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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

IVAN SVITEK, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents; FARZIN KHALKHALI et al., Interveners and Appellants.	B268745 (Los Angeles County Super. Ct. No. BS148145)

APPEAL from a judgment and order of the Superior Court of Los Angeles County. Robert O'Brien, Judge. Affirmed.

Alston & Bird, Paul J. Beard II and Maya Lopez Grasse for Plaintiff and Appellant.

Manatt, Phelps & Phillips, Victor De la Cruz, C.J. Laffer and Benjamin G. Shatz for Interveners and Appellants.

Michael N. Feuer, City Attorney, Terry P. Kaufman Macias, Assistant City Attorney, Amy Brothers, Deputy City Attorney, for Defendants and Respondents.

A property owner obtained a permit to build a three-story house on a hillside overlooking Pacific Coast Highway. A neighbor whose view would be partially blocked challenged the issuance of the permit, contending that it violated the City of Los Angeles's zoning ordinances regarding a structure's maximum height and minimum setback from the street. After the administrative agency with the last word invalidated the permit, the property owner petitioned for a writ of mandate to reinstate the permit on both grounds. The trial court granted the petition in part and denied it in part, ruling that the permit complied with the rules governing maximum height but did not comply with the rules governing minimum setback. Both the property owner and neighbor appeal. We conclude there was no error, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Plaintiff Ivan Svitek (Svitek) owns a 11,369 square foot lot, located at the street address of 200 Arno Way in Pacific Palisades. Arno Way sits on a hill that overlooks, and is 300 feet away from, Pacific Coast Highway. Arno Way runs alongside the upper boundary of the Bel Air Bay Club, and becomes Pintoresca Drive. Arno Way and the driveway into the Bel Air Bay Club are like the two prongs of a tuning fork, with Arno Way continuing into Pintoresca Drive as the handle.

Under the zoning ordinances enacted by defendant City of Los Angeles (the City), the neighborhood where the lot is located is zoned R1-1, a designation reserved for single-family dwellings. Because of its location, the lot is also considered, under the City's zoning ordinances, to be within (1) a "Hillside Area," and (2) a "Dual Jurisdictional Coastal Zone," which means any permits

must be approved both by the City *and* by the California Coastal Commission (Coastal Commission) (Pub. Resources Code, §§ 30600, 30601; Cal. Code Regs., tit. 14, § 13301, subd. (a); *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 794).

In February 2011, Svitek applied for and obtained from the City an "approval in concept" to build a 4,989 square foot single-family dwelling comprised of two stories and a basement. The house would be 37 feet $11^{1/4}$ inches in height.

In May 2011, Svitek applied for and obtained from the Coastal Commission a letter waiving the requirement that he obtain a Coastal Development Permit. (See *La Fe, Inc. v. County of Los Angeles* (1999) 73 Cal.App.4th 231, 241 [Coastal Commission may take action after obtaining an approval in concept from the local jurisdiction]; see generally Cal. Code Regs., tit. 14, § 13052.) The letter explained that the "proposed project"—described as a "two-story (with basement), 45-foot high (above street level), 4,935 square foot single-family residence with two two-car garages"—qualified for a "de minimis" waiver because it "is consistent with community character, and will have no negative effects on visual resources or coastal access." The waiver would not become effective until the Coastal Commission held a properly noticed meeting and received no objections to the waiver. (Cal. Code Regs., tit. 14, § 13238.1.) No objections were raised at the meeting.

In September 2011, Svitek applied and obtained a building permit from the City to erect a 5,492 square foot single-family residence. The permit authorized the construction of a three-level residence (two stories plus a basement) having a total height of 37.9 feet and set back 9 feet 10 inches from Arno Way.

In May 2013, the City issued a supplemental building permit. The square footage, height, and setback remained the same; the supplemental permit listed the building as "three stories" rather than "two."

Interveners Farzin Khalkhali and Zohreh Bahmani (neighbors) are Svitek's neighbors; they live on a street higher up on the hillside that overlooks Svitek's lot.

II. Procedural History

A. *Administrative Appeals*

In February and July 2013, neighbors filed two appeals challenging the City's issuance of Svitek's building permit—the first asserted that the permit violated the maximum height restriction in the City's zoning ordinances, and the second asserted that the permit violated the minimum setback requirement in the City's zoning ordinances. The City's Department of Building and Safety (Department) rejected both appeals.

Neighbors next appealed the Department's two decisions to the City's Director of Planning (Director). The Director also rejected both appeals.

Neighbors finally appealed to defendant West Los Angeles Area Planning Commission of the City of Los Angeles (Planning Commission).

In two separate orders resolving the two separate appeals, the Planning Commission vacated Svitek's building permit.

In the appeal challenging the permit for violating the City's maximum height requirement, the Planning Commission ruled that Svitek's lot was subject to the 33-foot maximum contained in

Los Angeles Municipal Code section 12.21.1.[1] That section provides for a 45-foot maximum height if a single-family dwelling in an R1 zone is "located in a Hillside Area or Coastal Zone," but a 33-foot maximum height if it is not. (L.A. Mun. Code, § 12.21.1.)[2] Although Svitek's lot was physically located in a Coastal Zone,[3] the Planning Commission concluded that the 33-foot maximum height applied because (1) an April 1996 memo from the City's Chief Zoning Administrator interpreted section 12.21.1 to apply the 33-foot maximum height when a lot was "*not subject to* the Hillside Ordinance or Coastal Zone provisions"; and (2) a December 2002 memo from a City engineer explained that "only those projects which obtain a Coastal Development Permit . . . are to be considered as 'subject to the Coastal Zone provisions'" within the meaning of the April 1996 memo. Because Svitek had obtained a de minimis waiver (in lieu of a Coastal Development Permit), the Planning Commission reasoned, his lot

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1 All further statutory references are to the Los Angeles Municipal Code unless otherwise indicated.

2 This section was subsequently amended, but the parties agree that the amendment does not apply because it took effect after Svitek applied for his building permit.

3 Although Svitek's lot was also physically located in a Hillside Area, the height restrictions contained in the ordinance governing Hillside Area residences (§ 12.21-A.17) do not apply to "construction on a lot with a vehicular access from a street improved with a minimum 28 foot wide continuous paved roadway within the Hillside Area" (§ 12.21-A.17, subd. (i)(2)). Arno Way is more than 28 feet wide.

was "not subject to Coastal Zone provisions" and thus subject to the 33-foot maximum height restriction.

In the appeal challenging the permit for violating the City's minimum setback requirement, the Planning Commission determined that Svitek's lot was located "where" "40% or more of the *frontage*" consisted of "developed lots which have front yards that vary in depth by not more than ten feet"; as a result, the minimum setback was defined as "the average depth of the front yard of such lots." (§ 12.08-C.1, italics added.) Because "frontage" is defined, in pertinent part, as "[a]ll property fronting on one (1) side of a street between intersecting or intercepting streets" (§ 12.03), and because "Arno Way continues to Pintoresca Drive without any discernable features to distinguish the two different streets" and "appears to be a continuous single street," the Planning Commission found that the City should have calculated the average depth by looking to the front yards of the lots on Arno Way *as well as* Pintoresca Drive, rather than just the lots on Arno Way alone. Because the properly calculated average front yard depth came to a minimum setback of 22.7 feet, Svitek's permit allowing for only a 9-foot 10-inch setback was invalid.

B. *Writ Proceedings*

In April 2014, Svitek filed a lawsuit against the City and the Planning Commission seeking a petition for a writ of administrative mandate.[4] The trial court granted neighbors' motion to intervene.[5]

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4 Svitek also sued for $20 million in damages on the ground that the City's and Planning Commission's actions constituted an unconstitutional taking of property and violated due process, and

Following briefing, and a hearing, the trial court issued an eight-page order granting Svitek's petition in part and denying it in part. Because, in its view, no fundamental, vested right was at stake, the trial court reviewed the Planning Commission's ruling for substantial evidence. The court concluded that substantial evidence did not support the Planning Commission's ruling on the maximum height because "[i]t is undisputed that [Svitek's lot] is located within the Coastal Zone" and because "the application of the statutes hinges on the geographic location of the property," not the type of approval obtained from the Coastal Commission. The court concluded that substantial evidence did support the Planning Commission's ruling on the minimum setback because "substantial evidence" "supported" its finding "that Arno Way and Pintoresca Drive were really one continuous street and that the properties [on] Pintoresca Drive should also be used to calculate the frontage . . . ."

C. *Appeals*

After judgment was entered and the writ issued, neighbors filed a timely notice of appeal, and Svitek filed a timely notice of cross-appeal.

DISCUSSION

A court may issue a writ of administrative mandate if, among other reasons, the administrative agency committed a "prejudicial abuse of discretion" because it did "not proceed[] in

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also sued for declaratory relief. Svitek later dismissed those claims.

5 The court also deemed this case related to *Bel-Air Bay Neighborhood Association v. City of Los Angeles* (Super. Ct. L.A. County, No. BS148503), a lawsuit neighbors brought against Svitek to enforce the Planning Commission's rulings.

the manner required by law," its "order or decision is not supported by the findings" or its "findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).) Where the agency's challenged action substantially affects a fundamental, vested right of the person seeking the writ, the trial court is to use its independent judgment in evaluating the administrative agency's ruling; otherwise, it is to review the agency's action for substantial evidence. (*Id.*, subds. (b) & (c); *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.) A property owner "'acquires a vested right to complete construction in accordance with the terms of [a building] permit'" if he "'has performed substantial work and incurred substantial liabilities in good faith reliance upon [that] permit.'" (*Halaco Engineering Co. v. South Central Coast Regional Com.* (1986) 42 Cal.3d 52, 72, quoting *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 791.) Svitek alleges in his verified complaint that he "commenced" construction in December 2011, but there is no further evidence as to whether he has "performed substantial work and incurred substantial liabilities." We need not resolve this issue, however, because this appeal turns on the interpretation of the Los Angeles Municipal Code as well as the application of undisputed facts to the law; these are questions we review de novo. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1032; *City of Los Angeles v. Superior Court* (2015) 234 Cal.App.4th 275, 281-282.)

I. Maximum Height

Whether the building permit issued to Svitek violates the maximum height restriction turns on whether Svitek's lot is "located in a Coastal Zone" within the meaning of section 12.21.1. If it is, then the 45-foot maximum applies (and the existing

permit allowing for a 37.9-foot house is valid); if it is not, then the 33-foot maximum applies (and the existing permit is invalid).

Section 12.21.1 itself provides the general rule, in pertinent part, that "In the . . . R1 . . . Zones" located in a Hillside Area or a Coastal Zone, "no Building or Structure shall exceed 45 feet in height." (§ 12.21.1.) The ordinance goes on to state: "Notwithstanding the preceding paragraph, the following height regulations shall apply on a Lot that is not located in a Hillside Area or Coastal Zone: . . . In the R1 . . . Zone[], no Building or Structure shall exceed 33 feet in height." (§ 12.21.1.) The key determinant is where the lot is "located." In common parlance and in the absence of a specialized definition, "location" refers to *physical* location. Because the "'plain meaning [of a statute] controls if there is no ambiguity in the statutory language' [citation]" (*Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1385), this central canon of statutory construction all but dictates that section 12.21.1 looks to physical location. This means that Svitek's lot is subject to the 45-foot maximum height because it is physically located in a Coastal Zone.

Neighbors marshal three arguments in defense of the Planning Commission's construction of section 12.21.1.

First, they argue that the City has construed section 12.21.1's definition of "location" to refer not to physical location, but rather whether the lot at issue is "subject to Coastal Zone provisions" and has opined that a lot is not "subject to Coastal Zone provisions" unless the Coastal Commission has issued a Coastal Development Permit. Neighbors assert that we must defer to the City's interpretation.

Although courts, "'[a]s a general matter, . . . will be deferential to government agency interpretations of their own regulations'" (*In re Cabrera* (2012) 55 Cal.4th 683, 690), the level of deference is not fixed. Courts give the greatest deference where the "interpretation concerns technical and complex matters within the scope of the agency's expertise" (*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 236 (*Center for Biological Diversity*)), especially when that interpretation has been "adopted through a process of notice and public comment" (*Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 954) (*Friends of College*)). Courts give the least deference when the issue is a "statute['s] meaning and effect" because the power to interpret statutes lies "'within the constitutional domain of the courts.' [Citation.]" (*Center for Biological Diversity*, at p. 236; *New Cingular Wireless PCS, LLC v. Public Utilities Com.* (2016) 246 Cal.App.4th 784, 807 ["The final word on questions of statutory interpretation always rests with the judiciary"].)

Using these guideposts, the City's interpretation of section 12.21.1 is not entitled to much deference, if any. That is because we are engaging in the inherently judicial act of construing a statute; because the meaning of the term "location" amidst zoning ordinances is not a "technical and complex matter[]"; and because neither the April 1996 memo from the City's Chief Zoning Administrator nor the December 2002 memo were adopted through a process of notice and public comment.

Further, the two prior constructions of section 12.21.1 do not on their face lend much support to the City's argument in this case. The April 1996 memo addressed a very specific question: If

a lot is exempt from the height limit of section 12.21.1 because it is in a "Hillside Area," and also exempt from a specified height limit for Hillside Areas (due to the width of the street), does this mean there is *no* height restriction at all? The 1996 memo answered that question, "No," on the ground that "[i]t was not the intent of these two ordinances to create a 'no-mans'-land' within which certain property owners would have greater development rights than would be afforded other property owners in the same zone and geographic area." The 1996 memo then restated its conclusion: "[If] a lot is *not subject to* the Hillside Ordinance or Coastal Zone provisions, through either geographic exclusion or by specific exception, it would automatically be subject to" section 12.21.1. (Italics added.) Nothing in the 1996 memo purported to define *when* or *how* a lot was not "subject to" the Coastal Zone provisions; as a result, it does not speak to the issue on appeal in this case. The December 2002 memo speaks specifically to the issue in this case insofar as it provides that "projects that receive Coastal Zone exemptions or waivers"—which ostensibly includes a de minimis waiver—"are not considered 'subject to the Coastal Zone provisions,'" but the 2002 memo is directly contradicted by a February 2008 memo prepared by another City engineer providing that a project obtaining a de minimis waiver *is* "subject to the Coastal Zone provisions." These two diametrically opposed memos effectively cancel each other out; neither is entitled to deference. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1105, fn. 7 [no deference "when an agency's construction '"flatly contradicts"' its original interpretation"]; *Tower Lane Properties v. City of Los Angeles* (2014) 224 Cal.App.4th 262, 276 [no deference where agency has not "consistently followed its putative interpretation"].)

Second, neighbors contend that the legislative history of section 12.21.1 supports a construction that would exempt a lot from section 12.21.1's more onerous height restriction only if the lot undergoes the highest level of administrative scrutiny by the Coastal Commission—that is, only if the lot's owner was required to obtain a Coastal Development Permit. To be sure, section 12.21.1 was aimed at curtailing the practice of so-called "mansionization"—that is, the practice of demolishing existing single-family homes and replacing them with bigger, wider, and taller homes that occupy a greater portion of the property owner's lot. Notwithstanding this aim, however, section 12.21.1 did not erect an absolute, one-size-fits-all height maximum; instead, as pertinent here, it left it to the Coastal Commission to decide, after the City gives its preliminary approval, what to do about lots in Coastal Zones. Section 12.21.1 did not purport to tell the Coastal Commission how to carry out its duties; nor would it, as the anti-mansionization concerns underlying section 12.21.1 are not the same as the concerns that inform the Coastal Commission's decisions whether to require a Coastal Development Permit, which in this case turned on concerns about community character and interference with coastal access. Neighbors urge that only a Coastal Commission process involving the maximum degree of notice and a hearing will suffice, but nothing in section 12.21.1 speaks to procedural protections. What is more, a de minimis waiver only becomes effective if it is placed on a properly noticed Coastal Commission meeting and if there are no objections at the meeting.

Third, neighbors assert that reading section 12.21.1 to treat a lot obtaining a de minimis waiver as being "located in a Coastal Zone" leads to an absurd result because de minimis waivers are

not subject to the same level of scrutiny as Coastal Development Permits. Although courts may disregard a statute's plain language when "'"a literal interpretation would result in absurd consequences"'" (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616), we do not believe—for the reasons noted above—that construing section 12.21.1 to allow the Coastal Commission to decide what level of scrutiny to apply to lots falling within its dual jurisdiction is an absurd result, at least where a de minimis waiver is issued after scrutiny by Coastal Commission staff and subject to review by the Coastal Commission itself at a noticed meeting.[6]

II. Minimum Setback

Whether the building permit issued to Svitek violates the minimum setback requirement turns on whether the "frontage" used to calculate the "average depth of the front yard[s]" includes just the four houses on Arno Way, or includes the four houses on Arno Way *and* the four houses on Pintoresca Drive. It if is the former, then the average is 3.27 feet, which under a 2001 Zoning Administrator interpretation is raised to five feet, and Svitek's permit allowing for a 9-foot 10-inch setback is valid; if it is the

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6 At oral argument, neighbors argued that the City's issuance of an "approval in concept" was erroneous which, in their view, rendered invalid the Coastal Commission's subsequent issuance of a de minimis waiver. This argument was waived because it was not raised until oral argument. (*People v. Crow* (1993) 6 Cal.4th 952, 960, fn. 7.) It is also effectively an "end run" around our prior decision in *Khalkhali v. Cal. Coastal Commission* (Nov. 3, 2014, B249860) [nonpub. opn.], which concluded that neighbors' challenges to the very same administrative actions were time barred. Indeed, even the Planning Commission recognized that the propriety of the City's issuance of an approval in concept had definitively been resolved.

latter, then the average is 22.7 feet, and Svitek's permit allowing for a 9-foot 10-inch setback is invalid for not having a sufficient setback. The resolution of this question turns on (1) whether the definition of "frontage" in section 12.03 includes a continuous street that changes street names, and (2) if so, whether Arno Way and Pintoresca Drive are a continuous street.

With regard to the first, definitional question, section 12.03 defines "frontage" as "[a]ll property fronting on one (1) side of a street between intersecting or intercepting streets, or between a street and right-of-way, waterway, end of dead-end street, or city boundary measured along the street line. An intercepting street shall determine only the boundary of the frontage on the side of the street which it intercepts." (§ 12.03.) The plain text of this definition seems to indicate that a change in street name does not, by itself, mean that the two streets do not share the same "frontage." Section 12.03 specifically enumerates what demarcates when a "frontage" begins and ends—namely, (1) an intersecting street, (2) an intercepting street, (3) a right-of-way, (4) a waterway, (5) the end of a dead-end street, or (6) a city boundary. A change to the name of the street is not on that list. We are not allowed to add words to a statute. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 350 ["Ordinarily we are not free to add text to the language selected by the Legislature"].) Nor does the purpose behind section 12.03 compel us to do so. The reason why section 12.03 gauges the minimum setback by what occurs in neighboring yards is "to ensure consistency and compatibility of the street frontage"; this concern for aesthetics would seem to pay no heed to whether the name on the street sign changes.

Svitek raises three objections to this definitional question. He argues that section 12.03's use of the word "street" in the singular should be read to mean "a street with a single name." But that is not what the statute says, and we decline to add new limits to the City's definition of "street" based on an ambiguous grammatical construction, particularly when it does not advance the statute's purpose of ensuring aesthetic consistency. Svitek next asserts that the City has previously defined "frontage" solely by looking at street maps, rather than at how the street actually looks. This practice, however, finds no support in the text of section 12.03. It is also not entitled to much, if any, deference given that the decision to look only at a map does not entail a "technical" or "complex" matter and was not adopted after a notice and public comment process. (See *Center for Biological Diversity*, *supra*, 62 Cal.4th at p. 236; *Friends of College*, *supra*, 1 Cal.5th at p. 954.) Svitek lastly points to an example contained in the City's Zoning Code Manual that treated the "frontage" as ending at an alleyway; however, the Manual explicitly notes that the "alley is a right-of-way," which is one of the points of demarcation expressly spelled out in section 12.03. Changes to a street's name are not.

With regard to the second question, the undisputed evidence supports the finding that Arno Way and Pintoresca Drive constitute a continuous street. That is what the maps and photos show. Numerous witnesses, including the City's own Zoning Administrator, also testified to this fact before Planning Commission. Indeed, two of the Planning Commissioners had visited the location and offered their concurrence with this testimony.

Svitek raises five challenges to this conclusion, two procedural and three substantive. Procedurally, he asserts that the Planning Commission was wrong (1) to consider new evidence because its sole task was to review the Director's ruling for an "abuse of discretion," and (2) to allow the Planning Commissioners themselves to offer their personal views regarding the street. Both assertions lack merit. Section 12.26.K empowers the Planning Commission to decide whether "there was [an] error *or* abuse of discretion by the Director," and also specifically dictates that the Planning Commission "shall set the matter for a hearing *at which the Commission shall take evidence*." (Italics added.) In other words, the Municipal Code mandates the consideration of new evidence and authorizes the Planning Commission to review the Director's ruling for "error" in light of that new evidence. The Planning Commission also did not err in considering the two Planning Commissioners' site visits. (See *Siller v. Board of Supervisors* (1962) 58 Cal.2d 479, 484 [noting that planning commissioners' site views and personal knowledge of the site "constitute independent evidence which must be deemed by the reviewing court to have been considered by the commission members in reaching their decision"].)

Substantively, Svitek asserts that (1) Arno Way and Pintoresca Drive are not a continuous street because Pintoresca Drive becomes very wide at the point at which it forks into Arno Way and the road entering the Bel Air Bay Club; (2) Arno Way bends slightly to the north (creating what Svitek says is a 135-degree angle) at the fork; and (3) the only reason Arno Way and Pintoresca Drive look like a one continuous street is because some of the homeowners on Pintoresca Drive are unlawfully encroaching onto the street itself. The first two arguments are

without merit; the fact that a street is not a geometrically straight line is not a basis, under section 12.03, for determining that the houses along that street are not part of the same "frontage"; adding a change to the street's name does not alter that conclusion. The last argument lacks merit because there is no evidence of unlawful encroachment. Svitek's counsel argued about the encroachment before the Planning Commission, but it is well settled that "the arguments of counsel are not evidence." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1345.) Svitek cites three cases that he contends set up a different rule in the administrative context, but they pertain only to witnesses—not counsel. (See *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 289-294 [agency proceedings not invalid simply because witnesses were not placed under oath]; *Carmel Valley View, Ltd. v. Board of Supervisors* (1976) 58 Cal.App.3d 817, 823 [narrative testimony of expert witness supported agency's decision]; *Jenner v. City Council of Covina* (1958) 164 Cal.App.2d 490, 496 [unsworn testimony of witnesses may be considered by agency].)

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

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* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.