Los Angeles lawyer Tina Shim reflects on the precedent for the court of appeal’s decision in *San Francisco Beautiful*.
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are the qualities that define the contributors to Los Angeles Lawyer.

This column for the annual real estate issue has often ended with an expression of gratitude to the writers who devoted their time and energy to submitting articles for this special issue. This year, we break from tradition to express appreciation to each author (and the publication staff) for their contributions right from the start.

Writing a continuing legal education piece or a Practice Tip for Los Angeles Lawyer is hardly a proverbial walk in the park. Sam Lipsman, the late publisher of this magazine, was a perfectionist who set the editorial bar exceptionally high. Sam did not want scholarly law review commentary, but he did expect articles to contain legal content that would enhance and support the practices of LACBA’s members. The Editorial Board and staff continue to honor, respect, and follow Sam’s publication standards today.

Any author who approaches this editorial standard must have a concept—but not just any; the concept must be original and involve a topic that is current and relevant to litigators or transactional attorneys. The topic must relate to a defined substantive or procedural area of the law. Once the concept comes into focus, the author must spend time researching and analyzing relevant case law, statutes, regulations, and publications related to the proposed topic and developing a framework for the article.

After that comes the moment when hands must be placed on the keyboard or, if you are old school, pen is put to paper. The author must write the first of what likely will be several drafts before the article is finally in a form that can be submitted for review and editing by a member of the Los Angeles Lawyer Editorial Board.

Like the authors, Editorial Board members are volunteers. Board members give up their time and sweat to edit articles, working with writers to hone each article into a form that is clear, accessible, and supported by legal precedent. It is rare for this goal to be accomplished on the first draft. It is more likely that a few revisions are needed before an article can be submitted to the editorial staff for final polishing.

The contributors to this year’s real estate issue have not only survived this ordeal but have also excelled in covering a breadth of topics relevant to those who practice in this area. The topics in this issue include the duty of care of design professionals, CEQA, enforceability of boilerplate lease provisions, liability for the criminal acts of third parties, and the constitutionality of signage regulations.

While this special issue is dedicated to real estate, no policy exists to prevent publication of articles on this subject area throughout the year. On the contrary, if a decision is published or a statute is enacted that relates to some facet of real estate, environmental, or land use matters that should be covered in 2015 rather than in 2016, we strongly encourage you to submit that article.
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What is the perfect day? Kayaking in the Marina in the morning, getting a little work done working on a new program, and then spending some time with my kids.

What is overrated about working at LA Law Library? People don’t realize the funding issues that we have.

What is underrated? The job satisfaction. How much we’re able to do for the community. It’s amazing.

What is the biggest misconception about your current job? People think that law libraries are just big buildings full of books. We are so much more than that.

What would you do if a brick-and-mortar building when so much virtual information is available online? People need a live human being to help and a place to work. That has to happen somewhere.

What is the future of LA Law Library? To be a vibrant educational institution in the Los Angeles community.

Is LA Law Library financially sound? Yes. We are primarily funded by civil filing fee revenue.

The Santa Monica branch closed in 2013. Should we expect more closures? No. Actually, the so-called closures are more like transformations in our book. We have transformed a few locations into digital resources. We call them eBranches. It’s not yet open in Santa Monica.

You went to Berkeley, then Boalt. Why did you decide to become a lawyer? I had no intention of being a lawyer. I became very interested in gender discrimination, human rights, and civil rights and decided that law school would be interesting.

What was the academic mood of the East Bay area in the 80s? Boalt Hall was an interesting place to be in the late 80s. There were a lot of gender issues going on, change going on as women professors were fighting for and being granted tenure.

Your first paid law job after Boalt was working with Riordan & McKenzie, which lasted for 13 years. What was that like? It was terrific. I interviewed to find a firm that was happy with who I was.

Is there one significant case that you remember from your time there? There were a series of election cases that I handled that had to do with the right to anonymity under the Political Reform Act.

What was your best job? This one.

What was your worst job? I spent a week as a receptionist in a law firm. There was an old-fashioned switchboard you had to plug and unplug. I was terrible at it.

What characteristic do you most admire in your mother? Generosity.

If you were handed one million dollars tomorrow, what would you do with it? Make sure my kids had appropriate college accounts and try to start my own charitable fund to support law-related activities.

What book is on your nightstand? The Fault in Our Stars, so I could be able to talk to my daughter about it.

What fictional hero or heroine would you like to be? Someone with special powers.

Which magazine do you pick up at the doctor’s office? I pick up something really silly to laugh at, like a fashion magazine.

What scared you the most the first time you stood in front of a judge? That he or she would ask me a question that I didn’t know the answer to. I was ridiculously prepared.

What concerned you the most when you became Executive Director of LA Law Library in December 2012? That I had a lot to learn about library sciences.

Anything fun planned for LA Law Library? We have eBranches that we’ve just launched—one in the Los Angeles County Bar Association offices.

What is your favorite vacation spot? Camping in the Santa Barbara Mountains with my kids.

What do you do on a three-day weekend? Rancho Oso by Lake Cachuma.

What are your retirement plans? I don’t know when or whether I’ll retire.


Are you on Twitter? The library is. We follow Grand Park and other downtown activities.

Which person in history would you like to take out for a beer? Sandra Day O’Connor.

What are the three most deplorable conditions in the world? Poverty. Illness. Ignorance.

Who are your two favorite U.S. presidents? Lincoln and FDR.

What is the one word you would like on your tombstone? Helpful.
A Guide to Being Receptive to a Superior’s Constructive Criticism

WHEN A NEW ATTORNEY SEES the phrase “Please see me” in an e-mail or on a draft of a brief, he or she may feel that something particularly menacing is lurking behind this ostensibly benign request. Inevitably, it seems, the supervising attorney who wrote the request will explain that the work product is not good enough. Maybe the research is wrong, or the organization is messy. The supervising attorney may think the writing is sloppy or the conclusions are legally incorrect. Then come the comments regarding misspellings, missing punctuation, and variances in formatting. Interspersed with this criticism is a barrage of questions: “Did you research the statutes?” “Did you actually read the cases?” “I don’t understand what you are saying here—did you just copy this from another brief?” “Did you look at the exemplars I sent you?” “You had all week to work on this—why isn’t this better?”

There are five considerations that attorneys new to the practice of law need to remember in order to respond effectively to criticism. First, it is important to understand that criticism is a fundamental part of the practice of law. In many ways, the legal system is one big criticism pyramid in which supreme courts criticize appellate courts, appellate courts criticize trial courts, and trial courts criticize the legal arguments made by the attorneys before them. Appreciating this aspect of the legal field helps put criticism of work product in context. The only way to move up this pyramid is to put together the best argument possible, which means refining it over and over again before it is submitted to the trial court. This process starts with a more seasoned attorney’s reviewing a newer attorney’s work product.

Second, the practice of law is different from law school. Law schools teach legal theory and how to think like a lawyer. They do not teach how to practice law. Most law school exams consist of listing every possible legal issue or element of a cause of action one can remember or picking the best answer on a multiple choice exam. Further, because most law schools grade on a curve, students spend three years having their work product only generally criticized, plotted along a bell curve, and slotted into broad percentiles. Most law school grades never have to defend or explain their work product, with lamentations like “that professor grades hard” or “I always do poorly on multiple choice tests” typically disposing of the need for greater analysis.

Judges, however, are not professors. They do criticize work product, and they do it in the open for everyone to see and hear. Simply demonstrating knowledge is insufficient, and there are no bell curves or percentiles. Courts require legal precision and factual application in order to rule on an issue. While experienced attorneys understand this, new lawyers often lack this context and tend to respond to criticism by scrambling to discern what they believe the supervising attorney wants to hear, much as they did when trying to figure out what a professor or bar exam grader wanted to see.

New attorneys need to appreciate that criticism of their work product is necessary to build on and refine the skills gained in law school. New attorneys need to appreciate that work product criticism is necessary to build on and refine the skills gained in law school. Taking criticism as a personal attack will diminish the ability to improve in these areas, which is contrary to the intent of constructive criticism.

Fourth, new attorneys need to remember to accept, explain, confirm, and act. New associates should always make sure they 1) accept responsibility for errors or mistakes that are obvious on their face, 2) explain how they arrived at their conclusions, 3) confirm what changes are needed and why, and 4) act on those changes. For example, if formatting and spelling errors are rampant in the document, it is a waste of time nitpicking whether spellcheck was run. Instead, the focus should be on explaining the research and reasoning when substantive criticism is made. This step helps the supervising attorney understand the associate’s work process and identify areas that need further development. Next, the junior attorney should confirm that he or she understands not only what changes should be made, but why those changes are needed. Finally, act affirmatively by making all requested edits in a timely manner.

Finally, more important than all the rest, a new attorney needs to remember not to panic. Constructive criticism is part of the job, and even the most abrasive supervising attorney knows that great lawyers are made, not born. In that regard, “please see me” is not a threat but an invitation to gain skills that will turn a new attorney into a seasoned advocate.
FOR YEARS, DESIGN PROFESSIONALS HAVE avoided negligence liabil-
ity to third-party property purchasers by arguing that their role
makes them too remote from the purchasers. Instead, design profes-
sionals usually became involved in a construction lawsuit when they
were sued by the builders or developers with whom they had contracts.
This paradigm is changing as a result of the California Supreme Court’s
holding in Beacon Residential Community Association v. Skidmore,
Owings & Merrill LLP.1

In Beacon Residential, the court ruled that in the context of res-
idential development, design professionals owe a duty of care to
third-party property purchasers. The court distinguished earlier case
law that had restricted liability in cases in which design profession-
als only prepared plans or made design recommendations and held
that design professionals can be liable to a purchaser for negligence
even when they do not actually build the project and do not exercise
control over construction decisions. The supreme court declined to
follow the court of appeal’s finding of a statutory duty of care, relying
instead on a common law multifactor test. The holding still
allows design professionals to argue that the rule is not absolute but
makes it more difficult for them to avoid litigation at an early stage
and increases their exposure to liability.

The plaintiff in Beacon Residential was a condominium home-
owners association that, on behalf of individual homeowners, sued the
developer and the project architects for construction defects that the
plaintiffs argued were caused by negligent architectural design work.
The architects filed demurrers, which the trial court sustained, finding
that the claims did not show that the architects did anything beyond
the typical role of an architect in making recommendations to an
owner and that there is no duty owed by architects to future condo-
ominium purchasers when the architects act in that capacity.2 The court
of appeal reversed, finding both a common-law duty and a statutory
duty under the Right to Repair Act.3 The architects appealed the issue
to the California Supreme Court, which affirmed the court of appeal’s
ruling on more narrow grounds.

Building on a long history of negligence case law, the supreme
court held that in circumstances in which the design professional is not
subordinate to any other design professional, a duty of care is owed to
future purchasers. The court found a duty even though the developer
made final decisions on the architect’s recommendations and the con-
tractors had control over the construction process and implementation
of plans and recommendations.4 The court noted that in hiring the archi-
tect, the developer relied upon the architect’s specialized training, tech-
nical expertise, and professional judgment. Moreover, the court found
that the architect applied this expertise throughout the construction of
the project, conducting inspections, monitoring contractors’ compliance
with plans, and altering design requirements as issues arose.5

The court based its holding on an evaluation of factors developed
in two earlier California Supreme Court decisions, one holding that
a duty was owed to third parties and another holding that it was not.
In the first case, Biakanja v. Irving,6 the court had held that a notary
public who negligently drafted a will could be liable to the third-party
intended beneficiary of the will. Applying the factors set forth in
Biakanja, The court in Beacon considered 1) the extent to which the
transaction was intended to affect the future homeowner, 2) the
foreseeability of harm to the homeowner, 3) the degree of certainty
that the homeowner suffered injury, 4) the closeness of the connection
between the design professional’s conduct and the injury suffered, 5)
the moral blame attached to the design professional’s conduct, and 6)
the policy of preventing future harm.7 The Biakanja court, in the con-
text of a notary’s faulty preparation of a will, had held that the prepa-
ration of the will was intended to affect the beneficiary, it was fore-
seeable that faults in the preparation of the will would cause the
intended beneficiary loss, the loss of benefits that the will was intended
to provide was clearly suffered by the intended beneficiary, and, but
for the negligent preparation of the will, that loss would not have been
suffered. Therefore, the loss was closely connected to the notary’s con-
duct, and the moral blame attributed to the conduct was high—it
amounted to the unauthorized practice of law—which the court held
should be discouraged as a matter of policy.8

The Beacon Residential court arrived at a similar outcome when
it considered the Biakanja factors in the context of an architect’s role

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tice group in the firm’s San Diego office, focuses his practice on business and
real property-related litigation.
in residential construction. The supreme court held that 1) the architects’ work was intended to benefit the homeowners living in the residential units that the architects designed and helped to construct, 2) it was foreseeable that these homeowners would be among the limited class of persons harmed by the negligently designed units, 3) the homeowner association’s members had suffered injury because the design defects made their homes unsafe and uninhabitable during certain periods, 4) in light of the nature and extent of the architects’ role as the sole architects on the project, there was a close connection between their conduct and the injury suffered, 5) because of the architects’ unique and well-compensated role in the project as well as their awareness that future homeowners would rely on their specialized expertise in designing safe and habitable homes, significant moral blame attached to their conduct, and 6) the policy of preventing future harm to homeowners reliant on architects’ specialized skills supported recognition of a duty of care, all of which favored imposing a duty of care on architects.9

The second case that the Beacon Residential court considered in its review of common law factors was Bily v. Arthur Young & Company, in which the court had held that an accounting firm that audited a company did not owe a duty to third-party investors in the company.10 In Bily, the court based its decision of no liability on three central concerns. The court first explained that auditors exposed to negligence claims from all foreseeable third parties faced potential liability far out of proportion to their fault, including because the company being audited retained primary control over the financial reporting process, which resulted in a mismatch between an auditor’s “secondary” role in the financial reporting process and the “primary” role attributed to an auditor in a negligence suit by a third party. Second, the class of potential plaintiffs in auditor liability cases was generally more sophisticated than the ordinary consumer, and so could rely on their own audits or direct communications with a company’s auditor to protect themselves and could pursue claims based on contract rather than tort liability to control and adjust the pertinent risks. Third, the Bily court expressed skepticism that holding auditors liable to third-party investors would increase the quality of audits.11 Limiting its decision to the facts of the case before it, the Bily court explained that in other circumstances auditors could owe a duty to third persons to whom or for whom misrepresentations were made when those third persons actually and justifiably relied on auditors’ mistaken reporting.12

Contrasting the role of architects with that of auditors, the Beacon Residential court reasoned that a duty should be imposed on architects because 1) the architects’ primary role in the design of the project bears a “close connection” to the injury suffered by the homeowners, 2) the imposition would not render the architects liable for an indeterminate amount of time to an indeterminate number of persons as the construction of the project was intended to affect the limited number of people who would own and ultimately occupy the completed residences, and 3) the typical homeowner relies on the expertise of the design professionals involved in the design and construction and does not have the expertise or independent ability to discern defects in the professionals’ work.13 In short, the court determined that the alleged negligent design bore a close connection to the injury suffered, that it was foreseeable that the home purchasers would be the ones to suffer that injury, and that holding design professionals liable would more efficiently protect homeowners from design defects and their resulting harms.14

Limitation of Weseloh

In finding a duty of care to future condominium owners, the supreme court distinguished Weseloh Family Ltd. Partnership v. K.L. Wessel Construction Company, Inc.,15 often relied upon for the proposition that a design professional does not owe a duty of care to a third-party property owner that did not hire the design professional. In Weseloh, a property owner hired a general contractor to construct an automobile dealership. The general contractor then hired a subcontractor to build retaining walls, and the retaining wall subcontractor in turn hired design engineers to perform consulting work concerning the walls and to supervise the wall design work of the project design engineers. The retaining wall design engineers did not have a contract with the property owner for construction or design work and did not have a role in the construction, although they did inspect the walls after they were constructed. When the retaining walls failed, the property owner sued the general contractor, the subcontractor, and the design engineers.16 The trial court considered the Biakanja and Bily factors and awarded judgment for the wall design engineers, holding that they did not owe a duty of care to the property owner.17 The court of appeal affirmed.

In evaluating the Biakanja factors, the court of appeal in Weseloh held that 1) the wall subcontractor rather than the property owner was intended to be the beneficiary of the wall engineers’ work,2) though the resulting damage was foreseeable, this factor alone was not enough to impose liability, 3) the injury was not closely connected to the work of the wall engineers, which was limited to providing professional advice and opinion but did not extend to participation or supervision of construction, 4) moral blame should not be assigned to the wall engineers, and 5) expanded liability would not result in greater care in design engineering.18 In evaluating the Bily factors, the court of appeal held 1) that liability would be out of proportion to the wall engineers’ fault (the alleged damages were $6 million, while the engineers were paid only $2,200 for their services), 2) because they were not involved in the construction of the walls, the engineers did not have control over the creation of the walls, and 3) there was no evidence to support a policy reason for allocating loss to the engineers as compared with the property owner.19 As a result, the court of appeal in Weseloh held that the engineers did not owe a duty of care to the property owner with which they had no contract.20

The architects in Beacon Residential relied on Weseloh in arguing that they did not owe a duty to future property purchasers. The court rejected this argument and expressly limited the applicability of Weseloh. The court explained that Weseloh did not broadly hold that a design professional who provides only professional advice and opinions, without having ultimate decision making authority, cannot be liable to third parties for negligence. Rather, Weseloh held only that a design professional’s role can be so minor or subordinate to another professional in the same discipline as to foreclose liability to third persons.21 Though in the years since the Weseloh decision was issued, design professionals have argued for broad application of Weseloh’s reasoning, the decision itself states that it is limited to the facts before it and should not be interpreted to create a rule that a design professional can never be liable to a third party with which it does not have a contract.22

Impact of Beacon Residential

Beacon Residential is a logical extension, and in some respects an affirmation, of longstanding tort law. However, even after Beacon Residential, there may still be some limitations on a design professional’s liability to third parties. Where the line will be drawn is not entirely clear. A design professional who inspects, supervises, or monitors construction almost certainly owes a duty to third-party residential property purchasers, and even a professional who does nothing more than provide plans may owe a duty—and face liability—if that professional is the principal professional for a project in a certain discipline. As noted by the California Supreme Court, the application of the common-law factors it considered “necessarily depends on the circumstances of each case.”23

The supreme court could have eliminated any uncertainty, at least in connection with residential construction, but it chose not to do so. California’s Right to Repair Act (formerly SB 800) provides construction standards applic-
able to new residential construction with purchase agreements signed on or after January 1, 2003.24 The statutory scheme is intended to address every component of residential construction,25 and it expressly applies to design professionals.26 In holding that design professionals were subject to liability to third-party residential property purchasers, the court of appeal in *Beacon Residential* held the plain language of the statutory scheme to be dispositive of the issue.27 The supreme court, however, expressly chose not to decide whether the Right to Repair Act disposes of the issue,28 allowing room for the argument that whether a particular design professional’s involvement in a project rises to a level at which liability should be imposed must be decided on a case-by-case basis.

In the limited circumstances in which a design professional is not involved in advising, conducting inspections, supervising, or revising plans during construction, it may be possible after *Beacon Residential* to argue at trial that the design professional’s involvement with a project was too attenuated for liability to attach. However, because very few construction defect actions are currently proceeding to trial, the practical effect of *Beacon Residential* is much more pronounced. The ruling provides another source of direct recovery for homeowners by solidifying the right of property owners to bring claims directly against design professionals for construction deficiencies. When the design professional’s indemnity obligations are not controlled by contract, the ruling strengthens the ability of builders, developers, and contractors to bring claims for equitable indemnity by pointing the finger at design professionals. No longer will architects or engineers be able to quickly remove themselves from litigation in which design defects may be an issue. Instead, their risk management programs and insurance providers will need to adapt to the reality of protracted litigation and the likely need to contribute settlement funds to resolve claims in advance of trial.

Although *Beacon Residential* concerned residential construction, the decision and its reasoning could be extended to other types of construction in which the property owner does not have a direct contract with the design professional. Examples include commercial properties that are built for sale and distressed properties that are purchased after construction is substantially or fully completed. Design professionals involved in the construction of apartment projects could also find themselves facing liability to an expanded group of persons, if the project is converted to condominiums and defects are later discovered.

The full implications of the *Beacon Residential* decision will play out over time, and design professionals should be prepared for greater involvement in construction litigation that they may previously have been able to sidestep.

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2 CIV. CODE §§895 et seq.
3 *Beacon Residential*, 59 Cal. 4th at 581-82.
4 CIV. CODE §897.
5 CIV. CODE §936.
7 *Beacon Residential*, 59 Cal. 4th at 578-80.
9 *Beacon Residential*, 59 Cal. 4th at 574.
11 *Beacon Residential*, 59 Cal. 4th at 579-80.
12 CIV. CODE §580.
13 Id. at 581-85.
14 Id. at §581.
16 CIV. CODE §581.
17 Weseloh Family Ltd. P’ship, 125 Cal. App. 4th at 159-60.
18 Id. at 161.
19 Id. at 167-70.
20 Id. at 170-72.
23 *Beacon Residential*, 59 Cal. 4th at 578.
24 CIV. CODE §§895 et seq.
25 CIV. CODE §897.
26 CIV. CODE §5916.
28 *Beacon Residential*, 59 Cal. 4th at 578.

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12 Los Angeles Lawyer January 2015
Determining Premises Liability for the Criminal Acts of Third Parties

ON MAY 23, 2014, ELLIOT RODGER DROVE through the streets of Isla Vista continuing a deadly rampage that had started earlier that night in his apartment.1 Earlier, a shooter opened fire at a child’s birthday party in Sacramento, killing one person and wounding six others.2 Earlier still, a gunman walked into Terminal 3 at Los Angeles International Airport and opened fire, killing a Transportation Security Administration agent.3 Prior to that incident, another gunman opened fire at Santa Monica College, killing six and injuring four.4 These crimes are always shocking, and it may be argued that they are unforeseeable for purposes of establishing civil liability against the owner of the property where the incident occurred. But the ability of institutions to protect against these threats continues to improve.

In the case of Rodger, the signs of trouble were obvious. Rodger had posted a series of increasingly disturbing videos that were available to anyone with Internet access. The police were warned about his behavior and spoke with him at least three times prior to the shooting. The devastation he caused was shocking and tragic, but it was hardly unforeseeable.

There are certain circumstances in which a landowner can be held liable for the criminal actions of a third party. Many factors go into determining liability, but the court will most often look to the foreseeability of the harm and the measures that a landowner could have taken to prevent the harm. It may be impossible to predict the exact circumstances of any particular crime, but that does not mean that public institutions and businesses can be permitted to fail to take certain basic steps to protect the public.

Historically, landowners did not face tort liability for third-party criminal attacks on their premises—despite the duty to protect patrons from unreasonable risks of harm. But over time, as crime rates increased, so too did courts’ willingness to recognize exceptions to the judicially created no-duty rule. Section 344 of the Restatement (Second) of Torts provides that a landowner has a duty to protect patrons from foreseeable third-party criminal attacks; however, courts have disagreed as to the meaning of “foreseeability.”

Some courts have defined foreseeability narrowly—imposing a duty only when the landowner knew or had reason to know that a third-party criminal act was imminent.5 These courts held that prior criminal incidents were insufficient notice.6

The shift away from the no-duty rule led many other courts to define foreseeability broadly. The prior-similar-incidents rule, which emerged as the majority position in numerous jurisdictions, imposes a duty on landowners to provide protection from criminal attack when prior incidents of a similar violent nature have occurred on the landowner’s property.7 On the other hand, some courts look to other, additional factors to determine the foreseeability of third-party criminal attacks.

In 1985, while California joined some of the jurisdictions following the prior-similar-incidents rule in Isaacs v. Huntington Memorial Hospital,8 the California Supreme Court adopted a “totality of the circumstances” approach that made it easier for plaintiffs to hold landowners liable. The court held that “foreseeability is determined in light of all the circumstances and not by a rigid application of a mechanical ‘prior similars’ rule.”9 Evidence of prior similar incidents on the landowner’s premises continued to be helpful in determining foreseeability, but Isaacs made clear that this evidence was not necessary. The proclaimed pro-victim, totality-of-the-circumstances approach of Isaacs garnered much debate as it marked a noteworthy departure from the traditional prior similar incidents rule.

Property owners had no way of knowing whether they had a duty or what might be required to fulfill that duty.

In 1993, the state Supreme Court found that Isaacs was in need of “refinement” against the backdrop of the “random, violent crime [that] is endemic in today’s society.”10 Because “it is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable,” the court felt compelled to revisit Isaacs.11

In Ann M. v. Pacific Plaza Shopping Center, plaintiff Ann M. was raped at knifepoint while working alone at a secluded shop in the Pacific Plaza Shopping Center.12 The shopping center was in an area where violent crimes had occurred, and transients frequently loitered in its common areas. While no rapes had occurred at the shopping center, there had been purse snatchings, bank robberies, and at least one assault.13 Pacific Plaza’s owner was unaware of these crimes and did not provide security patrols.14

Ann M. filed a negligence suit, alleging that Pacific Plaza breached its legal duty to protect her from an unreasonable risk of harm by not providing adequate security.15 Although no evidence of prior rapes was presented, Ann M. argued that the presence of the transients on the premises gave rise to a foreseeable risk of such a crime.16

The trial court granted Pacific Plaza’s motion for summary judgment, finding that the Pacific Plaza did not owe Ann M. a duty of care.17 The appellate court affirmed summary judgment but disagreed with the trial court as to whether Pacific Plaza owed Ann M. a duty of care.18 Indeed, the appellate court specifically found that Pacific Plaza had a duty to protect Ann M. from third-party criminal attacks. But the court

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ultimately held that no reasonable jury could have found that the mall’s failure to provide security patrols breached that duty.

Ann M. appealed the lower courts’ decisions to the California Supreme Court. The supreme court held that because Pacific Plaza did not have knowledge of prior, similar violent crimes on its premises, Ann M. could not prove that a third-party criminal attack was sufficiently foreseeable to impose a duty on Pacific Plaza to provide security.19

In refining the totality-of-the-circumstances approach, the court placed greater weight on the requirement that “the scope of the duty is determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed.”20 The court discussed the economic and social costs of imposing a duty to hire security guards and held that such a burden would be justified only in the event that there had been prior similar incidents of violent crime.21 This, the court reasoned, would provide the essential “high degree of foreseeability.”22

Although Ann M. diplomatically averts that it refined Isaacs, it in fact undercuts the totality-of-the-circumstances precepts of Isaacs, creating a middle-of-the-road approach to premises liability that embraces neither the totality-of-the-circumstances rule nor the strict prior similar incidents test.

Subsequently, the California Supreme Court decided Sharon P. v. Arman, Ltd.23 The court declined to impose a duty on the landlord to provide security guards in an underground commercial parking garage because the plaintiff’s sexual assault was not foreseeable.24 Although there was evidence of multiple non-violent bank robberies on the first floor, several hundred crimes (including two rapes) in the general neighborhood, and vagrants sleeping and urinating in or around the garage prior to the assault, the court found that there was not enough evidence that a reasonable person could foresee the type of assault that occurred.25 Ostensibly, the court did not demand that prior incidents be identical but held that the plaintiff did not establish the high degree of foreseeability necessary to justify the “significant burden” of imposing a duty to provide security guards in the garage.26

Neither Ann M. nor Sharon P. required identical prior act proof to warrant finding a duty to protect. Rather, the major issues were whether the prior crimes sufficiently closely resembled the criminal activity generating the claimed injury.

The nature and scope of business landowners’ duty to protect their customers became even more convoluted in Delgado v. Trax Bar & Grill.27 Michael Delgado and his wife went to Trax Bar and Grill in the evening, attracting the attentions of Jacob Joseph and his three friends.28 As tensions rose, the bar’s bouncer asked Delgado to leave, figuring it an easier request that a single couple leave rather than a group.29 After Delgado left with his wife, Joseph followed, signaling 12 to 15 of his gang buddies.30 Joseph and his friends chased down and brutally beat Delgado, who spent 16 days in the hospital.31

Delgado brought a negligence suit against the bar on theories of premises liability. On appeal, Delgado asserted that Trax owed him a duty of care “because of the special relationship created by the hiring of security guards,” and because his wife gave Trax notice of the “potential problem prior to its occurrence.”32 Trax argued that because there was no evidence of prior, similar criminal assaults either at the bar or in the vicinity, Delgado’s assault was unforeseeable as a matter of law.33 Accordingly, Trax argued it owed no duty to provide security and could not be found liable for Delgado’s injuries.

The court rejected the argument that a showing of heightened foreseeability is required to impose liability upon a business landowner for the criminal conduct of a third party.34 Rather, the court expressly reaffirmed the “sliding scale balancing formula” approach, which it said it had been using all along.

The court ultimately concluded that, while Delgado failed to establish sufficient prior similar incidents as evidence to invoke the heightened foreseeability requirement of hiring more security guards, the bar did have a duty to prevent unreasonable risk
of harm to Delgado by “minimally burdensome measures.”

More recently, the court has attempted to clarify some of the confusion that these rulings were creating in the lower courts. In Castaneda v. Olson, the California Supreme Court addressed whether the owners of a mobile home park could be held liable for a gang-related shooting. The plaintiff was standing outside his mobile home when a stray bullet from a gang shootout hit him in the back. Prior to the shooting, there were numerous reports of gang activity, including reports of drug sales, and two shootings. The defendants had rented a space next to the one where the plaintiff resided to a man with gang affiliations.

The plaintiff’s argument to establish a duty for the defendants was threefold: 1) the defendants had the duty not to rent units to gang members, 2) the defendants had a duty to remove tenants once the problem because apparent, and 3) the defendants should have had security guards and additional lighting on the premises. The court clarified the analytical framework for evaluating these arguments. First, the court must identify the specific measures that the plaintiff believes would have prevented that harm. This step frames the issue for the court. Second, the court will consider how burdensome the proposed measures would be for the landlord to implement. In the third step the court:

[M]ust identify the nature of the third party conduct that the plaintiff claims could have been prevented had the landlord taken the proposed measures, and assess how foreseeable (on a continuum from a mere possibility to a reasonable probability) it was that this conduct would occur. Once the burden and foreseeability have been independently assessed, they can be compared in determining the scope of the duty the court imposes on a given defendant. The more certain the likelihood of harm, the higher the burden a court will impose on a landlord to prevent it; the less foreseeable the harm, the lower the burden a court will place on a landlord.

Applying this standard, the court found that it would be too burdensome to require a landlord not to rent units to suspected gang members. Such a requirement would essentially force a landlord to make relatively uninformed judgments about tenants that could expose the landlord to discrimination suits. The court also held that the plaintiff’s claims failed because the record showed insufficient evidence that security guards or lighting would have prevented the shooting.

The California Supreme Court’s decisions have mostly involved private businesses. However, these same principles also apply to public institutions like schools. Indeed, school districts often face the additional concern of having some actual or constructive knowledge of problem students. Schools also have a pre-existing duty to supervise their students. In particular, school districts need to pay close attention to their policies when it comes to supervising potentially dangerous students. California courts have found school districts civilly liable for criminal acts perpetrated on their campuses.

In M.W. v. Panama Buena Vista Union School District, a mentally disabled student was violently sexually assaulted in a school bathroom by an upperclassman. The standard of care for schools in California is different than that for other institutions. The court held that it was well established that “[i]t is the duty of the school authorities to supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection.” The school did not have any security on campus at the time the minor plaintiff was assaulted, which the court found constituted a breach of their duty to protect students. The school district attempted to argue that this incident was not foreseeable as it had no knowledge that this type of assault would occur. However, there was evidence presented that the assailant had a long history of disciplinary issues at the school, and while none of the incidents involved a sexual assault, the court found “no distinction between a physical assault and a sexual assault for purposes of foreseeability in this case.” Thus, the foreseeability was not so narrowly constrained to the exact incident, but rather to the type of harm—in this case, an assault on a student. The court held that plaintiff could recover against the school district under these circumstances.

California law gives landowners and litigants a number of factors to consider both post- and prelitigation. Landowners should constantly assess what if any dangers third parties could pose to persons on their property. Then, landowners should determine whether any measures can be taken to prevent or mitigate these dangers. Most of the time minimally burdensome measures will satisfy their duty. Additionally, ignorance of a potential danger will not constitute a valid defense if the landowner should have known about the danger. Therefore, landowners should be proactive in seeking information about potentially problematic tenants or students.

Similar factors have been applied in other high-profile crimes, and in certain circumstances liability has been found for unexpected acts of criminal violence. For example, after the Columbine tragedy, victims of the shooting were able to recover more than $2.5 million against the shooters’ parents. The majority of the settlement came from the homeowner’s insurance of the shooters’ parents. There was no evidence that the parents knew about what their sons had planned that day. However, the fact that their sons’ behavior went unnoticed under their roof was enough to impute some knowledge. Likewise with the Virginia Tech shooting, the school had some knowledge of Seung Hui Cho’s disturbing behavior prior to the incident. But more important, the school had actual knowledge that a gunman was on campus before the main attack occurred. Subsequent investigations also revealed that there were no appropriate security procedures in place to reasonably protect students and that university officials locked down their own building while deciding their next course of action but “failed to issue an all-campus notification” for nearly two hours. As a result of the shooting a Virginia circuit court approved an $11 million settlement for wrongful death claims. Two families refused to settle, and in 2012 a jury awarded $4 million to each of the families. However, due to a cap on damages that can be awarded when suing the state, the verdict was appealed and reduced to $100,000 for each family.

For a plaintiff to assert a claim, the plaintiff must be able to articulate a clear, minimally burdensome measure that would have prevented the crime. This crucial step frames the entire judicial analysis. Simply arguing that a business should have additional security guards rarely seems to persuade courts. But steps such as keeping locks and doors in working order can get a case past a motion for summary judgment. Additionally, any evidence that a defendant had actual or constructive knowledge of a danger will go a long way to establishing a duty. If some or all of these factors are present, a business or institution may face civil liability for the crimes of a third party. This is not to suggest that businesses are required to essentially insure victims for the crimes of a madman, but they need to have policies and procedures in place that plan for the possibility.

6 See, e.g., McClurg v. Delta Square Ltd. P’ship, 937 S.W. 2d 891, 895 (Tenn. 1995).
7 See Delgado v. Trax Bar & Grill, 36 Cal. 4th 224, 251
Continued on page 35.
UTILITY BOXES, typically about four feet tall and painted gray, are needed to operate and maintain telephone service. In 2007, AT&T proposed installing 850 utility boxes across the city and county of San Francisco to support its project to upgrade broadband speed and expand its fiber optic network. AT&T applied to San Francisco for a categorical exemption for review of this project under California Environmental Quality Act (CEQA). Although the city planning department decided the project was exempt, AT&T withdrew its application in response to a public protest at a hearing of the city and county’s board of supervisors.

In 2010, AT&T revised the project and submitted a new application to the city for the same categorical exemption. AT&T reduced the number of boxes to 726, limited their size, increased the distance between new and existing cabinets to provide flexibility in their location, eliminated adding new facilities within historic districts, and promised to affix a 24-hour-a-day contact number for reporting graffiti directly to AT&T. The city planning department again determined that the project was categorically exempt, and two organizations appealed the decision to the board of supervisors. AT&T presented a memorandum of understanding to the city in which the company agreed to further actions, including providing notice to neighbors and conduct community meetings for each cabinet site, maintaining a public Web site about the project, placing cabinets in less conspicuous locations when possible, and reimbursing the city for the cost of graffiti removal. The city’s board of supervisors upheld the planning department’s determination that the project was categorically exempt. San Francisco Beautiful, a nonprofit advocacy group, and a few neighborhood associations then sought a writ of mandate to set aside the city’s decision until an environmental impact report (EIR) could be prepared and mitigation measures could be adopted. The trial court denied the petition, and the court of appeal affirmed that decision in San Francisco Beautiful v. City and County of San Francisco. The case is instructive on the categorical exception to CEQA regulation.

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CEQA concerns notwithstanding, Public Utilities Code Section 7901 provides telecommunication companies with a right to install utility boxes

by TINA SHIM

OUTSIDE THE BOX

KEN CORRAL
Depending on the nature and level of a project’s environmental impact, a public agency is mandated by CEQA to undertake a one-to-three-tier impact analysis. Under the first level of analysis, a public agency must make a preliminary review to determine if an activity is a project subject to CEQA. A “project” is defined as the whole of an action and includes any action that has a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. If the proposed project fails to meet these criteria, no further CEQA analysis is needed. If the project may create a direct or indirect physical change in the environment, the public agency must evaluate if the project is exempt from CEQA. A project is exempt if the legislature has concluded it may not have a significant effect on the environment. If a project falls within an exemption, then a public agency does not generally need to proceed with any further environmental review. Finally, if an agency finds there is substantial evidence that some aspect of a project may have a significant effect on the environment, then the third tier of CEQAs analysis becomes operative. This requires the agency to prepare an EIR, which the San Francisco Beautiful plaintiffs were seeking. An EIR is intended to inform decision makers and the public of the potential environmental impacts of a project as well as identify feasible alternatives to the project and mitigation measures to avoid any negative environmental impacts.

AT&T’s plan to install new utility boxes was submitted to the city as a potential project under CEQA, so the CEQA analysis focused on whether the second or third tiers of this analysis applied. AT&T argued that the analysis stopped at the second level because the utility was entitled to a categorical exemption under 15303(d) of the state CEQA guidelines, known as the Class 3 exemption. This exemption removes projects involving the “construction and location of limited numbers of new small facilities or structures; [and] installation of small new equipment and facilities in small structures” from further CEQA analysis. The plaintiffs contended that certain exceptions to this exemption applied because of its environmental impacts, thereby requiring to prepare an EIR. The city agreed with AT&T that its project qualified for the Class 3 exemption and no further CEQA review was required. Once the city made this determination by filing a notice of exemption, no authority existed to mandate that AT&T prepare and submit an EIR.

The plaintiffs, on the other hand, argued that even if the Class 3 exemption applied, the project would have significant environmental impacts and qualified for an exemption within that exception; therefore, the city was required to prepare an EIR. CEQA provides an exception to the application of categorical exemptions “where there is a reasonable possibility of unusual circumstances.” To determine if this “unusual circumstances” exception applied, the appellate court in San Francisco Beautiful conducted two distinct inquiries set forth in CEQA guidelines Section 15300.2(c). First, the court conducted an analysis as to whether the project presented unusual circumstances, and second, if there was “a reasonable possibility of a significant effect on the environment due to the unusual circumstances.” As to the former, the court found that the Class 3 exemption applied to a limited number of new utility structures that were small and in public rights-of-way. According to the court, the plaintiffs failed to present evidence showing how AT&T’s utility boxes would create unusual impacts. The court was particularly persuaded by the fact that San Francisco is an urban landscape in which, among other things, “13,000 MUNI-maintained poles, 132 cabinets to support MUNI operations, 5,800 signalized intersections, 25 automatic toilets..., 5,151 trolley poles, [and] 21,891 street lights” exist in the public rights-of-way. The court found that the plaintiffs had no basis for arguing that the AT&T boxes would attract graffiti, public urination, impede pedestrians, or block drivers at a level greater than that which existed with the 47,000 similar structures on San Francisco’s streets. And while the new structures might be unsightly, they would create only a slight incremental visual effect. In sum, any negative impact was minimal at best because of San Francisco’s urban environment.

The plaintiffs also contended that given the cumulative impacts of the AT&T project, this exception to the Class 3 exemption under CEQA was equally applicable. The court rejected this argument and found that the plaintiffs failed to present evidence showing that the utility boxes would create significant cumulative impacts. The plaintiffs also asserted that the gray boxes would have significant aesthetic impacts that were within the city’s purview to regulate under the decisions in Pocket Protectors v. City of Sacramento and Ocean View Estates Homeowners Association, Inc. v. Montecito Water District. The court distinguished these cases because they involved a clear change to the existing environment whereas the utility boxes being challenged in San Francisco Beautiful would not degrade the existing visual character of the urban environment into which they were going to be placed.

Further, the plaintiffs claimed the project’s impacts were inconsistent with the city’s Public Works Order and Better Streets Plan. The court dismissed this argument because it found that the city contemplated the installation of utility boxes when it adopted those

Utility Boxes as Public Art

In Los Angeles and other California cities, street art projects now include painting utility boxes. As noted in San Francisco Beautiful v. City and County of San Francisco, San Francisco properly governed the minimization of the negative visual impacts of new utility boxes with its Public Works Order and Better Streets Plan, even though the plaintiffs’ aesthetic concerns did not rise to the level of a significant impact. In Los Angeles, the counterpart to San Francisco’s plan is found in Section 22.119 of the Administrative Code, titled Original Art Murals on Private Property. The content-neutral language of the ordinance indicates intent to adhere to the limits of the city’s police powers.

In Los Angeles, large-scale public art has been a part of the landscape since as early as 1932, which saw the creation of murals on historic Olvera Street. Los Angeles’s temporary 2002 ban on public murals was lifted by the Los Angeles City Council last August. The murals have been slow to return, but on January 22, 2014, art on six new utility boxes was unveiled in Downtown’s Historic Core around the intersections of Winston, Main, and Los Angeles Streets. Nine utility box art installations will follow along the 1st Street Arts Corridor in Boyle Heights. In addition, 118 Winston, a local art gallery and yoga studio, has been coordinating a series of murals on utility boxes in and around Verdin Place in Downtown’s Skid Row—known as Indian Alley—to celebrate the Native American history of the site.—T.S.
plans. In fact, the court fully expected that AT&T would ensure that its boxes complied with the aesthetic and placement requirements of the plans. Finally, the court held that the city had not improperly relied on AT&T’s changes to the project as mitigation measures, and that AT&T’s memorandum of understanding had not been the basis for the city’s CEQA determination.

**Telegraph Poles**

By concluding the city had very limited authority to regulate AT&T’s utility boxes, the court in *San Francisco Beautiful* avoided creating a conflict between CEQA and California’s long-standing regulation of public utilities like AT&T. The discretion that AT&T retained to decide where its utility boxes would be located owes its existence to laws first enacted in the mid-1800s granting telegraph companies the right to construct poles and lines along any public road or highway, provided this did not incommode the public. In 1850, when the California Legislature first convened, the precursor to Public Utilities Code Section 7901 was enacted with the heading of Act concerning Corporations. The legislature recognized that telegraph operations, the new communications technology of its time, required a uniform statewide regulatory structure, not a hodgepodge of local government laws. Under the act, local governments were stripped of authority over telegraph companies, which were permitted to “associate for the purpose of constructing a line or lines of wires of telegraph through this State, or from and to any point within this State,” as well as to “construct lines of telegraph along and upon any of the public roads and highways.”

Years later, the legislature extended these rights to telephone companies. To this day, Section 7901 gives telecommunication companies the right to install devices in the public rights-of-way. Local governments are barred from acting contrary to state law except in limited circumstances.

This view of the statute is supported by the Ninth Circuit decision *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge*, in which the court examined the preemption of city ordinances under Section 7901. The court affirmed the city’s limited right to regulate access to public rights-of-way and negated the city’s attempt to prevent construction. The court quoted the California Supreme Court’s description of the effect of Civil Code Section 536 (the predecessor to Public Utilities Code Section 7901) on local regulations: “The right and obligation to construct and maintain telephone lines has become a matter of state concern. For this reason, a city cannot today exclude telephone lines from the streets upon the theory that ‘it is a municipal affair.’”

The franchise relationship between utilities and the state is an equally important consideration in understanding the relatively protective legal status of utility boxes. Courts have consistently held that Section 7901 constitutes an offer by the state to grant a franchise for construction and maintenance of telecommunications equipment much like the legislature did in 1850 when it extended a similar offer to telegraph corporations. This offer was presented to ensure that California residents had access to statewide communication services. Once a corporation built and operated facilities in the right-of-way, the state’s offer was deemed accepted.

Today, the laws that were originally created for telegraph companies have been extended to wireless communications and fiber optic cable by Public Utilities Code Sections 234(a) and 233, which allow Section 7901 to apply to any telephone corporation that provides wireless or landline services.

Generally, a local government’s power to regulate its streets is derived from its police power. In the context of utility boxes, however, the grant of a franchise to a telecommunications company does not arise from a local government’s police power but rather from the state. Therefore, a local government has no authority to refuse the construction of these boxes, nor may it adopt an ordinance barring construction of utility boxes based on aesthetic grounds. This limitation on ordinances governing utility boxes is acknowledged in *San Francisco Beautiful*. The city’s Public Works Order and Better Streets Plan did not authorize outright refusal of construction installed on the public rights-of-way and only imposed requirements related to the location and design of the structures. These requirements were intended solely to minimize the negative effects on pedestrian and driver safety and on aesthetics. In other words, cities may govern only the way in which the public roads are accessed to construct these boxes but not whether the road actually is accessed.

This limited authority is described in Public Utilities Code Section 7901.1: “It is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed.”

Rather than debate whether state law pre-empts that of a local government, the court in *San Francisco Beautiful* stated that there was no reason to think that AT&T would not comply with the city’s Public Works Order and Better Streets Plan. The court was able to accomplish this because for new construction that falls within Section 7901, a local government has little or no authority to prevent construction. One conclusion that may be drawn from *San Francisco Beautiful* is that it is difficult to show significant adverse aesthetic impacts for new construction in a highly urbanized setting. *San Francisco Beautiful* may also be said to stand for the proposition that it is futile to argue that adding small structures that are consistent with local municipal zoning laws may have a significant adverse aesthetic impact.

*San Francisco Beautiful* offers guidance for attorneys advising municipalities and public agencies about state regulation of telecommunication companies. Regardless of whether the city’s planning department or its board of...
supervisors had reached a contrary decision and upheld the request of San Francisco Beautiful for the preparation of an EIR, AT&T retained the right to install its metal utility boxes under state law. There was little the city could have done beyond some nominal regulation of the aesthetics of those gray utility boxes. While the case may be distinguished by its urban setting, a similar case arising in a rural setting that involved a public right of way would implicate the same rights under Section 7901. Lastly, a city’s effort to regulate the aesthetics of utility boxes is relevant but probably not dispositive in analyzing whether significant negative aesthetic impacts may occur.

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3 Id.
5 Cal. Code Regs. tit. 14, §15378 (CEQA’s definition of a project includes public works constructions, improvements to existing public structures, enactment of zoning ordinances, adoption of general plans, activities supported by public agency monies, and even activities issuing leases, permits, and licenses.).
8 No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 74 (1974); Cal. Code Regs. tit. 14, §§15061(d), 15062(a).
15 Id. at 1019.
17 San Francisco Beautiful, 226 Cal. App. 4th at 1024.
18 Id. at 1025.
19 Id.
20 Id.
21 Id.
22 Id. at 1027-28.
23 Id. at 1030; Cal. Code Regs. tit. 14, §15300.2(b).
24 San Francisco Beautiful, 226 Cal. App. 4th at 1031.
26 San Francisco Beautiful, 226 Cal. App. 4th at 1031.
27 Id. at 1032.
28 Id. at 1030-32.
29 Id. at 1033.
34 Shonafelt, supra note 31.
35 Oro Elec. Corp. v. Railroad Comm’n of Cal., 169 Cal. 466 (1915); Pacific Tel. & Tel. Co., 197 Cal. App. 2d 133.
37 Id. at 689.
38 Cox Comm’n’s PCS, P.L. v. City of San Marcos, 204 F. Supp. 2d 1272 (2002) (Public Utilities Code §7901 constituted a contractual offer by the states, acceptance of which took place when the corporation built and operated facilities in the rights of way.).
41 Cox Comm’n’s PCS, 204 F. Supp. 2d at 1272.
42 Id.
44 Id. at 771.
46 Id. at 692.
47 Id. at 693.

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Los Angeles Lawyer January 2015
Common provisions in commercial real property contracts may be unenforceable, partially enforceable, or not enforceable according to their literal meaning.

VIRTUALLY EVERY commercial real property contract contains pages of boilerplate provisions with language that seeks to narrow the scope of any subsequent dispute, limit liability, and dictate the manner in which disputes are adjudicated. The virtual ubiquity of these provisions indicates that they are relied upon, but do they work? Stated differently, are the provisions enforced in accordance with their literal meaning? In some cases, common boilerplate provisions in commercial real property contracts are absolutely unenforceable, enforced in certain contexts, or not enforced in accordance with their literal meaning.

For example, commercial real estate contracts often contain provisions in which the parties agree that the purchaser or tenant is taking the property “as-is” and disclaim any representations made outside of the written language in the contract. Boilerplate integration provisions typically state that the contract contains the complete agreement between the parties. Although as-is and integration provisions literally preclude claims based upon alleged promises outside the contract, their enforcement falls short of their literal meaning.

In an as-is sale of property, the use of the term “as-is” relieves a seller of real property from liability for observable defects in the property’s existing condition. In an as-is sale, no warranties of quality or condition are implied in the sale of the property. However, an as-is provision will not shield the seller from all claims concerning the condition of the property. When a seller intentionally conceals, through fraud or misrepresentation, material defects not otherwise visible or observable to the buyer, the as-is provision will not shield a seller from a buyer’s claims.

Nor is an integration clause always effective in accordance with its literal meaning. The clause seeks to bar introduction of parol evidence, which is evidence of prior or contemporaneous oral communications introduced to alter the meaning of written contracts. An integration clause is governed by Section 1856 of the Code of Civil Procedure, which states: “Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement.”

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Integration clauses are generally enforceable and can be effective to bar introduction of evidence of alleged promises that are contrary to the clear and express terms of the contract. However, parol evidence may be introduced to interpret the contract when it is ambiguous. Thus, even in the face of an integration clause, a court can, and likely will, hear evidence of prior or contemporaneous oral communications in adjudicating a dispute concerning a real estate contract. Moreover, integration clauses have, at most, a limited application to fraud claims. It has been the law for years that a “party may not contract away liability for fraudulent or intentional acts or for negligent violations of statutory law.” Section 1668 of the Civil Code states: “All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.” In general, an integration provision will not bar claims of fraud in the inducement of a real property contract. As explained in Manderville v. PCG & S Group, Inc., a “party to a contract who has been guilty of fraud in its inducement cannot absolve himself or herself from the effects of his or her fraud by any stipulation in the contract, either that no representations have been made, or that any right that might be grounded upon them is waived. Such a stipulation or waiver will be ignored, and parol evidence of misrepresentations will be admitted, for the reason that fraud renders the whole agreement voidable, including the waiver provision.”

While prior law essentially allowed parties to contract around fraud committed prior to the execution of an integrated contract by refusing to admit parol evidence contrary to the contract, the California Supreme Court in Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association held that the parol evidence rule does not bar evidence of fraudulent promises that contradict the terms of an integrated writing. The Riverisland court relied upon Section 1856(f) of the Code of Civil Procedure to rule that “it was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud.”

Riverisland has been applied to real estate contracts, such as the commercial leases at issue in Julius Castle Restaurant, Inc. v. Payne and Thrifty Payless, Inc. v. Americana at Brand, LLC. In Julius, commercial tenants sued their landlord for fraud related to purported oral representations that the restaurant equipment was in working order and that the landlord would fix any broken equipment. Over the landlord’s objections, the court concluded that “parol evidence is admissible as to fraud claims involving sophisticated parties,” reasoning that said admissibility “does not create any injustice” because parties “claiming fraud in the inducement [are] still required to prove they relied on the parol evidence and that their reliance was reasonable.” In Julius, the tenants met their burden “to prove that, notwithstanding both the Lease’s integration clause and the ‘as is’ language with respect to the restaurant equipment, they reasonably relied on [the landlord’s] prior oral assurances in entering into the agreements.” The Julius court also disagreed with the landlord’s argument that Riverisland should only apply to contracts of adhesion.

Likewise, Thrifty cited to Riverisland to find extrinsic evidence “admissible to establish fraud or negligent misrepresentation in the face of the lease’s integration clause.” In Thrifty, the plaintiff tenant of commercial space alleged fraud against the landlord for purported false representations about estimated tax, insurance, and common area expenses made in a letter of intent before the parties executed the final lease. The landlord demurred, arguing that tenant agreed in the lease that “it was entering into the lease based on its own investigation,” that “implied terms of the contract could not contradict the express terms,” and that “the lease contained an integration clause…such that prior negotiations and discussions, which were no more than ‘estimates,’ were merged into the lease.” The trial court granted the landlord’s demurrer, but the court of appeal reversed in light of Riverisland, stating that “extrinsic evidence is admissible to establish fraud or negligent misrepresentation in the face of the lease’s integration clause.”

While as-is clauses and other provisions disclaiming any representations or warranties outside of the contract may not be enough to win demurrers or motions for summary judgment, the clauses may be considered as factors tending to disprove the justifiable reliance element of fraud. Indeed, it will be difficult for a party to show that it justifiably relied on a precontract statement contrary to the terms of a final written contract when the contract contains an integration clause in which the party affirms that it cannot rely on any precontract statements contrary to the terms of the final written contract.

In sum, although as-is clauses, integration clauses, and other provisions disclaiming any representations or warranties outside of the contract may have some efficiency in narrowing future contractual disputes, these provisions will not likely be enforced in accordance with their literal meaning with respect to fraud claims, particularly claims of fraud in the inducement.

It is also customary for commercial real estate contracts to contain exculpatory clauses. For example, commercial leases commonly include provisions stating that the landlord shall not be liable for negligence. In general, California law regards exculpatory clauses with disfavor. Civil Code Section 1668 provides that certain exculpatory clauses “are against the policy of the law.” Nevertheless, parties may agree to certain exculpatory clauses when the contract does not affect the public interest. When the supreme court reviewed the “troubled” history of Civil Code Section 1668, it found the decisions uniform in one respect: “The cases have consistently held that the exculpatory provision may stand only if it does not involve ‘the public interest.'”

Public Interest Test

In Tunkl v. Regents of University of California, the supreme court set forth a “rough outline” of factors to determine whether an exculpatory clause involves the “public interest” and thus may be invalid. First, the contract “concerns a business of a type generally thought suitable for public regulation.” Second, “The party seeking exculpation is engaged in performing a service of great importance to the public...which is often a matter of practical necessity for some members of the public.” Third, “The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.” Fourth, “As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public...[seeking those] services.” Fifth, “In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation...and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Sixth, “as a result of the transaction, the person or property of the purchaser is placed under the control of the seller...subject to the risk of carelessness by the seller” or the seller's agents.

Although the exculpatory clause in Tunkl, which purported to relieve a charitable research hospital of negligence as a condition of admission, was considered invalid as affecting the public interest, courts have routinely found contracts involving real estate to fall outside of the Tunkl factors. For example, in Barnett v. Chimney Sweep, the court found commercial leases to be “a matter of private contract between the lessor and the lessee with which the general public is not concerned.” Indeed, “no public policy opposes private, voluntary transactions in which one
1. The term “as-is” may relieve a seller of real property from liability for observable defects in the property’s existing condition.
   True.  False.

2. In an as-is sale, no warranties of quality or condition are implied in the sale of the property.
   True.  False.

3. When a seller intentionally conceals material defects not otherwise visible or observable to the buyer, an as-is provision will shield the seller from the buyer’s claims.
   True.  False.

4. An integration clause always defeats claims of fraud in the inception of a contract.
   True.  False.

5. Thrifty Payless, Inc. v. Americana at Brand, LLC, found extrinsic evidence inadmissible to establish fraud or negligent misrepresentation in the face of the lease’s integration clause.
   True.  False.

6. With respect to fraud claims, as-is clauses and integration clauses will always be enforced in accordance with their literal meaning.
   True.  False.

7. One factor that the U.S. Supreme Court has set forth to help determine whether an exculpatory clause involves the public interest is whether it concerns a business of a type generally thought suitable for public regulation.
   True.  False.

8. Contracts that have for their object to exempt anyone from his or her own fraud are against public policy.
   True.  False.

9. Exculpatory clauses that shield against liability for passive negligence always shield against liability for active negligence as well.
   True.  False.

10. Exculpatory clauses that shield against liability for gross negligence are generally enforceable.
    True.  False.

11. Parties can sometimes limit who is liable for certain wrongs, notwithstanding Section 1668 of the Civil Code.
    True.  False.

12. In a commercial transaction, a provision liquidating damages is presumptively valid unless the party seeking to invalidate it shows that it is unreasonable.
    True.  False.

13. In a commercial transaction, there is no bright-line rule to determine whether a provision liquidating damages is reasonable.
    True.  False.

14. The amount of damages actually suffered, as determined after a contract is made, is important in determining the validity of the liquidated damages provision.
    True.  False.

15. All provisions attempting to limit the parties’ recovery are construed as liquidated damages.
    True.  False.

16. Predispute waivers of the right to a jury trial are generally unenforceable.
    True.  False.

17. To validly agree to a general judicial reference, a party must expressly waive his or her right to a jury.
    True.  False.

18. A general judicial reference can only be entered into after a dispute arises.
    True.  False.

19. Since an agreement to submit future disputes to judicial reference acts as a predispute jury trial waiver, it is necessarily unenforceable.
    True.  False.

20. Judicial reference provisions are subject to standard rules of contract interpretation and contract defenses, such as fraud or unconscionability.
    True.  False.
party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party.”

In the context of commercial real estate transactions, California courts have repeatedly found general exculpatory clauses enforceable notwithstanding Civil Code Section 1668. Courts have found such provisions to shield against liability for “passive” negligence, but parties should include more explicit references to negligence if they wish to shield against liability for “active” negligence as well. In Inglis v. Garland, a general exculpatory clause shielded a landlord from its passive failure to discover the actual source of a leak sooner because the landlord made bona fide efforts to repair the leak. On the other hand, the court in But v. Bertola did not consider a general exculpatory clause sufficiently explicit and specific to shield a landlord from its active negligence in repeatedly failing to repair leaks that it knew about, which led to massive flooding that destroyed the tenant’s store.

Similarly, in Burnett, the court of appeal reversed the trial court’s judgment on the pleadings because questions of fact remained as to whether the exculpatory clause protected the landlord from liability for its active negligence in refusing to remediate a known mold infestation. There, the general exculpatory clause did not specifically mention negligence, but a provision purporting to shield the landlord from liability for any of the tenant’s loss of profits did. As the court stated, an agreement that “seeks to limit generally without mentioning negligence is construed to shield a party only for passive negligence, not for active negligence.” Had the exculpatory clause in Burnett specifically mentioned negligence as a claim released, it likely would have released the active negligence at issue. This is because exculpatory clauses that specifically mention negligence typically release parties from both passive and active negligence. The parties, however, probably cannot contract around gross negligence.

In Frittelli, Inc. v. 350 N. Canon Drive, LP, the exculpatory clause that specifically mentioned negligence shielded the landlord from liability for active negligence. The court further noted that the lease set forth the landlord’s “sole recourse” to file an insurance claim. Interestingly, parties can sometimes limit who is liable for certain wrongs as well, notwithstanding Section 1668. In short, in commercial real estate transactions, parties may exculpate themselves from liability for negligence (but probably not fraud or gross negligence), and they should specifically mention negligence in an exculpatory clause to reflect the parties’ intent to disclaim liability for active as well as passive negligence.

Provisions Limiting Damages

Commercial real estate contracts, particularly contracts for purchase and sale of real property, commonly include liquidated damages provisions. In a commercial transaction, a provision liquidating damages is presumptively valid unless the party seeking to invalidate it shows that it is unreasonable. However, in commercial contracts, a provision liquidating the damages to the seller if the buyer fails to purchase the property must also be 1) “separately signed or initialed by each party to the contract,” and 2) “set out either in at least 10-point bold type or in contrasting red print in at least eight-point bold type” if the provision is included in a printed contract. With respect to commercial property, the validity of a liquidated damages provision depends upon its reasonableness at the time the contract was made and not as it appears in retrospect. Accordingly, the amount of damages actually suffered or the fact that damages could become readily ascertainable at some point after the contract was made have no bearing on the validity of the liquidated damages provision.

In commercial transactions, there is no bright-line rule to determine whether a liquidated damages provision is reasonable, but “the circumstances existing at the time of the making of the contract are considered, including the relationship that the damages caused by the breach of contract bear to the range of harm that reasonably could be anticipated at the time of the making of the contract—the relative equality of the bargaining power of the parties, whether the parties were represented by lawyers at the time the contract was made, the anticipation of the parties that proof of actual damages would be costly or inconvenient, the difficulty of proving causation and foreseeability, and whether the liquidated damages provision is included in a form contract.” Most important in determining the reasonableness of liquidated damages is whether the amount is proportional to the damages that may actually flow from the anticipated breach—whether the amount represents the parties’ reasonable effort to estimate a “fair average compensation for any loss that may be sustained.” In the absence of this relationship, a liquidated damage clause is deemed void as a penalty.

In Harbor Island, the liquidated damages provision was considered a penalty because it allowed the landlord to collect double rent if the tenant breached the lease. The court determined that the amount was not reasonably related to any actual damages that the landlord could have anticipated resulting from the tenant’s failure to properly maintain the premises. Likewise, in Fox Chicago Realty
was intended.”

In some cases, damages for one of several breaches of a contract may be considered a liquidated damages provision.

A liquidated damages provision requires the tenant to pay a fixed sum as liquidated damages in the event of a breach, which was required at the time.

In Royal Manufacturing Company v. Zukor’s Dresses, a liquidated damages clause was considered a penalty when it required the tenant to pay $159,450 for breaching the lease by removing portions of the store.

Similarly, the provision in El Centro Mall, LLC v. Payless ShoeSource, Inc., was not a penalty, even though it provided for liquidated damages of 10 cents per square foot of leased space per day in the event of a breach.

Although the lease already provided for payments of percentage rental in the event of the tenant’s default, the liquidated damages clause was held reasonable in part because it accounted for more than percentage rental, such as anticipated loss of synergy, goodwill, and patronage.

Interestingly, not all provisions attempting to limit recovery are necessarily construed as liquidated damages. To the extent that a provision is considered a mere limitation on liability, as opposed to a liquidated damages clause, it may be enforced according to its literal meaning.

In Wheeler v. Oppenheimer, the agreement stated: “If Seller does not complete sale it is agreed that she will pay all accrued [sic] Costs and expenses, Seller only to be liable for such costs and expenses.” Despite the buyer’s claim that the clause constituted a void liquidated damages clause, the court disagreed, stating: “We think the provision was not intended to prescribe a definite liability, i.e., liquidated damages, but is a limitation on the maximum possible recovery for actual loss or damage alleged and shown by evidence. It imposes a limitation within which damages might be proved. The validity of the condition is not open to doubt.”

Thus, clauses imposing mere limitations on liability, subject to proof, as opposed to definite liability, are not considered liquidated damages.

The lesson is that a party seeking to limit its damages ahead of time may do so in a liquidated damages clause, as long as the amount constitutes a reasonable estimate given the circumstances at the time of contracting. However, if the liquidated damages provision constitutes a penalty, the provision will not be enforced, despite the literal meaning of the agreement. Parties may also consider limiting their damages in a more open-ended limitation-on-liability clause, subject to proof.

Waiver of Right to Trial by Jury

Many commercial real estate contracts still include predispute jury trial waivers, but these provisions are unenforceable. The exclusive methods for this type of waiver are set forth by Section 631(f) of the Code of Civil Procedure. Although one method is waiver by express consent, Section 631 “presupposes a pending action.”

In other words,
only persons who are already parties to a pending action may enter into a waiver of jury trial as provided by statute. As such, parties are generally prohibited from using a contract to prevent future disputes from being adjudicated by jury trial.

Parties, however, may effectively contract around a jury trial, while maintaining the procedural and substantive protections of a bench trial, by agreeing to resolve future disputes through general judicial reference. General judicial reference is a procedure by which the parties agree to submit their dispute to an appointed neutral third party who renders a binding decision. While parties can agree on modified procedural and evidentiary rules, judicial reference proceedings are conducted much like bench trials and are subject to appellate review. Referees are bound to follow applicable substantive law rather than more abstract notions of equity or fairness that may be applicable to arbitration.

A general judicial reference is initiated by agreement between the parties, can be entered into either pre- or postdispute, and results in a decision that is binding between the parties. Courts have repeatedly held that an agreement to submit future disputes to judicial reference is enforceable, even though it acts as a predispute waiver to the right to jury trial. Moreover, the agreement need not expressly negate jury trial, nor need it be filed with the court.

Judicial reference provisions, however, are subject to standard rules of contract interpretation and contract defenses, such as fraud or unconscionability. This requires the clause to be conspicuous, plain and clear, so that it does not defeat the parties’ reasonable expectations. Although the waiver of a jury trial need not be expressly stated, an agreement to submit to judicial reference must “clearly and unambiguously show that the party has agreed to resolve disputes in a forum other than the judicial one, which is the only forum in which disputes are resolved by juries.”

Common boilerplate provisions in real estate contracts are frequently not enforced in accordance with their literal meaning. In some cases, such provisions are absolutely unenforceable or may only be enforced in certain contexts. As a result, real estate lawyers and professionals should recognize the limitations of such boilerplate provisions as they negotiate and memorialize their agreements and consider alternative means to meet their objectives.

1 Shapiro v. Ha, 188 Cal. App. 3d 324 (1986).
7 Id. at 1180-81.
9 Julius, 216 Cal. App. 4th at 1442.
10 Id.
11 Id.
12 Thrifty, 218 Cal. App. 4th at 1241.
13 Id. at 1237.
14 Id. at 1241-42 (“Thrift can allege both intentional and negligent misrepresentations based upon Americana’s grossly inaccurate estimates.”).
16 CIV. CODE §1668; Burnett v. Chimney Sweep, 123 Cal. App. 4th 1057, 1066 (2004) (“[T]he law does not look with favor upon attempts to avoid liability or secure exemption for one’s own negligence, and such provisions are strictly construed against the person relying upon them.”) (quoting Basin Oil Co. of Cal. v. Baash-Ross Tool Co., 125 Cal. App. 2d 257, 594 (1954); Fritelle, Inc. v. 350 N. Canon Drive, LP, 202 Cal. App. 4th 35, 43 (2011) (Any exemption from liability for negligence “is subject to the public policy disfavoring attempts by contract to limit liability for future torts.”)).
17 Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 95-96 (1963).
Without the need to use those words); O’Donoghue [reference unambiguously results in a waiver of ‘jury trial’ without the need to use those words.”]; O’Donoghue v. Superior Court, 219 Cal. App. 4th 245, 256 (2011).


25 The exculpatory clause in Butt provided: “It is agreed by the parties hereto, that said Lessor shall not be liable for damages to any goods, property, or effects in or upon said demised premises, caused by gas, water, or other fluid from any source whatsoever.” Id. at 138.


27 Id. at 1066; Butt, 110 Cal. App. 2d at 140.

28 Burnett, 123 Cal. App. 4th at 1066.


30 Frittelli, 202 Cal. App. 4th at 43.

31 See id. at 45.

32 Id. at 39-40.


36 See id. §1671 cmts.


40 Id.; see also Fox Chicago Realty Corp. v. Zukor’s Dresses, 50 Cal. App. 2d 129, 134 (1942) (“Any provision by which money or property is to be forfeited without regard to the actual damage suffered calls for a penalty and is therefore void.”).

41 Fox, 50 Cal. App. 2d at 129.


43 Foo, 50 Cal. App. 2d at 134.


45 Hong, 161 Cal. App. 3d 115-16.


48 Id.

49 Id.


52 Grafton Partners, 36 Cal. 4th at 957-58.

53 Id.

54 CODE CIV. PROC. §638.


56 Id. at 104 (“A statute permitting agreement for a reference unambiguously results in a waiver of ‘jury trial’ without the need to use those words.”); O’Donoghue v. Superior Court, 219 Cal. App. 4th 245, 256 (2013).

MAY A CITY REQUIRE that businesses use the Latin alphabet and Hindu-Arabic numerals on their commercial signs? Recently, the city of Monterey Park proposed this as a new ordinance. Although the proposal was initiated to update outdated ordinances on the city’s books, it created racial tension and raised serious constitutional concerns. How the Monterey Park signage dispute was resolved provides valuable lessons for other cities in the Los Angeles area.

The outdated ordinances were themselves a legacy of a previous English-language signage controversy in the 1980s, when, in response to Asian immigration, three Monterey Park council members proposed that English be declared the official language of the city. Community leaders—including Judy Chu, who would later become the mayor of Monterey Park and a member of Congress—led a successful movement against passage of the ordinance. As a compromise, however, the Monterey Park City Council approved a sign ordinance that required all businesses in Monterey Park to display at least an English-language business identification (e.g., restaurant, bakery, dental office) on their commercial signs. In 2013, Monterey Park undertook a general revision of its zoning code, and as part of that process, city staff examined the old code and began to propose changes to ensure consistency with California law and the city’s general plan. One of the changes considered was updating the old English-language sign ordinance.

The proposed replacement ordinance, however, contained most of the same problems as the original. The proposed ordinance did not require the English language on signs but did require that each business have one sign that used the “modern Latin alphabet” and display “business specific information” using “Hindu-Arabic numerals and modern Latin alphabet.” In a city with dozens of businesses using signs con-

by Cyndie M. Chang and Paul J. Killion

The regulatory authority of municipalities over commercial signage does not trump the First Amendment

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taining Chinese and other Asian characters and with a history of racial tensions involving immigrant newcomers, the proposed ordinance created controversy. City council members differed on whether the proposed ordinance should be adopted. One online poll of 513 residents reported that 60 percent supported the ordinance because a “business should be as accessible as possible”; 34 percent said “the city should stay out of their business”; and 6 percent were unsure. The proposed ordinance also raised a host of legal concerns.

**California Signage Regulations**

Under the Government Code, local agencies are authorized to regulate the placement of signs and billboards. Generally, this authority to regulate signs is premised on a city’s police power, and “courts have upheld such regulations as justified by government interests such as traffic safety and aesthetics.” Local agencies may impose reasonable time, place, and manner restrictions on signs, as long as these restrictions “are adequately justified without reference to the content of the regulated speech.”

Further, while no statute specifically addresses a city’s ability to regulate or require specific languages or specific types of script and numerals in business signs, several come close. The California Residential Code, a part of the California Code of Regulations, requires Arabic numerals or alphabetical letters for dwellings. Specifically, Section R319.1, titled “Site Address,” requires that buildings have “approved address numbers” that “shall be Arabic numbers or alphabetical letters.” And while the California Building Code, which applies to “any structure used or intended for supporting or sheltering any use or occupancy,” does not specifically require Arabic numerals, it does require that “[n]ew and existing buildings shall be provided with approved address numbers or letters.” The code explains this as address numbers that are “[a]cceptable to the code official or authority having jurisdiction.”

This regulatory authority, however, does not grant cities the power to ignore the First Amendment. A key California case discussing the extent of the government’s police power over signage is *Carlin v. City of Palm Springs*. At issue in *Carlin* was a Palm Springs ordinance that effectively prohibited the use of outside business signs that made reference to prices or rates. The court of appeal struck down the ordinance because it created an invalid classification between rate and non-rate signs under the guise of aesthetics. The plaintiff had a permanent sign displaying the official name of the business as “650 Hotel” to describe the rate of $6.50. The plaintiff argued that the ordinance violated equal protection and free speech principles. The court agreed.

Signs are speech under the First Amendment. The key case in this area is *City of Ladue v. Gilleo*, in which the U.S. Supreme Court addressed challenges to a sign ordinance that prohibited residences from displaying any signs other than residence identification signs, “for sale” signs, and signs warning of safety hazards. The Supreme Court held the ordinance unconstitutional. Although the Court found that signs are subject to cities’ police powers—because they “take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation”—the measures regulating signs affect communication itself. As such, sign regulations may be challenged on the ground that they restrict too little speech because their “exemptions discriminate on the basis of the signs’ messages” or “on the ground that they simply prohibit too much protected speech.”

In analyzing First Amendment challenges, courts distinguish between commercial speech and noncommercial speech, generally applying a lesser, “intermediate” scrutiny to commercial speech, regardless of whether it is content-based. Commercial speech is defined as “speech which does ‘no more than propose a commercial transaction.’” Yet even speech that proposes a commercial transaction may be protected like noncommercial speech, if a law regulates the expression of culture and national origin through that speech. Under the intermediate level of review applicable to commercial speech, a law is constitutional if “a substantial government interest is advanced by the law and if the law’s regulation ‘is no more extensive than necessary to serve that interest.’” If a classification does not fall within the parameters of strict or intermediate scrutiny, the courts will generally uphold the classification if it is rationally related to a legitimate state interest.

**City of Pomona**

In the 1980s, the city of Pomona faced a signage controversy. In *Asian American Business Group v. City of Pomona*, the U.S. District Court for the Central District of California struck down a Pomona ordinance requiring that half of a “foreign alphabet sign” be devoted to English alphabetical characters. The district court found that the ordinance regulated content and that although regulating signs had commercial aspects, the ordinance did not regulate those aspects. Because it targeted noncommercial speech, the ordinance was subject to strict scrutiny, and the district court found that the ordinance violated the First Amendment because it was not narrowly tailored to meet Pomona’s stated interest in safety.

Unlike the Pomona ordinance, the proposed Monterey Park ordinance did not require the use of English, but it did require the Latin alphabet. This effectively forbade the sole use of language not employing the Latin alphabet. A sign using only Chinese characters, for example, would not comply with the ordinance. Thus, the proposed ordinance suffered from the same constitutionality problems identified in *City of Pomona*. That is, by regulating the type of language that can be used in business signs, Monterey Park’s proposed ordinance regulated the expression of culture and national origin. As such, Monterey Park’s proposed ordinance was subject to strict scrutiny analysis under the First Amendment.

Determining whether a stated governmental interest is sufficiently compelling varies from case to case, but public safety, health, and welfare are generally seen as compelling interests. The stated purpose of Monterey Park’s proposed ordinance was to “promote economic development; help public safety; and facilitate public communication.” The reasoning behind each stated purpose was tenuous, particularly when scrutinized through constitutional standards. Regarding economic development, proponents of the ordinance contended that modern Latin lettering on commercial signs would enhance the city’s “character and its economic base by requiring easily recognizable signage” and maintain and “improve the aesthetic environment and overall community appearance to foster the City’s ability to attract sources of economic development and growth.” The city noted that its new mixed-use zoning called for clear and consistent signage to help drivers locate particular businesses. No applicable decision has yet held that economic development is a compelling state interest in the context of a challenge to the constitutionality of a sign ordinance, although it has been a sufficient state interest in other contexts, such as in eminent domain. Instead, decisional law typically considers economic development to be an important—not compelling—state interest, to be guided by intermediate scrutiny.

The proponents of the ordinance also justified the sign ordinance with public safety arguments that the proposed modern Latin alphabet requirement was necessary so that firefighters and police could respond quickly and efficiently in the event of an emergency. The support for this argument consisted of conclusory statements by the city’s fire and police chiefs, with no specific studies or research in support. There was no evidence that any emergency responders in Monterey
Park had failed to locate an emergency because a sign did not use the modern Latin alphabet. Furthermore, in response to questions by a reporter, the fire chief acknowledged that his firefighters rely on GPS coordinates to confirm the location of an emergency, not business signs.35

In addition, proponents claimed the modern Latin alphabet requirement would “reduce possible traffic and safety hazards from confusing or distracting signs.”36 In promoting this justification, the proponents cited Federal Highway Administration (FHA) guidelines that indicate that uniformity of signage “ aids in recognition and understanding, thereby reducing perception/reaction time.”37 The FHA manual, however, does not address commercial signage.38 A safety argument probably could be made if traffic signs were solely in Chinese, but the proposed ordinance regulated commercial signage, and drivers do not rely on commercial signage to guide them in traffic.

Addresses may constitutionally be regulated and mandated to use Hindu-Arabic numerals because they are uniquely used as a proxy for location, and a common method to determine location is important to society.39 This government interest is demonstrated by the required use of Hindu-Arabic numerals for addresses in the National Emergency Number Association’s Master Street Address Guide, the U.S. Postal Service’s Postal Addressing Standards, and the Federal Geographic Data Committee’s Draft United States Thoroughfare, Landmark, and Postal Address Data Standard. Business signs are different. They are not a proxy for location, and no guidelines exist to suggest that business signs should be standardized. Rather, business signs are intended to convey consumer information, often in a unique and eye-catching manner. As such, there is no need for standardization in the same way as addresses.

With regard to fiscal impact, the city’s staff report indicated that the cost to the city was indeterminate.40 There would be “minimal cost[s] for codification of the regulations. As to administration and enforcement of the sign regulation, applications [would] off-set the City’s administrative costs as part of their application fee.”41 Therefore, the city anticipated that its costs would likely be minimal.42

Although not addressed in the city’s report, California law requires the payment of fair and just compensation when sign regulations require changes to existing signage. Specifically, California Business and Professions Code Section 5491 states that “no on-premises advertising display which is used for any of the purposes set forth and conforming to Section 5490 shall be compelled to be removed or abated, and its customary maintenance, use, or repair shall not be limited...without the payment of fair and just compensation.”

Narrowly Tailored

Even assuming the Monterey Park ordinance could be justified by a compelling government interest in public safety, its constitutionality under the First Amendment would still depend on whether the ordinance was narrowly tailored to meet the compelling state interest. In City of Pomona, the court found that Pomona’s ordinance violated the First Amendment because it was not tailored narrowly enough. Specifically, the district court found that an ordinance requiring English on business signs “would not necessarily insure the posting of a sign that would be helpful in reporting the location.”43 The court further noted that the most expedient way to report the location of an emergency would be the street address.44

In Wateka v. Illinois Public Action Council, a city passed an ordinance prohibiting door-to-door solicitation during certain hours of the night, citing “the safety, health, comfort, good order, protection, and welfare of [residents of the] City” as the reason for the ordinance.45 The Seventh Circuit held that in this context the regulation was not narrowly tailored to the asserted interests, explaining that “[w]hen a city like Watseka wants to pass an ordinance that will substantially limit First Amendment rights, the city must produce more than a few conclusory affidavits of city leaders which primarily contain unsubstantiated opinions and allegations.”46 A city must establish convincingly that its regulations will truly meet its asserted interests.47 For several reasons, proponents of the Watseka ordinance did not convincingly establish that the proposed ordinances would actually address a public safety goal.

First, a business sign can be in a different language other than English, such as German, Vietnamese, or Polish, and still comply with the ordinance, so long as the Latin alphabet is used, but it would not necessarily enhance effective communication with English-speaking emergency responders. Second, a business sign can comply with the proposed ordinance by phonetically spelling out words of a different language using the Latin alphabet (i.e., a transliteration). For example, the Greek for “Hellenic Republic” can be transliterated into Latin letters, but doing so does not advance the stated purpose of effective communication.

Third, a translation of a foreign language using the modern Latin alphabet does not necessarily aid emergency responders. For example, one commentator noted that translating the Chinese characters for car insurance into the modern Latin alphabet would result in the phrase “qiche baoxian;” a dentist would be “yake yisheng;” and barber would be “lifa shi.”48 Such phrases are hardly more effective in identifying a business than the use of actual Chinese characters, and they are unlikely to assist emergency personnel. Fourth, a business sign can comply with the proposed ordinance just by using a word such as “restaurant.” But as one city council member pointed out, adding the word “restaurant” to a sign in a shopping center containing multiple restaurants is hardly helpful to public safety. In sum, Monterey Park’s proposed sign ordinance would likely fail a strict scrutiny analysis in court.

Fourteenth Amendment

Under the equal protection clause of the Fourteenth Amendment, courts apply strict scrutiny to any governmental regulation that involves a suspect classification such as race, origin, or nationality.49 Intent to discriminate does not need to be shown where a “law has an overtly discriminatory classification on its face.”50 In order to withstand strict scrutiny, a regulation “must be precisely tailored to serve a compelling state interest.”51 In City of Pomona, the court found that Pomona’s ordinance discriminated on the basis of national origin because it required English on business signs.52 Use of foreign language is an expression of culture and national origin, and discriminating against business owners who use foreign language constitutes discrimination on the basis of national origin.53 Monterey Park’s proposed ordinance similarly used an overtly discriminatory classification because it expressly discriminated against business owners who used foreign characters on their signs. The fact that Monterey Park’s proposed ordinance did not require a specific language but instead required specific forms of letters and numerals still fundamentally discriminates against business owners who use languages employing characters.

Thus, as with the ordinance in City of Pomona, Monterey Park’s proposed ordinance would likely not withstand strict scrutiny. As held in City of Pomona, the proposed ordinance does not have a strong enough relationship to effectively further the stated public safety goal because there are other nondiscriminatory ways to achieve it, such as requiring all buildings to have signs that help emergency personnel.54

Due Process and Vagueness

The proposed Monterey Park ordinance also raised due process concerns under the Fourteenth Amendment. A statute or other legislative enactment “must ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.’”55 In addition, the chal-
A statute can be void for vagueness when it does not specify a sufficiently definite standard of conduct. Generally, vagueness claims that arise as challenges to municipal sign ordinances tend to involve permitting requirements for signs, prohibitions on obscenity on signage, and differential treatment of business and residential signage (including what counts as a “sign” for residential banners and other displays). Monterey Park’s proposed ordinance likely suffered from constitutional vagueness because its definition of “business specific information,” which is the information that store owners must post in the modern Latin alphabet, was unclear in consideration of the ordinance’s goals. “Business specific information” could mean a translation of the actual name of the business, a transliteration of the business name, language explaining why a particular name was chosen for a business, or any number of other interpretations. If the city intended shop owners to post a translation of their business’s actual name, it could have stated this easily; instead, the proposed ordinance’s lack of clarity hindered the efforts of business owners to comply.

In XXL of Ohio, Inc. v. City of Broadview Heights, the U.S. District Court for the Northern District of Ohio found some provisions in a city’s sign ordinance void for vagueness. In particular, the court found the terms “overly large,” “excessive amount of information,” and “out of scale with the building” were too vague to permit “[a] person of average intelligence [to] know from this provision when the size of lettering or the amount of information on a sign offends the ordinance.”

The controversial signage ordinance proposed in Monterey Park is not the only one of its kind in the Los Angeles area. For example, Rosemead, San Gabriel, San Marino, and Temple City, all cities with Asian populations of more than 50 percent, have similarly outdated ordinances on their books, raising questions of constitutional validity. If Monterey Park’s experience is any lesson, changing the ordinances can be controversial. When the ordinance was proposed in Monterey Park, it reopened racial wounds from the past. After many meetings, a divided city council defeated the proposed ordinance by deciding not to call a vote on it. The whole process did have a positive side. It brought...
together community organizations and city officials who have since held a harmony celebration dinner and have started a dialogue on diversity initiatives.

Perhaps the strongest argument against Monterey Park’s ordinance was simply that the proponents were unable to show there was a problem in need of a solution. Shortly after the previous ordinance was repealed, the city noted that it had about 100 small business applications. Despite the lack of regulation, all the new applicants had some English or modern Latin characters in their proposed storefront signage. Apparently, Monterey Park shop owners believe having some English on their business signs is simply good business.


5 FUNK, supra note 4, at 1, Attachment A at 2–3.


7 See GOV’T CODE §§38774, 65850(b).

8 See generally Steven T. Mattas, Specially Regulated Land Uses, in 1 CALIFORNIA LAND USE PRACTICE §12.11 (2014).


10 CAL. CODE REGS. tit. 24, §R319.1.

11 Id. at §§1.3, 202, 301.2 (202 defining “approved” and “building”).


13 Id. at 712-13 (internal citations omitted).


16 Id. at 48.

17 Id. at 50-51.


FUNK, supra note 4, at 3.

Id.

Id.


Id.


Id. at 1555 n.15.

Cf. id. at 1555.

See Waldie, supra note 35.


Hoffman, 767 F. 2d at 1435; City of Pomona, 716 F. Supp. at 1332.

City of Pomona, 716 F. Supp. at 1332.

Id. at 1330, 1332.

Id. at 1332.


See Grayned, 408 U.S. at 108-09.


Id. at 807.

See ROSEMEAD, CAL., MUN. CODE tit. 9, art. 11-6(G)(1) (2014) (“Each business in commercial or manufacturing zones having an on premises advertising sign visible from a public right of way or parking area open to the general public shall identify the name of the business or the nature of the business conducted on the property in the English language.”); see also U.S. CENSUS BUREAU, U.S. DEP’T OF COMM., http://www.census.gov.


DETERMINING PREMISES LIABILITY FOR THE CRIMINAL ACTS OF THIRD PARTIES

(2005).
9 Id. at 659.
11 Id.
12 Id. at 210.
13 Id.
14 Id. at 210-11.
15 Id. at 211.
17 Ann M., 863 P. 2d 207.
18 Id. at 215-16.
19 Id.
21 Id. at 132.
22 Id. at 123-24, 127, 129-30.
23 Id. at 127, 130.
25 Id. at 1162.
26 Id.
27 Id. at 1162-163.
28 Id. at 1164 (internal quotations omitted).
29 Id. at 1163.
30 Id. at 1171.
33 Id. at 1212.
34 Id.
35 Id.
36 Id. at 1214
37 Id. (quoting Vasquez v. Residential Inv., Inc., 118 Cal. App. 4th 269, 285 (2004)).
38 Castaneda, 41 Cal. 4th at 1216.
39 Id.
41 Id. at 517.
42 Id. at 520.
43 Id.
Concerns about a CEQA Reform That Favors Multimodal Transportation

RECENT DEVELOPMENTS SHOW THAT REFORM of the California Environmental Quality Act (CEQA) presents political risks that few public officials want to take without consensus. In response to significant public interest, the Office of Planning and Research (OPR) extended the public comment period for proposed CEQA alternative transportation metric regulations to November 21, 2014. The regulations were proposed in response to SB 743, a bill passed in California’s 2013 legislative session.

Primarily known for amending streamlined environmental review procedures for state-designated development projects, SB 743 also mandated that “automobile delay, as described solely by level of service,” (LOS) no longer be considered a significant environmental impact. Instead, the bill directed an alternative transportation metric be implemented to “promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks [pedestrian, bicycle, and public transit], and a diversity of land uses.”

The regulations propose replacing LOS with Vehicle Miles Traveled (VMT) as the method for analyzing transportation impacts. Unlike LOS, which estimates the amount of traffic congestion that a proposed project may generate, VMT focuses on the total amount of motorized vehicle travel created by a project.

The change is positive. LOS analyzes auto congestion, not the environmental impacts of motor vehicle travel, including air pollution and greenhouse gas emissions. The LOS standard discourages urban infill and multimodal transportation networks, requires costly roadway expansion to maintain existing LOS levels, and impedes projects that lower roadway capacity, including bike lanes and public transit. Replacing LOS with VMT refocuses CEQA analysis on the state’s goal of reducing transportation-related greenhouse gas emissions by evaluating motor vehicle usage rather than traffic congestion.

The regulations, however, omit critical details as to how VMT will work under CEQA. The OPR could ease the transition with additional guidance. Legal uncertainties in the CEQA process often promote poor environmental review and result in costly litigation. By clarifying the VMT analysis in the regulations, these reviews would provide project proponents with reasonable certainty against litigation claims.

The regulations lack specificity in developing VMT data. Nearly 20 different methods can be used to calculate data that “range in complexity and sensitivity.” Worse, public agencies may arbitrarily adjust VMT models. In contrast, LOS is limited to two well-established models—Circular 212 and the Highway Capacity Manual. Without a widely accepted industry standard, VMT model selection could be manipulated and encourage litigation.

The regulations also fail to adequately explain how to determine when a project’s impact on transportation is significant. The OPR offers two different methods in making this determination—comparing a project’s VMT to existing conditions or regional average for similar land uses. Agencies are provided no standards to decide which approach to follow. For example, developing a shopping center on vacant land will significantly impact transportation compared to existing conditions. However, a proposed shopping center may still have insignificant VMT compared to neighboring shopping centers.

Finally, the regulations suggest that developers use experimental and difficult-to-quantify mitigation measures to lower VMT, with little direction to help quantify the actual impact. VMT may be mitigated by, among other things, increasing access to common goods and services, incorporating affordable housing, and improving the jobs/housing fit of a community. Yet the OPR provides public agencies with no instruction on how to quantify the impact of these measures on VMT.

The OPR deliberately adopted a more flexible approach in deference to California’s public agencies. However, this increases the costs and litigation risks inherent in such a significant regulatory change. The OPR drafted less detailed regulations, reasoning that since CEQA regulations “apply to all public agencies, and all projects, throughout the state, they generally must be drafted broadly.” Instead, the OPR must provide nonbinding guidance on VMT methodology and mitigation while not preventing public agencies from adopting other approaches to ease the transition into VMT, improve the quality of environmental analysis, and reduce potential disputes.

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