MOBILEHOME PARK CLOSURES AND CONVERSIONS

By: GEORGE H. KAELIN III
Endeman, Lincoln, Turek & Heater LLP
600 B Street, Suite 2400
San Diego, CA 92101
(619)544-0123; ghk@elthlaw.com

I. INTRODUCTION

A. WHAT IS A PARK CLOSURE OR CONVERSION

1. A park can be closed for redevelopment for new use or to be held as vacant land. (Gov't. Code §65863.7 or §66427.4)

2. A park can be subdivided or stock cooperated and converted to resident ownership (Gov't. Code §66427.5)

B. MOBILEHOME PARK CONVERSIONS WILL INCREASE

1. There are currently 5,493 mobilehome and RV parks in California. Most were built in the 1950 - 1970 time frame. Many parks are sitting on land ripe for redevelopment to economic higher and better uses. Many have utility systems that are failing or about to fail.

2. Current law provides a loophole to rent control if a mobilehome park is converted through the Subdivision Map Act to resident ownership (Gov't. Code §66427.5)

C. WHAT SHOULD BE DONE

1. Adopt a conversion or closure ordinance without a pending conversion or closure being at issue

2. Understand the political and legal issues involved

   a. GSMOL is the resident lobbying group

   b. WMA is the park owner lobbying group

   c. Legal issues are being refined by the courts

II. THE BASIC LEGAL FRAMEWORK

A. THE STATUTORY FRAMEWORK

1. Authority to change the use of a park

   a. Government Code Section 65863.7 allows for the conversion, closure or cessation of a mobilehome park as follows:

      i. Park owner (or applicant) files a Resident Impact Report ("RIR")

      ii. The local governmental agency conducts a hearing on the adequacy of the RIR

      iii. The local governmental agency can condition the closure or conversion upon the owner/applicant taking steps to mitigate any adverse impact of the closure or conversion on each resident

      iv. The conditions set "SHALL NOT EXCEED THE REASONABLE COSTS OF RELOCATION."

   b. Government Code Sections 66427.4 and .5 provide for the conversion or closure of a park under Subdivision Map Act

      i. Section 66427.4 requires basically the same items as Government Code Section 65863.7 to obtain approval to close or change the use of a park

      ii. Section 66427.5 requires: 1) a survey of the residents on issue of conversion; 2) an offer to sell lots to residents upon conversion; and 3) a report on impact of conversion on the residents.

2. Civil Code Section 798.56(g) allows a tenant (and his or her home) to be evicted from a mobilehome park upon an AUTHORIZED "change of use" or "portion thereof" of the park

   a. Absent an approved "change of use," a Park owner cannot evict a tenant at termination of his or her lease. Civil Code Section 798.18 (Owner shall offer a lease)

b. Park owner can only evict tenant for authorized reasons within Civil Code Section 798.56

3. Government Code Section 66427.5 provides that conversion of a park to resident ownership exempts the entire park from rent control

a. Section 66427.5 was interpreted in El Dorado v. Palm Springs (2002) 96 Cal.App.4th 1153 to allow a park owner to obtain approval of a subdivision map without complying with city-imposed conditions to protect residents and then sell one subdivided unit to complete "the conversion." Once "the conversion" is complete rent control no longer applies.

b. The legislature amended Section 66427.5 with the express intent to close this El Dorado loophole. The amendment does not appear to have accomplished this goal.

c. AB 1542 and SB 900 are currently under consideration to repeal Section 66427.5 and close the loophole

B. PARK CLOSURE OR CONVERSION DEFINED

1. A park closure or conversion is technically referred to as a "change of use" of the mobilehome park

a. "Change of Use" is defined by Civil Code Section 798.10 as changing the use of a mobilehome park from the holding out of two or more spaces for rent to accommodate mobilehomes....A "change of use" can involve an entire park or any portion of the park.

b. Keh v. Walter (1997) 55 Cal.App.4th 1522, Park owner tried to evict tenants one at a time to close a park without getting any city approval or paying relocation benefits. Park owner argued that each time he evicted a single unit it constituted a "change of use" of that space entitling eviction under Civil Code Section 798.56(g). However, because he was not "changing the use" of the entire park (just the space), he was not bound by Government Code Section 65863.7 requirement

for city hearings or approvals to close the entire park. It did not work. The Court held:

i. "Change of Use" does not apply to single space

ii. "Change of Use" laws were designed to protect residents from unlawful eviction

iii. It is improper to "Change Use" of park piecemeal without complying with city required steps to obtain approval

c. A good closure ordinance can address this issue. See Sunnyvale Mun. Code §19.72.030 (if 25% of park vacated, notice to city triggered)

2. A park owner is entitled to convert a park to interim "vacant use." Keh v. Walters (1997) 55 Cal.App.4th 1526, 1533

3. Traphagen v. the City of Dana Point (unpublished G036195) (O.C. Sup. Ct. No. 04CC00676) holds that "a local agency's involvement in the closure of a mobilehome park is ministerial in nature." Therefore:

a. CEQA does not apply

b. Mello Act does not apply

C. WHAT IF A CITY OR GOVERNMENTAL ENTITY MAKES A DECISION (EITHER THROUGH OWNERSHIP OR REVOCATION OF A CONDITIONAL USE PERMIT) WHICH RESULTS IN CLOSURE OR CONVERSION OF PARK?

1. Government Code Section 65863.7(I) states that the local governmental agency steps into the shoes of park owner and must itself prepare an RIR and take steps to mitigate the impact on the residents of the closure or conversion

2. Does the California Relocation Assistance Act apply when a city closes a park and evicts tenants?

a. The California Relocation Assistance Act (Gov. Code Section 7260 et. seq.) states that any time a "public entity" conducts "any displacing activity" which causes a person "to move from real property or move his or her personal property from real property" that agency must comply with the Relocation Assistance Act guidelines. Gov. Code §7260.

b. In the case of Superior Strut & Hanger Co. v. Port of Oakland (1977) 72 Cal.App.3d 987, the Court held that the service of eviction notices was a "displacing activity" which entitled the tenant to benefits under the Relocation Act

c. Tale of Two Cities: Two cities took opposite approaches in city-owned park closures in past five years

D. IS A PARK OWNER ENTITLED TO CLOSE A PARK?

1. Keh v. Walters (1997) 55 Cal.App.4th 1522, 1533, finds that Government Code Section 7060 (The Ellis Act) which allows apartment building landlords to "go out of business" does not control mobilehome park closures. See Gov't. Code §7060.7.

2. However, Keh holds: "A park owner is entitled to convert property used as mobilehome park to another use, or even hold it as vacant land.")

3. Wong v. City of Carson (unpublished B074046) (L.A. Sup. Ct. No. B5008355) concludes: "There is no constitutional right to go out of business or to any particular use of land." However, issue was the "reasonableness" of the Carson closure ordinance.

4. Traphagen v. City of Dana Point (unpublished G036195) (O.C. Sup. Ct. No. 04CC00676), holds: "The Ellis Act (§7060 et seq.) permits a landlord, including one that operates a mobilehome park, to go out of business."

E. ARE PARK TENANTS ENTITLED TO RIGHT OF FIRST REFUSAL TO PURCHASE THE PARK AND AVOID CLOSURE?

1. Not under state law

2. Civil Code Section 798.80 requires only that notice be given to a properly-formed resident association 30 days before the owner enters into a listing agreement

3. Some cities have tried to supplement law to make right of first refusal apply (See San Diego Mun. Code §143.0640)

III. CLOSURE ORDINANCE CONTENTS

A. CONTENTS OF APPLICATION FOR CLOSURE OR CONVERSION

1. Name and age of park
2. Number of spaces in park (occupied vs. vacant)
3. Name of owners and detailed description of park
4. Intended use of park if closed
5. Contact information of relocation consultants acceptable to the owner
6. Contact information for person responsible for executing the change of use on behalf of the owner
7. Anticipated time frame for park closure
8. Application fee ("reasonable fee" allowed under Govt. Code Section 65863.7(g))
9. History of rent increases during the past two years
10. History of vacancies during the past two years
11. Describe circumstances re: current vacancies
12. A list of resident owned vs. Park owned homes in park
13. A list of number of 1st vs. 2nd homes in the park
14. Description of tenants in park (i.e., ages, income levels, length of tenancy in park, contact info.)

(See San Leandro Mun. Code §5-2304)

B. CONTENTS OF RIR:

1. Availability of adequate replacement housing (Govt. Code Section 65863.7(a))
2. Relocation costs (Govt. Code Section 65863.7(a))
3. Analysis of each homes ability to be relocated
4. Survey of available spaces and mobile homes in area
5. Survey of available apartment units in area
6. Statement of ability and process for new project to provide replacement housing
7. Procedures used to notify residents of closure or conversion
8. Copies of all correspondence with the residents

regarding closure or conversion

9. Itemized plan for each resident to be relocated
10. Itemized calculation for each resident of the relocation benefits which that resident is entitled to receive in the event the park is closed or converted
11. Contact information for the person or entity who will work with the residents to relocate each of them
12. Analysis of park resident income levels
13. Appraisal of each home?
14. Analysis of liens or mortgages on park homes and effect on each resident
15. Section on special need tenants such as elderly or disabled and additional benefits, if any, for such persons

C. RESPONSIBILITY OF CITY ONCE RIR RECEIVED:

1. Gov't. Code §65863.8 requires city to send notice to applicant 30 days before hearing which explains the notice requirements of Civil Code §798.56 and specifies the manner of such notice.

2. Section 798.56(G) requires 15 days' notice to each resident before the hearing.

3. Conduct the hearing on adequacy of RIR

D. PARAMETERS FOR DETERMINING RELOCATION BENEFITS:

1. Physical cost to move home and personal belongings to new location within certain geographical area

   a. Should include cost for temporary housing during move
   b. Should include insurance for the move
   c. Should include cost of re-establishing landscaping and related improvements
   d. Should include indemnity for damage to the extent not covered by insurance
   e. Should include amount for fee if charged by new park to accept the home

   (See Huntington Beach Mun. Code §234.08(A)(1) for good example of ordinance language)

2. Rent differential for low income residents if lack of adequate low cost replacement housing exists

   a. Space rent differential if replacement site found
   b. Apartment rent differential

3. What if home cannot be relocated?

   a. limited to moving costs (See Anaheim Mun. Code §18.26.070)
   b. last resort housing payment - similar to Calif. Relocation Assistance Act (See L.A. Mun. Code §47.08-09)
   c. "fair price" (See Concord Mun. Code §58.31)
   d. fair market value of the home (See American Canyon Mun. Code §19.32)

4. Must have clear guideline for valuation

   a. good guideline in American Canyon Mun. Code §19.32 (average of 2 appraisers)
   b. good guideline in Concord Mun. Code §58-31 (City picks appraiser)
   c. bad guideline in Sunnyvale Mun. Code §19.72.020 (3 appraisers and judicial involvement)

E. EXAMPLES OF GOOD CITY CLOSURE ORDINANCES

1. Least Protective of Residents. Anaheim Municipal Code Section 18.26.070 provides for actual physical relocation costs regardless if home can be relocated

2. Most Protective of Residents. Huntington Beach Municipal Code Chapter 234 requires the purchase of each home by the applicant (at the in-place value, not to be less than the replacement cost of new home)

3. Formula Similar to California Relocation Assistance Act. San Diego Housing Commission Policy 300.401 provides in the event a home cannot be relocated and occupied by the resident at a new site, the resident will be entitled to:

   a. all proceeds from the sale of the home to be removed from park
   b. a rent differential payment for 48 months to

allow the resident to move to an apartment, or mobilehome; and

c. moving expenses for personal belongings

(See also L.A. Mun. Code §47.08-09)

F. UNREASONABLE CLOSURE ORDINANCE MAY CREATE A TAKINGS CLAIM

1. Wong v. City of Carson (Unpublished)

a. Appellate court held that relocation benefits must be "reasonable" or else constitute a taking. (Case # B074046)

b. Trial court stated that payment of fair market value for each home as relocation benefits could constitute taking due to potential impact on value from rent control. However, Carson ordinance at time actually required only payment of "depreciated replacement cost." (L.A. Sup. Ct. Case # BS008355 - Statement of Decision)

c. Many city ordinances have a takings savings clause. See Huntington Beach Mun. Code §234.09 (Allows park owner to apply for exemption if relocation benefits would deprive owner of economic use of his or her property.

IV. CONCLUSION

A mobilehome park closure or conversion raises conflicting economic and emotional issues for park owners and residents. Both sides can polarize the issues and the process. Hopefully, by understanding the issues and setting forth clear parameters up front, a city can minimize the emotional and political divisiveness a closure or conversion can create. A good ordinance which is fair to both sides and clear is key.

Chapter 234 Mobilehome Park Conversions

(3334 - 6/97, 3595–1/03, 3689-12/04)

Sections:

234.02 Applicability

All findings required for removal of the MHP overlay zone shall also be applied to requests for rezoning existing RMP districts to different zoning districts, and for any change of use as hereinafter defined.

All findings required for removal of the MHP overlay, rezoning from RMP or change in use shall be required for all property upon which a mobilehome park then exists, or upon which a mobilehome park existed at any time within the preceding five (5) years.

234.04 Definitions

Words and phrases whenever used in this chapter shall be construed as defined herein unless from the context a different meaning is intended and more particularly directed to the use of such words and phrases.

A. Affordable unit. A unit that is sold to and occupied by a low or moderate income household. Affordable unit shall also mean a rental unit for which the monthly payment does not exceed 25 percent of the household's gross income for low income households or 30 percent of the household's gross income for moderate income households.

B. Applicant. The person, firm, corporation, partnership, or other entity having leasehold interest or fee ownership in the operation of a mobilehome park.

C. Change of use. Use of the park for a purpose other than the rental or the holding out for rent of two or more mobilehome sites to accommodate mobilehomes used for human habitation, and shall not mean the adoption, amendment, or repeal of a park rule or regulation. "Change of use" may affect an entire park or any portion thereof, and such "change of use" shall include, but is not limited to, a change of a park or any portion thereof to a condominium, stock cooperative, planned unit development, commercial use, industrial use, or vacant land.

D. Eligible owner. Any mobilehome owner owning a mobilehome in a park at the time of issuance of the notice of intent to change use, but shall not include any mobilehome owner who is renting his unit to another party at such time.

E. Manufactured home. Shall mean the same as Mobilehome as used in this Chapter (3689-12/04)

F. Market rate unit. A residential unit that is sold on the open market without constraints imposed on the sales price, rental rate, or buyer qualifications. (3689-12/04)

G. Mobilehome. A structure designed for human habitation and for being moved on a street or highway under permit pursuant to the California Vehicle Code Section 35790. Mobilehome does not include a recreational vehicle, as defined in the California Civil Code Section 799.24, or a commercial coach, as defined in Health and Safety Code Section 18218. (3689-12/04)

H. Mobilehome Park. An area of land where two or more mobile home sites are rented, or held out for rent, to accommodate mobilehomes used for human habitation. Mobilehome park shall not include a mobilehome subdivision of stock cooperative. (3689-12/04)

I. Mobilehome space. Any area, tract of land, site, lot, pad or portion of a mobilehome park designated or used for the occupancy of one mobilehome. (3689-12/04)

J. Notice of intent to change use. Notification as required by California Civil Code Section 798.56(g)(2). (3595-1/03, 3689-12/04))

K. Senior citizen unit. A residential unit which meets the standards for an affordable unit which is situated in a project that is designed to accommodate senior citizens through special financing programs and/or modified development standards.

234.06 Removal of MHP Overlay or RMP Zone or Change of Use

The City Council shall not approve a zone change for any parcel when such change would have the effect of removing the MHP or RMP designation from that property, or approve a change of use unless the following findings have been made:

A. That all applicable requirements as set forth in California Government Code Section 66427.4, or 65863.7, whichever is applicable, have been completed. (3595-1/03)

B. That the proposed zoning is consistent with the General Plan of the City of Huntington Beach and all elements thereof; and for projects located within the coastal zone that the proposed zoning is consistent with the Land Use Plan portion of the Local Coastal Program. (3334-6/97)

C. That the proposed change of land use will not have an adverse effect upon the goals and policies for provision of adequate housing for all economic segments of the community, as set forth in the Housing Element of the Huntington Beach General Plan.

D. That the property which is the subject of the zone change would be more appropriately developed in accordance with uses permitted by the underlying zoning, or proposed zoning.

E. That a notice of intent to change the use of a mobilehome park and relocate mobilehome owners was delivered to such owners and to the Department of Community Development at least eighteen (18) months prior to the date the mobilehome owner is required to vacate the premises.

F. The zone change shall not become effective unless a Local Coastal Program amendment is effectively certified by the Coastal Commission. (3334-6/97)

234.08 Mitigation of Adverse Impacts and Reasonable Costs of Relocation - Relocation Assistance Plan : (3689-12/04)

A. Consistent with California Government Code Section 65863.7 (e), the applicant shall take steps to mitigate the adverse impact of the conversion, closure or cessation of use on the ability of displaced mobilehome park residents to find adequate housing in a mobilehome park. These required steps shall not exceed the reasonable cost of relocation as detailed in (1) below. (3689-12/04)

1. Relocation Costs. All eligible mobilehome owners shall be entitled to receive the cost of relocation. As used in this section, the reasonable costs of relocation shall include the cost of relocating displaced homeowners' mobile/manufactured home, accessories and possessions to comparable mobile/manufactured home park within twenty (20) miles of its existing location, including costs of disassembly, removal, transportation, and reinstallation of the mobile/manufactured home and accessories at the new site, and replacement or reconstruction of blocks, skirting, siding, porches, decks, awnings or earthquake bracing if necessitated by relocation; reasonable living expenses of displaced park residents from the date of actual displacement until the date of occupancy at the new site; payment of any security deposit required at the new site; and the difference between the rent paid in the existing park and any higher rent at the new site for the first twelve (12) months of the relocated tenancy. (3689-12/04)

2. Mobilehome Purchase. If the mobilehome cannot be relocated to a comparable mobile/manufactured home park within twenty (20) miles of its existing location, and the homeowner has elected to sell his or her mobile/manufactured home, the reasonable costs of relocation shall include the cost of purchasing the mobile/manufactured home of a displaced homeowner, including any optional equipment and/or tag-a-longs and expando rooms at its in-place value. Such value shall be determined after consideration of relevant factors, including the value of the mobile/manufactured home in its current location, assuming the continuation of the mobile/manufactured home park in a safe, sanitary and well maintained condition and not considering the effect of the change of use on the value of the mobile/manufactured home, but at no time shall the value of the mobile/manufactured home be less than the replacement cost of a new home of similar size and square footage. (3689-12/04)

B. Extensions of time; In-park relocation

1. The applicant may grant one (1) six-month extension to the length of time given to the mobilehome owners in the notice of intent to change use by notifying the mobilehome owners of such extension at least four (4) months prior to the date specified in such notice. The extension shall be granted for no more and no less than six (6) months. (3689-12/04)

2. An applicant may, with the consent of the mobilehome owner, transfer a mobilehome unit to another space in the park. Such transfer shall not constitute permanent relocation, and the cost of all such moves shall be borne by the applicant. (3689-12/04)

Including reasonable living expenses of the residents from the date of actual displacement until the date of occupancy at the new site. All damages to the home incurred during the relocation shall be immediately repaired or replaced by the applicant. (3689-12/04)

C. In order to facilitate the intentions of the mobilehome owners and an applicant for a change of use with regard to a change of use, the parties may agree to mutually satisfactory relocation assistance. To be valid, such an agreement shall be in writing, shall include a provision stating that the mobile home owner is aware of the provisions of this chapter, shall include a copy of this chapter as an attachment, shall include a provision in at least ten-point type which clearly states the right to seek and the importance of obtaining an attorney's advice prior to signing the agreement, and shall be drafted in form and content otherwise required by applicable state law. No mobilehome owner signing a relocation assistance agreement provided for in this subsection may contest the adequacy of the conversion impact report at the hearing on such report. Any mobile home owner signing such an agreement may rescind it in writing within ten days of signing it. Any such agreement which is procured by fraud, misrepresentation, coercion or duress, of any kind, shall be void and unenforceable. (3689-12/04)

D. No benefits shall be provided to any person who is renting a mobilehome from the park owner (who owns the mobilehome) where such tenant shall have executed a written agreement with such park owner waiving his or her rights to any such benefits. No such waiver shall be valid, unless it contains the text of this section, and unless such tenant shall have executed a written acknowledgment that he or she has read and understands his or her rights pursuant to this chapter and knowingly agrees to waive them. (3689-12/04)

E. No waiver by an eligible mobilehome owner of any of his/her rights pursuant to this section shall be valid or effective for any purpose except with regard to a relocation assistance agreement as provided in subsection C of this section. (3689-12/04)

F. Alternative Housing. If the mobilehome owner cannot be relocated in accordance with the procedures contained herein, the applicant has the option of making available suitable, and acceptable, alternative housing, together with compensation, to such mobilehome owner. (3689-12/04)

Where alternative housing is proposed, it shall be available in the following categories:

1. Senior citizen housing;
2. Affordable housing; and
3. Market rate housing.

G. Compensation Appeals. Appeals from the amount of compensation to be given a mobilehome owner shall be filed with the applicant within thirty (30) days after the mobilehome owner has notice of the amount he/she is to receive. (3689-12/04)

The applicant shall acknowledge any appeal within thirty (30) days, and if an agreement cannot be reached, the matter shall be referred to a professional arbitrator.

H. Purchase Rights. The mobilehome owners shall receive written guarantee of first-right-of-refusal to purchase units if the development which replaces the mobilehome park is to be residential in whole or in part. (3689-12/04)

I. Miscellaneous. That the applicant has complied with all applicable city ordinances and state regulations in effect at the time the relocation assistance plan was approved. (3689-12/04)

That the applicant has complied with the conditions of approval, including the following items:

1. Mobilehome owners will not be forced to relocate prior to the end of their leases.

2. Mobilehome owners have been given the right to terminate their leases upon approval of the relocation assistance plan.

3. Demolition or construction will not occur until the relocation assistance plan is approved and the eighteen (18) month notification period has expired.

234.09 Application for Exemption from Relocation Assistance Obligations.

A. Any person who files an application for change of use of a mobilehome park may, simultaneous with such application, file an application for total or partial exemption from the obligation to provide relocation assistance. (3689-12/04)

B. If such application is filed, notice of such application, with the information contained therein, and distribution thereof to the owners and residents of the mobilehome park shall be provided with the application for change of use. (3689-12/04)

C. Any such application shall state that it is made on either or both of the following bases: (3689-12/04)

1. That provision for relocation assistance would eliminate substantially all reasonable use or economic value of the property. Such basis may only be established if it is demonstrated that the imposition of such obligations would eliminate the reasonable use or economic value of the property for alternate uses, and that continued use of the property as a mobilehome park would eliminate substantially all reasonable use or economic value of the property for reasons not caused or contributed by the park owner or applicant. (3689-12/04)

2. That a court of competent jurisdiction has determined in connection with a proceeding in bankruptcy that the closure or cessation of use of said property as a mobilehome park is necessary, and that such court has taken further action which would prohibit or preclude payment of relocation assistance benefits, in whole or in part. (3689-12/04)

D. Any such application made pursuant to subsection (c)(1) shall contain, at a minimum, the following information: (3689-12/04)

1. Statements of profit and loss from the operations of the mobilehome for the most recent five-year period of the date of the application or request, certified by a certified public accountant. All such statements shall be maintained in confidence as permitted by the California Public Records Act. (3689-12/04)

2. If the applicant contends that continued use of the property as a mobilehome park necessitates repairs or improvements or both, that are not the result of the park owner or applicant's negligent failure to properly maintain said property, and that the costs thereof makes continuation of the park economically infeasible, a statement made under penalty of perjury by a general contractor licensed as such pursuant to the laws of the State of California certifying that such contractor has thoroughly inspected the entire mobilehome park; that such contractor has determined that certain repairs and improvements must be made to the park to maintain the park in decent, safe and sanitary condition, and that those certain

repairs are not the result of the park owner or applicant's negligent failure to properly maintain said property; the minimum period of time in which such improvements or repairs must be made; and itemized statement of such improvements and repairs; and the estimated cost thereof of repairs and improvements, if any, due to deferred maintenance separately identified. The applicant shall also submit a statement verified by a certified public accountant as to the necessary increase in rental rates of mobilehome spaces within the park within the next five years necessary to pay for such repairs or improvements that are not the result of the park owner or applicant's negligent failure to properly maintain said property. If the director requires an analysis of the information submitted by the general contractor, the director may procure services of another such licensed general contractor to provide such written analysis, and the cost thereof shall be billed to and payment therefor shall be required from the applicant. (3689-12/04)

3. The estimated total cost of relocation assistance which would otherwise be required to the provided pursuant to this chapter, which shall be based upon documented surveys, included with the application, of the available mobilehome spaces within twenty miles of the mobilehome park, residents of the park who are willing to relocate and those who would elect to sell their mobilehomes, and the value of the mobilehomes in the park. (3689-12/04)

4. An estimate of the value of the mobilehome park by a qualified real estate appraiser if the park were permitted to be developed for the change of use proposed in the application for redevelopment of the park, and an estimate of the value of such park by such appraiser if use of the property as a mobilehome park is continued. (3689-12/04)

5. Such other information which the applicant believes to be pertinent, or which may be required by the director. (3689-12/04)

E. Any such application filed pursuant to subsection (c)(2) shall be accompanied by adequate documentation as to the title, case number, and court in which the bankruptcy proceeding was held, and copies of all pertinent judgments, orders, and decrees of such court. (3689-12/04)

234.10 Acceptance of Reports

The final form of the impact of conversion report and relocation assistance plan will be as approved by the Planning Commission. The reports, if acceptable, shall remain on file with the Director for review by any interested persons. Each of the mobilehome owners shall be given written notification within ten (10) days of approval of the relocation assistance plan.

234.12 Actions of Planning Commission

At the conclusion of its hearing, noticed as provided in this code, the Planning Commission shall approve, conditionally approve, or deny said impact of conversion report and relocation assistance plan pursuant to the provisions of this article, and such decision shall be supported by a resolution of the Planning Commission, setting forth its findings.

234.14 Fees Required

Each impact report and relocation assistance plan submitted shall be accompanied by a fee established by resolution of the City Council.

Chapter 18.26
MOBILE HOME PARK (MHP) OVERLAY ZONE

Sections:

18.26.010 PURPOSE.

The purpose of this chapter is to provide for and promote the orderly growth and development of sites for mobile home parks, consistent with the City's goal of accommodating alternative housing types and to balance the interests of mobile home park owners and mobile home owners. It is also intended to mitigate the herein identified relocation challenges and adverse effects of displacement upon the displaced mobile home owners when a park is converted to another land use. (Ord. 5920 1 (part); June 8, 2004.)

18.26.020 APPLICABILITY.

.010 This chapter and the requirements contained herein are not intended to apply to a recreational vehicle or recreational vehicle park. If a mobile home park contains recreational vehicles, then this chapter and the requirements contained herein shall apply only to mobile homes located within the mobile home park.

.020 The Mobile Home Park (MHP) Overlay Zone may be combined with any zone ("underlying zone") in which residential uses are permitted or within which mobile home parks are located. The regulations contained in this chapter shall apply in addition to, and where inconsistent therewith shall

supersede, any regulations of such zone with which the (MHP) Overlay Zone is combined. When the (MHP) Overlay Zone is applied to a parcel with an existing mobile home park which was established pursuant to a conditional use permit, variance or other discretionary zoning approval or permit, any conditions or regulations applied therein shall remain in full force and effect, except as to matters specified in this chapter. (Ord. 5920 1 (part); June 8, 2004.)

18.26.030 DEFINITIONS.

For purposes of this chapter, the following words, terms and phrases shall have the meanings ascribed herein:

.010 "Average Comparable Mobile Home Park" shall be defined as the mean average of all other mobile home parks within a one hundred twenty-five (125) mile radius of the mobile home park being converted, which are reasonably similar to the mobile home park being converted. Such determination of similarity shall be based upon the condition, quality, amenities and other relevant factors of the mobile home parks being compared. Such determination shall not, however, be based upon the age or location of the mobile home parks being compared.

.020 "City Hearing Body" shall be defined as the Planning Commission. Upon any appeal to or review by the City Council pursuant to Chapter 18.60 (Procedures), the City Council shall thereafter be deemed the City hearing body for purposes of this chapter.

.030 "Mobile Home Owner" shall be defined as a collective unit composed of the registered owner or registered owners of an individual mobile home, regardless of the number of such owners or the form of such ownership. Any notice to mobile home owners or residents required hereunder need not be given to more than one such owner or resident of each mobile home. Any relocation benefits payable to a "Mobile Home Owner" hereunder shall be deemed payable jointly and collectively to the owners on a per mobile home basis, regardless of the number of owners or residents of each mobile home. (Ord. 5920 1 (part); June 8, 2004.)

18.26.040 PRIMARY USES.

Subject to the provisions of this zone, only the following primary uses and structures, either singly or in combination, shall be permitted in this zone:

.010 Mobile home parks.

.020 Mobile home park subdivisions. (Ord. 5920 1 (part); June 8, 2004.)

18.26.050 ACCESSORY USES AND STRUCTURES.

The following uses and structures are permitted only when they are integrated with, and clearly incidental to, a primary use, and when the sole purpose is to provide convenience to residents of the development and their guests, rather than to the general public:

.010 Recreation buildings, game courts, swimming pools and other similar facilities.

.020 Recreational vehicle parks constituting an incidental section, area or number of units within a mobile home park.

.030 Parking structures, including garages and carports.

.040 Storage sheds or fully enclosed outdoor storage areas.

.050 Home occupations, in compliance with the provisions of Section 18.38.130 (Home Occupations) of Chapter 18.32 (Supplemental Use Regulations).

.060 Signs, as permitted by the provisions of the underlying zone and in compliance with Chapter 18.44 (Signs).

.070 Laundry facilities for the residents of the mobile home park.

.080 On-site management offices for the mobile home park. (Ord. 5920 1 (part); June 8, 2004.)

18.26.060 SITE DEVELOPMENT STANDARDS.

Except as otherwise specifically provided in this chapter, development of any property within this zone shall comply with the site development standards of the underlying zone in which the property is located. The density of any development, including any new mobile home park development, shall not exceed the maximum density otherwise permitted by the underlying zone. If the property is in a non-residential zone, the density allowed by the "RM-3" Zone shall apply. (Ord. 5920 1 (part); June 8, 2004.)

18.26.070 CONVERSION AND RECLASSIFICATION FROM THE MOBILE HOME PARK OVERLAY ZONE.

.010 Reclassification. Prior to conversion of any property upon which a mobile home park exists, or upon which a mobile home park existed at any time within the preceding two years, to another land use not otherwise permitted in this zone, the (MHP) Overlay Zone shall be required to be removed from the property by reclassification, in accordance with the procedures and conditions set forth in Chapter 18.76 (Zoning Amendments). Any application for a reclassification pursuant to the provisions of this chapter shall be deemed an application for a "change of use," for purposes of Section 798.56(f) of the Civil Code of the State of California or any successor provision thereto.

.020 Conversion Impact Report. Prior to approval of a reclassification from the (MHP) Overlay Zone for any property upon which a mobile home park exists, or upon which a mobile home park existed at any time within the preceding two (2) years, the person or entity proposing such reclassification shall file fifteen (15) copies of a comprehensive conversion impact report with the City, on the impact of the proposed change of use upon the mobile home owners within the mobile home park. Such report shall contain, but need not be limited to, the following information:

.0201 The age of the mobile home park;

.0202 The number of mobile homes existing in the park;

.0203 The ages of the mobile homes existing in the park;

.0204 A detailed description of the park as to landscaping and individual site development;

.0205 The length of time that each resident has lived in the park;

.0206 An analysis of the availability of adequate replacement space in comparable mobile home parks within a one hundred twenty-five (125)-mile radius of the mobile home park to be converted;

.0207 An estimate as to the costs to relocate each mobile home to an average comparable mobile home park, as defined in Section 18.26.030 ("Cost to Relocate" means disassembly and reassembly of the mobile home, including installation of awnings, skirtings, porches, and other amenities required by an average comparable park to which the mobile home could be relocated, and transportation costs as herein provided);

.0208 The owner's proposal as to relocation benefits; and

.0209 A general statement as to the condition of the existing park.

.030 Availability of Conversion Impact Report. The person or entity proposing such reclassification shall make available a copy of the conversion impact report to owners of all mobile homes within the mobile home park at least fifteen (15) days prior to the hearing on the report by the City hearing body. Such mobile home owners shall be notified as to the availability of the report for examination by the person or entity proposing the reclassification, and also as to the place and time of the hearing. The person or entity proposing such change may charge such persons a reasonable duplication fee for copies of the report.

.040 Relocation Benefits. Prior to approval of any reclassification for property upon which a mobile home park exists, or upon which a mobile home park existed at any time within the preceding two (2) years, the City hearing body shall conduct a duly noticed public hearing in accordance with the procedures set forth in Chapter 18.60 (Procedures), at which public hearing the City hearing body shall review such conversion impact report and hear testimony and evidence relating thereto. The City hearing body shall require as a condition of approval of any such reclassification that the person or entity proposing the reclassification take reasonable measures to mitigate any identifiable adverse impacts of the change of use on the ability of displaced mobile home owners to find adequate replacement space in another mobile home park. The mitigation measures by the person or entity proposing such reclassification shall be limited to the payment to the displaced mobile home owner of relocation benefits, consisting of the following amounts:

.0401 The estimated cost of disassembly and reassembly of the displaced mobile home, including existing awnings, skirtings, porches and storage structures;

.0402 The estimated cost of transportation of the displaced mobile home to an average comparable mobile home park; and

.0403 The estimated additional cost the displaced mobile home owner will be required to spend to meet an average comparable mobile home park's lawful requirements for improvements to the mobile home space and the mobile home which is being relocated (collectively referred to herein as "improvement costs"). The person or entity proposing the change of use shall establish the improvement costs of an average comparable mobile home park, by surveying a representative number of comparable mobile home parks where available replacement spaces can be identified within a one hundred twenty-five (125)-mile radius from the mobile home park to be converted. These improvement costs shall be categorized as to their type, including requirements for skirting, awnings, landscaping and other

applicable categories. The estimated additional cost for each displaced mobile home owner to conform to each of these categories shall also be established. These costs shall be established on the basis that the work is to be done by a professional contractor hired by the mobile home owner, rather than the mobile home owner performing the work himself. The information specified in this subsection shall be included in the conversion impact report, and shall be subject to review and approval by the City hearing body.

.050 Private Agreements. Nothing contained in this section shall be deemed to preclude any mobile home owner and mobile home park owner from mutually agreeing upon different benefits, in lieu of the benefits otherwise required to be paid to each mobile home owner by this section.

.060 Comparable Relocation Unavailable. In the event the City hearing body, at its sole discretion, finds, based upon the conversion impact report and information presented at the public hearing, that there are no reasonably comparable mobile home parks within a one hundred twenty-five (125)-mile radius from the mobile home park to be converted to which a displaced mobile home could be relocated, due to the age, size or condition of the displaced mobile home or for other reasons, the displaced mobile home owner shall be entitled to relocation benefits equal to those payable herein to owners of mobile homes capable of such relocation.

.070 Relocation to a Specific Park Not Required. In no instance shall any mobile home owner be required to relocate to a specific park or location as a condition of payment of the relocation benefits; provided, however, that the benefits payable to any mobile home owner shall be those specified herein, regardless of the location or park to which the mobile home is actually moved or the availability of any such relocation space.

.080 Notice of Effect of this Chapter. All mobile home park owners in the City of Anaheim shall notify in writing all existing and future mobile home owners and park residents, if different from such mobile home owners, (hereinafter referred to collectively as "households") of the mobile home park's rights and obligations under this chapter. Delivery of a copy of this chapter shall be deemed sufficient notification in lieu of any other notice required pursuant hereto. The notice may include, at the mobile home park owner's option, additional information relating to the procedures and effects of a change of use.

.0801 New households shall be notified on or before the date of commencement of occupancy. If the new household commences occupancy without first notifying the mobile home park owner and without signing the mobile home park's rental documents, then notice may be given to such household within ninety (90) days of the date of execution and delivery to the mobile home park of such rental documents.

.0802 Notice may be given by first class mail, or in the manner prescribed by the California Code of Civil Procedure Section 1162, or any other lawful means reasonably designed to insure that the household has received such notice.

.090 Termination of Tenancies. Nothing contained in this chapter shall be deemed to authorize the termination of any tenancy within all existing mobile home parks, except as otherwise authorized by state law. (Ord. 5920 1 (part); June 8, 2004.)

18.26.080 FINDINGS OF FACT FOR RECLASSIFICATION.

.010 Before the City hearing body may grant any reclassification to remove the (MHP) Overlay

Zone for property upon which a mobile home park exists, or upon which a mobile home park existed at any time within the preceding two (2) years, it must make a finding of fact that the evidence presented at the public hearing establishes the existence of one or more of the following facts:

.0101 That the proposed change of land use will not have an adverse effect upon the goals and policies for preservation of housing within the City of Anaheim, as set forth in the Housing Element of the Anaheim General Plan;

.0102 That the proposed change of use is necessitated by the underlying site conditions which pose a threat to the life, health, safety or general welfare of the mobile home park residents;

.0103 That the proposed change of use is necessitated by circumstances beyond the reasonable control of the owner of the property;

.0104 That denial of the reclassification would deprive the owner of all reasonable or economically viable use of the property; or

.0105 That the reclassification is required by public necessity and convenience and the general welfare.

.020 Notwithstanding the requirements of this section, the approval or denial of any reclassification pursuant to this chapter shall be deemed a legislative act, reviewable exclusively pursuant to Section 1085 of the Code of Civil Procedure. (Ord. 5920 1 (part); June 8, 2004.)

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"Architect and Engineer Design Liability and AB 573: Big Deal, or Ho-Hum?"

Roland Nikles[1]
Bell, Rosenberg & Hughes
1300 Clay Street, Suite 1000
Oakland, CA 94612
(510) 832-8585
rn@brhlaw.com
www.brhlaw.com

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The California Legislature has burdened the Civil Code with another anti-indemnity statute. Effective January 1, 2007 Civil Code Section 2782.8 makes void indemnity clauses in public agency contracts for "design professional services, . . . except for claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional." The provision applies to agreements with architects, engineers, and land surveyors entered into on or after January 1, 2007 and any amendment thereto.[2]

This article will take a brief look at project risk that flows from the work of design professionals and what role indemnity has traditionally played in allocating this project risk, it will suggest a reason why the legislature may feel compelled to curtail the freedom to contractually allocate project risk, it will attempt to divine the apparent intent of this new anti-indemnity statute, and finally, it will suggest what public owners can do to continue to mitigate design project risk in light of Civil Code Section 2782.8.

Project Risks: Why Do We Need Indemnity?

When an accident occurs at a project site, or the project goes awry, blame can often be traced to the doorstep of a design professional. As Professor Justin Sweet has put it: [3]

> A fire chief said "When you see a fire you realize that had the architect designed it better, there wouldn't have been a fire." Crimes are committed because the architect did not design in a way that would minimize the likelihood of people robbing and killing. Claims have been made against architects who design prisons when prisoners kill themselves or people are killed in a prison riot.

Even though such claims may be successful only rarely, the public owner as client of the design professional can become enmeshed in such litigation and the cost of defense is very high. Construction work is dangerous. On rare occasions a structure will collapse. On the other end of the spectrum, mundane errors and omissions in the coordination of plans and specifications routinely cause delays and add to the cost of projects.

Indemnity as a Tool to Minimize Project Risk

Public entities universally include indemnity clauses in their agreements with design professionals as a means to mitigate project risk arising from the design professional's work. The general laws relating to the application and interpretation of indemnity agreements is codified in Civil Code Sections 2772 et. seq. In general, parties may allocate project risk in their contracts as they see fit. The intention of the parties as actually expressed in their agreement should control. *Rossmoor Sanitation, Inc. v. Pylon,*

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[2] The term "local agency" includes cities, counties, school districts, other districts, joint powers authorities, or public corporation. The statute does not apply to state agencies or the University of California.

[3] Justin Sweet, *Construction Law*, ABA Forum on Construction Industry (1997).

Inc. (1975) 13 Cal.3d 622, 633 (the question whether an indemnity agreement covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control). Parties can agree that one of the parties (e.g. a design professional) will indemnify another (e.g. a public owner) for damages that arise out of the actual or alleged negligence of either party.

Forty years ago the legislature reined in absolute freedom of contract by adding Civil Code Section 2782 and making void all agreements in construction contracts that purport to indemnify a party against its sole negligence or willful misconduct. With respect to contractors, a public agency's right to be indemnified is further circumscribed in that indemnity may not be obtained for defects in design that the public entity furnishes to the contractor. *Id.* Finally, public entities may not seek indemnity for their own *active* negligence[4]. CC 2782 (c). Nevertheless, in light of these established rules, public entities have generally exacted indemnity agreements that have obligated design professionals to defend and indemnify the public entity against claims arising out of the design professional's work unless the claim was the result of the sole negligence, active negligence, or willful misconduct of the public entity. Under these "arising out of" clauses a public entity was not required to prove negligence on the part of the indemnitor: as long as there was an allegation, or it could be shown that a claim arose from the work of the design professional the design professional was obligated to defend and indemnify.

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[4] "Active negligence" is a legal term of art which suggests that a party actively created a hazard or had actual knowledge of the hazard and acquiesced in its existence and had a legal duty to guard against it. "Passive negligence" is negligence attributed to a party that did not create the risk, and had no actual knowledge of it, but was under a legal duty to guard against it. See *Jiminez v. Pacific Western Construction* (1986) 185 CA3d 102, 112. Negligent failure to discover a dangerous condition is not considered active negligence.

Such a Type 1[5] indemnity clause has been an effective and favored tool in the owner's tool box for mitigating project risk.[6]

To be effective and commercially reasonable a Type 1 indemnity agreement relies on the ability of the indemnitor to purchase an insurance policy to spread the assumed risk. The indemnitor (design professional for our purposes) must be able to insure the risk of assuming an obligation to defend and indemnify another party (the public entity) for damage arising from the negligent acts, or alleged negligent acts, of the public entity and others. To the extent that the design professional assumes liability for defense costs and indemnity for acts and events that are beyond its control (negligent acts of others are *per se* beyond the control of the design professional) the design professional must be able to insure such risk or risk ruin. A contractually assumed liability has traditionally been an insurable risk for design professionals and contractors alike. See, for example *Ins. Co. of N. Am. v. Nat'l Am. Ins. Co.* (1995) 37 Cal. App. 4th 195. Without the ability to spread the assumed risk through insurance, taking on contractual risk for the negligence of others not under the control of the design professional would be potentially ruinous for the design professional.

There is some evidence that insurance for assuming contractually assumed indemnity obligations has become not generally available to design professionals. By contrast, insurance coverage specialists report that contractually assumed liability coverage continues to be widely available to subcontractors and general contractors on commercial projects. In any case, the perceived lack of availability of such insurance for

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[5] See *MacDonald & Kruse, Inc. v. San Jose Steel Co.* (1972) 29 Cal. App. 3d 413. According to *MacDonald & Kruse*, Type I indemnity "provides 'expressly and unequivocally' that the indemnitor is to indemnify the indemnitee for, among other things, the negligence of the indemnitee," and the indemnitee is indemnified whether its liability arises from its sole or concurrent negligence. (*Id.* at p. 419.) Under the second type of indemnity clause, the indemnitee would be indemnified for his or her own *passive* negligence but not for *active* negligence. The third type of indemnity clause "is that which provides that the indemnitor is to indemnify the indemnitee for the indemnitee's liabilities caused by the indemnitor, but which does not provide that the indemnitor is to indemnify the indemnitee for the indemnitee's liabilities that were caused by other than the indemnitor." In *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628-629, the California Supreme Court declined to adopt this Type I, Type II, and Type III classification system. The Supreme Court said: "If an indemnity clause does not address itself to the issue of an indemnitee's negligence, it is referred to as a 'general' indemnity clause. (citation omitted). While such clauses may be construed to provide indemnity for a loss resulting in part from an indemnitee's *passive* negligence, they will not be interpreted to provide indemnity if an indemnitee has been *actively* negligent. (citations omitted) Provisions purporting to hold an owner harmless 'in any suit at law', 'from all claims for damages to persons', and 'from any cause whatsoever', without expressly mentioning an indemnitee's negligence, have been deemed to be 'general' clauses (citations omitted)." *Rossmoor* explained that the analysis of an indemnity clause was a matter of contract interpretation and the "active-passive dichotomy" was not "wholly dispositive." Nevertheless, the term Type I Indemnity continues to have general currency in the land to describe provisions whereby party A agrees to indemnify party B for all claims, including claims resulting in part, but not exclusively, from the negligence of party A. *See,* McCrary Construction Co. v. Metal Deck Specialists, Inc. (2005) 133 Cal App. 4th 1528, 1536.

[6] See, e.g., *Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 506-507 (subcontractor who installed negligently manufactured valve obligated to indemnify owner even though it was not independently negligent).

design professionals was used as the key argument by supporters of the legislation and is the main reason for the almost unanimous support for the legislation.[7]

Insurance-like Qualities of Indemnity

I have argued elsewhere[8] that efforts to legislate risk allocations between public entities and architects and engineers, and all similar efforts, are misguided because the free allocation of risk through indemnity agreements assures the most efficient allocation of risk in the market place, freedom of contract is a fundamental tenet in American jurisprudence, broad indemnity agreements are not unfair and play an important role in insuring risk on projects, and proportional indemnity imposed by legislative fiat would be unfair to public owners who will be found vicariously or passively liable for injuries that are actively and directly caused by architects or engineers. To the extent that design professionals may have difficulty procuring insurance coverage necessary to assume a Type 1 indemnity liability, this may be a short term issue—and insurance coverage may be available again in due course. In the meantime, parties should be allowed to allocate risk on projects as they see fit.[9]

Nevertheless, it is perhaps noteworthy that insurance has long been an area of legislative interest and that indemnity as a means of risk allocation on construction projects is so closely tied to insurance that it naturally invites legislative scrutiny. The role of the indemnity provisions in a contract serves the same function as insurance: it provides peace of mind to the owner. In requiring indemnity from its design professionals for all claims arising from the design work the public entity is looking for assurance that if something goes wrong, if there are claims, the design professional will take care of it. This assurance, once obtained, is independent of any fault by the indemnitor. The assurance given serves as a kind of insurance policy, which may or may not be backed by an actual insurance policy issued by a duly licensed insurance company that is purchased by the design professional.[10] The insurance-like qualities of indemnity agreements may explain why legislative bodies throughout the country have inserted themselves into this area of risk allocation on construction projects.

What is the Intent of Civil Code Section 2782.8?

The meaning and intent of the new legislation is not entirely transparent. The extent of the indemnity obligation that continues to be permitted, therefore, will have to be determined by the courts on a case by case basis. An argument can be made that the statute will only prevent indemnity in cases where there is no contributory negligence or conduct of any kind by the design professional—a very small change indeed. The statute, in its entirety, reads as follows:

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[7] CC 2782.8.

[8] *California Constructor Magazine,* Journal of the California Associated Contractors of CA, April 2006.

[9] A review of the top 500 design firms in the country, published in *Engineering News and Record,* April 2006, suggests that engineering firms are doing very well and not in need of special legislative protection.

[10] See Sweet, *Construction Law, supra,* p. 429, et. seq.

§ 2782.8. Contracts for design professional services; Agreements indemnifying public agency from liability as void.

(a) For all contracts, and amendments thereto, entered into on or after January 1, 2007, with a public agency for design professional services, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any such contract, and amendments thereto, that purport to indemnify, including the cost to defend, the public agency by a design professional against liability for claims against the public agency, are unenforceable, except for claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional. This section shall not be waived or modified by contractual agreement, act, or omission of the parties. Contractual provisions, clauses, covenants, or agreements not expressly prohibited herein are reserved to the agreement of the parties.

(b) For purposes of this section, the following definitions apply: **(1)**"Public agency" includes any county, city, city and county, district, school district, public authority, municipal corporation, or other political subdivision, joint powers authority, or public corporation in the state. Public agency does not include the State of California. **(2)**"Design professional" includes all of the following: **(A)** An individual licensed as an architect pursuant to Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code, and a business entity offering architectural services in accordance with that chapter. **(B)** An individual licensed as a landscape architect pursuant to Chapter 3.5 (commencing with Section 5615) of Division 3 of the Business and Professions Code, and a business entity offering landscape architectural services in accordance with that chapter. **(C)** An individual registered as a professional engineer pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, and a business entity offering professional engineering services in accordance with that chapter. **(D)** An individual licensed as a professional land surveyor pursuant to Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code, and a business entity offering professional land surveying services in accordance with that chapter.

(c) This section shall only apply to a professional service contract, or any amendment thereto, entered into on or after January 1, 2007.

The operative language in paragraph "a" of Section 2782.8 suggests that an obligation to indemnify for "claims that arise out of pertain to, or relate to the negligence" of the design professional will continue to be valid. Although it seems predictable that design professionals will argue that the "claims that arise out of" phrase implies a comparative fault concept, the statute does not state that comparative fault is intended, and the legislative history suggests that a comparative fault concept was

rejected. Therefore, public entities, whose agreements should be modified to mirror the new statutory language[11], may properly argue that, as long as the claim arises in part (even in small part) from the design professional's negligence, then the design professional must continue to indemnify the public entity, including such part as may result from the negligence of others, including the passive[12] negligence of the public entity. In other words, if a claim arises in part from the work of the design professional, the Type 1 indemnity concepts we've all become used to over the last forty years should continue to apply. Only when the claim does not "arise out of" or "pertain to" or "relate to" negligence of the design professional is indemnity prohibited. The extent of this obligation will have to be resolved by the courts as indemnity claims arise based on particular facts.

The interpretation that this new section is not a "proportional fault" statute, and that it does not prohibit indemnity for the public agency's percentage of passive fault[13] is supported by legislative history. An earlier version of Assembly Bill 573 (the legislative vehicle for Section 2782.8) had authorized indemnity, including defense costs, only "*to the extent caused by* the negligence, recklessness, or willful misconduct of the design professional and other persons employed by the design professional in the performance of the agreement or contract." The "to the extent" language in the earlier versions of the bill would have resulted in a clear comparative fault scheme. The "to the extent" language, however, was dropped from the legislation by amendment on June 13, 2006. The fact that the final version only requires a causal connection between the claim and the design professional's negligence strongly suggests that the legislature rejected this comparative fault idea.

What about the duty to defend? The obligation to indemnify may include the duty to defend when a claim arises out of, pertains to, or relates to the negligence of the design professional. However, if the design professional disputes that the claim gives rise to a duty to indemnify, then, as a practical matter, the public entity will not be able to receive a defense under the indemnity clause in the first instance: it may have to first prove up the indemnity claim (i.e. prove that the claim arises out of the design professional's negligence) and then collect defense costs expended after a judgment is obtained. The desire of a public entity to be defended in the first instance when a claim arises highlights the insurance nature of indemnity clauses: they are intended to provide peace of mind, which includes assurance that there will be a good defense paid by others when claims arise. However, whereas an insurance company has a duty to defend as soon as there is a possibility that a claim will be covered (even if the claim is false or fraudulent), this standard is unique to insurance policies and does not apply in a normal contractual context. Ultimately, assurance that a good defense will be provided by others whenever a claim is asserted must come from insurance—it is not realistic to expect such peace of mind from a contractual indemnity clause independent of insurance.

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[11] See sample language on page 8 *infra*.

[12] See footnote 3, *supra* for distinction between "active negligence" and "passive negligence.

[13] Indemnity for active negligence having been prohibited by Section 2782 all along.

And what about the effective date of the statute? Paragraph "c" indicates that the provision applies only to "a professional service contract, or any amendment thereto, entered into on or after January 1, 2007." It is unclear whether an agreement entered into prior to January 1, 2007, but amended after this date, would be subject to the provision. The operative phrase appears to be "a professional services contract . . . entered into after January 1, 2007." The reference to "or any amendment thereto" appears to modify the operative phrase: it does not work as a separate freestanding provision. Clearly an amendment which adds an indemnity provision to an agreement after January 1, 2007 would be subject to the statute. An interpretation that an amendment having nothing to do with indemnity (e.g. an extension of a contract term or compensation) would retroactively void an indemnity agreement otherwise valid would be awkward. There would seem to be no policy consideration to support such an interpretation.

Steps to Take in Light of Civil Code 2782.8

Indemnity agreements with design professionals should be redrafted in the wake of this new legislation to take account of this new anti-indemnity legislation. Indemnity agreements should expressly carve out the following elements:

- Active negligence by the public entity must be excluded. *CC 2782(c).*
- Indemnity must be excluded in the absence of any negligence, recklessness, or willful misconduct of the design professional.

By including the operative language of the statute [defend and indemnify for claims "that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional"] a public entity will be able to argue that any claim arising from the work of the design professional is subject to the indemnity and defense obligation—even if the claim arises in part from the negligence of the public entity. In order to have the broadest possible clause, this intent should be made express. For example, a provision might read in part as follows:

- To the maximum extent permitted by law, [Design professional] agrees to indemnify and defend [public agency] and its officers, officials, agents, employees and volunteers from any and all claims, demands, costs or liability that arise out of, or pertain to, or relate to the negligence, recklessness, or willful misconduct of [design professional], but this indemnity does not apply to liability for damages for death or bodily injury to persons, injury to property, or other loss, arising from the sole negligence, willful misconduct or defects in design furnished by [public agency], or arising from the active negligence of [public agency]. Except as provided above, [design professional] will indemnify and defend [public entity] notwithstanding any alleged or actual passive negligence of [public entity] which may have contributed to the claims, demands, costs or liability.

The agreement should contain a severance clause permitting a court to parse out the last sentence, above, in the event that a court were to conclude that the new statute in fact intends a comparative fault concept.

Public entities should require design professionals to add the public entity as an additional insured on the design professional's commercial general liability policy for the project. Additional insured status will permit the public entity to tender defense of the claim to the design professional's CGL policy in the first instance, and this will obviate the need to rely on enforcing the defense provision of the indemnity clause against a design professional who may not have the means to adequately fund the cost of defense. In addition, by being added as an additional insured on the design professional's policy, a public entity will be able to obtain a defense against claims notwithstanding a court's finding that Civil Code Section 2782.8 is a comparative fault statute that permits indemnity for even passive negligence of the public entity, or others. A careful assessment should be made of the design professional's errors and omissions policy as well as the CGL policy.[14]

For design build contracts, an effort may be made to differentiate between the construction elements and the design elements of an agreement with a design-builder. In this way a traditional Type 1 indemnity may be preserved for the construction work, subject only to the limitation in Civil Code Section 2782, while the design work would be subject to Section 2782 *and* the new provisions in Civil Code Section 2782.8. It is unclear whether the functions of construction management or construction inspection will be covered by the statute when those services are being provided by an individual registered as a professional engineer. The provision should be considered when entering into contracts for construction management or construction inspection with persons that fit the definition of "design professional" provided in the statute.

When contractors on public work project submit claims for change orders arising out of alleged errors or omissions in the plans and specifications public entities often enter into tolling agreements with the design professional to permit the public entity to defend contractor claims without the awkward necessity of simultaneously being adverse against its design professional.[15] Similar circumstances may occur in post-completion dangerous condition cases alleging a dangerous road or intersection. Usually, the public entity will be relying to some degree on the design professional to demonstrate the reasonableness of the design as a part of a design immunity defense.[16] Nothing in Section 2782.8 should limit the discretion of public entities to enter into such tolling agreements. In light of the Section 2782.8(c) [section applies to agreements entered into on or after January 1, 2007 and amendments thereto], for agreements predating the

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[14] Errors and Omissions policies provide coverage for the professional negligence of the design professional only, and it excludes coverage for any liability that does not arise from the errors and omissions in the design work. General liability coverage for a design professional covers liability that may arise from the design professional's presence at the site not related to design errors and omissions. The CGL coverage for the design professional is generally low risk. However, if the public entity is added as an additional insured the risk profile of that coverage may increase, which may affect the premium.

[15] See Code of Civil Procedure Section 360.5.

[16] See Gov. Code §830.6; *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63.

effective date of the statute, it would be wise to state that such a tolling agreement is not intended as an amendment of the underlying professional services agreement.

When a public entity is exposed to claims on account a design professional's work, the public entity may elect between tort remedies and contractual remedies.[17] To the extent that the new anti-indemnity statute weakens a public entity's ability to obtain general indemnity from the design professional for its negligence based errors and omissions, it makes it that much more important to clearly delineate the scope of work of the architect so that the public entity can pursue its remedy through contract causes of action, if necessary. For example, obligations regarding pre-design field investigations, design-to-budget clauses, and coordination of design elements should be made express. An express warranty that the design does not violate copyright laws should be included. Keep in mind, however, that most professional practice policies exclude coverage for contractual liability.

Conclusion

In conclusion, is the addition of Civil Code Section 2782.8 Ho-Hum, or No-Big-Deal? You decide. The statute is an example of a national trend of anti-indemnity statutes that are primarily driven by the close connection between indemnity and insurance and the historical interest that legislatures have had in controlling the field of insurance. The extent to which this statute will affect the indemnity relationships between public entities and their architects will have to be determined by the courts on a case by case basis. Arguably, the statue has very little impact, limiting indemnity only in those case where the design professional can prove that its services are not collateral to the claim, did not affect the claim, or do not relate to the claim. In the meantime, public entities should protect themselves by clearly delineating the scope of the design professional's services in their agreements and by requiring design professionals to add the public entity as an additional insured to the design professional's CGL policies.

Roland Nikles
Bell, Rosenberg & Hughes

[17] *Gagne v. Bertram* (1954) 43 Cal.2d 481.