Case No. B322465

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

CHRISTOPHER ANDERSON; ROSS BAGDASARIAN; PETER BARKER; and JAMES MORLEY,
Petitioners and Respondents,

v.

COUNTY OF SANTA BARBARA and BOARD OF SUPERVISORS OF SANTA BARBARA COUNTY,
Respondents and Appellants.

[PROPOSED] AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENTS AND APPELLANTS COUNTY OF SANTA BARBARA AND BOARD OF SUPERVISORS OF SANTA BARBARA COUNTY

On Appeal from the Santa Barbara County Superior Court
Case No. 22CV01299
The Honorable Thomas P. Anderle

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I. INTRODUCTION

This case presents important issues concerning how the courts should confront attempts by petitioners to avoid enforcement actions against unlawful conduct by raising CEQA or other claims. The undisputed facts in the case show that the County began receiving complaints about the volume of hikers parking near a popular trail head in Respondents' neighborhood. The County discovered that although it is lawful to park in the County right of way on the road at issue in this case, such lawful parking was being blocked by vegetation, signs, boulders and other encroachments. As a result, the numerous hikers already using the trail were forced to park in a manner that partially blocked the roadway, reducing the usable roadway to only one lane in certain stretches.

It is uncontested that Respondents have unlawful encroachments in the County right of way and have never sought an encroachment permit. It is further uncontested that County road commissioners have the authority to order such encroachments to be removed, and there are no allegations in this case that the encroachment laws are unconstitutional or otherwise unlawful. In short, this case squarely presents a public official duly exercising his or her statutory authority to abate what is concededly unlawful conduct.

Nevertheless, based only on a verified petition and one declaration –

all signed by individuals who are not qualified experts in biological resources, evacuation routes, or fire hazards – the trial court granted a preliminary injunction, which had the direct effect of preventing "execution of a public statute by officers of the law for the public benefit." (Code Civ. Proc., § 526, subd. (b)(4).) For reasons of both law and policy, this the trial court cannot do.

Appellants' briefs aptly detail the many reasons the preliminary injunction was wrongfully granted, and Amicus Curiae joins in those arguments. This brief will amplify three points that this Court should consider in determining whether the preliminary injunction issued in this case is improper:

(1) It is a public safety issue of statewide importance on both local roads and State highways that the courts do not allow the work of those charged with clearing unlawful encroachments from being tied up and delayed in civil lawsuits that pit private interests against what the Legislature has determined to be a nuisance and a crime, the abatement of which is in the public interest.

(2) Courts must give deference to road commissioners in their determinations of road administration and safety. Upholding the issuance of the preliminary injunction in this case would allow every property owner subject to an encroachment abatement action to speculate on the supposed environmental harms of

removing the unlawful encroachments to delay recovery of public property. It would also place the court in the position of giving such petitioners authority to continue violating the law. It is bad public policy and incompatible with the applicable statutes.

(3) Preliminary injunctions, which are a remedy in equity, cannot be issued to allow petitioners with "unclean hands" to continue unlawful conduct. There is no provision in CEQA that immunizes petitioners from enforcement actions against unlawful encroachments.

II. ARGUMENT

A. The ability of Road Commissioners and Caltrans to quickly enforce encroachment requirements is a statewide matter of public safety.

This case presents issues that go beyond particular encroachments on one County roadway. Rather, the ability to remove admittedly unlawful encroachments interfering with the safe passage of vehicles and pedestrians is a matter of statewide importance. CSAC's member counties are responsible for an astounding 71,749 centerline miles of roadway in this State. (Calif. Dept. of Transportation, *Caltrans Facts* (June 2021) p. 17.)[1]

[1] This document is available at: https://dot.ca.gov/-/media/dot-media/programs/research-innovation-system-information/documents/caltrans-fact-booklets/2021-caltrans-facts-a11y.pdf (last accessed on Feb. 12, 2023).

This is also a critical issue for Caltrans, which maintains 15,058 centerline miles and has issued over 16,000 encroachment permits. (*Id.* at pp. 16, 24.) Caltrans must determine the safety of each of the encroachments proposed, revoke permits when the permit holder is violating the permit conditions and abate encroachments that are in place without a permit in violation of State law. (See, e.g., *Jamison v. Depart. of Transportation* (2016) 4 Cal.App.5th 356; *Dean W. Knight & Sons, Inc. v. State of California ex rel. Dept. of Transportation* (1984) 155 Cal.App.3d 300.)

"The term 'encroachment' includes any tower, pole, poleline, pipe, pipeline, driveway, private road, fence, billboard, stand or building, or any structure or object of any king or character not particularly mentioned in this section, which is placed in, under or over any portion of the county highway." (Sts. & Hy. Code, §1450.) It is uncontested that encroachments of any kind, including landscaping, in the County right of way require an encroachment permit. (Sts. & Hy. Code, § 1460 [making it a misdemeanor to "place, change or renew" an encroachment or "[p]lant, remove, cut, cut down, injure or destroy any tree, shrub, plant or flower growing within any county highway" without an encroachment permit].) [2]

State law also authorizes the road commissioner to remove unpermitted encroachments as a nuisance. (Sts. & Hy. Code, § 1484.) This

[2] The same prohibition applies to Caltrans maintained roadways. (Sts. & Hy. Code, § 670.)

is true even if an encroachment permit was issued but later revoked by the road commissioner, as "[a]ll permits other than those issued to public agencies or a public utility having lawful authority to occupy the highways are revocable on five days' notice." (Sts. & Hy. Code, § 1463; *County of El Dorado v. Al Tahoe Inv. Co.* (1959) 175 Cal.App.2d 407, 410 ["Reading [section 1484] with section 3479 of the Civil Code, which defines a nuisance as anything which unlawfully obstructs the free passage of any county highway, and section 3494 of the Civil Code, which states that a public nuisance may be abated by any officer authorized by law, it would seem that once the encroachment permit was revoked the encroachment would become a nuisance which the road commissioner could seek to have abated."].) The authority vested in the road commissioner is a dictate of State law as enacted by the Legislature. "Even a board of supervisors does not have power to authorize the use of roads or streets for private purposes, except where the use is temporary." (*Ibid,* quoting *Strong v. Sullivan* (1919) 180 Cal. 331.)

Uses that are authorized in a public right of way must be consistent with the right to travel. (76 Ops.Cal.Atty.Gen. 31, 37 (1993).) When considering whether to authorize such encroachments, the "safety and convenience of the traveling public" must be protected. (*Id.* at p. 32.) The "people as a whole have a paramount right to use the public streets wherever located, such right being superior to any right of a portion of the

general public to any use of the street inconsistent therewith." (*City of Los Angeles v. Metropolitan Water Dist.* (1981) 115 Cal.App.3d 169, 173.)

For these reasons, where encroachments are permitted, they must meet specified guidelines. The permit holder may be required to provide a bond to ensure that enforcement / removal costs are covered if they fail to comply with the terms of the permit. (Sts. & Hy. Code, § 1467.) Permitting entities like Caltrans adopt detailed permitting standards making clear that encroachment permits are not property rights and do not run with the land, and that the permittee is responsible for all liability and personal injury and property damage. (See Calif. Dept. of Transportation, *Encroachment Permits Manual* (2018), pp 1-3, 2-27.)[3] Caltrans has also adopted very specific criteria for encroachment permits that involve landscaping in State rights of ways to ensure there is a clear recovery zone, take into account pedestrian safety, and address the permittee's liability insurance. (*Id.* at pp 5-45 to 5-51.)

These types of provisions are typical for counties as well. As noted in its briefing, Santa Barbara County requires its encroachment permittees to provide adequate security and a hold harmless agreement. (Opening Br., p. 81.) And Santa Barbara is not alone. Napa County prohibits any

[3] This document can be found at: https://dot.ca.gov/-/media/dot-media/programs/traffic-operations/documents/encroachment-permits/epm-chapters-all-ada-a11y.pdf (last accessed on Feb. 12, 2023).

encroachments in the right of way on its road system without an encroachment permit. (Napa County Code, § 12.04.020.) Mendocino County requires that all applications for encroachment permits be accompanied by a certificate of insurance in the amount of one million dollars. (Mendocino County Policy #14 – Encroachment Permits.)[4] The Mendocino County Road Commissioner is authorized to reduce the insurance amount, but only to a level that will "protect the County and the general public from the risks reasonably associated with the activity of the permit." (*Ibid.*) Siskiyou County requires permittees to indemnify the County and hold the County harmless for any liability that arises as a result of the encroachment. (See Siskiyou County Application for Encroachment Permit, para. 6.)[5]

Both Caltrans and counties also take into account emergency evacuation concerns when designing roadways and considering right of way encroachments. Caltrans Design Bulletin Number 93 ("Evacuation Route Guidance") instructs that road shoulders serve important functions in

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[4] This document can be found at: https://www.mendocinocounty.org/home/showpublisheddocument/11845/636413452560630000 (last accessed on Feb. 12, 2023).

[5] This document is available at: https://www.co.siskiyou.ca.us/sites/default/files/fileattachments/public_works/page/5101/dpw_20210310_encroachmentpermitapplication.pdf (last accessed on Feb. 12, 2023).

the event of an emergency, like a fire. They can serve as an additional lane during an evacuation, or can assist in providing space for emergency vehicles or equipment to pass during an emergency. They also provide space for disabled vehicles that may otherwise block lanes of traffic. (Calif. Dept of Transportation, *Design Information Bulletin Number 93* (Dec. 3, 2020) p. 3.)[6] As another example, San Diego County's emergency management plan estimates evacuation times by considering total roadway capacity in a given area, capacity that would be diminished by half if portions of a roadway's travel lanes are blocked by parked cars that are unable to park in the public right of way. (County of San Diego, *Operational Area Emergency Operations Plan* (Sept. 2018), p. 16.)[7]

In sum, whether to permit a particular encroachment and the authority to remove unlawful encroachments is a significant statewide issue, one on which our State Legislature has vested broad control to Caltrans and county road commissioners in order to protect the public and meet critical transportation goals. This is a policy determination made by the Legislature that forecloses individuals from using public rights of way

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[6] This document is available at: https://dot.ca.gov/-/media/dot-media/programs/design/documents/signed-dib-93-evacuation-route-a11y.pdf (last accessed on Feb. 12, 2023).

[7] This document is available at: https://www.sandiegocounty.gov/content/dam/sdc/oes/emergency_management/plans/op-area-plan/2018/2018-Annex-Q-Evacuation.pdf (last accessed at Feb. 12, 2023).

for their own private interests (aesthetics and a distaste for visitors parking in their neighborhoods included). For this reason, there is a very long line of cases making clear that a court cannot issue an injunction to prevent execution of a public statute by officers of the law for a public benefit. (See *Loftis v. Superior Court* (1938) 25 Cal.App.2d 346; *Financial Indemnity Co. v. Superior Court* (1955) 45 Cal.2d 395; *Lawton v. Bd of Medical Examiners* (1956) 143 Cal.App.2d 256.) This prohibition on the use of injunctions has similarly been codified in statute. (Code of Civ. Proc., § 526, subd. (b); Civ. Code, § 3423.) Petitioners cannot avoid this prohibition by couching their claims in CEQA terms, as enforcement actions as also exempt from CEQA. (Cal. Code Regs., tit. 14, § 15321.) And Respondents' blithe assertion that their unlawful encroachments would be granted an encroachment permit if one was requested fails to recognize the surety, indemnity, safety and public use of roadway considerations that are part of the statutory scheme for encroachments in this State.

Affirming the preliminary injunction in this case would jeopardize this system of ensuring order and safety on our state and local public roadways. It would create a precedent that allows private interests, such as private property aesthetics,[8] to delay use of the clear authority of road

[8] It is worth noting that Respondents describe the purpose of their encroachments as adding "to the community's rural nature and charm." (Respond. Br., p. 58.) When compared against the public purposes served by having clear rights of ways that ensure travel lanes in both directions are

commissioners to remove encroachments that diminish the public's right to use the public rights of way in a lawful manner.

B. Courts must give deference to the opinions of County road commissioners and other qualified transportation agency staff to ensure the speculative concerns of non-experts do not interfere with the safety and maintenance of the county road system.

As Appellants note, the trial court granted the preliminary injunction based on the verified petition and a single declaration from Respondents' attorney. None of the individuals signing the petition or declaration have alleged any expertise in the areas that are the basis of their CEQA claim—biological resources, evacuation routes, and fire hazards. By comparison, the County is relying on its road commissioner and other experts in its transportation department in support of its position on the harm caused by Respondents' unlawful encroachments. Though Respondents describe this expert opinion as "self-serving" (Respond. Br., p. 43.), the Legislature has assigned these County officials with responsibility for county road system and they are required to meet minimum qualifications related to that work. The trial court erred by failing to provide deference to their opinions and elevating instead the unqualified assertions of

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open and available for both ordinary traffic safety and emergency evacuations and response, it is apparent that the statutory scheme is specifically designed to preclude an injunction like the one issued here.

Respondents, who will reap individual gains (continuation of unlawful encroachments on the County right of way) through the preliminary injunction. In so doing, the trial court erred.

Our system of county road administration and maintenance did not come into place by happenstance. Very early in California's history, the County Board of Supervisors was vested with direct control over the county road system. (*Coulter v. Pool* (1921) 187 Cal. 181.) However, in 1947, the Legislature adopted the Collier-Burns Highway Act, which limited the role of the Board of Supervisors to policymaking and budget, and gave direct administrative responsibility of the county road system to a county road commissioner. (Sts. & Hy. Code, § 2209; *Johnston v. County of Yolo* (1969) 274 Cal.App.2d 46, 52.) Road commissioners are required to be civil engineers, with limited exceptions. (Sts. & Hy. Code, § 2006.) "The general purpose of the 1947 legislation was to confide immediate responsibility for highway planning, design and administration in a competent engineer, usually a registered one, who was equipped by training and professional status to make engineering decisions affecting highway safety and efficiency. (See Sts. & Hy. Code, §§ 1076, 1191, 1331; *Hard v. County of Plumas* (1950) 35 Cal.2d 577, 580.) The Civil and Professional Engineers Act declares that the assumption of responsibility for highway

design and planning is part of the practice of civil engineering. (Bus. & Prof. Code, §§ 6731, 6734.) Registration of one who practices civil engineering in a public or private capacity is aimed at safeguarding 'life, health, property and public welfare.' (Bus. & Prof. Code, § 6730.)" (*Johnston, supra,* 274 Cal.App.2d at pp. 52-53.)[9]

The trial court erred in analyzing Respondents' CEQA claim by giving credence to the lay opinions underlying the allegations in the verified petition and attorney declaration over the opinions of the qualified experts who have been designated by the Legislature to assume the responsibility of safeguarding the public in their use of county roadways. It is well established that lay opinion is not substantial evidence. (*Wollmer v. City of Berkely* (2011) 193 Cal.App.4th 1329, 1350.) "Unsubstantiated opinions, concerns, and suspicions about a project, though sincere and deeply felt, do not rise to the level of substantial evidence supporting a fair argument of significant environmental effect." (*Leonoff v. Monterey County Bd.*

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[9] Respondents are dubious that the county road commissioner in executing his statutory authority under State law to remove unlawful encroachments can operate separately from his role as a Public Works Director. (Respond. Br., pp. 37-41.) The Legislature does not share that concern, but rather specifically authorizes the positions of road commissioner and Public Works Director to be consolidated. (Gov. Code, § 24300, subd. (q).)

of Supervisors (1990) 222 Cal.App.3d, 1337, 1352.) Thus, even if this enforcement action were a "project" under CEQA, which it is not for the many reasons set forth in the County's briefs, the allegations presented to the court would be insufficient to support the preliminary injunction.

This statutory scheme is in place for well-founded policy reasons. Every property owner facing an encroachment abatement action can surely speculate, without any expert qualifications, on how removal of the encroachment may have some potential to effectuate a change on traffic, biological resources, aesthetics and so on. Issuing a preliminary injunction on those grounds would only encourage petitioners to file lawsuits to delay the enforcement efforts that would end their unlawful conduct and would interfere with the road commissioner's work to promote the public's safety as directed by the Legislature.

C. Preliminary injunctions are a remedy in equity that cannot be used to allow petitioners to continue unlawful conduct when the validity of the underlying statutes is not at issue.

As the County correctly notes, a preliminary injunction cannot be issued to continue an unlawful encroachment because there is no right to continue a public nuisance, even one that has been in place for some period of time. (Opening Br., p. 43, 80.) This

truism is based on the long-standing principle that equitable remedies are not available to those with unclean hands.

Injunctions, including preliminary injunctions, are an equitable remedy. (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 454.) The unclean hands doctrine comes from the maxim: "He who comes into Equity must come with clean hands." (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1059.) Regardless of the merits of a claim, in seeking an equitable remedy, the petitioner "must come into court with clean hands, and keep them clean, or he will be denied relief. . . ." (*Precision Co. v. Automotive Co.* (1945) 324 U.S. 806, 814-815.) This principle can be applied in legal as well as equitable claims. (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978.) The doctrine applies where, as here, the misconduct directly relates to the cause at issue, and is the subject matter of the equitable relations between the parties. (*Id.* at p. 979.)

"This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the

requirements of conscience and good faith. . . . This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant." (*Eldridge v. Burns* (1978) 76 Cal.App.3d 396, 434-435.)

The public policy supporting the notion that an injunction cannot be used to allow the continuance of unlawful conduct is self-evident. The unclean hands doctrine is "at the heart of equity, and serve[s] to pick out situations that present a great danger of opportunism." (*Symposium-Contract as Promise at 30: The Future of Contract Theory: The Equitable Dimension of Contract,* 45 Suffolk U.L.Rev. 897, 907 (2012).) The concept is not just found in case law, but has also been incorporated into statute by the Legislature. (Civ. Code, § 3543.)

The unclean hands doctrine is not about protecting one party over another. Rather, it "protects judicial integrity and promotes justice. It protects judicial integrity because allowing a plaintiff with unclean hands to recover in an action creates doubts as to the justice provided by the judicial system. Thus, precluding recovery to the unclean plaintiff protects the court's, rather than the opposing party's, interests." (*Kendall-Jackson Winery, supra,* 76 Cal.App.4th at p. 978, citing *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 727.)

Courts should not be used as a tool for allowing the continuation of unlawful conduct when neither the statute prohibiting the conduct nor the statute's enforcement mechanisms are challenged as unlawful or unconstitutional. Petitioners are simply not entitled to the equitable remedy of an injunction under these circumstances.

III. CONCLUSION

For all of these reasons, the trial court's preliminary injunction order should be reversed.

Dated: February 15, 2023

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 3,648 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 15th day of February, 2023 in Sacramento, California.

Respectfully submitted,

/s/ *Jennifer B. Henning*
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