CEB®

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Key Developments in Real Property Law 2023

Land Use and Environmental Legislation and Caselaw

Speakers: Sheri Bonstelle and Fred Trester

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Learning Objectives

Each year, developments in California and federal legislation, as well as policymaking and new judicial opinions, contribute to a changing legal landscape in Real Property Law. This program provides an overview of important developments in Real Property Law based on new legislation, cases, and state/federal policies in 2023. This program is for new and experienced attorneys interested in Real Property Law and the changes in this practice area in the past year.



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Fredric W. Trester is a named partner with Manning & Kass, where he leads the Professional Liability and Real Estate Teams. He was a member of the California Association of Realtors' Strategic Defense Counsel Panel, and former adjunct professor at Southwestern University School of Law, where he taught the Real Estate Transactions course, and is also a frequent CEB contributor as well as the author of the chapter entitled "Litigation: Suing & Defending Real Estate Brokers" in the CEB treatise entitled "California Real Estate Brokers Law in Litigation." Mr. Trester has been named a 2006 and 2008–2020 Super Lawyer, a distinction awarded to no more than five percent of attorneys in a state who have attained a high degree of peer recognition and professional achievement.

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- *Kail De Leon v. Juanita's Foods,* 85 Cal.App.5th 740, 301 Cal. Rptr. 3d 678 (Cal. Ct. App. 2022)

- *Desert Regional Medical Center Inc v. Leah Miller, 87 Cal.App.5th 295, 303 Cal. Rptr. 3d 412 (Cal. Ct. App. 2022)*

- *Sobita Dhital, et al. v. Nissan North America, Inc.,* 84 Cal.App.5th 828 (Cal. Ct. App. 2022)

- *Iliana Perez and Flavio Guzman Magana v. Discover Bank,* 74 F.4th 1003 (9th Cir. 2023)

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- *Shapell Socal Rental Properties, LLC v. Chico's FAS, Inc.,* 85 Cal.App.5th 198, 300 Cal.Rptr.3d 209 (Cal. Ct. App. 2022)

- *Ron Hacker v. Jacqueline Fabe,* 92 Cal.App.5th 1267 (Cal. Ct. App. 2023)

- *SVAP III Poway Crossings LLC v. Fitness International LLC,* 87 Cal.App.5th 882, 303 Cal.Rptr.3d 863 (Cal. Crt. App. 2023)

- *Hanin Atalla v. Rite Aid Corporation, et al.,* 89 Cal.App.5th 294 (Cal. Crt. App 2023)

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- *The Oregon Clinic, PC v. Fireman's Fund Insurance Company,* 75 F.4th 1064 (9th Cir. 2023)
- *VHT Inc V Zillow Group Inc.,* 918 F.3d 723 (9th Cir. 2023)
- *Group XIII Properties LP v. Michelle Stockman,* 85 Cal.App.5thSupp. 1, 300 Cal.Rptr.3d 913 (Cal. Super. 2022)
- *William Hobbs, et al. v. City of Pacific Grove, et al.,* 85 Cal.App.5th 311 (Cal. Crt. App. 2022)

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- *James R. Whitlach v. Premier Valley, Inc., et al.,* 86 Cal.App.5th 673 (Cal. Crt. App. 2022)

- *Travis Blaylock v. DMP 250 Newport Center LLC,* 92 Cal.App.5th 863 (Cal. Crt. App. 2023)

- *Richard Lauckhart v. El Macero Homeowners Association,* 92 Cal.App.5th 889 (Cal. Crt. App. 2023)

- *RAR2 Villa Marina Center CA SPE, Inc., et al. v. County of Los Angeles,* 91 Cal.App.5th 1050 (Cal. Crt. App. 2023)

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- *Kimball-Griffith, L.P. v. Brenda Burman,* 67 F.4th 1006, (9th Cir. 2023)
- *Elenor Moses v. Pascale Roger McKeever,* 91 Cal.App.5th 172, (Cal. Crt. App. 2023)
- *Olympic and Georgia Partners LLC v. County of Los Angeles,* 90 Cal.App.5th 100, 306 Cal.Rptr.3d 845 (Cal. Crt. App. 2023)
- *West Pueblo Partners LLC v. Stone Brewing Co LLC,* 90 Cal.App.5th 1179 (Cal. Crt. App. 2023)

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- *Inzunza v. Naranjo*, 94 Cal.App.5th 736, 312 Cal.Rptr.3d 596, (Cal. Crt. App. 2023)

- *Adolph v. Uber Technologies, Inc.,* 14 Cal.5th 1075, Cal. Crt. App. 2023)

- *Cvejic v Skyview Capital, LLC,* 92 Cal.App.5th 1073, 309 Cal.Rptr.3d 891 (Cal. Crt. App. 2023)

- *Kinder v. Capistrano Beach Care Center, LLC*, 91 Cal.App.5th 804, (Cal. Crt. App. 2023)

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- *Borden v Stiles*, 92 Cal.App.5th 337 (Cal. Crt. App. 2023)
- *Braugh v Dow*, 93 Cal.App.5th 76 (Cal Crt. App. 2023)
- *Iten v County of Los Angeles*, 81 F.4th 979 (9th Cir. 2023)
- *Piedmont Capital Management, LLC, v McElfish*, 94 Cal.App.5th 961, (Cal. Crt. App. 2023)

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- *Coastal Protection Alliance v. Airbnb*, 95 Cal.App.5th 207 (Cal. Crt. App. 2023)
- *Ridec LLC v. Hinkle*, 92 Cal.App.5th 1182 (Cal. Crt. App. 2023)
- *Shetty v HSBC Bank USA*, 91 Cal.App.5th 796, (Cal. Crt. App. 2023)
- *Visitacion Investment LLC v 424 Jessie Historic Properties LLC*, 92 Cal.App.5th 1081 (Cal. Crt. App. 2023)

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List of Legislation and Caselaw

2023 Land Use, Housing and Environmental Legislation

- Climate Related Disclosure Bills
- Housing Bills
- California Environmental Quality Act (CEQA) Reform Bills

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2023 Land Use and Environmental Caselaw

- ***Sackett v. Environmental Protection Agency**, 598 U.S. ____ (2023).*
- ***Martinez v. City of Clovis** (Apr. 7, 2023) 90 Cal. App. 5th 193*
- ***Pacific Palisades Residents Association, Inc. v. City of Los Angeles** (2023) 88 Cal.App.5th 1338.*
- ***Historic Architecture Alliance, et al v. City of Laguna Beach, et al** (2023) 96 Cal.App.5th 186.*
- ***United Neighborhoods for Los Angeles v. City of Los Angeles** (2023) 93 Cal.App.5th 1074.*
- ***Christopher Anderson, et al. v. County of Santa Barbara, et al.** (2023) 94 Cal.App.5th 554.*
- ***East Oakland Stadium Alliance v. City of Oakland** (2023) 89 Cal.App.5th 1226*
- ***Cal. Restaurant Ass'n V. city of Berkeley** (2023) 65 F.4th 1045*
- ***Make UC a Good Neighbor v. Regents of University of California** (2023) 88 Cal.App.5th 656*
- *US Supreme Court Petition: **Martin v. City of Boise** (9th Cir. 2019) 920 F.3d 584 and **Johnson v. City of Grants Pass** (9th Cir. 2022) 50 F.4th 787*

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Climate Related Disclosure Bills

- SB 253 (Sen. Scott Wiener) Climate Corporate Data Accountability Act
- SB 261 (Sen. Stern) Climate Related Financial Risk

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Housing Bills

- AB 1287 (Assembly Member Alvarez) – Additional Density Bonuses for Very-Low or Moderate Income Units in Density Bonus Project.
- SB 747 (Sen. Caballero) and AB 480 (Assembly Member Ting) – Amendments to the Surplus Land Act (SLA).
- AB 821 (Assembly Member Grayson) – Local Agency to Make Consistent General Plan and Zoning.
- AB 529 (Assembly Member Jesse Gabriel) – Building Code Updates for Adaptive Reuse Projects**.** AB 1490 (Assembly Member Alex Lee) – Adaptive Reuse for 100% Affordable Housing Projects
- SB 272 (Sen. John Laird) – Sea Level Rise Planning in Coastal Commission and Bay Conservation and Development Commission (BCDC).

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Housing Bills – Cont.

- SB 4 (Sen. Scott Wiener) – Ministerial Approval for Affordable Housing Projects on Property Owned by Religious Organizations and Educational Institutions.
- SB 423 (Sen. Scott Wiener) – Extension and Expansion of Streamlined Ministerial Approval Law for Affordable Projects with Objective Zoning Compliance.
- SB 684 (Sen. Anna Caballero) – Ministerial Approval of Up to 10-Unit Housing Projects on 5-Acre Sites.
- AB 1114 (Assembly Member Matt Haney) and AB 281 (Assembly Member Tim Grayson) – Reforms to Post-Discretionary Entitlement Permitting.
- AB 911 (Assembly Member Pilar Schiavo) – Notification and Ownership Requirements for Modifications to Recorded Covenants Restricting Development of Affordable Housing.
- SB 439 (Sen. Nancy Skinner) – New Procedure to Strike Lawsuit Challenging Affordable Housing.

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Housing Bills – Cont.

- AB 1218 (Assembly Member Josh Lowenthal) – Replacement Units Requirements and Relocation Benefits For Demolition of Protected Housing.
- SB 469 (Sen. Ben Allen) – Exemptions from Article 34 of the California Constitution for Affordable Housing Projects Receiving Specified Funding.
- AB 812 (Assembly Member Tasha Boerner) – Authorization of Conditions of Approval for Affordable Artist Housing.
- ADU Laws: AB 1033 (Assembly Member Ting) – ADUs May Be Sold Separately Subject To Subdivision Map Act; AB 976 (Assembly Member Ting) – Owner-Occupancy Requirements Prohibited Beyond 2025; AB 1332 (Assembly Member Juan Carrillo) – 30-Day Review of Preapproved ADU Plans.

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Housing Bills – Cont.

- HCD Enforcement: AB 1485 (Assembly Member Haney) – Attorney General and HCD Right to Intervene in Housing Enforcement Suits; AB 434 (Assembly Member Grayson) – Expanded HCD Enforcement Authority.
- SB 789 (Sen. Allen) Two Constitutional Amendments Facilitating Affordable Housing Set for the General Election Ballot:
  - Assembly Constitutional Amendment (ACA) 1 (Assembly Member Cecilia Aguiar-Curry) – Constitutional Amendment to Lower Voter Threshold for Affordable Housing General Obligation Bonds;
  - SCA 2 would repeal California Constitution Article 34.

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California Environmental Quality Act (CEQA) Reform Bills

- AB 1633 (Assembly Member Phil Ting) – CEQA Amendment for Infill Housing Exemption AB 1307 (Assembly Member Buffy Wicks) – Residential Noise Not A CEQA Impact.
- AB 1449 (Assembly Member David Alvarez) – New CEQA Exemption for 100% Affordable Housing Project.
- SB 406 (Sen. Dave Cortese) – Financial Assistance Exemption Extends to Other Public Agencies
- SB 91 (Sen. Tom Umberg) – Extension of CEQA Exemption for Motel/Hotel Conversion Housing Projects.
- AB 356 (Assembly Member Devon Mathis) – Dilapidated Building Refurbishment Act.
- SB 149 (Sen. Caballero) – CEQA Litigation Administrative Record Reform.

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Sackett v. Environmental Protection Agency*, 598 U.S. ____ (2023).*

In *Sackett*, released May 25, 2023, the United States Supreme Court significantly narrowed the scope of the wetlands and other waters subject to the Clean Water Act's protections. The Court's opinion limits the definition of waters of the United States to "relatively permanent" water bodies such as streams, oceans, rivers and lakes, and to wetlands with a "continuous surface connection" to those water bodies. The case will significantly impact numerous previously-protected wetlands, including many ephemeral and intermittent streams, and undermines the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency's recent rules adopting a new definition for waters of the United States.

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Martinez v. City of Clovis *(Apr. 7, 2023) 90 Cal. App. 5th 193*

The California Fifth District Court of Appeal provides guidance to local jurisdictions on the heightened housing element requirements and the consequences of failing to meet those requirements. The City of Clovis was required to accommodate a RHNA allocation of 6,328 units, from the fifth planning cycle, as well as 4,425 unbuilt units from the previous fourth cycle. The City adopted an overlay district to allow both multifamily and single family housing, but retained the original base zoning. The Department of Housing and Community Development (HCD) certified the City's Housing Element based on a determination that the overlay zone substantially complied with housing law. First, the Court held that for cities with a shortfall of housing units carried over from a prior planning cycle, the Housing Element must rely on mandatory zoning and not an optional overlay zone. Second, although courts will not overturn HCD's Housing Element certification unless it is clearly erroneous or unauthorized, the Court held that HCD's action was clearly erroneous to rely on the overlay zone. Finally, the Court determined the Housing Element violated the 2018 Affirmatively Furthering Fair Housing (AFFH) statute, and provided specific guidance for compliance.

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Pacific Palisades Residents Association, Inc. v. City of Los Angeles *(2023) 88 Cal.App.5th 1338.*

The Second District Court of Appeal affirmed the trial court's judgment denying writ relief in a lawsuit challenging approval of a CEQA-exempt eldercare facility project in Pacific Palisades against significant well-funded NIMBY opposition, that was often hyperbolic, at the administrative and judicial levels. The 82 room 4-story senior housing facility provided much needed support for ailing seniors that want to age in place, and was zoning compliant. The Project was approved with a Class 32 CEQA exemption by the Zoning Administrator, and on appeal by the West LA Area Planning Commission, City Council, and Coastal Commission. The neighbor's claims included death and significant harm caused by traffic accidents, intolerable noise, and ironically, lack of a fair hearing, despite holding five separate Project hearings. Under the deferential substantial evidence standard of review, the Court of Appeal held that a fair argument can be made to support approval of the Project, even though other conclusions might also be reached, and denied the neighbor's writ relief.

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Historic Architecture Alliance, et al v. City of Laguna Beach, et al *(2023) 96 Cal.App.5th 186.*

The Fourth District Court of Appeal affirmed the trial court's judgment denying a CEQA writ petition challenging the City of Laguna Beach's determination to approve the remodel of a historic single family home with a CEQA Class 31 exemption for historic properties. The Court observed that the application of CEQA's historical resource exemption and its historical resource exception both depend on whether a project complies with the Secretary of the Interior's Standards. If an agency finds a project complies, it is exempt; conversely, if an agency finds a project noncompliant, the exception applies. Applying the deferential substantial evidence standard of review, the Court upheld the City's determination that there was substantial evidence in the record, including a historic report, to support the finding that the Project was consistent with the Secretary's Standards and fell within the Class 31 Exemption. The Court thereby preserved a meaningful CEQA categorical exemption for owners that want to remodel historic properties.

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United Neighborhoods for Los Angeles v. City of Los Angeles *(2023) 93 Cal.App.5th 1074.*

The Second District Court of Appeal affirmed a judgment granting a writ of mandate setting aside the City of Los Angeles' approval of a 10-story hotel project in Hollywood and the Class 32 CEQA exemption for infill projects. The Court held that because the hotel project would result in the demolition of 40 apartments subject to the City's rent stabilization ordinance, and the City failed to consider whether it was consistent with "all applicable general plan policies", including Housing Element policies to preserve affordable housing, the record failed to contain substantial evidence supporting City's use of the exemption. The Court stated, "we affirm the trial court's judgment because we cannot defer to the City's "weigh[ing] and balanc[ing] [of] the [General] [P]lan's policies" where there is no indication the City weighed and balanced all applicable policies."

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Christopher Anderson, et al. v. County of Santa Barbara, et al. *(2023) 94 Cal.App.5th 554.*

The Second District Court of Appeal reversed the trial court's grant of a preliminary injunction in a CEQA action enjoining the Santa Barbara County Road Commissioner from enforcing public laws by removing unpermitted encroachments from a public right-of-way. The owners installed landscaping, including trees, bushes and boulders, in the County public right of way, and the County attempted to compel removal to restore public parking for a nearby public trail. The owners sued by claiming the County failed to comply with CEQA and obtained a preliminary injunction from the trial court against the County, preventing the County from enforcing removal pending a trial on the merits. The Court of Appeal reversed the trial court's grant of a preliminary injunction as erroneous, held that "CEQA is not a 'limitation or restriction on the power or authority of any public agency in the enforcement or administration of any provision of law', and found that the unusual circumstances exception to a CEQA exemption may apply. In summary, the failure of the County to comply with CEQA is not a defense to the commission of a crime.

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East Oakland Stadium Alliance v. City of Oakland *(2023) 89 Cal.App.5th 1226*

The First District Court of Appeal upheld the trial court issuing a writ of mandate finding an inadequate mitigation measure addressing the project's adverse wind impacts under CEQA, but denying all other claims. The City of Oakland seeks to construct a new ballpark and a large adjoining development featuring commercial and residential buildings in the Port of Oakland to preserve local sports teams after the City lost the Raiders to Las Vegas and the Warriors to San Francisco. The City approved the entitlement and CEQA review for the project, but the East Oakland Stadium Alliance filed suit. The Court gave a detailed analysis of the requirements for an EIR to defer mitigation measures for Greenhouse Gas Emissions and wind impacts. The Court determined that the EIR met the requirements for PRC §15126.4 for GHGs but not wind impacts, because the City failed to provide specific performance standards.

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Cal. Restaurant Association v. City of Berkeley *(2023) 65 F.4th 1045*

The Ninth Circuit Court of Appeals concluded that the City of Berkeley is preempted from prohibiting natural gas piping, because Berkeley is barred from banning natural gas appliances under Federal law. Berkeley adopted an ordinance that prohibited natural gas infrastructure in most newly constructed buildings in the continued effort to require all-electric infrastructure in new buildings. However, Congress adopted the Energy Policy and Conservation Act ("EPCA"), 42 U.S. 6297(c)), which expressly preempts state and local regulations concerning the energy use of many natural gas appliances, including those used in household and restaurant kitchens. Without gas piping, any natural gas appliances will not be able to function; therefore, the 9th Circuit held the EPCA preempts the City's ordinance.

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Make UC a Good Neighbor v. Regents of University of California *(2023) 88 Cal.App.5th 656*

The California Supreme Court granted review of the First District Court of Appeal's published decision reversing the trial court judgment upholding the adequacy of the EIR for the University of California, Berkeley's long range campus development plan and a controversial housing development project at the historic People's Park. This case presents the following issues: (1) Does the CEQA require public agencies to consider as an environmental impact the increased social noise generated by student parties that a student housing project might bring to a community? And (2) Under CEQA, when a lead agency has identified potential sites for future development and redevelopment in a programmatic planning document, is the agency required to revisit alternative locations for a proposed site-specific project within the program? The first question was dealt with in recent legislation that specifically prohibits considering increased social noise as an environmental impact (AB1633).

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Martin v. City of Boise *(9th Cir. 2019) 920 F.3d 584 and* ***Johnson v. City of Grants Pass*** *(9th Cir. 2022) 50 F.4th 787*

The United States Supreme Court may decide whether to clarify camping bans and homeless policies next term. In August 2023, the City of Grants Pass filed a petition to the Supreme Court to review the *Johnson* decision and more than 30 amicus briefs have been filed. In *Martin*, the Ninth Circuit held that the City of Boise's camping ban violated the Eighth Amendment's restriction against cruel and unusual punishment, and established that the government cannot criminally penalize homeless individuals for sleeping in public if there is a "greater number of homeless individuals… than the number of available shelter spaces". In *Johnson*, the Ninth Circuit expanded on *Martin*, and found that a city cannot enforce its camping ban or impose fines or *civil* penalties on people sleeping on public property. *Martin* and *Johnson* have subsequently resulted in various lawsuits in both state and federal court by homeless individuals and advocacy groups, and have been criticized as an unworkable standard for local governments.

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Final Notes

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CEB Resources to Check Out

- **CEB DailyNews**
  - Kristin Schwaighart, *California Supreme Court Unanimously Rules Against Uber in PAGA Case* (August 7, 2023)
  - Megan Oliver Thompson, *Another Win for Commercial Landlords in the Force Majeure Arena,* (May 26, 2023)
  - Robia Crisp, *Make UC A Good Neighbor v. Regents of University of California Makes a Case for Major CEQA Reform* (March 8, 2023)
- **CEB Publications**
  - *California Land Use Practice* (2023)

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History

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