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California Court of Appeal Rejects Citizens Group Nuisance Case Regarding Sea Lion Stench

The Fourth Appellate District of the California Court of Appeal concluded that the City of San Diego (City) could not be held liable for public nuisance associated with the stench created by sea lions because the City did not create the nuisance. *Citizens for Odor Nuisance Abatement v. City of San Diego* 8 Cal. App. 5th 350 (Cal. Ct. App. 2017). In 2013, the Citizens for Odor Nuisance Abatement (CONA), a nonprofit citizen's group sued the City of San Diego for "foul, noxious and sickening odors emanating" from the excrement of sea lions on the rocks adjacent to a nearby cove. CONA alleged that the City caused the odors by constructing a fence that denied human access to the rocks adjacent to the cove, thereby encouraging sea lion habitation. CONA brought their causes of action on a public nuisance theory.

In January 2015, the City moved for summary judgment based on the fact that there was no triable issue as to: 1) whether the City owed a duty to control wild animals, 2) whether the City's conduct was a substantial factor in causing the alleged nuisance, 3) whether the City was immune under Government Code section 831.2, 4) whether the nuisance claim was barred by Civil Code section 3482, and 5) whether the seriousness of the harm outweighed the social utility of the condition. In March 2015, the court ruled the City did not, as a matter of law, have a duty to control an alleged nuisance caused by wild animals and found no legitimate factual dispute as to whether the City's actions caused the alleged nuisance.

As the complaint alleged that the odors constituted a public nuisance, the court held that in order to prove causation for public nuisance, the critical question is whether *the defendant created or assisted in the creation of the nuisance*. Causation may consist either of an act or a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the nuisance. The court believed that the City offered competent evidence that the fence was not a substantial factor in the rapid sea lion population growth or resulting waste odors at the subject cove.

The court concluded that the City's proffered evidence that the fence had been in place for decades long before large numbers of sea lions began congregating in the subject cove shifted the burden to CONA to provide evidence of causation in order to survive summary judgment. The court found CONA's evidence inadequate, noting that, at best, it merely established that "perhaps between 15 and 30 years ago, there

was no fence and no odor.” The court ruled that CONA failed to submit evidence that the fence *created* the odor.

As such, it is best to remember that when asserting that a public nuisance has been created, it is not whether the defendant owns, possesses or controls the property, nor whether the defendant is in a position to abate the nuisance, but whether the defendant created or assisted in creating the public nuisance that is key.

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