on deception on a different level. Although the defendant is aware that they are signing a contract and in fact intend to enter into the contract, their willingness to do so is induced by fraud. Even though mutual assent exists and a contract is formed, the contract is voidable at the defendant's discretion. To exercise this right, the defendant must rescind the contract. *Rosenthal v Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 415.

§18.54 B. Estoppel

Sometimes circumstances exist that simply make it unfair for a plaintiff to bring a claim against the defendant. Often, this scenario will involve an assertion of estoppel. A defense based on estoppel requires that (*Golden W. Baseball Co. v City of Anaheim* (1994) 25 CA4th 11, 47)

- The party to be estopped (plaintiff) knew the facts;

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