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IN THE SUPREME COURT OF CALIFORNIA

TOWN OF APPLE VALLEY,
Plaintiff and Appellant,

v.

APPLE VALLEY RANCHOS WATER et al.,
Defendant and Respondent.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION TWO • CASE NO. E078348
SAN BERNARDINO COUNTY SUPERIOR COURT • DONALD R. ALVAREZ, JUDGE • CASE NO. CIVDS1600180

PETITION FOR REVIEW

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ISSUES PRESENTED

The Eminent Domain Law (Code Civ. Proc., § 1230.010 et seq.)[1] imposes heightened requirements when a public agency adopts a resolution of necessity to support a proposed taking of electric, gas, or water utility property. Upon such a resolution, the presumptions of public necessity for the proposed taking, and that the taking is a more necessary public use for the property, are only *rebuttable presumptions affecting the burden of proof*, to be decided under a preponderance of the evidence standard.

1. In a property owner's challenge to a proposed taking of utility property, does a trial court applying these rebuttable presumptions conduct a *trial* to determine by a preponderance of the evidence whether the public necessity elements have been met? Or, as the Court of Appeal here held in a published decision, does the trial court merely *review* the agency's eminent domain decision under a deferential gross abuse of discretion standard, upholding the decision so long as it is supported by any substantial evidence? The Court of Appeal's decision conflicts with a recent published decision by the Third District. The Court of Appeal here concluded that trial courts must apply rebuttable presumptions to be evaluated under the preponderance of the evidence standard and, *at the same time*, engage only in deferential substantial evidence review of the same issues. Yet

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

the Third District concluded that such an approach is "illogical and unworkable."

2. As a related matter, when a property owner challenges the proposed taking of utility property, is the owner free to rebut the presumptions of public necessity and a more necessary public use with any otherwise admissible evidence relevant to the necessity of the proposed taking? The Court of Appeal's decision here is in tension with the decision of the Third District by holding the trial court may consider only those facts that existed when the agency adopted its resolution of necessity.

INTRODUCTION

This Court should grant review to resolve a direct conflict in the published decisions about the proper interpretation of the Eminent Domain Law in actions seeking to take privately owned utility property for public use. This Court should clarify and confirm the right of utilities to rebut the presumptions of public necessity for a proposed taking, and that the proposed taking is a more necessary public use for the utility property, with extrinsic evidence at trial. This Court also should confirm that trial courts decide those questions in utility takings cases as triers of fact, and do not merely review agencies' findings for substantial evidence under a deferential gross abuse of discretion standard.

The Eminent Domain Law, part of the Code of Civil Procedure, imposes heightened requirements when a public entity adopts a resolution of necessity to take electric, gas, or water utility property. Upon such a resolution, the resulting presumptions of public necessity for the proposed taking, and that the proposed taking is a more necessary public use of the

property, are only *rebuttable presumptions affecting the burden of proof*. Such presumptions are deductions that the law requires be directed from particular facts and are rebutted by the existence of contrary evidence, not by the absence of supporting evidence. By enacting these rebuttable presumptions—in contrast with the conclusive presumptions that apply in most other takings cases—the Legislature made the necessity of a proposed taking of utility property a judicial question rather than a quasi-legislative one. The trial court below properly applied these presumptions in the Town of Apple Valley's eminent domain action, which seeks to take Liberty Utilities (Apple Valley Ranchos Water) Corp.'s water system so the Town can operate the system as a utility under public management. The court heard the evidence as trier of fact and concluded Liberty had rebutted the presumptions and the Town's eminent domain action should be dismissed.

The Court of Appeal, however, reversed in a published decision conflicting with a recent published decision by the Third District Court of Appeal, *Pacific Gas and Electric Company v. Superior Court of San Joaquin County* (2023) 95 Cal.App.5th 819 (*PG&E*). Contrary to the holding in *PG&E*, the Court of Appeal here held that, despite the Eminent Domain Law's plain language establishing rebuttable presumptions, the trial court should not exercise its independent judgment to decide whether the evidence rebuts the public necessity elements for a taking. Instead, the court held, the trial court should engage only in deferential review and should uphold an agency's resolution of necessity if it is supported by any substantial evidence.

Without review by this Court, courts presiding over eminent domain actions involving utility property will be confused about the standard they should apply when resolving a utility's objections to a proposed condemnation. Does the trial court engage in a deferential substantial evidence review of an agency's findings, as the Court of Appeal held here? Or does the court—as trier of fact—itself determine whether the public necessity elements are met, as the statutory rebuttable presumptions seem to require and as the Third District held in *PG&E*? What is more, courts attempting to follow the Court of Appeal's opinion here would find themselves attempting the impossible: applying the statutory rebuttable presumptions and a preponderance of the evidence standard while, at the same time, engaging in deferential review and upholding the public agency's decision so long as it is supported by any substantial evidence.

This Court also should grant review to address the scope of admissible evidence in such trials. The Court of Appeal held the trial court's role is limited to deferential review of the public agency's resolutions of necessity and, as a result, evidence postdating the resolutions is presumptively inadmissible. This holding conflicts with the rebuttable nature of the presumptions. Like any party with the burden of proof, a utility opposing a taking should be permitted to introduce any admissible evidence relevant to disproving the public necessity elements, and should not be limited to evidence that existed when the agency adopted its resolutions.

Utility takings cases present important questions of law because they concern both the taking of private property and the

provision of vital services to the public.[2] This case, in particular, presents such important questions because the Legislature, by enacting the rebuttable presumptions, intended to make the public necessity for a taking of utility property a judicial question, rather than a quasi-legislative one within the sole purview of local governments. Yet, left undisturbed, the Court of Appeal's decision would permit almost any municipality to take any utility and operate it under its own management. This Court should grant review to provide needed guidance about the proper operation of the rebuttable presumptions, to resolve the clear conflict in the published decisions, and to vindicate the will of the Legislature.

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[2] In recent years, public entities have frequently invoked eminent domain to seize operating utilities. (*City of Claremont v. Golden State Water Co.* (Super. Ct. Los Angeles County, 2014, No. BC566125) [action to acquire water utility]; *Golden State Water Co. v. Casitas Mun. Water Dist.* (Super. Ct. Ventura County, 2014, No. 56201300433986) [action to acquire water utility]; *South San Joaquin Irrigation Dist. v. Pacific Gas and Electric Co.* (Super. Ct. San Joaquin County, 2016, No. STK-CV-UED-2016-0006638) [action to acquire electric system]; *Monterey Peninsula Water Management Dist. v. California-American Water Company* (Super. Ct. Monterey County, 2023, No. 23CV004102) [action to acquire water system]; *Petition of the City and County of San Francisco for a Valuation of Certain Pacific Gas & Electric Company Property Pursuant to Public Utilities Code Sections 1401-1421,* Public Utilities Comm. No. 21-07-012 [valuation petition preceding action to acquire electric system].)

STATEMENT OF THE CASE

A. The parties

The Town of Apple Valley (the Town) is a municipality in San Bernardino County. The Town is a "[l]ocal public entity" with eminent domain powers. (§ 1235.150.)

Liberty Utilities (Apple Valley Ranchos Water) Corp. (Liberty), formerly known as Apple Valley Ranchos Water Corporation (AVR), operates a private water distribution system in its service area, which includes the Town. (Typed opn. 2–3.) Carlyle Infrastructure Partners purchased AVR in 2010. (Typed opn. 3.) In 2014, Carlyle entered into a merger agreement to sell AVR and its water system to Liberty Utilities Co. (*Ibid.*) The California Public Utilities Commission, which regulates Liberty, approved the merger in 2015. (Typed opn. 4.)

B. The Town of Apple Valley adopts resolutions of necessity and sues to take the water system by eminent domain.

The Eminent Domain Law (§ 1230.010 et seq.), provides that "[a] public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of this article." (§ 1245.220.) A resolution of necessity must contain findings that: "[t]he public interest and necessity require the project" (§ 1240.030, subd. (a)); "[t]he project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury" (§ 1240.030, subd. (b)); and "[t]he property sought to be acquired is necessary for the project" (§ 1240.030, subd. (c)). These three requirements are commonly

known as " 'the public necessity elements.' " (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 468.) In addition, where, as here, the property sought to be taken is already devoted to public use (the property here is being used by Liberty to deliver water to the public), the public entity must find "the use for which the property is sought to be taken is a more necessary public use." (§ 1240.610.)

In November 2015, while the merger was nearing completion, the Town approved two resolutions of necessity to take the water system by eminent domain, so the Town could operate it as a utility under the Town's management. (Typed opn. 3.) One resolution concerned the water system within the Town's boundaries, the other concerned portions outside the Town's boundaries. (*Ibid.*) To comply with the Eminent Domain Law (§ 1245.230, subd. (c)), the Town declared the taking to be a public necessity (see typed opn. 3, 8; § 1240.030, subd. (a)), and its proposed operation of the water system to be a " 'more necessary public use' " (typed opn. 3, 8; § 1240.610).

Two months later, the Town sued to take the water system by eminent domain in *Town of Apple Valley v. Apple Valley Ranchos Water*. (Super. Ct. San Bernardino County, 2016, No. CIVDS1600180). (Typed opn. 4.)

C. The Eminent Domain Law provides a procedure for Liberty to challenge the Town's resolutions of necessity.

The Eminent Domain Law authorizes a defendant to "object to the plaintiff's right to take, by demurrer or answer." (§ 1250.350.) The Eminent Domain Law requires the trial court

to "hear and determine all objections to the right to take." (§ 1260.120, subd. (a).) "If the court determines that the plaintiff does not have the right to acquire by eminent domain any property described in the complaint, it shall order" dismissal of the proceeding. (§ 1260.120, subd. (c).)

Section 1250.360 enumerates grounds for objecting even when a public entity has adopted a resolution of necessity that gives rise to a conclusive presumption of necessity. Among these are: (1) that the proposed use does not satisfy section 1240.610's "more necessary public use" requirement (§ 1250.360, subd. (f)); and (2) "[a]ny other ground provided by law" (§ 1250.360, subd. (h)).

Section 1250.370 authorizes additional grounds for objection where, as here, the resolution does *not* give rise to a conclusive presumption of necessity. Among these are that any of the public necessity elements are not satisfied. (§ 1250.370, subds. (b)–(d).) Section 1250.370 applies here because, as discussed in the next section, the Town's resolutions do not give rise to conclusive presumptions of public necessity. (§ 1245.250, subd. (b).)

D. In utility takings cases such as this one, the presumptions of public necessity and more necessary public use are rebuttable, rather than conclusive.

In nearly all takings cases, a public entity's resolution of necessity conclusively establishes that the proposed taking satisfies the public necessity elements (§§ 1240.030, 1245.250, subd. (a)). As a corollary of the conclusive presumption, a party challenging such findings in the trial court must demonstrate

that the agency's findings are not supported by substantial evidence, i.e., that they reflect a "gross abuse of discretion."[3] (§ 1245.255, subd. (b).) Judicial review is generally limited to the administrative record. (See *Santa Cruz County Redevelopment Agency v. Izant* (1995) 37 Cal.App.4th 141, 150–151.) Similarly, while the condemning agency bears the burden of proving a "more necessary [public] use," its proposed use is conclusively presumed to be more necessary than the property's existing use by a nonpublic entity. (§ 1240.650, subd. (a); see § 1240.620.)

These conclusive presumptions do not apply, however, where, as here, a public agency attempts to seize privately owned electric, gas, or water utility property to operate it as a utility under public management. In 1992, by adopting Senate Bill No. 1757 (1991–1992 Reg. Sess.) (SB 1757), the Legislature provided that the presumptions of public necessity and a "more necessary public use" in such actions are not conclusive, but *rebuttable*. (§§ 1240.650, subd. (c), 1245.250, subd. (b).)

The statutes establishing these rebuttable presumptions provide they are presumptions "affecting the burden of proof." (§ 1245.250, subd. (b).) Section 1245.250, subdivision (b), concerning the public necessity elements, provides:

> If the taking is by a local public entity . . . and the property is electric, gas, or water public utility property, the resolution of necessity *creates a*

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[3] Before adoption of the Eminent Domain Law in 1975, a property owner had no right to challenge findings of public necessity. (*People ex rel. Department of Public Works v. Chevalier* (1959) 52 Cal.2d 299, 307 (*Chevalier*).) The Eminent Domain Law permits a limited collateral attack on an agency's decisionmaking. (§ 1245.255, subd. (a).)

> *rebuttable presumption* that the matters referred to in Section 1240.030 are true. *This presumption is a presumption affecting the burden of proof.*

(Emphasis added.)

Likewise, Code of Civil Procedure section 1240.650, subdivision (c), relating to whether the proposed use is a more necessary public use, provides:

> Where property which has been appropriated to a public use is electric, gas, or water public utility property which the public entity intends to put to the same use, *the presumption of a more necessary use established by subdivision (a) is a rebuttable presumption affecting the burden of proof.*

(Emphasis added.) Under the Evidence Code, a presumption affecting the burden of proof "impose[s] upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." (Evid. Code, § 606.)

E. Liberty objects, disputing that the public necessity elements and the more necessary public use requirement have been satisfied.

In its answer to the Town's eminent domain complaint, Liberty objected on three grounds: (1) the public interest and necessity do not require the Town's proposed project (§§ 1240.030, subd. (a), 1250.370, subd. (b)); (2) the proposed project is not planned in a manner most consistent with the greatest public good and least private injury (§§ 1240.030, subd. (b), 1250.370, subd. (c)); and (3) the Town's proposed use of the water system is not a more necessary public use than Liberty's continued use (§§ 1240.650, subds. (a), (c), 1250.360, subd. (f)). (Typed opn. 4; 1 AA 804–810; 2 AA 1478–1479, 1549–1550; 3 AA 2362; RB 20–27.)

F. The parties litigate the standard of proof to be applied in the impending right-to-take trial in the superior court.

In the Town's eminent domain action, the parties litigated the proper standard of proof to be applied by the trial court when a public entity's asserted right to take utility property is contested. (Typed opn. 4–5.) Liberty argued the rebuttable presumptions permit it to contest the public necessity for a taking with extrinsic evidence and, as a result, the trial court must decide the public necessity issues as the trier of fact based on the evidence presented at trial, rather than merely reviewing the Town's findings for substantial evidence under a gross abuse of discretion standard, as when the presumptions are conclusive. (Typed opn. 5; 1 AA 900.) The Town argued the trial court should uphold its resolutions so long as they are supported by substantial evidence and are not a "gross abuse of discretion." (Typed opn. 4; 2 AA 1114–1115.)

The trial court agreed with Liberty, ruling the "gross abuse of discretion" standard does not apply in utility takings cases. (Typed opn. 5.) Instead, given the statutory rebuttable presumptions, Liberty bears the burden of proving by a preponderance of the evidence that at least one of the four required elements (§§ 1240.030, subds. (a)–(c), 1240.650, subd. (c)) was not satisfied. (Typed opn. 5; 2 AA 1125.) The court ruled " '[i]t is up to Liberty to decide what evidence it believes is relevant to meeting its burden of proof.' " (Typed opn. 5, quoting 2 AA 1125.)

G. The trial court finds the Town has not shown a public necessity for the proposed taking of Liberty's water system.

The court then conducted an extensive bench trial between 2019 and 2021, much of it during the COVID-19 pandemic. (Typed opn. 5.) In an 84-page proposed statement of decision, the court found Liberty had met its burden of disproving the public necessity for the proposed taking and disproving that the Town's proposed use was a more necessary public use; the Town therefore was not entitled to acquire the water system by eminent domain. (Typed opn. 5; 3 AA 2188–2201.)

The Town objected to the proposed statement of decision on several grounds, including that the trial court: (1) failed to apply the deferential " 'gross abuse of discretion' " standard; and (2) allowed Liberty to present whatever evidence it wanted—including postresolution evidence—to rebut the presumed facts. (Typed opn. 6; 3 AA 2268, 2270–2272.)

The trial court overruled the Town's objections and issued its final statement of decision. (Typed opn. 6; 3 AA 2353–2354, 2356–2440.) The court then dismissed the eminent domain action. (Typed opn. 6; 3 AA 2442.) The Town appealed. (Typed opn. 6; 4 AA 2457, 2552–2558.)

H. While the Town's appeal was pending, the Third District Court of Appeal decides *Pacific Gas & Electric Co. v. Superior Court*.

While the Town's appeal was pending, the Third District Court of Appeal decided *PG&E*, *supra*, 95 Cal.App.5th 819, a writ proceeding in an eminent domain lawsuit by a rural irrigation district. In that case, as here, a public entity sought to take

privately owned utility property to run it as a public utility. (*Id.* at pp. 826–827.) There, despite the statutory rebuttable presumptions, the trial court ruled it would review the district's findings of public necessity and more necessary public use only for substantial evidence and a gross abuse of discretion. (*Id.* at pp. 827–829.) The utility challenged that ruling, arguing review only for substantial evidence and a gross abuse of discretion conflicts with the statutory scheme. (*Id.* at p. 832.)

The Third District agreed and granted writ relief. (*PG&E*, *supra*, 95 Cal.App.5th at pp. 826, 837–838.) The court began by noting it reviews questions of statutory construction de novo. (*Id.* at p. 832.) Quoting this Court's decision in *John v. Superior Court* (2016) 63 Cal.4th 91, 95–96 (*John*), it explained: " ' "We consider first the words of a statute, as the most reliable indicator of legislative intent. [Citation.]" [Citation.] We construe the statute's words in context, and harmonize statutory provisions to avoid absurd results.' " (*PG&E*, at p. 832.) " 'If we find the statutory language ambiguous or subject to more than one interpretation, we may look to extrinsic aids, including legislative history or purpose to inform our views.' " (*Ibid.*)

Applying that approach, the Third District agreed the utility was not required to demonstrate the irrigation district "grossly abused its discretion or that the findings in the resolution of necessity are not supported by substantial evidence." (*PG&E*, *supra*, 95 Cal.App.5th at p. 832.) "[I]t simply must prove that one of the public necessity elements (§ 1240.030) or the more necessary public use element (§ 1240.610) is not true by the *preponderance of the evidence*." (*PG&E*, at p. 832,

emphasis added.) The court ruled that the utility's "construction of the relevant statutes has properly harmonized their provisions." (*Id.* at p. 833; see *id.* at pp. 829–833 [summarizing applicable provisions of the Eminent Domain Law].)

The *PG&E* court explained that "because the property at issue is electric public utility property, 'the resolution of necessity creates a rebuttable presumption' that the public necessity elements are true." (*PG&E*, *supra*, 95 Cal.App.5th at p. 833, quoting Code Civ. Proc., § 1245.250, subd. (b).) " 'The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.' " (*Id.* at p. 834, quoting Evid. Code, § 606.)

The *PG&E* court supported its statutory interpretation by analogizing to extraterritorial takings—those targeting property beyond the condemning agency's boundaries. (*PG&E*, *supra*, 95 Cal.App.5th at p. 833.) There too, in an adjacent subdivision of the same statute, the Legislature has made the presumptions of public necessity and more necessary public use "rebuttable." (*Id.* at pp. 833–834, citing § 1245.250, subd. (c).) The court observed it is well-settled in such cases that "the issues of public use and necessity must be judicially determined *without deference* to the public entity's findings." (*Ibid.*, emphasis added, citing *San Bernardino County Flood Control Dist. v. Grabowski* (1988) 205 Cal.App.3d 885, 898 (*Grabowski*).) The court acknowledged that although presumptions affecting the burden of proof (as in utility takings cases) and those affecting the burden of producing evidence (as in extraterritorial takings cases) "are different, they

are also related, and we see no basis for concluding that only one permits a substantive challenge to a public necessity element or the more necessary use element." (*PG&E*, at p. 834.)

The *PG&E* court also supported its statutory interpretation by pointing out that deferential review would be "illogical and unworkable" because it would be impossible for trial courts to apply a rebuttable presumption—with a preponderance of the evidence standard—while engaging in substantial evidence review at the same time:

> We agree with PG&E that, in addition to being inconsistent with the statutory scheme, *the requirement imposed by the trial court that PG&E demonstrate the District's findings in its resolution of necessity lacked substantial evidence is illogical and unworkable in combination with the rebuttable presumption and a burden of proof by a preponderance of evidence*. We cannot give effect to section 1240.650, subdivision (c) or section 1245.250, subdivision (b) while also applying a substantial evidence standard.

(*PG&E*, *supra*, 95 Cal.App.5th at p. 834, emphasis added.) The court elaborated: " 'A presumption affecting the burden of proof places on the party against whom it operates the obligation to establish by evidence the requisite degree of belief concerning the nonexistence of the presumed fact in the mind of the trier of fact or the court.' " (*Id.* at p. 835, quoting *Farr v. County of Nevada* (2010) 187 Cal.App.4th 669, 681 (*Farr*).) " 'Unless deemed by the law to be conclusive, *a presumption is rebutted by the existence of contrary evidence, not by the absence of supporting evidence*.' " (*Ibid.*, emphasis added.)

"In contrast," the Third District explained, " ' "[i]n substantial evidence review, the reviewing court defers to the factual findings made below. It does not weigh the evidence presented by both parties to determine whose position is favored by a preponderance. Instead, it determines . . . whether any rational finder of fact could have made the finding that was made below. If so, the decision must stand." ' " (*PG&E*, *supra*, 95 Cal.App.5th at p. 835, quoting *Coastal Environmental Rights Foundation v. California Regional Water Quality Control Bd.* (2017) 12 Cal.App.5th 178, 187–188.) The court thus concluded the Legislature's adoption of a rebuttable presumption affecting the burden of proof in utility taking cases "further demonstrates that substantial evidence review does not apply." (*Id.* at p. 835.)

The *PG&E* court also rejected the irrigation district's separation of powers argument that deferential review is required because its resolution was a quasi-legislative act and "the trial court has no authority to judicially veto discretion granted to the District by the Legislature." (*PG&E*, *supra*, 95 Cal.App.5th at pp. 835, 837.) The court responded that—as in extraterritorial takings cases—"the question of necessity can be made a judicial question by statute, and the Legislature has done just that in the context of public utilities." (*Id.* at p. 837, citing *Chevalier*, *supra*, 52 Cal.2d at p. 306; see *id.* at p. 835 ["That argument is at odds with the settled interpretation of the statutes with respect to extraterritorial cases"].) The court added: "[I]t is not absurd that the Legislature decided to make the public necessity and more necessary use elements judiciable

in this context. Indeed, . . . it appears the Legislature had policy reasons for doing so." (*Id.* at pp. 835–836.)

Finally, the Third District addressed the parties' arguments about the legislative history of SB 1757. The court concluded that its interpretation of the statutory language controlled because that language is unambiguous, *so there was no need to turn to the legislative history as an interpretive aid.* (*PG&E*, *supra*, 95 Cal.App.5th at p. 836 ["Neither party has identified an ambiguity that would require us to turn to the legislative history"].)

The court nonetheless concluded that "the legislative history confirms our construction of the relevant statutes." (*PG&E*, *supra*, 95 Cal.App.5th at p. 836.) The court noted that an Enrolled Bill Report for SB 1757 "states the Governor's Office of Planning and Research recommended the Governor sign the bill because '*there is a clear difference between taking property because the community needs it for a more important use, and taking property because the local government wants it under its own management* . . . . This office believes that *private property owners should have the right to legally challenge whether it is in the public's best interest to seize their property*.' " (*Ibid.*, emphasis added.) The court explained that the Enrolled Bill Report "comports with our understanding that, just as in extraterritorial condemnation cases, the Legislature had policy reasons for allowing greater judicial scrutiny over the decision to condemn" in utility takings cases. (*Ibid.*)

The court then addressed an excerpt of the legislative history relied on by the irrigation district—a comment in the

Journal of the Assembly by Assemblymember Jackie Speier. (*PG&E*, *supra*, 95 Cal.App.5th at p. 836.) Speier described the rebuttable presumptions in these terms: " ' "[T]his is a procedural change, evidentiary in nature"—and . . . it does not affect basic rights but only allows introduction of evidence on the subject of the presumption.' " (*Id.* at pp. 836–837.) Based on Speier's comment, "The District argue[d] that the only change made by Senate Bill No. 1757 was to allow the introduction of extrinsic evidence." (*Id.* at p. 837.) The Third District found that argument "unpersuasive because it does not follow from the plain language of the statute." (*Ibid.*) The court also found Speier's comment "too vague" to inform the statute's interpretation. (*Ibid.*)

The Third District therefore concluded that its "review of the legislative history cited by the parties does not alter our analysis of the statutory language." (*PG&E*, *supra*, 95 Cal.App.5th at p. 837.) Based on that statutory analysis, the court held "PG&E need not demonstrate the District abused its discretion in adopting its resolution of necessity to successfully object to the District's right to take its utility property." (*Ibid.*)

I. The Court of Appeal here reverses the judgment in Liberty's favor in a published decision that expressly disagrees with *PG&E*.

More than a year after *PG&E* was decided, the Fourth District Court of Appeal, Division Two, issued its published opinion here reversing the judgment in Liberty's favor in the Town's eminent domain action. In so ruling, the court flatly disagreed with the Third District's analysis in *PG&E*. (Typed

opn. 17 ["we disagree with the [*PG&E*] decision in some key respects"], 26 ["disagree[ing]" with *PG&E*'s holding that "the 1992 amendments made public utility takings a judicial question that courts resolve without giving *any* deference to a public entity's findings"], 27.) The court held that, despite the statutory rebuttable presumptions when utility property is at issue, a trial court should deferentially review the resolution of necessity under a gross abuse of discretion standard, upholding it so long as it is supported by any substantial evidence. (Typed opn. 28–29, 31–32.)

Unlike the *PG&E* court, the Court of Appeal here did not begin its analysis with the statutory language and it did not find that language to be ambiguous. (Cf. *PG&E*, *supra*, 95 Cal.App.5th at p. 832.) Instead, it began with an assumption, based on pre-SB 1757 case law, that *all* intraterritorial takings—including those involving utility property—are quasi-legislative acts entitled to judicial deference. (Typed opn. 10–11, 23.) The court acknowledged that the necessity for a taking can be made a judicial question by statute. (Typed opn. 26.) But, it reasoned, "[j]ust because an eminent domain decision is justiciable does not mean courts need not defer to the public entity due to separation-of-powers considerations." (*Ibid.*)

The court criticized *PG&E* for basing its analysis on "the plain language of the relevant statutes." (Typed opn. 23; see typed opn. 19 ["The court reached this conclusion based solely on its reading of the relevant statutes"].) It acknowledged that the applicable statutes make the presumptions rebuttable in utility cases, and allow a utility to demonstrate by a preponderance of

the evidence that the necessity elements are not met. (Typed opn. 23.) But, it observed, that "does not speak to the applicable standard of review or deference courts should give to quasi-legislative decisions, such as a valid intraterritorial taking." (*Ibid.*)

The court also criticized *PG&E* for not "grappl[ing]" with what it saw as the "distinctions" between extraterritorial takings and those involving utility property. (Typed opn. 23.) For two reasons, it rejected *PG&E*'s view that the Legislature intended trial courts to afford no deference to agency findings in utility cases, as in extraterritorial cases. (Typed opn. 25.) First, in the court's view, the Legislature would have employed exactly the same language it used in extraterritorial cases if it wished the same law to apply, but in utility takings cases the Legislature made the rebuttable presumptions to affect the " 'burden of proof' " instead of the " 'burden of producing evidence.' " (*Ibid.*) Second, the court posited that an extraterritorial taking is not a "valid legislative action" by a local agency, while an intraterritorial taking is. (*Ibid.*)

The Fourth District, Division Two, relied heavily on the legislative history of SB 1757, focusing on what that history "*does not say*." (Typed opn. 26.) The court explained that the legislative history does not mention case law—decided in the conclusive presumption context—giving "great deference to a public entity's eminent domain decision because it is a quasi-legislative act of a coequal branch of government." (Typed opn. 27, 28 ["the legislative history of the 1992 amendments says *nothing* about this precedent, much less anything that reflects an

intent to overrule it"]; see typed opn. 28 ["We have scoured the legislative history and found nothing that suggests . . . the Legislature intended to so fundamentally alter the courts' role in reviewing" utility takings cases].)

The court also relied heavily on Assemblymember Speier's comment that SB 1757 imposed a " 'procedural change' " that " 'does not affect basic rights but only allows introduction of evidence on the subject of the presumption.' " (Typed opn. 27, emphasis omitted; see typed opn. 13–14, 29.) It asserted that Speier's comments must be viewed in light of then-existing case law—again, decided in the conclusive presumption context—"that courts give great deference to a public entity's eminent domain decision because it is a quasi-legislative act of a coequal branch of government." (Typed opn. 27.) The court concluded that one of the " 'basic rights' " unaffected by SB 1757 was a local government entity's "right" to have " 'great deference' " accorded to its eminent domain decisions. (Typed opn. 29.) The court also gave "no weight" to the legislative history cited in *PG&E*—a statement by the Governor's Office of Planning and Research explaining its recommendation that the governor sign the bill. (Typed opn. 30.) The court asserted that statements by the executive branch " 'cannot reflect the intent of the Legislature.' " (Typed opn. 31.)

Upon this foundation, the Court of Appeal rejected the Third District's conclusion in *PG&E* that the rebuttable presumptions and preponderance of the evidence standard conflict with substantial evidence review, and therefore the trial court must "determine whether *any evidence* supports the public

entity's decision." (Typed opn. 31, emphasis added.) The court observed that "[t]his conflates the burden of proof with the trial court's standard of review." (*Ibid.*) The court reasoned that SB 1757 did not do away with the gross abuse of discretion standard in utility cases because the Legislature would not have silently or obscurely " 'decided so important and controversial a public policy matter and created a significant departure from the existing law.' " (Typed opn. 32.)

The Fourth District, Division Two, concluded that the Town's proposed approach—that the trial court engage only in deferential review of the Town's eminent domain decision, rather than conducting a trial—"better harmonizes the statutory language, legislative history, and relevant case law." (Typed opn. 32.) The court summarized the Town's proposed approach as applying a substantial evidence standard of review:

> "In utility-condemnation cases, the [public entity's] findings are presumed procedurally valid and presumed supported by substantial evidence, and *a private utility must convince the trial court, using evidence outside the administrative record if necessary*, that the resolution is procedurally invalid or *that the* [*public entity's*] *findings are not supported by substantial evidence*."

(*Ibid.*, emphasis added.) The Court of Appeal reversed the judgment in Liberty's favor because the trial court did not review the Town's resolutions of necessity for substantial evidence but instead "exercis[ed] its independent judgment." (Typed opn. 35.)

In the final portion of its opinion, the Court of Appeal held the trial court committed " 'fundamental error' " by disregarding

the Town's findings, objectives, and supporting evidence in its resolutions of necessity and instead relying on Liberty's "extra-record evidence." (Typed opn. 35–36.) Because the Court of Appeal viewed the trial court's role as limited to deferential review of the Town's resolutions, it held the court further erred by allowing Liberty to present extensive evidence that postdated the Town's resolutions. (Typed opn. 36–38.)

Liberty petitioned the Court of Appeal for rehearing, arguing the court's opinion is in error in the following respects: (1) the trial court did not base its decision solely on evidence postdating the Town's resolutions of necessity (see typed opn. 2, 36–37); (2) the trial court in fact considered and rejected the Town's findings and objectives (see typed opn. 6, 33, 35, 37); (3) the Town did not consistently argue that evidence postdating its resolutions of necessity was irrelevant (see typed opn. 33, fn. 7), and indeed presented postresolution evidence of its own (see 3 AA 2410, 2418, fn. 21); and (4) pursuant to section 1268.720, the opinion should be corrected to hold that Liberty, rather than the Town, will recover its costs on appeal (see typed opn. 40). The Court of Appeal denied rehearing but modified its opinion in certain respects and awarded Liberty its costs on appeal. (Order modifying opn. and denying petn. for rehg. 1–3.)

LEGAL ARGUMENT

I. Review should be granted to resolve the conflict in the published case law about application of the rebuttable presumptions of public necessity and more necessary public use in utility takings cases.

This Court should grant review to resolve the conflict in the published case law concerning the operation of the statutory rebuttable presumptions in utility takings cases. (Cal. Rules of Court, rule 8.500(b)(1).) The *Town of Apple Valley* and *PG&E* decisions are irreconcilable. If left unresolved, their conflict will only deepen, sowing statewide confusion in this important area of eminent domain law that impacts vital utility services. The public, the parties, and the courts require clarity. In addition, review should be granted to give effect to the will of the Legislature in adopting SB 1757 by holding the public necessity for a proposed taking of utility property is a judicial question and, as a result, municipalities are not free to take virtually any utility property they choose.

In *PG&E*, the Third District held a utility property owner could successfully challenge a public agency's right to take by introducing evidence to rebut the presumptions of public necessity and more necessary public use by a preponderance of the evidence; the owner need not show the agency abused its discretion, or that the agency's decision was unsupported by substantial evidence. (*PG&E*, *supra*, 95 Cal.App.5th at pp. 826, 832–833, 837–838.) By contrast, here, in *Town of Apple Valley*, the Fourth District, Division Two, held the trial court *erred* by applying the rebuttable presumptions in the manner outlined by *PG&E*, applying its independent judgment to weigh the evidence

presented at trial. (Typed opn. 35–36.) The court held the trial court should have reviewed only the Town's decision to determine if it was supported by substantial evidence. (Typed opn. 32.) This Court should grant review to resolve the conflict between these diametrically opposed holdings.

Review also should be granted to provide guidance to lower courts and litigants because the *PG&E* and *Town of Apple Valley* decisions are in conflict *as to each step of the legal analyses by which they reached their opposing results*. The Third District in *PG&E* followed this Court's guidance in *John* by beginning its analysis with the statutory language, seeking to harmonize SB 1757's imposition of rebuttable presumptions with other applicable statutes. (*PG&E*, *supra*, 95 Cal.App.5th at p. 832, citing *John*, *supra*, 63 Cal.4th at pp. 95–96.) The Fourth District, Division Two, on the other hand, criticized the *PG&E* court for basing its decision primarily on the statutory language. (Typed opn. 19, 23.) More important, in the view of the court here, was the pre-1992 case law concerning conclusive presumptions in other categories of takings cases, which emphasized trial courts' deferential review, and which the Court of Appeal assumed the Legislature did not mean to abrogate when enacting SB 1757. (Typed opn. 27–28, 32.)

The *PG&E* court also correctly concluded that for a trial court to review a utility takings decision only for substantial evidence would be "illogical and unworkable," and would thwart the Legislature's imposition of rebuttable presumptions affecting the burden of proof. (*PG&E*, *supra*, 95 Cal.App.5th at p. 834.) That court noted the provisions of the Evidence Code defining

rebuttable presumptions. (*Id.* at pp. 834–835.) An evidentiary presumption is rebutted by the existence of contrary evidence and *not by the absence of supporting evidence*. (*Ibid.*, quoting Evid. Code, § 606; see *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 463 [" '[O]nce a presumption affecting the burden of proof comes into play, that is an issue which must be presented to the trier of fact' " (emphasis omitted)].) The Court of Appeal here, however, perceived no incompatibility. It assumed the Legislature intended for trial courts to apply an evidentiary rebuttable presumption and the preponderance of the evidence standard while still engaging in deferential substantial evidence review of the agency's eminent domain decision. (Typed opn. 32.) Review is thus needed so trial courts have clarity regarding the proper conduct of a right to take trial involving utility property.

The Third District in *PG&E* also supported its interpretation of SB 1757 by analogizing to the statutory rebuttable presumptions in extraterritorial takings cases. (*PG&E*, *supra*, 95 Cal.App.5th at p. 833; see *Grabowski*, *supra*, 205 Cal.App.3d at p. 898; *City of Los Angeles v. Keck* (1971) 14 Cal.App.3d 920, 927–929; *City of Carlsbad v. Wight* (1963) 221 Cal.App.2d 756, 761–763.) There, as discussed, the Legislature made such takings a judicial question; trial courts do not defer to agency findings of public necessity. (*PG&E*, at p. 834.) The *PG&E* court concluded SB 1757 is another example of the Legislature exercising its power to make a class of takings cases justiciable, this time in the context of utility takings. (*Ibid.*)

But here, the Court of Appeal drew no such conclusion, finding extraterritorial takings cases inapposite. It emphasized superficial differences in the statutory language establishing the rebuttable presumptions in the two classes of cases: In utility takings cases the presumptions " 'affect[ ] the burden of proof' " while in extraterritorial cases they " 'affect[ ] the burden of producing evidence.' " (Typed opn. 25.) The court offered no reason why this minor linguistic difference was material to the trial court's role in considering the evidence, instead simply assuming the Legislature would have employed identical language if it had intended the same result when adopting SB 1757. (See *ibid.*) The court also theorized that an extraterritorial taking is not a valid legislative action by a local agency (*ibid.*), though that assertion is at odds with at least two statutes (Code Civ. Proc., § 1240.125 [authorizing a "local public entity" to "acquire property by eminent domain outside its territorial limits"]; Gov. Code, § 54341 [authorizing a local agency to "improve any enterprise wholly or partially within or wholly without the local agency" and to "acquire any real or personal property" by eminent domain]). Review is therefore necessary to determine which view is correct, and whether courts in utility takings cases may look to extraterritorial takings decisions for guidance.

Finally, the Third District in *PG&E* concluded the statutory language is unambiguous and thus found no need to resort to the legislative history of SB 1757 to decide the proper application of the rebuttable presumptions in utility takings cases. (*PG&E*, *supra*, 95 Cal.App.5th at p. 836; §§ 1240.650,

subd. (c), 1245.250, subd. (b).) In so ruling, it was following this Court's established precedent. (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1055 ["Only when the language of a statute is susceptible to more than one reasonable construction is it appropriate to turn to extrinsic aids, including the legislative history of the measure, to ascertain its meaning"].) By contrast, the Fourth District, Division Two, resorted to the legislative history as an interpretative aid *without* first parsing the statutory language to decide whether it is ambiguous. (See typed opn. 26–30.) Indeed, it is fair to characterize the Court of Appeal's decision below as focused on the case law in existence when SB 1757 was adopted, along with clues the court gleaned from what SB 1757's legislative history said and *did not* say, almost to the exclusion of the governing statutory language. Review is thus needed to decide whether SB 1757's statutory language is ambiguous so as to permit resort to its legislative history as an interpretative aid.

The two decisions' treatment of the legislative history of SB 1757 is as opposed as every other aspect of their analyses. The *PG&E* court, while not relying on the legislative history, concluded several aspects of that history support the court's reading of SB 1757's plain text. (*PG&E*, *supra*, 95 Cal.App.5th at p. 836.) And it attached no significance to Assemblymember Speier's ambiguous comment that SB 1757 wrought only a " ' "procedural change, evidentiary in nature" ' " and did not affect " 'basic rights.' " (*PG&E*, at p. 837.) The court found that comment "too vague" to guide its analysis. (*Ibid.*) And, indeed, the most reasonable interpretation of Speier's comment is that

the imposition of a rebuttable presumption affecting the burden of proof *is a procedural change* that does not affect the basic power of a local government entity to take property by eminent domain, though it may affect whether a utility can rebut the presumptions of public necessity and more necessary public use in a particular case.

But the Fourth District, Division Two, took issue with that interpretation as well. It found Speier's cryptic comments pregnant with meaning, especially given the importance the court attached to the pre-SB 1757 case law requiring deference to agency takings decisions in other contexts. (Typed opn. 26–27, 29.) According to the court, Speier's comments betrayed an unstated legislative intent to engraft a rebuttable presumption and the preponderance of the evidence standard onto a preexisting deferential "substantial evidence" standard of review. (Typed opn. 27, 29, 32.) At the same time, the court rejected as unreflective of the Legislature's intent portions of the legislative history inconsistent with the court's decision. (Typed opn. 30–31.) Thus, the court discounted legislative history critical of utility takings and showing the purpose of SB 1757 was to strengthen the ability of private utilities to contest such takings. (*Ibid.*) Review is necessary to give effect to the Legislature's intent in enacting SB 1757 and to disapprove the Fourth District, Division Two's published decision in *Town of Apple Valley*, which, if left undisturbed, will frustrate the Legislature's goals in enacting that legislation, rendering the 1992 amendments a nullity.

For all of these reasons, the published decisions in *PG&E* and *Town of Apple Valley* cannot be reconciled. This Court should grant review to resolve this burgeoning conflict, thereby providing lower courts, public agencies, litigants, and the public with certainty in this important area of law.

II. This Court should grant review to clarify the scope of admissible evidence in a utility takings trial.

This Court also should grant review to clarify the scope of admissible evidence where utility property is the subject of the proposed taking, and where the presumptions of public necessity and more necessary public use are therefore rebuttable.[4] The tight constraints the Court of Appeal's published decision has placed on the scope of admissible evidence in such a trial will play havoc with the statutory scheme and undermine the Legislature's goals in enacting SB 1757 by requiring the exclusion of otherwise admissible evidence that could rebut the statutory presumptions.

As discussed, the Court of Appeal here held the trial court in a utility taking trial merely decides whether the condemning agency's resolution of necessity was supported by substantial evidence. (Typed opn. 32, 35.) As a corollary of that holding, the court further held the trial court committed " 'fundamental error' " by relying on Liberty's evidence *postdating* the Town's 2015 resolutions of necessity. (Typed opn. 35–38.) In the Court

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[4] This issue is "fairly included" in the first question presented. (Cal. Rules of Court, rule 8.516(a)(1).) Liberty identifies it as a second issue for review because the Court of Appeal's opinion addresses it in a separate section. (Typed opn. 33–38.)

of Appeal's view, Liberty's defense at trial should have been limited to the specific facts it pled several years earlier in its 2016 answer to the Town's eminent domain complaint. (Typed opn. 36–37.)

This Court should grant review to decide whether the Court of Appeal's dramatic limitation on the definition of relevant evidence in utility takings cases comports with SB 1757. Where, as here, a public entity seeks to take utility property, "the resolution of necessity creates a rebuttable presumption that *the matters referred to in Section 1240.030* are true." (Code Civ. Proc., § 1245.250, subd. (b), emphasis added.) The "presumed fact[s]" (Evid. Code, § 606) are the public necessity elements themselves, not the public entity's findings *about those elements*.

It follows, then, that at trial the objecting party should be permitted to disprove *the public necessity elements* to rebut the statutory presumption of their truth, and that inquiry should not be limited to challenging *the public agency's findings about those elements* or the time period when those findings were made. (See Code Civ. Proc., § 1250.370, subds. (b)–(d).) In other words, to give proper effect to the rebuttable presumptions, the defendant in a utility takings case should not be limited to undercutting the basis for the agency's findings. Rather, like any party with the burden of proof, it should be permitted to introduce any admissible evidence relevant to disproving the public necessity elements.[5] (Evid. Code, § 606; *Farr*, *supra*, 187 Cal.App.4th at p.

[5] Section 1240.610, which requires that the proposed use be a "more necessary public use," does not require that such a finding be included in a resolution of necessity. This is another reason

681 ["A presumption affecting the burden of proof places on the party against whom it operates the obligation to establish by evidence the requisite degree of belief concerning the nonexistence of the presumed fact in the mind of the trier of fact or the court"].)

This case is an ideal vehicle for deciding this important question. The Town adopted its resolutions of necessity in 2015, when Liberty's proposed merger with the water system's previous owner, Carlyle, was still pending. (Typed opn. 3.) By the time the right to take trial concluded in 2021, however, the water system had been under Liberty's competent management for six years. (See typed opn. 4–6, 36.) By then, evidence relating to the Town's objectives of alleviating any issues with Carlyle's management was—if not moot—only a small part of the universe of relevant evidence relating to the public necessity for the proposed taking and whether the Town's proposed use of the property was a more necessary public use.

Accordingly, this Court should grant review to decide the appropriate scope of admissible evidence in a right to take trial involving utility property. Because SB 1757 makes the public necessity and more necessary public use inquiries judicial questions when utility property is at issue, the Court should hold a utility can present any otherwise admissible evidence to rebut the presumptions. Artificial temporal constraints on the scope of admissible evidence can serve only to assist municipalities in

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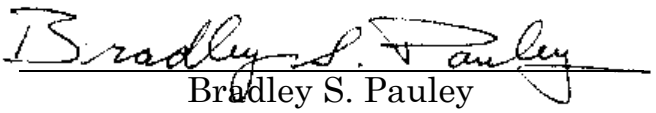
not to limit evidence pertaining to this requirement to that which existed when the resolution was adopted.

taking utility property when such a taking is not justified under all the evidence and is not in the public's interest.

CONCLUSION

For all these reasons, this Court should grant review.

February 21, 2025 **HORVITZ & LEVY LLP**
ROBERT H. WRIGHT
BRADLEY S. PAULEY

By: 
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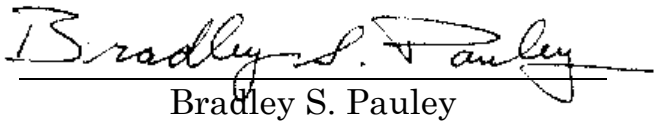
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 8,392 words as counted by the program used to generate the petition.

Dated: February 21, 2025



Bradley S. Pauley

JANUARY 15, 2025
PUBLISHED OPINION

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

TOWN OF APPLE VALLEY, Plaintiff and Appellant, v. APPLE VALLEY RANCHOS WATER, et al. Defendants and Respondents.	E078348 (Super. Ct. No. CIVDS1600180) OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez, Judge. Reversed.

Greines, Martin, Stein & Richland, Edward Xanders, and Timothy T. Coates; Best Best & Krieger, Kendall MacVey, Christopher Pisano, and Guillermo Frias, for Plaintiff and Appellant.

Manatt, Phelps & Phillips, Edward G. Burg, Michael M. Berger, George M. Soneff, David Moran, Benjamin Shatz, and Joanna S. McCallum, for Defendant and Respondent, Apple Valley Ranchos Water.

No appearance for Defendants and Respondents, Jess Ranch Water Company, and Jess Ranch Development Company.

[42]

I.

INTRODUCTION

The Town of Apple Valley (TAV) sought to condemn via eminent domain a private water utility system. In November 2015, TAV passed two resolutions of necessity (RON) to acquire the water system, which was then owned by Carlyle Infrastructures Partners and operated by Apple Valley Ranchos Water (AVR). In January 2016, TAV filed this eminent domain action to acquire the water system. A day later, Carlyle's sale of the water system to respondent Liberty Utilities closed.

After extensive proceedings, including a 67-day bench trial held between late 2019 and early 2021, the trial court issued a Statement of Decision (SOD) finding that TAV did not have the right to acquire the water system. The court thus entered judgment and an award of attorney's fees for Liberty. TAV timely appealed.

We reverse for two main reasons: (1) the trial court applied the wrong standard of proof and, in turn, failed to give the appropriate deference to TAV's decision and underlying findings, and (2) the trial court improperly based its decision entirely on post-RON facts and events, namely, Liberty's conduct after TAV adopted the RONs. The matter is remanded for further proceedings consistent with this opinion.

II.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2010, investment fund Carlyle Infrastructure Partners purchased TAV's water system from AVR over TAV's objections. Because TAV was concerned about how Carlyle would operate the water system, TAV began investigating whether to acquire the system in early 2011.

In September 2014, however, Carlyle entered into a merger agreement to sell the water system to Liberty, a subsidiary of Algonquin Power & Utilities Corporation. Right after signing the agreement, Liberty began seeking approval from the California Public Utilities Commission (CPUC), which took until January 2016 to complete. As reflected in the merger agreement, Liberty and Carlyle knew that TAV was considering taking the water system via eminent domain.

In November 2015, while the merger agreement remained pending, TAV approved two RONs to acquire the water system from AVR. One RON concerned the water system within TAV's boundaries while the other concerned minor parts of the system outside of TAV's boundaries.[1] The RONs defined TAV's project as the "public ownership, operation, and maintenance of the Apple Valley Water System to provide water service to the public."

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[1] The parties do not differentiate between the RONs and Liberty does not argue that they should be analyzed differently. Rather, Liberty essentially treats the RONs as only one RON that concerns the water system within TAV's borders.

In December 2015, the CPUC approved the merger agreement over TAV's objections, which allowed Liberty to acquire the water system.

In January 2016, TAV filed this eminent domain action against AVR.[2] Later that month, Liberty's purchase of the water system from AVR went through.

Liberty's operative amended answer asserts various objections under California's Eminent Domain Law (Code Civ. Proc., § 1230.010 et seq.), although Liberty later abandoned most of them.[3] As relevant here, Liberty objected on three main grounds: (1) the public interest and necessity do not require TAV's project (§ 1240.030, subd. (a)); (2) the project is not planned in a manner most consistent with the greatest public good and least private injury (§ 1240.030, subd. (b)); and (3) TAV's proposed use of the water system is not a more necessary public use (MNPU) than Liberty's continued use (§ 1240.650, subds. (a), (c)).

In 2018, the trial court ruled on the parties' disputes over (1) the appropriate standard of review for the trial court to apply when deciding Liberty's objections after a bench trial and (2) the role of the 55,000-page administrative record (AR) underlying TAV's RONs. TAV argued the "gross abuse of discretion standard of section 1245.255, subdivision (b)" controlled, meaning that Liberty had to show TAV's adoption of the RONs was a gross abuse of discretion. Liberty, on the other hand, argued it only had the

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[2] TAV sued two other entities, but those claims are not at issue here.

[3] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

burden of proving by a preponderance of the evidence "the nonexistence of (1) one or more of the three public necessity elements in [s]ection 1240.030; or (2) the more necessary public use element under [s]ection 1240.650(c)."

As for the AR, TAV argued that Liberty had to submit the entire AR, yet it failed to do so. Liberty argued the AR was irrelevant because it was not objecting to the validity of the RONs and, as TAV conceded, Liberty was entitled to rely on evidence outside of the AR to meet its burden.

The trial court agreed with Liberty on both issues in a thorough order in October 2018. The trial court ruled that the "gross abuse of discretion standard" does not apply and, instead, Liberty bears the burden of proving by a preponderance of the evidence that at least one of the four required elements (see § 1240.030, 1240.650, subd. (c)) was not satisfied. The court then ruled that to meet this burden, Liberty need not submit the AR. Rather, the court decided that "[i]t is up to Liberty to decide what evidence it believes is relevant to meeting its burden of proof."

The trial court held a bench trial spanning over 67 court days between 2019 and 2021. After receiving post-trial briefing, the trial court issued an 84-page tentative SOD finding that Liberty had met its burden and thus TAV was not entitled to acquire the water system via eminent domain.

The SOD does not acknowledge or mention the RON's findings or objectives, nor does it explain how Liberty rebutted them. The SOD essentially rejected all of TAV's evidence while finding Liberty's more persuasive or credible.

[46]

TAV filed extensive objections to the tentative SOD, including objections that (1) the trial court failed to give any deference to the RONs and their findings, (2) the trial court erroneously allowed Liberty to present whatever evidence it wanted to introduce to rebut the RONs, (3) the trial court should have admitted and considered the AR, (4) the trial court failed to apply the "gross abuse of discretion" standard, (5) the trial court failed to consider the RONs' findings as they existed when the RONs were adopted, (6) Liberty's answer failed to state with specificity the facts and grounds on which its objections were based as section 1250.230 requires, (7) the trial court incorrectly relied exclusively on post-RON evidence to determine whether the RONs' findings were rebutted and whether Liberty had met its burden, (8) at the same time, the trial court improperly precluded TAV from using post-RON evidence to support its position, and (9) at a minimum, the trial court should have remanded the case to TAV to consider in the first instance the post-RON evidence admitted at trial that the SOD relied on.

The trial court overruled all of TAV's objections and adopted the tentative SOD in full as its final SOD (except for minor modifications Liberty requested). The court then entered judgment for Liberty, dismissed TAV's complaint, and awarded Liberty over $13 million in attorney's fees. TAV timely appealed.

III.

DISCUSSION

TAV contends the trial court made four fundamental errors: (1) the court applied the wrong standard of review; (2) the court erroneously refused to admit and consider the

AR and the RON's findings/objectives and, in so doing, misapplied the rebuttable presumption; (3) the court improperly relied on post-RON evidence to find Liberty met its burden, yet ruled that TAV could not rely on post-RON evidence to support the RONs; and (4) assuming post-RON evidence is relevant, the court erred by refusing to remand the case to allow TAV to consider post-RON evidence in the first instance. We address each issue in turn, but we first provide some background on the applicable law.

A. *Legal Background*

1. *Eminent Domain Law*

Eminent Domain Law (§ 1230.010 et seq.) outlines "[t]he entire framework which exists for the exercise of the inherent governmental power of eminent domain in California," and "these statutory provisions must be strictly complied with when proceeding in an eminent domain action." (*San Bernardino County Flood Control District v. Grabowski* (1988) 205 Cal.App.3d 885, 893 (*Grabowski*).)

In general, a public entity may take property via eminent domain only if the proposed "project" meets three criteria, which we refer to as the "public necessity elements": (1) the public interest and necessity require the project; (2) the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and (3) the property sought to be acquired is necessary for the project. (§ 1240.030, subds. (a)-(c); *SFFP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 468.) When, as here, the taking involves property already used for a public use (such as a utility), there is a fourth element; (4) the project's

proposed use of the property must be "a more necessary public use than the use to which the property is appropriated" (the MNPU element) (§ 1240.610).

A public entity may file an eminent domain action only if it has, among other things, adopted a RON finding that the proposed taking satisfies the three public necessity elements. (§ 1245.220.) If the entity has adopted a RON, the RON must expressly state that the public entity has "found and determined" that the three public necessity elements have been satisfied. (§ 1245.230, subd. (c).) When, as here, the project concerns a "property appropriated to public use," the RON need not "find" or "determine" that the MNPU element has been satisfied, but it must "refer" to the MNPU element statute (§ 1240.610).

A validly adopted RON triggers certain legal presumptions, depending on the project. Generally, "[e]xcept as otherwise provided by statute, a resolution of necessity adopted by the governing body of the public entity . . . conclusively establishes the matters referred to in section 1240.030" (i.e., the public necessity elements). (§ 1245.250, subd. (a).) Similarly, it is also presumed that the MNPU element is satisfied when the property to be condemned is already "appropriated to public use" and the public entity seeks to use the property for the same public purposes. (§ 1240.650, subd. (a).)

Different presumptions apply in other circumstances. If the property sought to be taken is a public utility, a validly adopted RON only "creates *a rebuttable presumption* that the [three public necessity elements] are true," which "affect[s] the burden of proof." (§ 1245.250, subd. (b), italics added.) Likewise, if the property is a public utility that

"the public entity intends to put to the same use," the MNPU presumption is only "*a rebuttable presumption* affecting the burden of proof." (§ 1240.650, subd. (c), italics added.) Finally, if the property "is not located entirely within the boundaries of the local public entity, the resolution of necessity creates *a presumption* that the [three public necessity elements] are true," which affects "the burden of producing evidence." (§ 1245.250, subd. (c), italics added.)

A property owner may obtain judicial review of the validity of a RON before an eminent domain suit is filed by petitioning for a writ of mandate under section 1085 or, if an eminent domain suit has been filed, by objecting to the right to take. (§ 1245.255, subd. (a).) Under either procedure, the trial court generally must apply a section 1085 deferential standard of review. (*Redevelopment Agency v. Rados Bros.* (2001) 95 Cal.App.4th 309, 316; *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 589; *Anaheim Redevelopment Agency v. Dusek* (1987) 193 Cal.App.3d 249, 258 (*Dusek*).)

If the public entity has filed an eminent domain suit, the defendant-property owner may object via a demurrer or an answer only on the grounds "authorized by [s]ection 1250.360 or [s]ection 1250.370." Section 1250.360 outlines various "[g]rounds for objection to the right to take, regardless of whether the plaintiff has adopted a [RON]." The only one at issue here is that the proposed taking does not satisfy the MNPU element of section 1240.610. (See § 1250.360, subd. (f).) Section 1250.070 identifies the "grounds for objection to the right to take where the plaintiff has not adopted a [RON]

that *conclusively* establishes" that the public necessity elements have been met. (Italics added.) The only objection at issue here is that the taking would not satisfy the public necessity elements. (See § 1250.370, subds. (b)-(c).)

The trial court "shall hear and determine all objections to the right to take." (§ 1260.120, subd. (a).) To do so, "[t]he court may . . . specially set [objections to the right to take] for trial." (§ 1260.110, subd. (b).)

The standard of review the trial court uses to resolve an eminent domain dispute can differ depending on the nature of the property sought to be taken. As relevant here, eminent domain actions involving property outside the boundaries of the public entity's jurisdiction (extraterritorial cases) are reviewed more strictly than actions involving property within the jurisdiction's boundaries. This is because of the different corresponding statutory presumptions (see §§ 1245.250, subds. (a), (c).)

When the property sought to be taken is within the public entity's jurisdictional boundaries, a RON has a conclusive effect as to the three public necessity elements unless "'its adoption or contents were influenced or affected by gross abuse of discretion by the governing body.'" (*Santa Cruz County Redevelopment Agency v. Izant* (1995) 37 Cal.App.4th 141, 148-149 (*Izant*).) This may be shown by "a lack of substantial evidence supporting the [RON]" or by showing that "at the time of the agency hearing, the condemnor had irrevocably committed itself to the taking of the property regardless of the evidence presented." (*Ibid.*)

This deferential standard applies because the adoption of a RON is "a quasi-legislative act." (*Dusek*, *supra*, 193 Cal.App.3d at p. 260.) Courts generally must defer to a public entity's "'fundamental political question'" to take property (*ibid.*), "because of the constitutional separation of powers." (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572; see also *Dusek*, *supra*, at p. 255 [noting "the historical deference accorded legislative determinations of necessity"]; *Izant*, *supra*, 37 Cal.App.4th at p. 150 [a "resolution of necessity is a legislative act . . . and thus great deference must be given to the legislative determination"].) Under the gross abuse of discretion standard, the trial court "'is limited to an examination of the proceedings to determine whether adoption of the resolution by the governing body of the public entity has been arbitrary, capricious, or entirely lacking in evidentiary support, and whether the governing body has failed to follow the procedure and give the notice required by law.'" (*Dusek*, *supra*, at pp. 257-258.) The trial court is thus confined to the administrative record and may not accept extra-record evidence. (See *Western States Petroleum Assn. v. Superior Court*, *supra*, at p. 576; *Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1269.)

Extraterritorial cases differ in the evidence the trial court may consider and how the court views the evidence. A defendant-property owner challenging a public entity's extraterritorial taking is entitled to a full trial during which the trial court may consider extra-record evidence. (See e.g., *Grabowski*, 205 Cal.App.3d 885, 893; *City of Los*

Angeles v. Keck (1971) 14 Cal.App.3d 920, 925-926 (*Keck*); *City of Carlsbad v. Wight* (1963) 221 Cal.App.2d 756, 761-762 (*Wight*).

In extraterritorial cases, a validly adopted RON creates a rebuttable—as opposed to conclusive—presumption that the public necessity elements have been met. (§ 1245.250, subd. (c).) This allows the trial court to decide whether, based on all the evidence admitted at trial, the elements have been met. (See *id.*, Leg. Comm. Comments—Senate [noting that section 1245.250 subd. (c), like its predecessor statute, makes the public necessity elements "justiciable"].)

The Legislature decided to differentiate intraterritorial and extraterritorial takings because of the "the differences in the postures of both the property owner and the condemning agency in these contrasting situations." (*Keck*, *supra*, 14 Cal.App.3d at p. 925.) To begin with, public entities cannot exercise their power outside of their jurisdictional boundaries (with limited exceptions not present here). (*Wight*, *supra*, 221 Cal.App.3d at p. 761.) But when a public entity decides to take property within its borders via eminent domain, that is "is a legislative, not a judicial, matter." (*Ibid.*)

There are also differing governmental representation concerns at issue because "[w]here the property is inside the territorial limits, the ministerial officers and legislative body of the condemning agency and the property owners and taxpayers should have full knowledge of conditions, locations, and the public good involved in the proposed improvement." (*Keck*, *supra*, 14 Cal.App.3d at p. 925.) The legislative body and its officials "are accountable to those who are property owners and, also, to those who are

taxpayers within the territorial limits through the elective process." (*Ibid.*) On the other hand, "where the property sought to be taken is outside and distant from these territorial limits, neither such knowledge nor such accountability may be present." (*Ibid.*) In other words, an extraterritorial takings is not a quasi-legislative act of a coequal branch of government that is entitled to deference because it is not a valid exercise of the public entity's legislative power, which does not extend beyond its boundaries (except in circumstances not present here). (See *ibid.*; *Wight*, *supra*, 22 Cal.App.2d at p. 760.) "Thus, the Legislature has specifically provided that the courts shall pass upon" extraterritorial takings. (*Keck*, *supra*, at p. 925.)

2. *The 1992 Amendments to the Eminent Domain Law*

The Legislature amended the Eminent Domain Law in 1992 with Senate Bill No. 1757, which enacted the rebuttable presumptions for public utility takings in sections 1245.250, subdivision (b) and 1240.650, subdivision (c).[4] (See Senate Bill No. 1757 (1991-1992 Reg. Sess.; Senate Bill No. 1757) (Stats. 1992, ch. 812, §§ 2-3); *Pacific Gas & Electric Co. v. Superior Court* (2023) 95 Cal.App.5th 819, 830 (*PG&E*).)

Assemblymember Jackie Speier was granted unanimous consent by the Legislature to print a statement concerning Senate Bill No. 1757 in the Assembly Journal. Assemblymember Speier explained: "[Senate Bill No. 1757 makes a procedural change in how, under limited circumstances, the question of necessity and better public use is

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[4] We grant TAV's unopposed request that we take judicial notice of the legislative history of Senate Bill No. 1757. We also note that Liberty relies on the legislative history as well.

proven in eminent domain actions. It creates a rebuttable rather than a conclusive presumption in the specified circumstances. [¶] When I presented [Senate Bill No.] 1757 on the Floor for Assembly passage, I stated in argument and stressed to the Assembly that this is a procedural change, evidentiary in nature, and that it does not affect basic rights but *only allows introduction of evidence on the subject of the presumption.*" (Emphasis added.)

Several legislative reports explain the legislation's "procedural change[s]" and its purposes in greater detail. A Senate Committee on the Judiciary analysis explains that the purpose of Senate Bill No. 1757 is "to allow private utility companies to challenge the decision of a public entity to take over the utility property for public operation and use." The report notes that a RON is generally conclusive unless its adoption or contents "were the result of a gross abuse of discretion." The report explains: "Section 1240.650 generally provides a conclusive presumption that the same use by public entities of the property to be taken is a "more necessary use" than the use for which the property was already being used by the private entity. The purpose of the presumptions is to avoid litigation and challenges to a public entity's legislative determination of public use and necessity."

Senate Bill No. 1757 thus "would remove those conclusive presumptions in the case of privately owned public utility property which is being taken for the same public use. The bill would instead substitute a rebuttable presumption affecting the burden of proof in favor of the condemnor public entity. Unlike a conclusive presumption, which

cannot be challenged or contradicted, a rebuttable presumption affecting the burden of proof permits a challenge to the fact being assumed. Under Evidence Code [s]ection 605, 'the effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the non-existence of the presumed fact.' Thus, in a case where the public entity proposes to take privately owned public utility property by eminent domain for the same use, [Senate Bill No.] 1757 would enable the private utility to challenge the proposed taking as to its necessity and purpose. However, it would be the condemnee private entity's burden to show that the taking was not a 'public necessity' and that the proposed use was not a more necessary use. [¶] A similar rebuttable presumption of 'more necessary use' applies where the state seeks to take property which is already put to the same use as is intended by the state (C.C.P. [§] 1240.640)."

An Assembly Committee on the Judiciary report explained that under then-existing law, a validly adopted RON "will conclusively establish that the prerequisites for taking the property (i.e., the public necessity) have been met and the property owner's right to challenge the right of the public entity to condemn the property will be severely limited. However, if a local public entity condemns property outside of its boundaries, the resolution of necessity creates a rebuttable presumption that the conditions for taking the property have been met (e.g., the resolution's finding that there is a 'public necessity' for the taking of the property is rebuttable)."

The report then summarized Senate Bill No. 1757 as making two main changes to the law. First, "[i]n eminent domain proceedings involving the property of an electric, gas or water public utility there is a rebuttable, rather than a conclusive presumption that (a) the taking of the property is a 'more necessary taking' and (b) the content of the resolution of necessity is true (e.g., the taking of the property is a 'public necessity') if the condemning public entity intends to put the property to the same use as the utility." Second, "[t]he rebuttable presumption is in favor of the condemning agency and is a presumption affecting the burden of proof."

The report went on to explain that "[b]y making the presumption rebuttable, this bill will give . . . utilities much greater ability to challenge any proposed taking of their property when it is being condemned with the intent to continue to use it as a utility." Although the utility would have the burden of showing that "the taking was not a 'public necessity' and that the proposed use was not a more necessary use," which would not be "an easy task" since it would require "prov[ing] the non-existence of any fact," Senate Bill No. 1757's amendments "will provide private utility owners a much greater ability to challenge any decision to condemn their property."

An Enrolled Bill report relays the Governor's Office of Planning and Research's (GOPR) statement explaining its recommendation that the governor sign Senate Bill No. 1757. That office understood the legislation as only "provid[ing] for a rebuttable, rather than a conclusive, presumption in certain eminent domain proceedings." The report explained: "Under current law, if the public entity plans to put the property to the same

use or any other public use, that use is *conclusively* presumed to be a 'more necessary use' than the current use. Legally, 'conclusive presumption is an automatic determination that a particular action is beyond dispute and which renders evidence to the contrary inadmissible. The rationale is that the usual validity of the assertion outweighs the costs and time of taking evidence." The GOPR understood that, on the other hand, a "'rebuttable presumption' is a presumption which may be rebutted or disputed by evidence; if no or insufficient evidence is presented, the presumption stands."

3. *PG&E*

PG&E, *supra*, 95 Cal.App.5th 819, was decided after TAV filed its opening brief and, to date, it is the only published decision to consider the 1992 utility amendments and their effect on the standard of review in an eminent domain action involving a public utility. Because Liberty contends *PG&E* forecloses TAV's argument that the trial court used the wrong standard of review and we disagree with the decision in some key respects, we discuss it in detail.

PG&E arose from a writ proceeding concerning the parties' dispute over the appropriate standard of proof to be used at the trial on an irrigation district's eminent domain action to take PG&E's electric distribution system within the district's service area. (*PG&E*, *supra*, 95 Cal.App.5th at pp. 826-827.) The district adopted a RON finding that the three public necessity elements and the MNPU element would be satisfied by the taking. (*Id.* at p. 827.) PG&E objected on various grounds, including (1) under section 1250.360, subdivision (f) that the district's taking was not for a more

necessary public use, and (2) under section 1250.370 that the public interest and necessity do not require the project. (*PG&E*, *supra*, at p. 827.) PG&E did not, however, challenge the RON under section 1245.255, which provides grounds for challenges to a RON, including that it was "'influenced or affected by gross abuse of discretion.'" (*PG&E*, *supra*, at p. 827; § 1245.255, subds. (a)-(b).)

After an appeal and remand, the trial court resolved the parties' dispute over the proper standard of review to apply at trial. (*PG&E*, *supra*, 95 Cal.App.5th at pp. 826-829.) The court ruled: "'PG&E may introduce additional evidence, out of the record of [the District]'s Resolution of Necessity proceeding, to attempt to disprove [the District]'s determinations that the four findings of public use and necessity have been established [citation]; and [¶] [t]he standard of judicial review is whether [the District] committed a gross abuse of discretion in adopting the Resolution by showing that there is a lack of substantial evidence to support the public use and necessity determinations.'" (*Id.* at p. 829.) The court also ruled that "'the applicable burden of proof standard for PG&E at the Right to Take trial is the preponderance of the evidence standard.'" (*Ibid.*)

The only issue the parties contested in an extraordinary writ proceeding in the Court of Appeal was the applicable standard of review at trial. (*PG&E*, *supra*, 95 Cal.App.5th at pp. 829, 832-838.) The court agreed with PG&E that PG&E did not have to show that the district's RON was a gross abuse of discretion or unsupported by substantial evidence. (*Id.* at p. 833.) Instead, PG&E only had to "prove that one of the

public necessity elements (§ 1240.030) or the more necessary public use element (§ 1240.610) is not true by the preponderance of the evidence." (*Ibid.*)

The court reached this conclusion based solely on its reading of the relevant statutes. (*PG&E*, *supra*, 95 Cal.App.5th at p. 833.) The court first noted that PG&E's only objections were brought under sections 1250.360 and 1250.370. (*PG&E*, *supra*, at p. 833.) PG&E objected under section 1250.360, subdivision (f), which is an objection that "may be raised 'regardless of whether the plaintiff has adopted a resolution of necessity.' (§ 1250.360)." (*PG&E*, *supra*, at p. 833.) PG&E also objected on several grounds under section 1250.370, which permits objections where "'the plaintiff has *not* adopted a resolution of necessity that *conclusively* establishes' the public necessity elements," which includes a RON concerning a public utility since the RON only *presumptively* establishes the public necessity elements. (*PG&E*, *supra*, at p. 833.) The Court of Appeal thus reasoned that *PG&E*'s objections were not challenges to a RON that "require[d] a showing of abuse of discretion or lack of substantial evidence." (*Ibid.*)

The *PG&E* court found that extraterritorial cases supported this conclusion. (*PG&E*, *supra*, 95 Cal.App.5th at p. 833.) The court observed that section 1245.250, subdivision (c), concerning extraterritorial takings, proscribes a rebuttable presumption that "affect[s] the burden of producing evidence." (*PG&E*, *supra*, at pp. 833-834.) Similarly, section 1245.250, subdivision (b), concerning public utility takings, also proscribes a rebuttable presumption that "affect[s] the burden of proof." (*PG&E*, *supra*, at pp. 833-834.) The *PG&E* court found that although these presumptions "are different,

they are also related," and there was no basis to conclude only the extraterritorial presumption allows "a substantive challenge to a public necessity element or the more necessary use element separate from challenging the validity of a resolution of necessity." (*Id.* at p. 834.) The court thus found "no reason for concluding that where the rebuttable presumption affects the *burden of producing evidence* the Legislature intended to allow the court to decide issues based on the evidence without deference to any relevant agency findings, but where the rebuttal presumption affects the *burden of proof* the Legislature intended that the court give the relevant agency findings deference." (*Id.* at p. 834.)

PG&E next concluded that substantial evidence review of the district's RON's findings would be "illogical and unworkable in combination with the rebuttable presumption and a burden of proof by a preponderance of evidence." (*PG&E*, *supra*, 95 Cal.App.5th at p. 834.) The court reasoned that a presumption is rebutted by contrary evidence, not the absence of evidence, while substantial evidence review considers only whether the prevailing party provided sufficient evidence to support a finding in its favor. (*Ibid.*)

The *PG&E* court then rejected the district's argument that PG&E's statutory interpretation, which the Court of Appeal adopted, would lead to absurd results. (*PG&E*, *supra*, 95 Cal.App.5th at p. 835.) The district contended that PG&E's position if accepted, would allow courts to "judicially veto" the district's decisions. (*Ibid.*) The Court of Appeal disagreed on the ground that the Legislature may make eminent domain

decisions "justiciable," and the legislative history of the 1992 amendments showed that is what the Legislature did with regard to public utility takings. (*Ibid.*)

The *PG&E* court first noted that it found it unnecessary to review the legislative history because it found the relevant statutes unambiguous, but concluded that the legislative history supported its interpretation. (*PG&E*, *supra*, 95 Cal.App.5th at p. 836.) The court relied exclusively on the following statement from the GOPR (outlined above): "'Under current law, private utility owners simply do not have the ability to challenge the necessity of a public entity to take their property for the same public use. This office believes that private property owners should have the right to legally challenge whether it is in the public's best interest to seize their property.'" (*Ibid.*) In the *PG&E* court's view, this supported the court's "understanding that, just as in extraterritorial condemnation cases, the Legislature had policy reasons for allowing greater judicial scrutiny over the decision to condemn." (*Ibid.*)

The district pointed to Assemblymember Speier's unanimous consent statement outlined above as evidence that the 1992 amendments only changed the law to allow the introduction of extrinsic evidence (i.e., evidence outside the administrative record) in public utility takings trials. (*PG&E*, *supra*, 95 Cal.App.5th at p. 837.) The *PG&E* court rejected the argument because "it does not follow from the plain language of the statute," and Assemblymember Speier's statement that the amendments would not 'affect basic rights' is too vague . . . to understand." (*Ibid.*)

Finally, the *PG&E* court rejected the district's argument that courts must defer to its quasi-legislative determinations, such as whether to take property. (*PG&E*, *supra*, 95 Cal.App.5th at p. 837.) The court reasoned that "the question of necessity can be made a judicial question" that is separate from the validity of a RON, as evidenced by extraterritorial cases, and "the Legislature has done just that in the context of public utilities." (*Ibid.*)

Because the trial court formulated the wrong standard of review to apply at trial, the *PG&E* court issued a writ directing the trial court to issue a new order consistent with the opinion. (*PG&E*, *supra*, 95 Cal.App.5th at pp. 837-838.)

B. *The Trial Court Applied the Wrong Standard of Review*

Liberty argues that *PG&E* confirms that the trial court here applied the right standard of review. We disagree. As TAV persuasively explains, there are several problems with *PG&E*'s analysis.

In our view, *PG&E*'s core shortcoming is its failure to acknowledge the fundamental differences between intraterritorial and extraterritorial takings. As pre-1992 case law that Liberty—but not *PG&E*—cites, extraterritorial takings raise different representative and constitutional concerns than do intraterritorial takings. (See e.g., *Keck*, *supra*, 14 Cal.App.3d at p. 925; *Wight*, *supra*, 221 Cal.App.2d at p. 761.) The decision to take property is a "fundamental political decision" (*ibid.*), which requires the condemning entity to consider and balance public policy concerns, use its expertise and superior knowledge of its jurisdiction, and weigh constituent concerns. (See *Western States*

Petroleum Assn. v. Superior Court, *supra*, 9 Cal.4th at pp. 569-573; *Keck*, *supra*, 14 Cal.App.3d at p. 925; *Dusek*, *supra*, 193 Cal.App.3d at pp. 258-260.)

Thus, a public entity's taking property within its borders is a quasi-legislative act that, when lawful, is a valid exercise of the entity's legislative discretion. (See *Dusek*, *supra*, 193 Cal.App.3d at p. 260.) A public entity's decision to take property outside of its borders, unless otherwise authorized, is not a valid exercise of its legislative power. (*Wight*, *supra*, 221 Cal.App.2d at pp. 760-761.)

PG&E did not grapple with these distinctions. Instead, it found that the plain language of the relevant statutes shows that PG&E could defeat the district's eminent domain action by showing that the taking is not for a more necessary public use (§ 1250.360, subd. (f)) or that the public interest and necessity do not require the taking (§ 1250.370, subd. (b)). (*PG&E*, *supra*, 95 Cal.App.5th at p. 819.)

True, but this does not speak to the applicable standard of review or deference courts should give to quasi-legislative decisions, such as a valid intraterritorial taking. As *PG&E* acknowledged, a RON "remains significant" when reviewing objections under sections 1250.360 and 1250.370 "because it impacts the burden at trial with respect to the public necessity elements." (*PG&E*, *supra*, 95 Cal.App.5th at p. 833.) The fact that objections under those statutes do not challenge the validity of a RON does not answer how courts should review a RON and its findings.

We thus disagree with Liberty that the gross abuse of discretion standard does not apply simply because its objections are under section 1250.360, subdivision (f) and

section 1250.370, subdivision (b), which are not necessarily challenges to the RON. It does not matter that these objections apply when a public entity has not adopted a RON or the RON is not given conclusive effect. As explained in more detail below, when, as here, the public entity has adopted a RON approving a public utility taking, the rebuttable presumption in section 1245.250, subdivision (b) applies. This requires the court to determine whether the party challenging the RON has rebutted the RON's presumptively correct findings that the public necessity elements are met—regardless of the statutory basis for the challenging party's objections.

As *PG&E* acknowledged, the only statutory language concerning the standard of review is the "rebuttable presumption" language in section 1245.250, subdivision (b) (concerning public utilities) and section 1245.250, subdivision (c) (concerning extraterritorial takings).[5] The presumption for public utilities "is a presumption affecting the burden of proof" while the presumption for extraterritorial takings "is a presumption affecting the burden of producing evidence."

Based on this similar language, *PG&E* saw "no reason why" the Legislature would let courts decide extraterritorial cases "without deference to any relevant agency

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[5] Again, section 1245.250, subdivision (b) states in relevant part: "If the taking is by a local public entity . . . and the property is electric, gas, or water public utility property, the resolution of necessity creates a rebuttable presumption that the matters referred to in Section 1240.030 are true. This presumption is a presumption affecting the burden of proof." Section 1245.250, subdivision (c) states in full: "If the taking is by a local public entity and the property described in the resolution is not located entirely within the boundaries of the local public entity, the resolution of necessity creates a presumption that the matters referred to in Section 1240.030 are true. This presumption is a presumption affecting the burden of producing evidence."

findings" while instructing courts to "give the relevant agency findings deference" in public utility cases. (*PG&E*, *supra*, 95 Cal.App.5th at p. 834.) Liberty likewise argues the language in subdivisions (b) and (c) of section 1245.250 is the same, and so it should be interpreted the same, meaning that the standards applicable to extraterritorial cases apply equally to public utility takings.

There are two problems here. First, the rebuttable presumption language in the two provisions is *similar*, but it is not the same. (*PG&E*, *supra*, 95 Cal.App.5th at p. 834 ["While a presumption affecting the burden of proof and a presumption affecting the burden of producing evidence are different, they are also related . . . ."].) We assume that if the Legislature wanted the same law to apply to extraterritorial and public utility takings, then it would have used the same language in sections 1245.360, subdivisions (b) and (c). Second, and more importantly, there is good reason to distinguish between extraterritorial takings and public utility takings: an extraterritorial taking, unless otherwise authorized, is not a valid legislative action, while an intraterritorial public utility taking is.[6]

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[6] For instance, section 1240.050 notes that a local public entity has the power to take property outside its boundaries only if "expressly granted by statute or necessarily implied as an incident of one of its other statutory powers." Local public entities therefore do not have a general power to condemn property outside their borders. Liberty notes that section 1240.125 authorizes local entities "to acquire property by eminent domain outside its territorial limits for water, gas, or electric supply purposes or for airports, drainage or sewer purposes if it is authorized to acquire property by eminent domain for the purpose for which the property is to be acquired." But, as TAV emphasizes, this case concerns a municipality's decision to condemn a water system located almost entirely within its borders, "*plus* a small, connected extraterritorial portion for which the Legislature has specifically authorized condemnation" under section

[footnote continued on next page]

PG&E fails to account for this critical distinction, particularly when addressing the district's separation of powers argument. *PG&E* is right that "the question of necessity can be made a judicial question by statute," as in extraterritorial cases. (*PG&E*, *supra*, 95 Cal.App.5th at p. 837.) But that does not answer how courts must resolve such a judicial question. Just because an eminent domain decision is justiciable does not mean courts need not defer to the public entity due to separation-of-powers considerations. (See *ibid.*) After all, section 1245.255 makes the validity of a conclusive RON justiciable "without undermining the historical deference accorded legislative determinations of necessity." (*Dusek*, *supra*, 193 Cal.App.3d at p. 255.)

PG&E nonetheless concluded that the 1992 amendments made public utility takings a judicial question that courts resolve without giving *any* deference to a public entity's findings underlying its eminent domain decision. We disagree.

What the legislative history of the 1992 amendments says *and does not say* provides helpful guidance on what the Legislature intended when enacting the public utility presumption. Assemblymember Speier's statement "commands respect" because she was granted unanimous consent by the Assembly to print it in the Assembly Journal. (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 590; see also *Sierra Club v. California*

1240.125. The core of TAV's decision at issue here (condemning a water system within its borders) is thus a legislative act, while the rest of the decision (condemning the portions of the water system outside its borders) stems from a legislative grant of power (section 1240.125). So, if anything, section 1240.125 reinforces our conclusion that TAV's decision to condemn the water system at issue here is entitled to deference as a predominantly intraterritorial taking coupled with a statutorily authorized extraterritorial taking.

Coastal Commission (2005) 35 Cal.4th 839, 853, fn. 8.) As she explained, the amendments made "a *procedural* change in how, under certain circumstances, the question of necessity and better public use is proven in eminent domain cases." (Italics added.) She explained that, when she presented the legislation to the Assembly, she "stressed . . . that this is a *procedural* change, evidentiary in nature . . . that does not affect basic rights *but only allows introduction of evidence on the subject of the presumption*." (Italics added.)

In *PG&E*, the district argued this statement showed that the amendments only changed the law so that extrinsic evidence (i.e., evidence outside of the AR) was admissible, but the *PG&E* court dismissed the statement as inconsistent with "the plain language of the statute." (*PG&E*, *supra*, 95 Cal.App.5th at p. 837.) The court also found Assembly member Speier's statement about "'basic rights'" was "too vague to understand." (*Ibid.*)

We agree with TAV that this statement "cannot be read in a vacuum." We presume the Legislature knew of the existing case law when enacting legislation. (*Stone Street Capital, LLC v. California State Lottery Com.* (2008) 165 Cal.App.4th 109, 118.) We thus presume that, when enacting the 1992 amendments, the Legislature was aware of the preexisting precedent that courts give great deference to a public entity's eminent domain decision because it is a quasi-legislative act of a coequal branch of government. (See e.g., *Dusek*, *supra*, 193 Cal.App.3d at pp. 258-260.) We also presume that the Legislature knew courts generally do not give deference to extraterritorial eminent

domain actions unless otherwise authorized. (See e.g., *Grabowski*, *supra*, 205 Cal.App.3d at p. 893.)

But the legislative history of the 1992 amendments says *nothing* about this precedent, much less anything that reflects an intent to overrule it. In fact, there is no mention in the legislative history of the extraterritorial statutes, standards, or cases, much less any indication that this authority should apply in public utility takings. We have scoured the legislative history and have found nothing that suggests that, by enacting the 1992 amendments, the Legislature intended to so fundamentally alter the courts' role in reviewing eminent domain decisions concerning public utilities. If the Legislature had intended such a significant departure from decades of well-established case law, we presume it clearly would have said so. (See *County of Los Angeles v. Frisbie* (1942) 19 Cal.2d 634, 644; see also *Presbyterian Camp & Conference Centers, Inc. v. Superior Court* (2021) 12 Cal.5th 493, 502-504.)

But it did not. The Legislative history repeatedly acknowledges the "gross abuse of discretion" standard codified in section 1245.250. Yet, the Legislature did not touch it nor suggest that it should not apply in public utility condemnations after the 1992 amendments. Nor did the Legislature suggest that utility condemnations should be treated the same as extraterritorial takings.

Instead, the legislative history repeatedly states that the only change to the law would be to make the presumptions concerning the public necessity elements (§ 1245.250) and the MNPU element (§ 1240.650) rebuttable instead of conclusive. We

presume the Legislature understood that a conclusive presumption "'"is conclusive because the adverse party against whom it operates is *not permitted* to introduce evidence to contradict or rebut the existence of the presumed fact." [Citation.]'" (*Homestead Savings v. Darmiento* (1991) 230 Cal.App.3d 424, 432, fn. 6.) In fact, this principle is reflected in Assemblymember Speier's statement that the amendments would effect only "a procedural change, evidentiary in nature" that would "only allow[] introduction of evidence on the subject of the presumption." Changing the presumption from a conclusive one that disallows extra-record evidence to a rebuttable one that permits extra-record evidence is fully consistent with the amendments' purpose of "allow[ing] private utility companies to challenge the decision of a public entity to take over the property for public operation and use."

This background gives important context to Assemblymember Speier's statement that the 1992 amendments would not "affect basic rights," which *PG&E* brushed aside as "too vague . . . to understand." Again, we presume the Legislature was aware of then-existing case law holding that a public entity's eminent domain decisions are quasi-legislative acts entitled to great deference. We can thus reasonably presume that this is among the "basic rights" the 1992 amendments were intended *not* to affect. On the other hand, stripping a public entity's takings decisions of all deference certainly would "affect basic rights."

Ignoring this and other aspects of the legislative history, *PG&E* and Liberty focus on the GOPR's statement outlining its support for the 1992 amendments. (*PG&E*, *supra*,

95 Cal.App.5th at p. 836.) They emphasize that the Office "'believes that private property owners should have the right to legally challenge whether it is in the public's best interest to seize their property'" and that then-current law did not allow private utility owners "'to challenge the necessity of a public entity to take their property for the same public use.'" (*Ibid.*)

But, like the rest of the legislative history, nothing in the statement suggests that the GOPR understood the 1992 amendments as overriding the historical deference given to a public entity's quasi-legislative eminent domain decisions. That office instead recognized that a conclusive presumption renders a decision "beyond dispute . . . and evidence to the contrary inadmissible," whereas a rebuttable presumption "may be rebutted or disputed by evidence," and, "if no or insufficient evidence is presented, the presumption stands." The GOPR thus understood that, in this case, the presumption "would favor . . . the public entity" and it was up to the challenger to present sufficient contrary evidence to rebut the presumption. So, if anything, the GOPR's statement supports TAV's argument that the 1992 amendments only changed the law so that extra-record evidence is admissible in public utility takings cases.

In any event, we give the GOPR's statement no weight. It was prepared by three staff members of the GOPR, an arm of the executive branch, and it recommended that the governor sign the legislation *after* it had already passed in the Legislature. We "do not infer legislative intent from a statement made by a nonlegislator *after* passage of the legislation." (*City of Hesperia v. Lake Arrowhead Community Services District* (2019)

37 Cal.App.5th 734, 758.) This is because statements made by executive branch staff on already-passed legislation "cannot reflect the intent of the Legislature." (*Joyce v. Ford Motor Co.* (2011) 198 Cal.App.4th 1478, 1492-1493.) *PG&E* and Liberty ignore this crucial principle when evaluating the legislative history.

PG&E also erred by finding the district's proposed standard of review, which is the same as TAV's, "illogical and unworkable." Like TAV, the district in *PG&E* argued that courts should review a public entity's decision to take a public utility for a gross abuse of discretion, which can be established by showing the decision lacks substantial evidence. (*PG&E*, *supra*, 95 Cal.App.5th at p. 834.) The *PG&E* court found this incompatible with the rebuttable presumption and a preponderance-of-the-evidence standard. (*Ibid.*) The court reasoned that the presumption and preponderance standard require the public utility owner challenging an eminent domain decision to prove that the private entity did not satisfy the four statutory prerequisites (public necessity elements and MNPU element) based on all of the evidence. (*Ibid.*) Substantial evidence review, in contrast, requires the reviewing court to determine whether any evidence supports the public entity's decision. (*Ibid.*)

This conflates the burden of proof with the trial court's standard of review. As explained above, the rebuttable presumption in section 1245.250, subdivision (b) (concerning public utility takings) imposes a burden of proof but says nothing about the judicial standards of review, such as a gross abuse of discretion or substantial evidence. And although the legislative history is replete with references to the burden of proof,

there is no mention of what the appropriate standard of review is for public utility takings.

Case law made clear before the 1992 amendments that courts review intraterritorial takings, whatever their nature, for a gross abuse of discretion. Yet, there is no indication in the amendments' legislative history that the Legislature intended to supplant that standard of review and replace it with a non-deferential standard of review that allows courts to independently review a public entity's quasi-legislative act of deciding to take a private utility. The Legislature "'would [not] have silently, or at best obscurely, decided so important and controversial a public policy matter and created a significant departure from the existing law." (*In re Christian S.* (1994) 7 Cal.4th 768, 782.) The Legislature does not "'hide elephants in mouseholes.'" (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1171.)

TAV persuasively proposes an approach that, in our view, better harmonizes the statutory language, legislative history, and relevant case law: "In utility-condemnation cases, the [public entity's] findings are presumed procedurally valid and presumed supported by substantial evidence, and a private utility must convince the trial court, using evidence outside the administrative record if necessary, that the resolution is procedurally invalid or that the [public entity's] findings are not supported by substantial evidence." This approach is consistent with the statutory language, comports with the longstanding deference courts give to quasi-legislative eminent domain decisions, and accounts for the Legislature's intent in enacting the 1992 amendments only to make a

"procedural change" to allow the admission of extra-record evidence in public utility takings cases.

For all of these reasons, we respectfully disagree with *PG&E* and decline to follow it here. In turn, we conclude the trial court applied the wrong standard of review.

C. *The Trial Court Erred by Refusing to Admit the AR, Failing to Use the RON as a Starting Point in its Analysis, and Improperly Applying the Rebuttable Presumption*

TAV argues that, regardless of what standard of review applies, the trial court made a series of related errors in applying the rebuttable presumption to the evidence that the court deemed relevant and admissible. TAV acknowledges that the trial court correctly recognized that section 1245.250, subdivision (b) imposes a rebuttable presumption that the RON's findings that the public necessity elements were met are true. But then, according to TAV, the trial court erred by (1) deeming the AR irrelevant, (2) not starting its analysis with the RON's findings and objectives and then requiring Liberty to rebut them, (3) allowing Liberty to present whatever evidence it wanted to meet its burden, and (4) failing to apply the rebuttable presumption altogether. We largely agree in all respects.[7]

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[7] We reject Liberty's contention that TAV forfeited its argument that the trial court failed to start with the RON's findings and objectives. This argument concerns the proper legal standards, which was a large focus of the parties' dispute below. We also reject Liberty's contention that TAV invited any error with respect to the trial court's use of post-RON evidence because TAV relied on post-RON evidence as well. TAV consistently argued that post-RON evidence was not relevant but, after the trial court ruled otherwise, TAV made "the best of a bad situation for which [it] was not responsible." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 213.)

The parties strenuously disputed before trial whether the AR should be admitted and considered by the trial court. Liberty argued the AR "has no place in th[e] proceeding" under the 1992 amendments. The trial court agreed and ruled that the AR was irrelevant and inadmissible, finding that "we don't need it."

The trial court erred. Regardless of which standard of review applied, section 1245.250, subdivision (b) imposed a rebuttable presumption in TAV's favor that TAV had satisfied the public necessity elements by adopting a RON which found that TAV's taking the water system would satisfy the public necessity elements. To successfully challenge TAV's eminent domain action, Liberty had to rebut those presumptively correct findings. Liberty necessarily could not do so unless the RON and its underlying findings/objectives in the AR were considered at the outset. Indeed, Liberty does not cite, nor can we find, any case challenging an administrative decision where the AR was properly found irrelevant and thus inadmissible.

The court's refusal to admit the AR was harmless, however, because TAV was allowed to admit all of the evidence from the AR that it wanted. Notably, TAV does not identify any evidence in the AR that the trial court did not admit and consider.

However, the trial court also erred for a different but related reason. The trial court found the AR irrelevant in large part because it ruled pre-trial that "[i]t [wa]s up to Liberty to decide what evidence it believes is relevant to meeting its burden of proof." Liberty thus recognized in its pre-trial briefing that the court ruled that "Liberty was free to decide what evidence to produce."

[75]

Even when courts need not defer to an administrative decision, they still "must afford a strong presumption of correctness concerning the administrative findings" and must find that the party challenging the administrative decision has proved findings "are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817, 824.) In this context, a court exercising its independent judgment when reviewing an administrative decision—like the trial court incorrectly did here—still must "begin its review with a presumption of the correctness of administrative findings, and then, after affording the respect due to these findings, exercise independent judgment in making its own findings." (*Id.* at p. 819.) In other words, a presumption that the administrative findings are correct, like the rebuttable presumption at issue here, "'provides the trial court with a starting point for review.'" (*San Diego Unified School Dist. v. Commission on Professional Competence* (2013) 214 Cal.App.4th 1120, 1141.)

"'[I]ndependent judgment' review" "'does not mean the preliminary work performed by the [agency] in sifting the evidence and in making its findings is wasted effort . . . . [I]n weighing the evidence the courts can and should be assisted by the findings of the board.'" (*Fukuda v. City of Angels*, *supra*, 20 Cal.4th at p. 812.) The trial court's SOD completely failed to apply these principles, irrespective of which standard of review applies. Liberty does not and cannot dispute that the SOD effectively ignores all of the RON's findings, objectives, and supporting evidence, and instead relies exclusively on Liberty's extra-record evidence. In doing so, the trial court rendered the rebuttable presumption in section 1245.250, subdivision (b) meaningless and "infected" the SOD's

findings with "fundamental error." (*Fukuda v. City of Angels*, *supra*, at p. 824.) Liberty ignored this issue entirely at oral argument in this court.

D. *The Trial Court Erroneously Relied on Post-RON Evidence*

The trial court's application of the wrong standard of review and its erroneous disregard of the rebuttable presumption was compounded by the nature of Liberty's evidence, which focused on Liberty's post-RON management of the water system. There are several problems with this approach.

First, when a public entity wants to condemn property, it must give the property owner notice and an opportunity to be heard. (§ 1245.235, subds. (a), (c).) And when a property owner-defendant answers an eminent domain complaint, the answer must "state the specific ground upon which the objection is taken and, if the objection is taken by answer, the specific facts upon which the objection is based." (§ 1250.350.) These statutes are consistent with the principle that public entities "are entitled to know at the outset whether the construction of a project will be placed at risk by a potentially meritorious challenge to the 'right to take.'" (*Grabowski*, *supra*, 205 Cal.App.3d at p. 894, fn. 5.) Liberty's answer necessarily could not state "the specific facts" underlying its objections insofar as they were based on their management of the water system in the years after TAV adopted the RON. Nor could Liberty's answer fairly advise TAV at the outset of the post-RON facts and developments that would form the basis of Liberty's case. In fact, Liberty's operative amended answer focused only on challenges to the RON with the TAV's resolution. Courts should not allow a party challenging an eminent

domain decision to base its defense exclusively on post-RON facts and developments that the party did not plead in its answer.

Second, the RON "is the fundamental predicate to the entire condemnation process." (*City of Stockton v. Marina Towers LLC* (2009) 171 Cal.App.4th 93, 107 (*Marina Towers*).) A RON is intended "to ensure that the public entity makes a careful and conscientious decision about the need for the project and the need for the property *before* it condemns private property." (*Id.* at p. 114.) As the trial court recognized before trial, *Marina Towers* shows that a "proposed project is considered in terms of that set forth in the [RON] because it is in that context findings of necessity are made and objections to the right to take are evaluated." (Italics added.) A RON would be meaningless if it "could be validated by post hoc events." (*Marina Towers*, *supra*, at p. 114.) A RON would likewise be meaningless (and a complete waste of public resources) if it could be invalidated with exclusively post-RON evidence without any consideration of its findings, objectives, and supporting evidence, as is the case here. No authority supports that approach.

Third, Liberty does not cite, nor can we find, any authority that supports the trial court's decision to rely wholly on post-RON evidence to find that Liberty met its burden. We are unaware of *any* case involving a mandamus action challenging an administrative decision, eminent domain or otherwise, holding that a party may successfully challenge the decision by relying entirely on events that arose after the decision was made. In the eminent domain context, in every case we can locate—whether involving intraterritorial

takings with conclusive presumptions or extraterritorial takings where no deference is due—courts focused on the circumstances existing when the public entity adopted its RON. (See e.g., *Grabowski*, *supra*, 205 Cal.App.3d at pp. 890-891, 898-899; *Wight*, *supra*, 221 Cal.App.2d at pp. 758-764; *Keck*, *supra*, 14 Cal.App.3d at pp. 922-923, 926-927; *Marina Towers*, *supra*, 171 Cal.App.4th at pp. 107-108; *Dusek*, *supra*, 193 Cal.App.3d at pp. 258-260; *Izant*, *supra*, 37 Cal.App.4th at pp. 148-149; *Redevelopment Agency v. Rados Bros.*, *supra*, 95 Cal.App.4th at pp. 316-317; *City of Saratoga v. Hinz* (2004) 115 Cal.App.4th 1202, 1221-1227.) Notably, Liberty did not address this issue at oral argument in this court.

E. *The Trial Court Had the Authority to Remand to TAV*

TAV argued in its post-trial briefs that, if post-RON evidence is relevant, then the trial court should remand the matter to TAV so that it could consider that evidence in the first instance. The trial court declined, finding "nothing in the Eminent Domain Law that allows for such a remand."

But the trial court has the "inherent power, in proper circumstances, to remand to the agency for further proceedings prior to the entry of a final judgment." (*Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 527, 533-535.) We see no reason why this principle should not apply here. As a result, we conclude the trial court incorrectly found that it did not have the discretion to remand the case to TAV to consider Liberty's post-RON evidence in the first instance.

Liberty argues the trial court did not abuse its discretion in declining to remand the matter. But the trial court thought it had no such discretion when it did, and the "failure to exercise discretion is an abuse of discretion." (*Kim v. Euromotors West The Auto Gallery* (2007) 149 Cal.App.4th 170, 176.) This is another issue that Liberty did not address at oral argument. We need not decide whether the error was prejudicial, however, because we reverse and remand for other reasons. On remand, the trial court may reconsider whether to remand the matter to TAV for further proceedings.

F. *Prejudice*

For the reasons outlined above, the trial court erred in three principal respects: (1) it did not apply the gross abuse of discretion standard; (2) it did not properly apply the rebuttable presumption; and (3) it erroneously relied solely on post-RON evidence to find that Liberty met its burden. Taken together, these errors were prejudicial because it is reasonably probable that TAV would have obtained a better result had the errors not occurred. (See *Fukuda v. City of Angels*, *supra*, 20 Cal.4th at p. 824; *Mercury Ins. Co. v. Lara* (2019) 35 Cal.App.5th 82, 96.) We therefore reverse the judgment and the order awarding Liberty attorney's fees.

TAV asks us to reverse and remand with directions for the trial court to enter an order allowing the taking or, alternatively, with instructions to remand the matter to TAV. TAV argues a third option is to remand for a new trial. We believe the better approach is to remand to the trial court to exercise its discretion on how best to proceed in a manner consistent with this opinion.

[80]

IV.

DISPOSITION

The judgment and order awarding Liberty attorney's fees are reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion. On remand, the trial court shall exercise its discretion and determine whether to (1) allow TAV to take the water system, (2) remand the matter to TAV for further administrative proceedings, or (3) hold a new trial and apply the appropriate burdens of proof and standard of review. TAV may recover its costs on appeal.

CERTIFIED FOR PUBLICATION

CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

FIELDS
J.

FEBRUARY 13, 2025
ORDER MODIFYING OPINION AND
DENYING PETITION FOR REHEARING
[NO CHANGE IN JUDGMENT]

[82]

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

TOWN OF APPLE VALLEY, Plaintiff and Appellant, v. APPLE VALLEY RANCHOS WATER et al., Defendants and Respondents.	E078348 (Super. Ct. No. CIVDS1600180) **ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING** [NO CHANGE IN JUDGMENT]

The petition for rehearing is denied. The opinion filed in this matter on January 15, 2025, is modified as follows:

1. On page 2 the third paragraph is modified to delete the word "entirely" and replace it with "in large part" so that the sentence reads as follows:

We reverse for two main reasons: (1) the trial court applied the wrong standard of proof and, in turn, failed to give the appropriate deference to TAV's decision and underlying findings, and (2) the trial court improperly based its decision on post-RON facts and event, namely, Liberty's conduct after TAV adopted the RONs. The matter is remanded for further proceedings consistent with this opinion.

[83]

2. On page 6, section III Discussion, after (2) the sentence is modified to read as follows:

(2) the court erroneously refused to admit and consider the AR and the RONs' findings/objectives and TAV's reasons for adopting them and, in so doing, misapplied the rebuttable presumption;

3. On page 12, in the citation after the second full sentence of the first paragraph, change "§ 1245.250, subd. (c)" to "§ 1245.250, subdivision (b)."

4. On page 22, in the last full paragraph, delete "(*ibid.*)"

5. On page 34, the second paragraph third sentence is modified to read as follows:

Liberty necessarily could not do so unless the RON and its underlying findings/objectives in the AR and TAV's reasons for adopting the RON were considered at the outset.

6. On pages 35 and continuing on page 36, the last paragraph is modified to read as follows:

"'[I]ndependent judgment' review" "'does not mean the preliminary work performed by the [agency] in sifting the evidence and in making its findings is wasted effort . . . . [I]n weighing the evidence the courts can and should be assisted by the findings of the [agency].'" (*Fukuda v. City of Angels*, *supra*, 20 Cal.4th at p. 812.) The trial court's SOD completely failed to apply these principles, irrespective of which standard of review applies. Liberty does not and cannot dispute that the SOD does not mention the RONs' findings and objectives and ignores a number of TAV's reasons for adopting the RONs while disregarding a significant amount of supporting evidence and

focusing instead on Liberty's extra-record, post-RON evidence.[8] In doing so, the trial court rendered the rebuttable presumption in section 1245.250, subdivision (b) meaningless and "infected" the SOD's findings with "fundamental error." (*Fukuda v. City of Angels*, *supra*, at p. 824.) Liberty ignored this issue entirely at oral argument in this court.

7. On page 36, the last paragraph footnote 8 is added to read as follows:

[8] For example, the SOD does not acknowledge that TAV adopted the RONs because of its concerns with Carlyle's management of the water system and Carlyle's threats to sue TAV over its plans to recycle water. Nor does the SOD recognize that TAV wanted to acquire the water system in order to improve fire prevention and land use planning, and to integrate the system into its sewer system to promote recycled water.

8. On page 37, the second-to-last last sentence is modified to read as follows:

A RON would likewise be meaningless (and a complete waste of public resources) if it could be invalidated with exclusively post-RON evidence.

9. On page 38, first full paragraph, the first sentence, delete the word "wholly."

10. On page 41, the last sentence of the Disposition is modified to read as follows:

Liberty may recover its costs on appeal. (See § 1268.720; *Eastern Municipal Water District v. Superior Court* (2007) 157 Cal.App.4th 1245, 1256.)

Except for these modifications, the opinion remains unchanged. This modification does not effect a change in the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

FIELDS
J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On February 21, 2025, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 21, 2025, at Burbank, California.

Kathy Turner

Kathy Turner

SERVICE LIST
Town of Apple Valley v. Apple Valley Ranchos Water et al.
SBCSC Case No.: CIVDS1600180
COA 4/2 Case No.: E078348
CASCT Case No.: S_____

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