

**CERTIFIED
TRANSCRIPT**

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

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PUBLIC.RESOURCE.ORG., INC.,))	
)	No. 34-2021-80003612
Petitioner,))	
)	
vs.))	Dept. 27
)	
CALIFORNIA OFFICE OF))	
ADMINISTRATIVE LAW, and the))	REPORTER'S TRANSCRIPT OF
CALIFORNIA BUILDING))	HEARING ON MOTION TO
STANDARDS COMMISSION,))	INTERVENE
)	
Respondents.))	

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FRIDAY, AUGUST 27, 2021

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The above-entitled matter came on regularly at the date above set forth before the HON. STEVEN M. GEVERCER, Judge of the Superior Court of the State of California, County of Sacramento.

Reported by:

Lisa A. Busath, RPR, CSR No. 10751

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FRIDAY, AUGUST 27, 2021

MORNING SESSION

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Proceedings in the matter of
PUBLIC.RESOURCE.ORG., INC. versus CALIFORNIA OFFICE OF
ADMINISTRATIVE LAW and CALIFORNIA BUILDING STANDARDS
COMMISSION, the Respondents, Case Number
34-2021-80003612, came on regularly before the Honorable
STEVEN M. GEVERCER, Judge of the Sacramento Superior
Court, County of Sacramento, State of California,
sitting in Department 27.

The Petitioner was represented by
RYAN O'HOLLAREN, MATTHEW D. CAPLAN and JOSEPH D. MORNIN,
Attorneys at Law.

The Respondents, CALIFORNIA OFFICE OF
ADMINISTRATIVE LAW and CALIFORNIA BUILDING STANDARDS
COMMISSION, were represented by KEITH R. WURSTER, Deputy
Attorney General.

The Intervenor, NATIONAL FIRE PROTECTION
ASSOCIATION, INC., was represented by BRYAN H.
HECKENLIVELY, Attorney at Law.

The Intervenor, INTERNATIONAL CODE COUNCIL,
INC., was represented by J. KEVIN FEE and LOUIS LEE,
Attorneys at Law.

The following proceedings were then had, to
wit:

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THE COURT: All right. The court is calling

1 case number 34-2021-80003612. This is
2 Public.Resource.Org., Inc. versus California Office of
3 Administrative Law and the California Building Standards
4 Commission.

5 The matter is here is here for a motion to
6 intervene filed by NFPA, and that's the National Fire
7 Protection Association, and the International Code
8 Council, and also for pro hac vice admission.

9 So first of all, let's have counsel identify
10 themselves for the record. Let's start with petitioner,
11 Public.Resource.Org.

12 Hold on. Can't hear you. Try it again. No.

13 MR. CAPLAN: Good morning, your Honor. This is
14 Matthew Caplan while Mr. O'Hollaren is working out the
15 technical details.

16 He will be arguing for us today. But also
17 appearing are myself and Joe Mornin.

18 THE COURT: All right. What was your name?
19 I'm sorry. I missed your name.

20 MR. CAPLAN: Matthew Caplan.

21 THE COURT: All right. Matthew Caplan. Thank
22 you.

23 And, Mr. O'Hollaren, were you able to get on?
24 No, not yet. Okay. We'll come back to you.

25 And let's have counsel for respondent.

26 MR. WURSTER: Good morning, you Honor. This is
27 Keith Wurster appearing on behalf of the respondents,
28 California Office of Administrative Law and California

1 Building Standards Commission.

2 THE COURT: All right. You're representing
3 both?

4 MR. WURSTER: That is correct, your Honor.

5 THE COURT: All right. Thank you. And let's
6 have counsel for our moving parties, National Fire
7 Protection Association.

8 MR. HECKENLIVELY: Good morning, your Honor.
9 This is Bryan Heckenlively with Munger, Tolles & Olson
10 for National Fire Protection Association.

11 THE COURT: Thank you. And for ICC?

12 MR. LEE: Good morning, your Honor. This is
13 Louis Lee from Morgan, Lewis & Bockius for ICC.

14 THE COURT: All right. And?

15 MR. FEE: Your Honor, we also have Kevin Fee on
16 behalf of ICC.

17 THE COURT: All right. Let's take care of the
18 pro hac vice request first.

19 Does anybody wish to be heard on that? I'm
20 going to deem it submitted. I'm granting the request
21 for pro hac vice status.

22 In this matter the court has issued a tentative
23 ruling with respect to intervention by our moving
24 parties.

25 And let me see if we can get Mr. O'Hollaren on
26 before we go any further.

27 MR. O'HOLLAREN: Good morning, your Honor. Can
28 you hear me now?

1 THE COURT: Much better. Thank you.

2 The court has issued a tentative ruling. The
3 tentative ruling is to grant intervention as of right,
4 and my understanding is that petitioner has asked for a
5 hearing. Correct?

6 MR. O'HOLLAREN: That's correct, your Honor.

7 THE COURT: All right. And, Mr. O'Hollaren,
8 you can be heard.

9 MR. O'HOLLAREN: Thank you, your Honor. And
10 apologies for the technical difficulties. We haven't
11 used this camera before so we're still figuring it out.

12 We'd like to discuss two conclusions from the
13 court's tentative order. Starting with a fundamental
14 principle of the CPRA, and that is that the purpose of a
15 request has no bearing upon the propriety of that
16 request. Yet movants' entire motion here is predicated
17 upon what PRO intends to do with the CCR. They've
18 written this into their briefs dozens of times, but
19 California law on this question is crystal clear, and
20 it's written into the statute at Section 6257.5.

21 Now, in our opposition to the motion, we
22 highlighted this.

23 THE COURT: That it's not relevant to the PRA,
24 right?

25 MR. O'HOLLAREN: Correct.

26 THE COURT: Okay. But is it relevant to
27 intervention? Isn't it relevant here that we have one
28 party that wants to disseminate information and another

1 party has a claim to it? That seems to be the
2 distinction that -- it is a distinction we're making
3 here.

4 We fully appreciate the motive may be an issue
5 that shouldn't be considered on the merits, but with
6 respect to intervention, we have a little bit different
7 viewpoint on that.

8 MR. O'HOLLAREN: Yeah, your Honor, in their
9 brief they make this distinction and they say, yes, the
10 agencies can't consider the motive or the purpose of the
11 request, but we are as private entities can. And the
12 tentative adopts that logic. But the statute doesn't
13 say that. It is a directive to the court to ignore the
14 purpose of the request.

15 And so to answer your question, yes, it does go
16 to the merits, but the purpose of the request doesn't
17 matter at the merits. So there is no reason to allow
18 intervention now based on an argument that courts have
19 unanimously said is irrelevant to the propriety of the
20 request, just so that movants can come back in a few
21 months at the merits stage and again make an irrelevant
22 argument.

23 THE COURT: Okay.

24 MR. O'HOLLAREN: So we think that California
25 case law on this, and we've cited the cases in our
26 brief, is unanimous. And they have not hidden the ball
27 in any way, shape or form.

28 With the L.A. Unified School District's case,

1 the Coronado Police Officers Association's case, the
2 Frederick's case, they've all held that the purpose of a
3 request is irrelevant, but the entire motion --

4 THE COURT: These are intervention cases?

5 MR. O'HOLLAREN: No, they're not. But again,
6 if the entire purpose of their intervention is to oppose
7 disclosure of the records based upon the purpose for
8 which the requester is requesting them, then their
9 interest is vacuous as a matter of law. To allow them
10 to intervene to just come back and make an irrelevant
11 argument, it shows that their interest has no bearing
12 upon that proceeding. And this proceeding is all that
13 is at issue.

14 So we think that just as a basic matter of
15 logic, they haven't established the requisite interest
16 based upon the CPRA to be allowed to intervene here.

17 And the second piece that we would like to talk
18 about, and of course take any questions from the court
19 on this, is the notion of copyright. Movants do not
20 hold copyrights in the CCR. And this is based on the
21 exact same authorities that the court cited in its
22 tentative ruling.

23 Now, the court observed the ASTM case, and it
24 was right to say that the consequences of incorporation
25 by reference vary by jurisdiction. And they do. They
26 definitely do. That's true. And the court was also
27 right to say that the court in that case could not
28 conclude the nature of the incorporation based on the

1 record.

2 So there's a spectrum. Everything from like
3 reference materials, labeling requirements, which the
4 court highlights, all the way to legally binding laws.
5 That's the spectrum.

6 But here, in California, Title 1, Section 20
7 which is the exact same section that the court cites in
8 its tentative ruling, resolves this question. There's
9 no ambiguity in California. There may be ambiguity in
10 other states, in all 49 other jurisdictions it may be
11 ambiguous as to what legal effect regulations have, but
12 not in this state.

13 So the court cites to Section 20 of Title 1 at
14 subsection (c). But if you just scroll down to
15 subsection (e) of that exact same section, it reads,
16 "Where regulation which incorporates a document by
17 reference is approved by OAL and filed with the
18 Secretary of State, the document so incorporated shall
19 be deemed to be a regulation subject to all provisions
20 of the APA."

21 "Shall be deemed to be a regulation subject to
22 all provisions of the APA."

23 So yeah, it can be ambiguous in other
24 jurisdictions, and the court highlighted that, but not
25 in California. We have a very clearly written rule
26 here. Incorporated materials become regulations. And
27 that's all we're asking for.

28 So they cannot sit here and say that it's

1 unclear. And we believe the tentative is inaccurate in
2 saying that it is unclear. California law answers the
3 question for the court. We don't need a developed
4 record to look through and find out what the legal
5 effect of incorporation by reference is in this state.
6 It's unambiguous.

7 I'll take any questions on that if you have
8 them.

9 THE COURT: No.

10 MR. O'HOLLAREN: Okay. And so we think just
11 based on these two premises and conclusions of law that
12 were in the tentative order, we think that the movants
13 have not demonstrated an adequate interest in this
14 proceeding to intervene as of right, nor an adequate
15 interest to intervene under the permissive statute
16 either.

17 THE COURT: I do have a question.

18 MR. O'HOLLAREN: Go ahead.

19 THE COURT: Title 1, Section 20, subdivision
20 (c)?

21 MR. O'HOLLAREN: Subsection (e).

22 THE COURT: Where is that referred to in your
23 brief?

24 MR. O'HOLLAREN: It's referred to in movants'
25 brief and it's referred to in the tentative order. It
26 was an argument brought up in the reply.

27 THE COURT: Okay. It's not in your brief?

28 MR. O'HOLLAREN: No, it's not in our brief.

1 THE COURT: Okay. Because I don't remember it
2 being there. Okay.

3 All right. I don't have any questions. I
4 would like to hear from the movants.

5 MR. HECKENLIVELY: Thank you, your Honor.

6 This is Bryan Heckenlively for NFPA. I'll try
7 and speak on behalf of both movants. Of course Mr. Fee
8 is free to jump in on behalf of ICC if the court has
9 particular questions for him. I'm sure he will.

10 In our view, the tentative gets it right, your
11 Honor. The arguments that petitioners make in their
12 brief and Mr. O'Hollaren is making today go to the
13 merits of the petition.

14 In fact, they underscore why it's important for
15 ICC and NFPA as copyright holders to have a seat at the
16 table.

17 There are complex copyright law issues, as all
18 of the authorities, in particular ASTM, the D.C. case,
19 and the Veeck case from the Fifth Circuit that the court
20 relies on in the tentative, both of those courts
21 recognize that these are difficult issues, both in terms
22 of the constitutional protection and in terms of the
23 fair use defense that the ASCM court referred to. That
24 it's really a work-by-work analysis in terms of the
25 copyright protection and the fair use defense for each
26 particular incorporated by reference document, each
27 particular work.

28 THE COURT: Do you agree that motive is the

1 only issue you're going to be raising at the hearing on
2 the merits?

3 MR. HECKENLIVELY: If motive is the only issue?
4 No, I don't agree with that at all, your Honor. In
5 fact, we alluded to that in our papers, that the request
6 itself would require the agencies to create copies of
7 the records in order to turn them over to the
8 requesters. That's what the agency said in their
9 response letters, is we're not going to do this because
10 the act of giving this to you would violate our
11 contractual obligations and the copyright and the terms
12 of our license.

13 So no, I don't believe that's the only issue
14 we're going to be raising. But I certainly agree with
15 the court that it does underscore the fact that we have
16 an interest in this proceeding and how the issues will
17 be addressed on the merits.

18 Unless the court has further questions, I'll
19 leave it at that.

20 THE COURT: Mr. Fee, since we granted your pro
21 hac vice motion, would you like to be heard?

22 MR. FEE: Well, I appreciate that, your Honor.
23 I really don't have anything else to add to
24 Mr. Heckenlively's presentation right now. Unless your
25 court has any questions, I'll be happy to address them,
26 subsequent to our petition for motion to intervene is
27 granted.

28 THE COURT: All right. And, Mr. O'Hollaren,

1 would you like the last word?

2 MR. O'HOLLAREN: Sure.

3 As Mr. Heckenlively said, it's their position
4 that there are a lot of copyright issues to sort out
5 through this case, but again, we must emphasize that
6 copyright law and their ability to vindicate their
7 rights under copyright law is not implicated in this
8 proceeding whatsoever.

9 All PRO is seeking is a copy of the California
10 Code of Regulations, which we believe very squarely
11 falls within the definition of a public record, which
12 under the CPRA, the agencies at issue are required to
13 disclose. And --

14 THE COURT: You may be right.

15 MR. O'HOLLAREN: -- and there is --

16 THE COURT: I'm inclined to hear that on the
17 merits.

18 MR. O'HOLLAREN: Correct. But here we think
19 that the fact that their motivation for intervention is
20 based upon the purpose of the request and that they are
21 trying to muddy the waters in saying that this is a
22 work-by-work analysis is entirely incompatible with the
23 law in California.

24 And the section they cite in their opening
25 brief, it says that incorporated materials are the law
26 of the state. And you understand under the recent
27 Georgia decision from the United States Supreme Court,
28 which is cited in the tentative, no one can own the law.

14

1 So in other jurisdictions it very well may be
2 ambiguous what the legal effect of incorporation is, but
3 not in this state.

4 THE COURT: All right. Anything further?

5 MR. HECKENLIVELY: No, your Honor.

6 THE COURT: All right. I'm going to take
7 another look at Title 1, Section 20. It wasn't in the
8 opposition brief, and Mr. O'Hollaren says it's more
9 important than I thought. I will take another look at
10 that.

11 I'm inclined, based upon what I've heard and
12 based upon the briefing -- which I want to complement
13 the briefing, the writers, they were good reads, I'm
14 inclined to stick with the tentative ruling.

15 And the reason is, to the court, this is
16 comparable to a reverse PRA action, and the moving
17 parties have shown a sufficient interest for purposes of
18 intervention. And I stress that: For purposes of
19 intervention. They show that there's a -- they claim an
20 interest. And they appear to be so situated that the
21 disposition of the action may impair or impede the
22 ability to protect that interest.

23 That's all the court would be saying by
24 granting intervention, but I'll take another look at it
25 before I give you a final order. You will -- I'll make
26 my decision by later today.

27 Thank you very much for your arguments and have
28 a good weekend.

1 MR. HECKENLIVELY: Thank you, your Honor.

2 MR. O'HOLLAREN: Thank you, your Honor.

3 MR. WURSTER: Thank you, your Honor.

4 THE COURT: Thank you.

5 (Whereupon the proceedings concluded for
6 the day.)

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CERTIFICATE OF CERTIFIED SHORTHAND REPORTER

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, LISA A. BUSATH, hereby certify that I am an Official Certified Shorthand Reporter, and that at the times and places shown, I recorded verbatim in shorthand writing all the proceedings in the following described action completely and correctly, to the best of my ability:

Court: Superior Court of California,
County of Sacramento.
Judge: HON. STEVEN M. GEVERCER,
Department Number 27.
Case: PUBLIC.RESOURCE.ORG., INC., Petitioner,
vs. CALIFORNIA OFFICE OF ADMINISTRATIVE
LAW and the CALIFORNIA BUILDING STANDARDS
COMMISSION, Respondents,
Case Number 34-2021-80003612.
Date: FRIDAY, AUGUST 27, 2021.

I further certify that my said shorthand notes have been transcribed into typewriting, and that the foregoing pages 1 to 16, inclusive, constitute an accurate and complete transcript of all of my shorthand writing for the dates and matter specified.

I further certify that I have complied with CCP 237(a)(2) in that all personal juror identifying information have been redacted, if applicable.

Dated: August 27, 2021.

Lisa A. Busath

LISA A. BUSATH, CSR NO. 10751, RPR

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