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RW&G Successfully Opposes Development of Major Transmission Line in Temecula Valley Region

B. Tilden Kim, with assistance from **Eric M. Alderete**, represented the City of Temecula in its successful challenge to an application by San Diego Gas and Electric Company (SDG&E) for California Public Utilities Commission (PUC) authorization to construct a 500 kilovolt (kV) transmission line project and associated upgrades (the Valley-Rainbow Project) in the Temecula Valley region. *In the Matter of the Application of San Diego Gas & Electric Company (U-902-E) for a Certificate of Public Convenience & Necessity Valley-Rainbow 500 kV Inter-Connect Project* (Application 01-03-036 filed March 23, 2001). This victory was made possible by the City's unprecedented coordinated effort with the Pechanga Indians and Save Southwest Riverside County, a local community group.

The Valley-Rainbow Project contemplated a 31-mile transmission line comprised of 130 to 160 feet transmission towers every 1,000 to 2,000 feet. The proposed path would have significantly affected the Temecula Valley's annual \$100 million wine industry, as well as jeopardized existing and planned communities, schools and parks throughout southwest Riverside County.

SDG&E claimed the project was necessary to meet the reliability criteria for California's transmission grid. The company also argued that the project was cost-effective based upon its \$350 million estimate of construction and right-of-way acquisition costs.

Tilden and Eric retained transmission line and industry experts to dispute SDG&E's reliability and economic arguments. They compared the expected demand for electricity in the San Diego area with the expected availability of electricity resources in that service area. Their analysis revealed SDG&E's biased calculation of expected demand and available electricity resources.

The PUC determined that SDG&E would continue to meet established reliability criteria for the region until at least 2008 even without the Valley-Rainbow Project. On this point, the agency adopted the forecasts by Temecula and the other intervenors that SDG&E could rely on resources in northern Baja California and Mexico, as well as the possibility for additional import capability due to transmission upgrades.

The PUC also concluded that the Valley-Rainbow Project would not provide positive economic benefits to SDG&E ratepayers or to Californians in general. Tilden and Eric introduced dramatic testimony that SDG&E’s \$350 million estimate was grossly inadequate. They also provided detailed, digitally enhanced photos depicting the Valley-Rainbow Project’s detrimental impact on existing and planned communities, schools, parks and the local wine industry.

ELECTIONS

Court of Appeal Resolves Compton Election Dispute

BY QUINN M. BARROW

On March 10, 2003, the Second District of the California Court of Appeal issued its long-awaited decision resolving the election contests challenging the results of the 2001 municipal election in the City of Compton. *Bradley v. Perrodin*, 2003 DJDAR 2779. This landmark decision reversed a trial court judgment in favor of incumbent Omar Bradley and reinstated Eric Perrodin as mayor. Additionally, the decision affirmed a judgment annulling Leslie Irving’s election to the city council and reversed a judgment declaring Melanie Andrews to be the winner of that seat.

BACKGROUND INFORMATION

Mayoral Election: Nine candidates ran for mayor in the April 2001 primary election. The city clerk listed them according to a randomized alphabet obtained from the Secretary of State, which resulted in Perrodin’s name appearing above Bradley’s on the primary ballot. Bradley finished first with 4,312 votes; Perrodin finished second with 1,983 votes.

Because no candidate received a majority of the votes, a runoff election was scheduled for June 2001. Using the same randomized alphabet, the city clerk listed Perrodin’s name above Bradley’s on the runoff ballot. Perrodin won the runoff election with 5,472 votes to Bradley’s 5,191 votes.

Bradley filed an election contest on numerous grounds, one of which was that the city clerk violated the law by using the primary ballot’s randomized alphabet for the runoff ballot. At the trial, expert testimony was presented that,

under the “primacy effect” theory, candidates listed first on a ballot receive on average 3.32% more votes. The trial court concluded that the city clerk was required to request a new randomized alphabet for the runoff election, and that the failure to do so resulted in an illegal advantage for Perrodin of at least 306 votes that would have gone to Bradley. Therefore, the trial court shifted 306 votes from Perrodin to Bradley and declared Bradley the winner.

Bradley was sworn in, but Perrodin appealed and obtained a stay of the judgment. Perrodin served as mayor while the appeal was pending.

City Council Election: Irving and Andrews were the two top vote getters for a city council seat in the primary. In the runoff, Irving defeated Andrews by a vote of 5,414 to 4,863.

Andrews contested the election on the basis that her name should have been listed ahead of Irving’s. She also argued that Irving had committed offenses against the elective franchise by soliciting non-citizens to register to vote, and by illegally instructing them on their votes. Relying on the primacy effect theory, the trial court shifted 295 votes from Irving to Andrews and declared Andrews the winner. The trial judge also found that Irving had committed offenses against the elective franchise and barred her from holding office in California.

Irving appealed the decision and sought a writ staying the election. Her application was denied, and Andrews served on the council while the appeal was pending.

THE COURT OF APPEAL’S DECISION

Perrodin Declared the Victor: After comprehensively reviewing the Elections Code, the

Second District held that the city clerk was not required to request a new randomized alphabet for the runoff election. This determination led the court to conclude that it was proper for Perrodin’s name to appear above Bradley’s on the runoff ballot. In dicta, the court observed that, even if the names had been erroneously reversed on the ballot, there was no legal justification for shifting 306 votes from Perrodin to Bradley.

She also argued that Irving had committed offenses against the elective franchise by soliciting non-citizens to register to vote...

Irving’s Election Annulled: Irving contended on appeal that there was insufficient evidence she personally participated in any fraudulent acts, and she attempted to impeach the credibility of the witnesses. The Second District rejected these arguments and ruled that the evidence was sufficient to uphold the judgment.

Irving also contended that the election should not be annulled because she would have won even if the nine votes cast by nonqualified voters were disallowed. The Second District disagreed: “When an otherwise successful candidate such as Irving is subsequently found to have committed an offense or offenses against the elective franchise, her election may be annulled even if the number of unqualified voters she fraudulently registered or the number of votes she unlawfully solicited were

too few to have changed the outcome of the election.” *Bradley*, 2003 DJDAR 2783. Nevertheless, the court lifted the ban on Irving holding office in California because she had not been convicted of a felony.

Andrews’ Election Set Aside: Lastly, the Second District set aside the judgment awarding the city council seat to Andrews. The court found that there was no statutory authority for shifting 295 votes from Irving to Andrews based on the primacy effect theory. Under the Elections Code, only illegal votes may be discarded in an election contest; unintentional clerical error is not a valid ground for shifting votes. The court thus set aside the election and declared the seat vacant.

FOR ADVICE CONCERNING ELECTION LAW ISSUES, PLEASE CONTACT YOUR OWN LEGAL COUNSEL, QUINN M. BARROW OR ANY OF THE ATTORNEYS IN THE FIRM’S ELECTION LAW PRACTICE GROUP.

PUBLIC LAW

**Recent Developments in
Subdivision Law**

BY KEVIN G. ENNIS

PRE-1893 MAPS DO NOT CREATE LEGAL LOTS

On February 6, 2003, the California Supreme Court issued its long-awaited and important decision addressing the issue of whether maps recorded prior to 1893 create legal lots. In *Gardner v. County of Sonoma* (2003) 29 Cal. 4th 990, the court confirmed that a map recorded prior to 1893 (the first year that the Legislature established laws relating to the creation of lots by subdivision maps) does not create legal lots under the Subdivision Map Act and that local agencies are not required to validate lots shown on those maps by issuing certificates of compliance.

The *Gardner* decision is important because, in many communities, developers have sought to validate lots depicted on “antiquated” pre-1893 maps. This is done to avoid the long and sometimes less successful method of subdividing land pursuant to the Map Act and in accordance with a local agency’s current subdivision standards.

The facts of *Gardner* are familiar in many older California communities. In 1865, a developer recorded a map that fully depicted 90 lots on sloping land without regard to the topographical features or constraints of the property. Most of the lots were never developed. In 1996, a developer sought to develop two of the lots and portions of 10 other fractional lots. The developer applied for certificates of compliance under the Map Act to confirm the legality of the lots. Sonoma County denied the applications on the grounds that the 1865 map did not create legally

cognizable parcels because it was recorded prior to 1893, when the first California statute regulating subdivision maps took effect.

The California Supreme Court upheld Sonoma County’s action, finding that merely because a map is sufficiently descriptive and was recorded does not mean that it makes the lots legal under the Map Act. The court also found that the “grandfather clauses” in the Map Act did not apply to the facts of the particular map. The *Gardner* opinion provides an important explanation of the history and purposes of the Map Act and its predecessor statutes.

SUBDIVISIONS OF MOBILEHOME PARKS MAY NOT OCCUR UNTIL A RESIDENT SURVEY IS CONDUCTED

AB 930 (Keeley) amended Section 66427.5 of the Subdivision Map Act, effective January 1, 2003, to ensure the legitimacy of a proposal to convert a mobilehome park to resident ownership by way of a subdivision and sale of the individual lots. The purpose of the bill was to address situations where mobilehome park owners relied upon restrictive language in the Map Act to obtain a subdivision, sell one lot, and continue operation of the park as a rental park free from the restrictions of local rent control. *See, e.g., El Dorado Palm Springs, Ltd. v. City of Palm Springs* (2002) 196 Cal.App.4th 1153.

AB 930 requires that, prior to the submission of a subdivision map application to the local agency, a survey be conducted of residents in the mobilehome park to determine whether they support the conversion. The survey must be by written ballot and upon terms agreed to by the park owner and the tenants. The results are to be considered during the hearing on the subdivision map, although the bill does not specify whether the subdivision may be denied based on the survey results. Local

agencies should consider amendments to their subdivision ordinances to address this issue.

NEW RESTRICTIONS ARE IMPOSED ON THE SUBDIVISION OF PROPERTY SUBJECT TO LAND CONSERVATION EASEMENTS

AB 1997 (Thomson) requires local agencies to deny subdivisions of properties that are subject to a variety of natural resource easements entered into after January 1, 2003.

The requirement applies if the subdivisions would create lots too small to sustain agricultural use or would result in residential development that is not incidental to the commercial agricultural use of land.

The requirement applies if the subdivisions would create lots too small to sustain agricultural use or would result in residential development that is not incidental to the commercial agricultural use of land. Real property is conclusively presumed to be too small to sustain agricultural use if it is either less than 10 acres in size, in the case of prime agricultural land, or less than 40 acres in size, in the case of other land. (Government Code Section 51201 defines “prime agricultural land.”). Numerous exceptions apply.

The easements that can trigger the AB 1997 denial requirement are as follows: a

Williamson Act agricultural land easement (Government Code Section 51200 *et seq.*); an open-space easement (Government Code Section 51074); an agricultural conservation easement (Government Code Section 10260); and a conservation easement (Civil Code Section 815).

SUBDIVISIONS FRONTING UPON WATERWAYS AND SHORELINES MUST IDENTIFY LOCATION OF REASONABLE PUBLIC ACCESS

Existing law requires subdivisions that front on waterways, streams, public lakes and coastlines to provide, by fee or easement, for public access from public highways to either a portion of the bank, river, stream or lake, or to the ordinary high water mark of any ocean coastline (Government Code Sections 66478.4–66478.12). Existing law also provides that local agencies are not required to disapprove a subdivision that does not provide this access if reasonable access is otherwise available within a reasonable distance from the subdivision. SB 2055 (Sher) requires the location of that alternative access to be specifically identified either on the map or as part of the documentation prepared for approval of the map.

COURT CONFIRMS STRICT STATUTE OF LIMITATIONS FOR CHALLENGES TO SUBDIVISION DECISIONS

On February 10, 2003, the California Court of Appeal confirmed that a lawsuit challenging a local agency’s decision “concerning a subdivision” must be commenced, and “service of summons effected,” within 90 days of that decision. *Sprague v. County of San Diego*, 2003 DJDAR 1614. This means that a challenger’s failure to both file (place on file with the applicable superior court) and serve the lawsuit (provide a copy of the lawsuit by personal service or mail to the local agency) within 90 days after the subdivision decision can effectively preclude

the lawsuit from being maintained against the local agency.

FOR ADVICE CONCERNING THE SUBDIVISION MAP ACT, PLEASE CONTACT YOUR OWN LEGAL COUNSEL, KEVIN G. ENNIS OR ANY OF THE ATTORNEYS IN THE FIRM’S PUBLIC LAW DEPARTMENT.

BANKRUPTCY
Secure First, Worry Later: Protecting Public Entities in Bankruptcy Proceedings
BY SONALI S. JANDIAL

Public entities are occasionally drawn into bankruptcy proceedings as creditors. Redevelopment agencies, for example, often make loans to low-income individuals to purchase first homes and other loans to assist in the development of commercial properties. Somewhere down the line the borrower's financial situation goes awry and refuge is sought under the bankruptcy law. The good news is that steps can be taken at the outset of these transactions to create a lien that will survive a bankruptcy. Moreover, after the bankruptcy is filed, the law favors these sorts of liens and places the onus of a challenge on the debtor.

The typical scenario unfolds as follows. A redevelopment agency provides certain subsidies to individuals of very-low, low, and low-to-moderate income to purchase a home pursuant to Health and Safety Code Section 33334.2. The agency usually offers a loan that makes up the difference between a loan by a primary lending institution and whatever money the homeowner can provide. Often, the agency holds a second or third mortgage on the property. Subsequently, the homeowner defaults on the notes and eventually files for bankruptcy, generally a Chapter 7 or Chapter 13, and the agency is left with an outstanding obligation.

At this point, the redevelopment agency has unwillingly stepped into the uneasy realm of bankruptcy. Its main concerns are getting its money back and ensuring that its interest will survive a bankruptcy. So long as the agency

has a valid lien secured by real property, that lien should survive a bankruptcy. In the landmark decision *Johnson v. Home State Bank* (1991) 501 U.S. 78, the Supreme Court reaffirmed the long-standing principle that bankruptcy discharges a debtor's personal liability for a claim but not the mortgage claim. In other words, notwithstanding the bankruptcy proceedings, a properly secured creditor remains able to seek satisfaction of debt against the secured property.

The facts of the *Johnson* case track the scenario outlined above. Home State Bank loaned Johnson \$470,000 for a home and accepted promissory notes secured by a mortgage on Johnson's farm. Johnson subsequently defaulted on the notes. The bank then brought foreclosure proceedings, and Johnson filed for Chapter 7 bankruptcy.

The bankruptcy court discharged Johnson from personal liability on the notes, but Home State Bank pressed forward with foreclosure proceedings. Before the foreclosure sale took place, Johnson filed a Chapter 13 petition. That petition listed the bank's mortgage as a claim against his estate and incorporated a payment into his Chapter 13 plan which was confirmed by the bankruptcy court.

The Supreme Court determined that the mortgage should have been included in Johnson's Chapter 13 plan because the claim survived the bankruptcy discharge. The court found that the Bankruptcy Code provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy:

“The Court of Appeal thus erred in concluding that the discharge of petitioner's personal liability on his promissory notes constituted the complete termination of the Bank's claim against petitioner.

Rather, a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor in personam—while leaving intact another—namely, an action against the debtor in rem.” 501 U.S. 78, 84.

Thus, a public entity’s creditor interest should be secured with real property, as opposed to a mere contractual agreement. This lesson applies to every situation in which a public entity may loan money.

Another step can be taken to secure a public entity creditor’s right to repayment. A deed of trust should be recorded with the county recorder. The deed becomes a lien upon delivery by the debtor.

The question remains, however, what a public entity creditor should do once a debtor files for bankruptcy. A proof of claim and a request for special notice should be filed upon learning of the bankruptcy. However, a public entity creditor will not forfeit its secured interest by not doing so. Rather, the debtor must bring a lien avoidance action or an adversary proceeding to challenge the lien.

Often a debtor will file a motion to sell free and clear of certain liens to pay off its creditors. This raises concern for a public entity creditor that seeks to preserve its secured interest on the debtor’s property. Fortunately, the Bankruptcy Panel for the Ninth Circuit has held that this motion itself is not adequate to decide the fate of a lien. Instead, an adversary proceeding is necessary to resolve the lien priority dispute. *Loloe v. Salisbury* (1999) 241 B.R. 655.

The message for public entity creditors is that the best protection against debtor bankruptcies is to secure the obligation to repay with real property.

The onus is then on the debtor to challenge a secured lien and the law protects the properly secured lien and enables it to survive a bankruptcy.

FOR ADVICE CONCERNING BANKRUPTCY LAW MATTERS, PLEASE CONTACT YOUR OWN LEGAL COUNSEL, SONALI S. JANDIAL OR ANY OF THE ATTORNEYS IN THE FIRM’S LITIGATION DEPARTMENT.

REAL ESTATE
**The One-Action and Antideficiency Laws:
Pitfalls and Solutions**
BY BRUCE W. GALLOWAY

Taking California real estate as collateral for any obligation requires a basic knowledge of the infamous “one-action” and “antideficiency” laws. Enacted toward the end of the Great Depression, these laws were intended (and are still construed) to protect debtors. They apply to public entities as well as private parties.

The “one-action” rule, which is codified in Code of Civil Procedure Section 726, begins: “There can be but one form of action for the recovery of any debt or the enforcement of any right secured by . . . real property” Section 726 specifies that the “one form of action” is a judicial foreclosure pursuant to which the property is sold and the court renders a so-called “deficiency judgment” in the amount, if any, by which the obligation exceeds the greater of: (i) the prevailing bid at the foreclosure auction; or (ii) the fair value of the property (determined at a fair value hearing). It is worth noting that a non-judicial foreclosure by trustee’s sale under the power of sale in a deed of trust is not considered an “action” under Section 726.

The “antideficiency” rule is set forth in Code of Civil Procedure Section 580(d), which provides that no deficiency judgment can be obtained after a sale of real property collateral in a non-judicial foreclosure (i.e., a trustee’s sale under a deed of trust). In other words, a deficiency judgment can only be obtained in a judicial foreclosure action. Non-judicial foreclosure, however, is preferable to judicial foreclosure for several reasons. It can be completed in approximately 130 days and

thereby avoids the lengthy delays caused by crowded court calendars. Additionally, it is not subject to the one-year post-sale redemption period applicable to judicial foreclosures that permits the debtor to “redeem” property by paying the buyer the same amount paid at the judicial foreclosure sale. The buyer at a judicial foreclosure sale is often the foreclosing creditor that simply desires to quickly re-sell the collateral; however, the one-year redemption period effectively prevents immediate resale after foreclosure and thus is anathema to most creditors.

Neither the one-action rule nor the antideficiency rule can be waived by the debtor at the outset of a transaction. Moreover, it is not clear whether these rules can be waived later in connection with a loan modification or “workout.”

MAJOR PITFALLS

The major one-action rule pitfall arises from the manner in which courts have interpreted the word “action.” For example, in a lawsuit by the debtor, the creditor’s successful assertion in a cross-complaint that the obligation owed by the debtor should be offset against the debtor’s claim can be an “action” resulting in the creditor’s inability to later enforce the real estate collateral. *Aplanalp v. Forte* (1990) 225 Cal.App.3d 609. More recently, a lender that obtained a pre-judgment attachment of a debtor’s assets located in Korea was barred from foreclosing on the debtor’s California real estate collateral because the attachment was found to be an “action.” *Shin v. Superior Court* (1994) 26 Cal.App.4th 542. In short, although there are some statutory and judicial exceptions to the one-action rule (including actions for fraud, mistake, waste and enforcement of certain environmental indemnity obligations), it is easier to violate

the one-action rule than to fit within an exception.

“The major antideficiency rule pitfall arises from securing the debt of a creditworthy debtor with real estate that is worth less than the total amount of the debt.” Considering the strong preference for nonjudicial foreclosure as the remedy for a default, the practical effect of the antideficiency rule is to deprive

The unified sale can include the real property together with the personal property that is used in connection with that real property; a sale of other personal property can follow later.

the creditor of access to the debtor’s other assets to satisfy the portion of the debt that exceeds the value of the real estate. This is sometimes an acceptable result, but it can often be unintended and undesired.

As an extreme example, envision two attorneys structuring the settlement of a lawsuit. One offers to secure the client’s payment obligation with a lien on the client’s tenancy-in-common interest in a vacation home or investment property. The other attorney must understand that to accept this offer means that the only way the payment obligation can be enforced against assets or earnings other than the real property security is by obtaining a deficiency judgment in a further judicial foreclosure action against that

real estate. Additionally, it must be understood that the deficiency judgment obtained in that later action would be limited to the difference between the “fair value” of the real estate interest and the amount of the debt, even if the amount bid at the judicial foreclosure sale was lower than the fair value (as is often the case).

SOME POSSIBLE SOLUTIONS

With respect to the antideficiency rule pitfall, consider obtaining a security interest in the debtor’s other assets, if any. Under Commercial Code Section 9501, security interests in real and personal property can be foreclosed in a single unified nonjudicial foreclosure sale, or they can be foreclosed separately in any order (provided the real property foreclosure sale is conducted in accordance with the real estate foreclosure laws, the personal property foreclosure is conducted under the Uniform Commercial Code, and no deficiency judgment is obtained except in connection with a judicial foreclosure of the real estate). The unified sale can include the real property together with the personal property that is used in connection with that real property; a sale of other personal property can follow later.

If it is not possible to obtain additional collateral, another solution is to bifurcate the obligation. This may be achieved by obtaining both a secured promissory note in the amount of the value of the real estate interest and an unsecured promissory note for the remainder. However, care must be taken that the two notes do not “overlap” in any way (*i.e.*, together exceed the total amount of the debt).

With respect to the one-action rule pitfall, in instances where the debtor is a legal entity, explore whether it is possible to obtain a guaranty from a person or entity related to the

debtor. Even if the debtor’s obligation is secured by real estate, the one-action and antideficiency rules do not apply to or affect enforcement of a true guaranty of that obligation. Note, however, that if the guarantor is found to be the “alter ego” of the debtor (as might occur when the guarantor is the sole shareholder of a corporate debtor, or the general partner of a general or limited partnership debtor), a judgment against the guarantor will be deemed to be a judgment or “action” against the debtor (resulting in the inability to enforce the real estate collateral). Additionally, a nonjudicial foreclosure in the real estate collateral might result in the guarantor, as “alter-ego” of the debtor, asserting the antideficiency rule as a defense to its guaranty obligations.

A “true” guaranty must be properly drafted in order to be enforceable when the guaranteed debt is secured by real property. For example, the failure to include a specific waiver (the so-called “Gradsky Waiver”) of the guarantor’s rights to pursue the debtor for reimbursement under the doctrine of subrogation will make the guaranty unenforceable after nonjudicial foreclosure on the real estate. (A guarantor who makes a payment under a guaranty is subrogated to [*i.e.*, “obtains”] the rights that the creditor has against the debtor for the guaranteed payment, but a creditor who forecloses nonjudicially loses those rights against the debtor by virtue of the antideficiency rule. A guarantor cannot then be subrogated to the rights of the creditor against the debtor because those rights no longer exist. Because it was the creditor’s choice to foreclose nonjudicially rather than judicially, and thereby deprive the guarantor of recourse against the debtor, state courts will refuse to let the creditor later enforce the guaranty against the guarantor).

If a creditworthy guarantor is not available, or the “alter ego” defense is a risk, consider requiring a letter of credit. Like a true guaranty, drawing on a letter of credit should not be subject to the automatic stay in a bankruptcy of the debtor. A court once held that drawing on a letter of credit was tantamount to an “action” because it subjected the debtor to suit by the issuing bank (for repayment of the sum drawn on the letter of credit and paid by the bank to the holder of the letter of credit). Code of Civil Procedure Section 580.5 overturned that decision. Unfortunately, obtaining a letter of credit requires payment of a fee, and the issuing bank will often require extensive collateral that may be unavailable.

At first reading, the one-action and anti-deficiency rules seem simple, but they are complicated in their interpretation and application. Although the benefits of having a lien on appreciating California real estate that has priority over liens of other potential lienors can outweigh the effects of the one-action and antideficiency rules, the decision to accept California real estate as collateral should be made with full knowledge of the potential legal consequences. Finally, note that if “economic gravity” (*i.e.*, what goes up must come down) applies to California real estate, the appreciating California real estate now being taken as collateral might not always be worth the full amount of the debt it secures.

FOR ADVICE CONCERNING REAL ESTATE LAW MATTERS, PLEASE CONTACT YOUR OWN LEGAL COUNSEL, BRUCE W. GALLOWAY OR ANY OF THE ATTORNEYS IN THE FIRM’S REAL ESTATE LAW DEPARTMENT.

ENVIRONMENTAL

Ninth Circuit Issues Landmark NPDES Decision

BY EVAN J. MCGINLEY

On January 14, 2003, the Ninth Circuit Court of Appeals largely upheld new regulations adopted by the United States Environmental Protection Agency (“USEPA”) to reduce storm water discharges. *Environmental Defense Center v. United States Environmental Protection Agency*, 2003 DJDAR 467. These regulations, which are collectively referred to as the “Phase II Stormwater Rule,” establish new operating requirements for a number of entities that have not previously been required to regulate storm water discharges. Operators of small municipal separate storm water systems (i.e., less than 100,000 residential connections), which are commonly known as “MS4s,” are the primary target of the regulations. However, other types of storm water sources are also affected, including construction sites between one and five acres, industrial dischargers, and illegal dischargers.

DEVELOPMENT OF THE PHASE II STORMWATER RULE

One of the goals of the federal Clean Water Act (“CWA”) is to ensure that pollutants are not discharged into navigable waters. During the past three decades, significant progress has been made in reducing the discharge of pollutants from point sources (essentially discrete or identifiable discharging sources) through the permitting scheme of the National Pollution Discharge Elimination System (“NPDES”). Unfortunately, less progress has been made in reducing the pollution associated with diffuse, or non-point sources (“NPS”). NPS pollution is a significant problem in urban areas where rain and snow have difficulty percolating into the groundwater due to the

ubiquity of paved surfaces. As a consequence, this runoff is typically captured—and ultimately discharged—by the storm water systems. Throughout this process of gathering and discharge, the runoff becomes increasingly polluted.

The CWA requires USEPA to develop regulations to reduce the quantity and toxicity of storm water runoff. The agency initially adopted regulations covering large and medium storm water systems in the late 1980s. It then turned its attention to MS4s and issued its proposed Phase II Stormwater Rule in 1998. USEPA received a substantial number of comments on the proposed rule and ultimately issued its final regulations on December 8, 1999.

The Phase II Stormwater Rule requires MS4 operators to operate their systems pursuant to a NPDES permit. Under the rule, operators can either obtain an individual NPDES permit or submit a “Notice of Intent” to operate under a general NPDES permit. Whichever option is chosen, the MS4 operator is obliged to take certain minimum measures. These measures include: (1) developing public education and outreach plans regarding the impacts of storm water; (2) ensuring public participation; (3) detecting illicit storm water discharges; (4) developing programs to reduce storm water flow in newly developed or redeveloped areas; (5) controlling storm water runoff from construction sites; and (6) developing a series of “best management practices” for MS4 operations.

NINTH CIRCUIT’S DECISION

Shortly after USEPA issued the Phase II Stormwater Rule, a variety of organizations contested the rule. In total, the petitioners raised nearly two dozen statutory, constitutional and regulatory challenges. Given the number of

parties involved and the myriad of arguments advanced, this article focuses on the issues raised by organizations representing the interests of local governments (the “Municipal Petitioners”).

The Municipal Petitioners first argued that USEPA had exceeded the scope of its authority under the CWA by requiring MS4 operators to obtain NPDES permits. Their primary contention was that the statute does not explicitly require storm water sewer systems to operate pursuant to these permits.

The Ninth Circuit found otherwise. It noted that the CWA does not explicitly either require or bar MS4 operators from discharging storm water pursuant to a permit. The court then reasoned that, under long-standing legal precedent, so long as USEPA’s decision to require these permits was reasonable, there was nothing improper about requiring MS4s to operate pursuant to a permit.

The Municipal Petitioners’ two constitutional challenges were no more successful than their statutory challenge. They first asserted that the rule amounted to excessive interference in local affairs, in violation of the Tenth Amendment. They further argued that the rule would insert the federal government into an area that had traditionally been viewed as a wholly local matter, i.e., the operation of municipal drainage works.

In deciding these constitutional issues, the Ninth Circuit reviewed the historic principles that have guided the federal government’s relations with the states and their political subdivisions. The most important is that the federal government “may not conscript state and local governments to regulate on its behalf.” But, as the court then observed, while the federal government is constitutionally

barred from coercing state and local governments to comply with federal requirements, there is nothing improper about attempting to encourage state and local governments to make certain policy choices. Moreover, as the Supreme Court has recognized, where Congress is vested with the authority to regulate private activity, it can regulate that activity through one of two means: it can allow states to regulate a particular activity, or, alternatively, it can use federal regulations to preempt state law.

Because the Ninth Circuit found that USEPA had not imposed any coercive mandates on local governments, it concluded there was no violation of the Tenth Amendment. Moreover, the court noted that a MS4 operator’s decision to comply with the rule was essentially a “voluntary” one. This “voluntariness” arises as a consequence of “deciding” to discharge into waters that fall under the aegis of the CWA. Thus, the court held that where a MS4 operator chooses to discharge into the nation’s lakes, estuaries and coastal waters, the Tenth Amendment does not bar USEPA from imposing reasonable requirements on those discharges.

The Municipal Petitioners also challenged the public education component of the Phase II Stormwater Rule on the grounds that it was a mandate from the federal government to espouse a particular political opinion, in violation of the First Amendment. The Ninth Circuit rejected this challenge as well. It found that the public outreach component was consistent with the broader purpose of the CWA and that it did not compel a MS4 operator to disseminate any particular point of view. The court further noted that nothing contained in this requirement limited an operator’s ability to provide additional information to customers.

Finally, the Municipal Petitioners challenged the inclusion of an alternative permit option in the rule. Specifically, they argued that USEPA had impermissibly included a provision in the rule that had not been part of the proposal for which it had originally sought comments. The Ninth Circuit rejected this claim too, noting that all of the elements that ultimately were included in the alternative permit option had also been part of the agency’s original proposal.

CONCLUSION

With the Ninth Circuit’s decision on the propriety of the Phase II Stormwater Rule, MS4 operators can look forward to the prospect of complying with a number of new and onerous regulatory requirements.

FOR ADVICE CONCERNING ENVIRONMENTAL LAW MATTERS, PLEASE CONTACT YOUR OWN LEGAL COUNSEL, EVAN J. MCGINLEY OR ANY OF THE ATTORNEYS IN THE FIRM’S ENVIRONMENTAL LAW DEPARTMENT.

FIRM NEWS

Litigation Victories

Mitchell E. Abbott and **Patrick K. Bobko** successfully represented the City of Monrovia in upholding the validity of its daytime juvenile curfew ordinance against a legal challenge brought by Donald Harrahill and the Home School Legal Defense Association. The central issue in the case was whether the ordinance was pre-empted by the Education Code provisions governing truancy. In a published decision, the Court of Appeal rejected the plaintiff’s preemption argument and affirmed the trial court’s decision granting summary judgment in favor of the City. *Donald Harrahill, et al. v. City of Monrovia* (2002) 104 Cal.App.4th 761.

Mitchell E. Abbott and **Patrick K. Bobko** were successful in representing the City of Beverly Hills in two separate actions brought by the Beverly Hills Government Ethics Committee. Both actions challenged the City’s adoption of mitigated negative declarations for City construction projects.

Juliet E. Cox and **Gregory M. Kunert** successfully represented the City of El Cerrito in an action brought by a developer who challenged the City’s denial of a tentative map.

Gregory M. Kunert was successful in representing the City of Palmdale in a CEQA challenge to the Palmdale Water District’s approval of a large windmill project based on a mitigated negative declaration.

T. Peter Pierce successfully represented the City of West Hollywood in enforcing its rent control ordinance against landlords who failed to exercise entitlements authorizing conversion of their apartment buildings into condominiums. In

a published decision reversing the trial court's judgment, the Court of Appeal rejected the landlords' argument that they were protected by a twelve-year old California Supreme Court decision that ruled against the City. *City of West Hollywood v. 1112 Investment Co.* (2003) 105 Cal.App.4th 1134.

T. Peter Pierce and **George M. Yin** obtained summary judgment in favor of the City of Agoura Hills against a homeowner who challenged the City's approval of an adjacent residential development.

CEB Administrative Mandamus Treatise

The firm is proud of its attorneys who prepared six chapters of the 3d edition of *California Administrative Mandamus*, which will be published by the Continuing Education of the Bar this summer. Those attorneys and their chapters are as follows:

Mitchell E. Abbott, David M. Snow, and Sonali S. Jandial: "Laying the Foundation at the Administrative Hearing."

Rochelle Browne: "Preparing the Record."

Gregory M. Kunert: "Initiating Proceedings to Review."

Mitchell E. Abbott and David M. Snow: "Pleadings in Response to the Petition."

Steven H. Kaufmann and Kelly A. Casillas: "Other Pleadings and Procedures Before Trial."

Mitchell E. Abbott and Patrick K. Bobko: "Trial and Judgment."

Steven H. Kaufmann and Kelly A. Casillas: "CEQA and Other Writ Proceedings With Special Rules."

The firm congratulates these attorneys and believes that their contributions reflect the breadth and depth of our law practice.

Presentations and Appointments

Alexander Abbe, Roxanne M. Diaz and **Robert H. Pittman's** legal overview on Housing Element Law has been reprinted in the California Inclusionary Housing Reader published by the Institute for Local Self Government. A copy of their paper is available by request to rdiaz@rwglaw.com, aabbe@rwglaw.com or rpittman@rwglaw.com.

Terence R. Boga was a panelist at the "Newsrack Ordinance Symposium" sponsored by the California Newspaper Publishers Association on February 7, 2003. Terence also published an article entitled "Federal Law Has Minimal Impact on Religious Land Use in the State" in the December 23, 2002 issue of the *Los Angeles Daily Journal*. The article was reprinted in the March 24, 2003 issue of *California Real Estate Journal*. A copy of the article is available by request to tboga@rwglaw.com.

Juliet E. Cox made a presentation on "Addressing and Avoiding Challenges to Building Permit Fees" to the Bay Area City Attorneys Association on February 28, 2003. Juliet also addressed the Napa/Solano Chapter of the International Code Council on the subject of "Before You Call the City Attorney: Teeing Up Successful Code Enforcement Actions" on April 2, 2003.

Steven L. Dorsey served as moderator for the panel "Debts, Audits and Red Ink" at the League of California Cities' City Attorneys Continuing Education Program "An Update of the Law of Municipal Finance" on February 27, 2003.

Kevin G. Ennis participated in a panel presentation on neighborhood traffic control

measures on December 4, 2002 that was coordinated by the City of La Mesa and attended by traffic engineers, planners and traffic commissioners. Kevin also presented a paper entitled “Significant California Land Use Legislation and Court Decisions in Calendar Year 2002” to the Planning Directors Association of Orange County in Costa Mesa on February 13, 2003. Kevin was part of a panel of presenters on traffic calming measures to northern California traffic engineers and planners that was coordinated by the Metropolitan Transportation Commission of Bay Area Counties and held at the Metro Center Auditorium in Oakland on March 14, 2003. At that seminar, Kevin presented a paper entitled “Legal Issues Regarding the Implementation of Traffic ‘Calming’ and Neighborhood Parking Control Measures.” Kevin also presented a paper entitled “Litigation Update: Significant California Land Use Court Decisions and Opinions in Calendar Year 2002” to the Planners Institute of the League of California Cities at its annual conference in San Diego on March 21, 2003. A copy of the papers is available by request to kennis@rwglaw.com.

Robin D. Harris presented a paper entitled “Current Developments in Assessment Districts; Proposition 218’s Impact on Assessments” at the League of California Cities’ City Attorneys Continuing Education Program “An Update of the Law of Municipal Finance” on February 27, 2003. A copy of the article is available by request to rharris@rwglaw.com.

Darold D. Pieper has been reappointed to the League of California Cities Transportation, Communications and Public Works Policy Committee. Darold addressed the Public Works Officers Institute on the subject of “Public Works Law and Litigation—New

Developments in 2002” in Monterey on February 26, 2003. Darold also made a presentation on “City Manager Employment Agreements” to the South Bay City Managers Association on March 19, 2003.

Craig A. Steele conducted a seminar on “Advanced CEQA” at the League of California Cities Planners Institute in San Diego on March 21, 2003. Craig has been appointed to represent the City Attorneys Department on the League’s Annual Conference Planning Committee. Craig is assisting the Institute for Local Self Government to draft a resources book on open space acquisition by cities. Craig also published an article entitled “New Voting Rights Law May Change the Face of Some Local Government Agencies” in the Winter 2003 issue of the *Public Law Journal*. A copy of the article is available by request to csteele@rwglaw.com.

Shareholder Admissions

Roxanne M. Diaz practices public law and advises cities and other local governmental entities in municipal law matters with an emphasis on community care facilities and land use issues. Roxanne currently serves as General Counsel to the Hub Cities Consortium, and as Assistant City Attorney for the cities of Beverly Hills, Hidden Hills and Norwalk.

Jim G. Grayson practices real estate law. Jim represents a wide range of public and private clients in the acquisition, sale, project entitlement, financing, workouts and restructurings of real estate development projects throughout California. He is chair of the firm's Real Estate and Business Department.

New Attorneys

Diana K. Chuang received her J.D. from Duke University School of Law in 1996. Diana joins the firm's Public Finance Department in our Los Angeles office.

Miguel S. Ramirez received his J.D. from Stanford Law School in 2000. Miguel joins the firm's Insurance and Litigation Departments in our Los Angeles office.

2003 Summer Associates

Benjamin Jacob Hanelin received his undergraduate degree from the University of California at Berkeley and will obtain his law degree from the University of California, Los Angeles School of Law in 2004.

Brian D. Mabee received his undergraduate degree from Grinnell College in 1994 and will obtain his law degree from the University of California, Davis School of Law in 2004.

Maricela E. Marroquin received her undergraduate degree from the University of California, San Diego in 2001 and will receive her law degree from the University of California, Los Angeles School of Law in 2004.

Sarah R. S. Soifer received her undergraduate degree from Cornell University, College of Arts and Sciences in 1998, her M.P.A. from Cornell University, Institute for Public Affairs in 1999 and will receive her law degree from Loyola Law School in 2004.

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