

SUPREME COURT OF THE STATE OF CALIFORNIA

TOWN OF APPLE VALLEY,

Plaintiff and Appellant,

vs.

**APPLE VALLEY RANCHOS
WATER, *ET AL.*;**

Defendants and Respondents,

Case No. S289391

Fourth Appellate District, Div. 2
(Appeals Court Case No. E078348)

San Bernardino County Superior Court
(Case No. CIVDS1600180)

**APPLICATION TO FILE
AMICI CURIAE BRIEF**

AMICI CURIAE BRIEF OF ASSOCIATION OF
CALIFORNIA WATER AGENCIES; LEAGUE OF
CALIFORNIA CITIES; CALIFORNIA
MUNICIPAL UTILITY ASSOCIATION;
CALIFORNIA SPECIAL DISTRICTS
ASSOCIATION; SOUTH SAN JOAQUIN
IRRIGATION DISTRICT IN SUPPORT OF TOWN
OF APPLE VALLEY

Gerry Houlihan (SBN 214254)
Matteoni, O’Laughlin & Hechtman
848 The Alameda
San Jose, CA 95126
Tel: (408) 293-4300
Fax: (408) 293-4004
Email: gerry@matteoni.com

Douglas Evertz (SBN 123066)
Murphy & Evertz LLP
650 Town Center Dr, Suite 550
Costa Mesa, CA 92626
Tel: (714) 277-1700
Fax: (714) 277-1777
Email: evertz@murphyevertz.com

Attorneys for Amici

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	4
I. INTRODUCTION AND SUMMARY OF ARGUMENT.....	12
II. ARGUMENT.....	13
A. Proper Resolution of this Issue Has Important Implications for Public Entities	13
B. Has a Rebuttable Presumption Ever Implicitly Modified Substantive Law as much as Senate Bill 1757?.....	16
C. Quasi-Legislative Actions are Not Subject to Independent Judgment Review.....	17
1. Necessity for a Taking and the Decision to Condemn Is a Discretionary, Political Undertaking.....	17
2. Legislative Decision Making is Entitled to Deferential Review.....	18
3. The Decision to Condemn and Adopt a Resolution of Necessity is an Inherently Legislative Act.	19
D. <i>PG&E's</i> Interpretation of the Limited Significance of the Resolution of Necessity in Utility Takings is Illogical.....	22
E. <i>PG&E's</i> Conclusion that a Rebuttable Presumption makes Quasi-Legislative actions Justiciable is Unsupported.	23
F. The Trial Court's Standard of Review is Not Altered by a Change in the Evidentiary Burden.....	24
G. Justiciable Quasi-Legislative Decisions are Still Subject to the Separation of Powers Doctrine.	25
H. The Substantial Evidence Standard is Compatible with the Rebuttable Presumption.....	26

I. Considering Extrinsic Evidence is Not Unworkable with the Gross Abuse of Discretion Standard.....	29
J. <i>TAV's</i> Analysis of the Legislative History of SB 1757 is Consistent with the Rules of Statutory Construction.....	31
K. <i>PG&E's</i> Reliance on the Rebuttable Presumption in Extraterritorial Condemnation Cases is Misplaced.	33
L. The Abuse of Discretion Standard Does Not Nullify the Legislative Intent in Adopting SB 1757.	34
M. <i>PG&E's</i> Distinction between Objections Pled Under Sections 1250.360 and 1250.370 and Objections Pled Under Section 1245.255(a) Imprudently Creates Different Standards of Review	35
III. CONCLUSION.....	37
CRC RULE 14(c) CERTIFICATE.....	38

TABLE OF AUTHORITIES

Cases

<i>Anaheim Redevelopment Agency v. Dusek</i> (1987) 193 Cal. App. 3d 249	18, 25, 36
<i>Brock v. Superior Court</i> (1952) 109 Cal. App. 2d 594	25
<i>Burbank-Glendale-Pasadena Airport Auth. v. Hensler</i> (1991) 233 Cal. App. 3d 577	36
<i>California Hotel & Motel Assn. v. Industrial Welfare Commission</i> (1979) 25 Cal. 3d 200	24, 35
<i>Carrancho v. California Air Resources Board</i> (2003) 111 Cal. App. 4th 1255	19
<i>City of Carlsbad v. Wight</i> (1963) 221 Cal. App. 2d 756	33, 34
<i>City of Los Angeles v. Keck</i> (1971) 14 Cal. App. 3d 920	33, 34
<i>City of Oakland v. Oakland Raiders</i> (1982) 32 Cal. 3d 60	18
<i>City of Stockton v. Marina Towers</i> (2009) 171 Cal. App. 4th 93	19
<i>County of Los Angeles v. City of Los Angeles</i> (2013) 214 Cal. App. 4th 643	19
<i>Fairfield v. Superior Court of Solano County</i> (1975) 14 Cal. 3d 768	26
<i>Fonseca v. City of Gilroy</i> (2007) 148 Cal. App. 4th 1174	28
<i>Fukuda v. City of Angels</i> (1999) 20 Cal. 4th 805	26
<i>Hoffmaster v. City of San Diego</i> (1997) 55 Cal. App. 4th 1098	28, 31
<i>Inyo Citizens for Better Planning v. Inyo County Bd. of Supervisors</i> (2009) 180 Cal. App. 4th 1	28

<i>Johnston v. Sonoma County Agricultural Preservation and Open Space District</i> (2002) 100 Cal. App. 4th 973	27, 28
<i>Jones v. Lodge at Torrey Pines Partnership</i> (2008) 42 Cal. 4th 1158.....	23
<i>Lincoln v. Barringer</i> (2002) 102 Cal. App. 4th 1211	22
<i>Mendoza v. Nordstrom, Inc.</i> (2017) 2 Cal. 5th 1074.....	23
<i>Pacific Gas and Electric Company v. Superior Court</i> (2023) 95 Cal. App. 5th 819.	<i>passim</i>
<i>People ex rel. Department of Transportation v. Cole</i> (1992) 7 Cal. App. 4th 1281	22
<i>People v. Chevalier</i> (1959) 52 Cal. 2d 299	18, 23
<i>Plaza Hollister Ltd. v. County of San Benito</i> (1999) 72 Cal. App. 4th 1	35
<i>Redevelopment Agency v. Norm's Slauson</i> (1985) 173 Cal. App. 3d 1121	21
<i>San Francisco Fire Fighters Local 798 v. City & County of San Francisco</i> (2006) 38 Cal. 4th 653	24, 25
<i>Shell California Pipeline Co. v. City of Compton</i> (1995) 35 Cal. App. 4th 1116	21
<i>Town of Apple Valley v. Apple Valley Ranchos Water</i> (2025) 108 Cal. App. 5th 62	<i>passim</i>
<i>Western States Petroleum Assn. v. Superior Court</i> (1995) 9 Cal. 4th 559	<i>passim</i>
<i>Wulzen v. Board of Supervisors</i> (1894) 101 Cal. 15	18

Statutes

Code of Civil Procedure section 1085.....	26, 29, 36
Code of Civil Procedure section 1094.5.....	25, 26

Code of Civil Procedure section 1094.5(c)	26
Code of Civil Procedure sections 1230.010, <i>et. seq</i>	10, 31
Code of Civil Procedure sections 1240.010 <i>et seq</i>	20
Code of Civil Procedure section 1240.030	<i>passim</i>
Code of Civil Procedure section 1240.610	22
Code of Civil Procedure section 1240.650(c)	13, 32, 37
Code of Civil Procedure section 1240.680	27
Code of Civil Procedure section 1241(2)	33
Code of Civil Procedure sections 1245.010 <i>et seq</i>	20
Code of Civil Procedure Section 1245.220	19, 20
Code of Civil Procedure section 1245.235(a)	21
Code of Civil Procedure section 1245.235(b)	21
Code of Civil Procedure section 1245.235(c)	21, 22
Code of Civil Procedure section 1245.240	22
Code of Civil Procedure section 1245.250(b)	<i>passim</i>
Code of Civil Procedure section 1245.250(c)	33, 34, 27
Code of Civil Procedure section 1245.255	25, 32
Code of Civil Procedure section 1245.255(a)	31, 35
Code of Civil Procedure section 1245.255(b)	22
Code of Civil Procedure section 1250.360	32, 35
Code of Civil Procedure section 1250.360(f)	35
Code of Civil Procedure section 1250.360(h)	36
Code of Civil Procedure section 1250.370	32, 35
Evidence Code section 664	24, 28
Government Code section 56824.14	20

Water Code sections 20500, *et seq* 10

Water Code section 22115 10

Water Code section 22456 10

Rules of Court

California Rules of Court, Rule 8.250(f) 8

Other Authorities

1 Childress & Davis, Federal Standards of Review (3d ed. 1999) 24

**TO THE HONORABLE CHIEF JUSTICE PATRICIA GUERRERO
AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME
COURT:**

Pursuant to California Rules of Court, Rule 8.250(f) the Association of California Water Agencies; League of California Cities, California Municipal Utility Association, California Special Districts Association, and South San Jose Irrigation District (“SSJID”) (collectively “Amici”), respectfully request permission to file the attached Amici Curiae Brief in Support of the Town of Apple Valley (“Town”).

Amici are writing in support of the Court of Appeal’s analysis and conclusions in *Town of Apple Valley v. Apple Valley Ranchos Water* (“TAV”) (2025) 108 Cal. App. 5th 62. TAV adopts an interpretation of Senate Bill 1757 that is consistent with the rules of statutory of construction, separation of powers jurisprudence and the settled expectations of the trial court’s proper role when reviewing quasi-legislative acts.

The Amici represent public agencies with the power of eminent domain who are directly affected by the determination of what is the proper standard of judicial review when a trial court applies the rebuttable presumptions triggered by the taking of utility property. Therefore, Amici respectfully request leave to file the enclosed brief.

I. INTEREST OF AMICI CURIAE

Association of California Water Agencies (“ACWA”) is a non-profit public benefit corporation organized and existing under the laws of the state of California since 1910. ACWA is comprised of over 460 water agencies, including State, city, county and municipal water districts, irrigation districts,

and special purpose districts. ACWA's Legal Affairs Committee monitors litigation and has determined this case will impact its member agencies' ability to acquire necessary utility systems through eminent domain, which is vital to assuring a safe and reliable water supply throughout California,

The **League of California Cities** ("Cal Cities") is an association of 472 California Cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee comprised of 27 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

California Special District Association ("CSDA") is a California nonprofit organization formed to promote good governance and improve core local services through professional development, advocacy, and other services for its more than 1,000 special district members throughout California. CSDA's members provide a wide variety of public services to urban, suburban, and rural communities, including irrigation, water, recreation and parks, cemetery, fire protection, police protection, library, utilities, harbor, healthcare, community-service districts and more. CSDA monitors issues of concern to special districts throughout California and has determined that this is a matter that substantially affects public policy and the ability of special districts to use eminent domain to ensure essential public services.

California Municipal Utilities Association ("CMUA") represents 84 publicly owned electric, gas, water, and wastewater utilities statewide, each

with the power of eminent domain at issue in this case. (Title 7, California Code of Civil Procedure section 1230.010, *et. seq.*). CMUA members collectively provide 75 percent of water service and 25 percent of electric service to Californians.

CMUA works with advocates and policymakers to promote best practices and ensure that public water agencies and publicly owned electric utilities have the tools necessary to deliver safe and reliable services. CMUA sponsors legislation, monitors regulatory and policy actions, and takes positions on issues of interest to its members and their customers. CMUA members have a vested interest in this matter, the resolution of which directly impacts their legislative eminent domain authority.

South San Joaquin Irrigation District ("SSJID") is a state agency formed and existing for governmental purposes. (Wat. Code §§ 20500, *et seq.*;) SSJID's service territory covers approximately 112 square miles and includes the cities of Manteca, Ripon, and Escalon, California. SSJID is authorized to engage in the "transmission, distribution, sale and lease of electric power" and has the power of eminent domain to take any property necessary for its purposes. (Wat. Code §§ 22115, 22456.)

SSJID is the acquiring agency in the pending eminent domain action to acquire portions of Pacific Gas and Electric Company electrical distribution assets within SSJID's service territory (San Joaquin County Superior Court Case No. 0006638). SSJID was the unsuccessful real party in interest in the published decision *Pacific Gas and Electric Company v. Superior Court ("PG&E")* (2023) 95 Cal. App. 5th 819. (Review denied; 2023 Cal. Lexis 7082, Dec. 2023.)

Amici each have a direct stake in the outcome of this matter. The brief will assist the Court by offering a broader perspective on why the standard of review applied in *TAV* is the only approach reconcilable with existing precedents and correctly balances the impacts on the ability of local governmental agencies to provide essential services to California residents.

The undersigned attorneys have examined the briefs filed by the parties and represent that, while supporting the Town's arguments, the Amici's brief further addresses why *TAV* and not *PG&E*, is consistent with the law of eminent domain and settled expectations concerning the separation of powers.

The undersigned attorneys further represent they authored this brief and no party to this action authored or paid to have this brief written.

Respectfully submitted,

/s/ Gerald Houlihan
GERALD HOULIHAN
Attorneys for Amici

/s/Doug Evertz
DOUG EVERTZ
Attorneys for Amici

I. INTRODUCTION AND SUMMARY OF ARGUMENT

ACWA, Cal Cities, CSDA, CMUA and SSJID (“Amici”) support the legal positions as set forth in the Town’s Answer Brief on the Merits. Amici concur with the Court of Appeal’s analysis in *Town of Apple Valley v. Apple Valley Ranchos Water* (2025) 108 Cal. App. 5th 62 (“*TAV*”) adopting a deferential standard of review that is consistent with the eminent domain statutes, separation of power principles, and the settled expectations of public entities concerning the deference due quasi-legislative determinations. *TAV* properly interprets and applies Senate Bill 1757 (“SB 1757”) in harmony with the entire legislative scheme. The focus of this brief is to supplement and expand on why the independent standard of review that is enunciated in *Pacific Gas and Electric Company v. Superior Court* (2023) 95 Cal. App. 5th 819 (“*PG&E*”) cannot be reconciled with existing precedent and impermissibly interferes with a public entity’s ability to provide utility services.

Local public entities have been granted broad powers - - including the power of eminent domain - - to provide for the welfare of their communities. When a public entity exercises its discretion in furtherance of improving the public’s interest, the courts have traditionally been precluded from second-guessing the legislative body. The courts exercise judicial restraint and deference when reviewing legislative determinations in accordance with the constitutionally required separation of powers among the three branches of government.

TAV recognizes this established principle, while *PG&E* glosses over it. It is not an oversimplification to say that this case boils down to whether the local legislative body or a trial judge decides who the utility provider should be

for a community. In other words, who is in the best position to determine this fundamentally political question, the elected legislative body that studies the issue, prepares plans and reports, holds a public hearing, and weighs the pros and cons of condemning a private utility, or a trial judge with no expertise or resources to thoroughly analyze whether the public interest is better served by a private utility or a publicly owned utility?

TAV is the better reasoned decision and should be affirmed. It is consistent with this Court’s jurisprudence on the fundamentally political nature of public interest and necessity determinations and the invocation of the power of eminent domain. *PG&E*’s determination that the legislature implicitly delegated these determinations to the trial court’s independent judgment, without analysis or clarification of this Court’s unbroken admonitions concerning the limited role of the trial court when reviewing a quasi-legislative decision, leads to a faulty and unprecedented result.

II. ARGUMENT

A. Proper Resolution of this Issue Has Important Implications for Public Entities.

TAV and *PG&E* reach diametrically opposed conclusions about the effect SB 1757 has on the proper trial court standard of review in utility takings cases. *PG&E*’s determination that SB 1757 delegated the necessity determinations to the independent judgment of the trial judge reduces the public entity to a mere plaintiff in a civil action.¹ *PG&E* failed to analyze or consider the unintended consequences of this determination for public entities.

¹ Unless otherwise indicated, reference to “findings of necessity” refers to the three findings of necessity in Code of Civil Procedure section 1240.030 and more necessary public use finding of section 1240.650, subd. (c).

At the outset, it is important to recognize that private utilities are different than local public entities. The California Public Utilities Commission (“CPUC”) regulates private utilities, while publicly owned utilities are accountable to the ratepayers and voters. Private utilities are focused on generating returns for shareholders, while public utilities are focused on community goals such as long-range planning for economic or residential development, and green energy. Public entities are unable to coordinate and improve services such as the Town desired to do with fire prevention and water conservation in this case. Private utilities are not in a position to undertake such improvements or coordination. To that end, the Legislature granted public entities the power to provide utility services and to condemn property for that purpose.

PG&E’s holding that the Legislature implicitly intended to eliminate deference accorded a quasi-legislative decision to use eminent domain to provide utility service impairs this essential governmental power by subjecting the decision to the whims of a single trial judge. *PG&E* shifts the role of setting policy and balancing of the public’s need for a utility project from the elected board to a trial judge. Neither SB 1757 nor *PG&E* provide any guidance or limitations on the trial court’s review. Inconsistent outcomes are certain to ensue because trial judges are apt to apply their personal judgment differently. *PG&E’s* untethering of the objections from the challenges to the resolution of necessity and the abuse of discretion standard creates uncertainty and undue risk in pursuing condemnation, greatly impairing a public entity’s ability to provide these essential services.

What transpired at the trial court in the present case is sufficient to establish the stultifying effect of applying the wrong standard of review. The need for the Town’s public project was subject to a 67-day trial where the administrative record, the resolution of necessity, and the Town’s findings were ignored. (*TAV, supra*, 108 Cal. App. 5th at pp. 73-74.) The trial court allowed Apple Valley Ranchos Water (“Liberty”) to introduce any evidence it wanted, including five years of post-resolution evidence, to meet its burden. (*Id.* at p. 91.) Rather than have Liberty rebut the Town’s analysis or findings, the trial court assessed the wisdom of the Town’s decision based on considerations Liberty believed were important. (*Id.* at pp. 90-91.) The trial court never addressed the important public policy goals underlying the Town’s resolution including its desire to coordinate and upgrade fire prevention and water recycling. (Town’s Answer Brief pp. 20-22.) The trial court decided inherently political questions (i.e., CPUC oversight being superior to the Town’s) and ruled against the Town.^{2, 3} The court then entered judgment for Liberty and awarded \$13.2 million dollars in litigation expenses.

The Town’s experience is a cautionary tale for other public entities and reinforces the need to overrule *PG&E*. *PG&E* improperly interferes with the public entities’ legislative powers and responsibilities to the communities they serve. *PG&E* undermines effective coordination of related utility services, implementation of local economic and planning goals, and local preference for green energy by permitting the trial court to second-guess a legislative body’s

² The Legislature has never expressed the preference adopted by the trial court for CPUC oversight of public entities providing utility services.

³ The Town’s Answer Brief at page 23, FN 3, lists the trial court’s public policy determinations.

political decision. It also upends the concept of good governance by disregarding the extensive studies and analysis a public entity undertakes before deciding to condemn private utility property.

The uncertainty of a lengthy and expensive process, coupled with the risk of a large litigation expense liability, does not serve the public's interest and cannot be reconciled with the Legislature's authorization for public entities to use eminent domain to provide these critical and necessary public services.

B. Has a Rebuttable Presumption Ever Implicitly Modified Substantive Law as much as Senate Bill 1757?

Before addressing the various arguments advanced, it is important to see the forest from the trees. Senate Bill 1757 ("SB 1757") merely added a rebuttable presumption affecting the burden of evidence, nothing more.

Based on *PG&E's* holding and Liberty's position, it is fair to ask, "Has a simple rebuttable presumption affecting the burden of proof ever implicitly accomplished more substantive changes to law than SB 1757?" Put another way, is it logical that a rebuttable presumption affecting evidence can accomplish the following:

- Implicitly make a quasi-legislative decision reviewable and subject to the trial court's independent judgment;
- Implicitly eliminate the historic deference given to quasi-legislative decisions;
- Implicitly alter the only standard of review expressed in the Eminent Domain Law for resolutions of necessity from gross abuse of discretion to independent judgment;

- Implicitly permit the admission of any evidence (including post-resolution) without regard to the record or findings before the legislative body;
- Implicitly upend the Legislature's statutory emphasis of the primacy of the resolution of necessity and required findings in perfecting the right to file an eminent domain action;
- Implicitly permit the trial court to determine the fundamentally political question of whether the public needs the project and whether the project is in the public interest.

It is neither reasonable nor logical to conclude that the Legislature intended to change the substantive law so drastically without the slightest mention of that intent. Neither *PG&E* nor *Liberty* cite any case in which the Legislature has authorized a trial court to apply independent judgment when considering a quasi-legislative decision. Similarly, no case law has been cited where a court concluded that a rebuttable presumption permits the court to exercise independent review of a quasi-legislative decision. *PG&E's* interpretation of the effect of rebuttable presumption cannot be reconciled with settled law establishing that quasi-legislative decisions are subject to limited trial court review.

C. Quasi-Legislative Actions are Not Subject to Independent Judgment Review.

1. Necessity for a Taking and the Decision to Condemn Is a Discretionary, Political Undertaking.

This Court recognizes that the power of eminent domain is an inherent attribute of sovereignty, limited only by the constitutional requirements of

“public use” and “just compensation.” (*People v. Chevalier* (1959) 52 Cal. 2d 299, 304.) “The determination as to whether or not the right of eminent domain should be exercised, and as to what lands are necessary to be taken in the exercise of that right, is a political and legislative question and not a judicial one. Its determination rests exclusively with the legislature, or with such subordinate legislative bodies as it may be properly devolved upon, and the question of whether the exercise of the power is wise or not is one with which the judicial department has no concern.” (*Wulzen v. Board of Supervisors* (1894) 101 Cal. 15, 21; *Chevalier, supra*, 52 Cal. 2d at p. 304. [“[A]ll other questions involved in the taking of private property are of a legislative nature (citation omitted)”].)

Ultimately, “when properly exercised, [the use of eminent domain] affords an orderly compromise between the public good and the protection and indemnification of private citizens whose property is taken to advance that good.” (*City of Oakland v. Oakland Raiders* (1982) 32 Cal. 3d 60, 64.) The decision to condemn is fundamentally a political question because it requires the balancing of the public interest and the need for a particular improvement. (*Anaheim Redevelopment Agency v. Dusek* (1987) 193 Cal. App. 3d 249, 261.

2. Legislative Decision Making is Entitled to Deferential Review.

Because a public entity exercises its delegated discretion when it decides to exercise the power of eminent domain, it is considered a quasi-legislative decision. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal. 4th 559, 572 [excessive judicial interference with delegated quasi-legislative authority is improper].) The fact that the decision to condemn is a quasi-legislative decision is dispositive of the level of judicial review

regardless of what evidence is admissible. (*Carrancho v. California Air Resources Board* (2003) 111 Cal. App. 4th 1255, 1265 [When an agency “performs a discretionary quasi-legislative act, judicial review is at the far end of the continuum requiring the utmost deference.”]. Deferential review of quasi-legislative activity minimizes judicial interference, consistent with the separation of powers doctrine. (*County of Los Angeles v. City of Los Angeles* (2013) 214 Cal. App. 4th 643, 654-655 [trial court incorrectly conducted independent review of a quasi-legislative decision].)

3. The Decision to Condemn and Adopt a Resolution of Necessity is an Inherently Legislative Act.

The very process for adopting a resolution of necessity confirms the quasi-legislative nature of the decision to invoke the power of eminent domain.⁴

“[T]he resolution of necessity...is the fundamental predicate to the entire condemnation process.” (*City of Stockton v. Marina Towers* (2009) 171 Cal. App. 4th 93, 107.) This fact is recognized in *TAV* but not properly analyzed in *PG&E*. *PG&E* erroneously concludes that the only significance of a resolution in a utility taking case is to trigger the rebuttable presumption's burden. (*PG&E, supra*, 95 Cal. App. 5th at p. 833.) *PG&E* completely disregards the legislative scheme that clearly establishes the primacy of the resolution in a public entity's use of eminent domain.

A public entity cannot commence an eminent domain proceeding unless the legislative body has adopted a resolution. (Code of Civil Procedure Section

⁴ All undesignated references to a “resolution” are referring to a resolution of necessity. Some cases quoted use the acronym “RON” when referring to a resolution of necessity.

1245.220.)⁵ The adoption of the resolution is not a mere formality; it is the culmination of exacting pre-condemnation requirements that must be met before a public agency can make the requisite necessity findings and adopt a resolution authorizing a condemnation action. (§§ 1240.010 *et seq.* and §§ 1245.010 *et seq.*)

For some public entities, numerous studies and other governmental approvals precede the adoption of a resolution. For example, SSJID’s retail electric project started in 2005 and underwent a lengthy review and vetting process by SJLAFCO - another quasi-legislative body - to first secure authorization to provide new retail electric services to its customers. (“Project”). SJLAFCO engaged multiple third-party experts to review and analyze the arguments, projections, and analysis provided by both SSJID and Pacific Gas & Electric Company and required the preparation of a Sphere Plan, Municipal Services Review Report, and an Environmental Impact Report. Pacific Gas and Electric Company opposed the Project in the SJLAFCO proceeding. Following an extensive hearing process, SJLAFCO approved SSJID’s application to provide retail electric service within its service territory in December 2014. (Gov. Code. § 56824.14.)

SJLAFCO specifically determined SSJID had the necessary administrative, technical, and financial ability, as well as “sufficient revenues,” to provide new retail electric service. In addition, SJLAFCO identified the Project’s numerous public benefits, including “...a reduction in retail electrical energy rates, more disposable income for local residents to spend with local merchants, the enhanced attractiveness of the area to new employment

⁵ All undesignated section cites are to the Code of Civil Procedure.

generating businesses due to lower electric rates, a more diversified local tax base due to new business generation and improved local control over electrical rates and service.”⁶

In considering whether to adopt a resolution, a public entity must provide notice and hold a public hearing on the establishment of the public necessity requirements of section 1240.030. (§§ 1245.235(a) and (c).) The purpose of the public hearing is to ensure that its governing body undertakes a judicious consideration - with input from the property owner(s) - of the pros and cons of the proposed taking before making any public necessity determination. (§ 1245.235(b) and (c); *Redevelopment Agency v. Norm’s Slauson* (1985) 173 Cal. App. 3d 1121, 1125-1126.) Accordingly, the legislative body usually considers staff reports, studies, plans, environmental review, and other documents and testimony before voting on any resolution.

At the hearing the legislative body also considers numerous policy factors in determining whether the public interest and necessity (§ 1240.030) requires the project. The Legislative Committee Comment to section 1240.030 reflects the breadth of these considerations:

“‘Public interest and necessity’ include all aspects of the public good including, but not limited to social, economic, environmental, and esthetic considerations.” (Leg. Com. Comment for Section 1240.030 of Code of Civil Procedure (2025) Deerings Annotated Code.)⁷

⁶ Relevant to the main issue in this case, all of these factors are proper considerations for a legislative body, not a trial court.

⁷ This Comment was cited and applied in *Shell California Pipeline Co. v. City of Compton* (1995) 35 Cal. App. 4th 1116, 1125.

A property owner has an opportunity to appear, raise objections and introduce evidence during the public entity's hearing on the resolution (§ 1245.235(c)). An owner must raise its objections to the necessity findings of section 1240.030 at the public hearing. The purpose of this requirement is to give the agency an opportunity to address and correct any alleged issues prior to making its findings and adopting its resolution and for the owner to make an adequate record concerning any necessity objections raised. (§ 1245.235(c); *see Lincoln v. Barringer* (2002) 102 Cal. App. 4th 1211, 1228; *People ex rel. Department of Transportation v. Cole* (1992) 7 Cal. App. 4th 1281, 1286.)

Only after a public hearing does the public entity determine whether the proposed condemnation satisfies the required public necessity elements and adopt a resolution establishing the necessity requirements under section 1240.030 and that of more necessary public use under section 1240.610 for utility takings. The resolution must be approved by at least two-thirds of the legislative body's members. (§ 1245.240)

D. *PG&E's* Interpretation of the Limited Significance of the Resolution of Necessity in Utility Takings is Illogical.

As discussed above, a public entity is required to undertake an involved, time-consuming and expensive process prior to exercising its discretion to use the power of eminent domain. For this reason, the Legislature adopted a gross abuse of discretion standard when an owner challenges the necessity for the taking the property. (§ 1245.255(b).)

PG&E reduces the resolution process to a meaningless technical requirement and concludes that both the resolution and its findings are irrelevant to determining whether the public entities' proposed use of private

utility property is necessary. The Legislature would not require a public entity to undertake an expensive and judicious analysis to adopt a resolution if the Legislature intended the resolution to be virtually ignored at trial. (*Mendoza v. Nordstrom, Inc.* (2017) 2 Cal. 5th 1074, 1087 [the Legislature does not engage in idle acts, and no part of its enactments should be rendered surplusage if a statutory construction avoids doing so].) If the Legislature intended such a departure from existing law, it would have expressed that intent. (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal. 4th 1158, 1171 [highly unlikely that the Legislature would make such a significant change to existing law without so much as a passing reference to what it was doing].)

E. *PG&E's* Conclusion that a Rebuttable Presumption makes Quasi-Legislative actions Justiciable is Unsupported.

PG&E concludes the Legislature intended to make necessity of utility takings justiciable by adding the rebuttable presumption. (*PG&E, supra*, 95 Cal. App. 5th at 834-837.) *PG&E* cites no authority where the addition of a rebuttable presumption was interpreted to express the Legislature's intent to make quasi-legislative decisions justiciable. Instead, *PG&E* cites to *People v. Chevalier* (1959) 52 Cal. 2d 299, 306-307. But *Chevalier* is citing to an express provision contained in the Michigan Constitution as an example. (*Id.* at p. 307.) *Chevalier* provides no support for the contention that adding a rebuttable presumption is a "delegation" or is properly interpreted as proof of legislative intent to make a quasi-legislative decision justiciable.

Under *PG&E's* logic, for any challenge to a quasi-legislative action involving a rebuttable presumption, the challenger would be entitled to a *trial de novo*. For example, where a court presumes that an official duty has been

regularly performed (Evid. Code § 664), the objecting party can cite *PG&E* to argue that the presence of the rebuttable presumption now allows the introduction of extrinsic evidence and a *trial de novo* in which the court exercises its independent judgment. Ironically, using *PG&E*'s logic, a rebuttable presumption intended to favor a public agency's decision instead favors the challenger by creating a right to a *trial de novo* where no right previously existed. This cannot be what the Legislature intends when it enacts statutory presumptions.

F. The Trial Court's Standard of Review is Not Altered by a Change in the Evidentiary Burden.

TAV correctly recognizes that the issue of the burden of proof is distinct from the standard the trial court applies in reviewing that proof. (*TAV*, *supra*, 108 Cal. App. 5th at pp. 88-89 ["[T]he rebuttable presumption in Section 1245.250 subdivision (b) imposes a burden of proof but says nothing about the judicial standards of review."].) In other words, "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." (*Id.*, at p. 85.)

"[A] standard of review prescribes the degree of deference given by the reviewing court to the actions or decisions under review." (*San Francisco Fire Fighters Local 798 v. City & County of San Francisco* (2006) 38 Cal. 4th 653, 667 citing 1 Childress & Davis, *Federal Standards of Review* (3d ed. 1999) § 1.01, p. 1-2.) "The courts exercise limited review of legislative acts by administrative bodies out of deference to the separation of powers between the Legislature and the judiciary...." (*Id.*, citing *California Hotel & Motel Assn. v. Industrial Welfare Commission* (1979) 25 Cal. 3d 200, 211–212.) These

principles of separation of powers apply to local legislation and local agencies. (Id. at 667.) In determining the court's scope of review of quasi-legislative acts, "consideration must be given to the fact that the courts must not usurp legislative power and thereby violate the separation of powers provision in the Constitution." (*Brock v. Superior Court* (1952) 109 Cal. App. 2d 594, 603.)

The trial court's standard of review for quasi-legislative acts does not change whether it applies a rebuttable presumption or considers contemporaneous extrinsic evidence. "[A]fter all, section 1245.255 makes the validity of a conclusive RON justiciable 'without undermining the historical deference accorded legislative determinations of necessity'" (*TAV, supra*, at pp. 85-86, citing *Dusek, supra*, 193 Cal. App. 3d at p. 255). In short, merely labeling an issue "justiciable" does not convert a quasi-legislative decision entitled to deference into a matter the trial court independently determines without regard to the legislative process.

PG&E's primary support for its justiciability analysis is a faulty analogy to extraterritorial condemnation cases. But as *TAV* explains, *PG&E's* reliance on those cases is misplaced because no quasi-legislative act is being reviewed when a public entity condemns outside its boundaries. (*TAV, supra*, 108 Cal. App. 5th at pp. 85-86.)

G. Justiciable Quasi-Legislative Decisions are Still Subject to the Separation of Powers Doctrine.

Liberty contends *TAV's* reliance on mandamus cases is misplaced because the cases are inapposite. (Reply Brief, pp. 16-17.) To the contrary, section 1094.5 mandamus cases establish that, even when the Legislature

authorizes the trial court to use its independent judgment, separation of power principles still limit how the court reviews the decision.

Section 1094.5 explicitly authorizes the trial court to exercise independent judgment in reviewing an administrative body's decision. (§1094.5(c).) Even so, the court is still limited to the evidence considered by the governing body, plus additional admissible evidence; it is not a full trial de novo. (*Fairfield v. Superior Court of Solano County* (1975) 14 Cal. 3d 768, 776 [where Section 1094.5 requires independent review, "it is not a trial de novo" but is tied to the administrative record, plus additional evidence allowed under Section 1094.5].) Even then, "a trial court must afford a strong presumption of correctness . . . to administrative findings," and the burden rests upon the complaining party to show that the administrative decision is contrary to the weight of the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal. 4th 805, 817.)

Under *PG&E's* and *Liberty's* logic, the rebuttable presumption added by SB 1757 impliedly converts the more deferential Section 1085 review into a more expansive trial than is even available under Section 1094.5 where the Legislature has explicitly authorized independent review. It is illogical to conclude that a rebuttable presumption creates a right to a *trial de novo* to review a quasi-legislative act, while an explicit legislative authorization to exercise independent judgment does not.

H. The Substantial Evidence Standard is Compatible with the Rebuttable Presumption.

PG&E holds the substantial evidence standard applied to quasi-legislative decisions cannot be reconciled with the fact that there is a rebuttable

presumption affecting the burden of proof by a preponderance of the evidence. (*PG&E, supra*, 95 Cal. App. 5th at p. 834.) But as *TAV* identified, *PG&E* conflates two distinct issues - the standard of review and the burden of proof. (*TAV, supra*, 108 Cal. App. 5th at pp. 88-89.) *PG&E*'s analysis is that a rebuttable presumption requires a trial by a preponderance of the evidence, and such a trial requires independent judgment by the trial court. But *PG&E* incorrectly equates a right to an "evidentiary trial" with a requirement that the trial court exercise its independent judgment without deference to the legislative determinations.

TAV, on the other hand, interprets SB 1757 to permit a court to consider additional evidence when reviewing the necessity determinations in a utility taking case, but disagrees that the trial court must independently determine whether the project is necessary without deference given to the public entity's findings. Instead, the public entity's findings are presumed to be supported by substantial evidence, and the private utility must convince the court the findings are not supported by substantial evidence. (*TAV, supra*, 108 Cal. App. 5th at p. 89.)

TAV's conclusion is supported by numerous cases where a rebuttable presumption affecting the burden of proof applied to quasi-legislative acts, yet the trial courts exercised deferential review.

Johnston v. Sonoma County Agricultural Preservation and Open Space District (2002) 100 Cal. App. 4th 973 ("*Sonoma*") addressed the intersection of a legislative determination and a rebuttable presumption affecting the burden of proof in favor of open space as a more necessary public use as detailed in Section 1240.680. (*Id.* at 985.) *Sonoma* holds the trial court's function is one

of review, not initial decision, given that the determination of more necessary public use by a public entity's governing body is inherently legislative. (*Id.* at pp. 983-984, 988-989.)

Hoffmaster v. City of San Diego (1997) 55 Cal. App. 4th 1098 (“*Hoffmaster*”) explains how a party facing a rebuttable presumption can prove a lack of substantial evidence. *Hoffmaster* deals with two rebuttable presumptions affecting the burden of proof and finds “petitioners carry the burden of proof as to the nonexistence of the presumed facts.” (*Id.* at p. 1110.) But, because the court is reviewing a legislative act, the trial court does not examine the merits or wisdom of the underlying policy. (*Id.* at p. 1106.) As a result, the challenger was required *to prove the inadequacy of the City’s analysis supporting the City’s housing element.* (*Id.* at p. 1110; italics added.)

Inyo Citizens for Better Planning v. Inyo County Bd. of Supervisors (2009) 180 Cal. App. 4th 1 is a CEQA case applying the rebuttable presumption of Evidence Code section 664 to a county’s determination that a tentative parcel map met the minimum lot size requirements. *Inyo* applied the normal CEQA substantial evidence standard of review regardless of the presence of a rebuttable presumption:

“A presumption exists that an administrative action was supported by substantial evidence. The burden is on the [challenger] to show there is no substantial evidence to support the findings of the [agency].” (*Id.* at p. 20.)

Fonseca v. City of Gilroy (2007) 148 Cal. App. 4th 1174 is a challenge to the housing element of a general plan. The adoption of a general plan and its various elements is a legislative act. (*Id.* at p. 1191.) The matter was tried as a

section 1085 traditional mandamus challenge despite a rebuttable presumption affecting the burden of proof on the validity of the housing element. (*Ibid.*) The court noted that judicial review for substantial compliance with statutory requirements of a housing element does not involve an examination of the merits of the element or the wisdom of the municipality's determination of policy:

“On the other hand, a city's adoption of a housing element is a legislative enactment, something which is generally entitled to some deference. There is a presumption that the adopted element is valid and we do not in the course of our review evaluate the municipality's determination of policy... If the municipality has substantially complied with statutory requirements, we will not interfere with its legislative action, unless that action was arbitrary, capricious, or entirely lacking in evidentiary support...

Accordingly, like the trial court, we do not review the merits of the housing element at issue or assess the wisdom of the municipality's determination of policy.” (Internal citations omitted.)

(*Id.* at 1191-92.)

In each of these cases, the substantial evidence standard applied. The rebuttable presumption did not require the trial court to independently weigh the evidence and substitute its judgment for that of the legislative body. Rather, the quasi-legislative nature of the decision limited the court's role, even though a party was entitled to introduce evidence to prove the inadequacy of the analysis supporting the decision.

I. Considering Extrinsic Evidence is Not Unworkable with the Gross Abuse of Discretion Standard.

PG&E found the lack of substantial evidence standard “unworkable” in combination with the rebuttable presumption because of limitation on admissible evidence under the abuse of discretion standard. But *PG&E* fails to

reconcile the rebuttable presumption with the constitutional separation-of-powers constraint. In *Western States Petroleum Assn. v. Superior Court*, *supra*, 9 Cal. 4th at p. 573, this court addressed the admission of extra-record evidence when reviewing a quasi-legislative act. “[W]e do not foreclose the possibility that extra-record evidence may be admissible in traditional mandamus actions challenging quasi-legislative administrative decisions under unusual circumstances or for very limited purposes. . .” (*Id.* at pp. 578-579.) *Western States* went on to cite federal cases where extra-record evidence was admissible for background information or for limited purposes, such as ascertaining whether the agency considered all the relevant factors or fully explained the grounds for the decision. (*Id.*)⁸

A trial court’s ability to consider extra-record evidence under the rebuttable presumption, however, does not mean it is free to ignore the separation of powers constraints imposed on judicial review of quasi-legislative decisions. *Western States* confirms that, while a court may admit extra-record evidence to establish that an agency has adequately considered all relevant factors, it cannot allow the proceeding to become a trial of whether the decision was “wise” or “scientifically sound” because these issues are not “appropriate for the judiciary.” (*Id.* at p. 577.) Yet, this is precisely what happened to the Town and what *PG&E* permits.

TAV’s interpretation is consistent with the intent of SB 1757 because the ability to introduce extrinsic evidence, which non-utility owners subject to the conclusive presumption lack, is a meaningful protection for private utility

⁸ The Town’s Answer Brief at pp. 56-57 identifies additional instances where extra-record evidence was admitted by California trial courts reviewing quasi-legislative decisions.

property owners. Extrinsic evidence can be used to either discredit a resolution or demonstrate a lack of substantial evidence supporting a resolution's determinations of necessity. Extrinsic evidence can also be used to show that the supporting facts and data in the record are incorrect or faulty, that the methodology used is disfavored or discredited, that the analysis is flawed or illogical, or that the assumptions relied on are erroneous. (E.g., see *Hoffmaster, supra*, 55 Cal. App. 4th at p. 1110 [challenger carrying the burden of the rebuttable presumption may present quantitative analysis refuting the legislative determinations].)

J. *TAV's* Analysis of the Legislative History of SB 1757 is Consistent with the Rules of Statutory Construction.

Liberty eschews consideration of the legislative history of SB 1757, contending there is no ambiguity. (Opening Brief, pp. 38-40.) But Liberty's "no ambiguity" argument focuses on the general rules of the Evidence Code and fails to address ambiguity in the context of the Eminent Domain Law. (Section 1230.010, *et seq.*)

Conversely, *TAV* focused on analyzing SB 1757 in the context of the Eminent Domain Law, recognizing the quasi-legislative nature of the Town's decision. In this context, SB 1757 is ambiguous. It does not expressly state the standard of review that applies to utility property takings. The only standard of review explicitly stated in the Eminent Domain Law is gross abuse of discretion (Section 1245.255(a)).

There is only a lack of ambiguity if it is assumed the Legislature impliedly changed the standard of review to independent judgment by adding an evidentiary rebuttable presumption. Neither *PG&E* nor Liberty have cited

any case law in which the Legislature's addition of a rebuttable presumption altered the deferential review for quasi-legislative decisions. The fact that two trial courts and two appellate courts reached completely different conclusions about the effect of SB 1757 is ample proof that the enactment is ambiguous.⁹

SB 1757's legislative history is notably silent on any intent, expressed or implied, to change the standard of review for utility property in favor of independent judgment by the trial court. If the Legislature intended to dramatically shift the power of necessity determinations from the legislative body to the court through SB 1757, it would have done so. It did not.

In changing the presumption from conclusive to rebuttable, the Legislature amended more than one statute but did not amend the standard of judicial review under the Eminent Domain Law. Specifically, SB 1757 did not amend the gross abuse of discretion standard of review under Section 1245.255 for utility property. Likewise, the amended Sections 1245.250(b) and 1240.650(c) do not state that the deferential standard of review is altered by the change in the presumption. Equally telling, the Legislature did not amend Sections 1250.360 and 1250.370 (which enunciate the permissible objections to the right-to-take) to provide a different standard of review for objections that pertain to utility property.

TAV's review of the legislative history was thorough and appropriate. Moreover, *TAV's* analysis of what was missing from the legislative history is a proper consideration when interpreting a statute. The Legislature was well aware that quasi-legislative decisions were reviewed under ordinary mandamus

⁹ Two trial judges in *PG&E* concluded the gross abuse of discretion standard applied to utility takings in contrast to the trial judge in *TAV*. (*PG&E, supra*, 95 Cal. App. 5th at pp. 827-829.)

and would have expressed such a dramatic change if it intended one. (See *Western States*, *supra*, 9 Cal. 4th 559, 571 [if the Legislature intended to replace the substantial evidence standard, it would have addressed it directly in the statute].)

K. *PG&E*'s Reliance on the Rebuttable Presumption in Extraterritorial Condemnation Cases is Misplaced.

PG&E incorrectly assumes that the rebuttable presumption applicable to extraterritorial condemnations under Section 1245.250(c) is what makes necessity justiciable in extraterritorial takings. (*PG&E*, *supra*, 95 Cal. App. 5th at pp. 833-834.) But the reason a trial court exercises independent judgment in extraterritorial cases is not the rebuttable presumption. A trial court exercises independent judgment because there is no quasi-legislative decision to review when public entities operate outside their jurisdiction. The cases of *City of Carlsbad v. Wight* (1963) 221 Cal. App. 2d 756, and *City of Los Angeles v. Keck* (1971) 14 Cal. App. 3d 920, cited in Liberty's Opening Brief, reinforce this point. (OB. at pp. 48-49.) Neither case involved a presumption, as both were decided before 1975 and prior to the adoption of Section 1245.250, subdivision (c), establishing a rebuttable presumption for extraterritorial condemnation. *Wight* and *Keck* were decided under the prior statute, Section 1241, subdivision 2, which merely stated that in the case of an extraterritorial taking, the "resolution or ordinance shall not be conclusive evidence." (*Keck*, *supra*, 14 Cal. App. 3d at pp. 924-925.)

In *Wight* and *Keck*, the court explicitly states the reason it exercised independent judgment and gave deference. "A decision to condemn "within its boundaries is a legislative, not a judicial, matter; but when a [public entity] city

seeks to condemn land without its corporate limits, it devolves upon the courts to determine whether the taking of the particular land is necessary for the use' (cites omitted)." (*Keck, supra*, 14 Cal. App. 3d 920, 925, citing *Wight, supra*, 221 Cal. App. 2d 756, 761.)

The Legislative Committee Comment to Section 1245.250(b) regarding extraterritorial condemnation cites *Wight* and *Keck* and confirms the intent to continue former case law denying conclusive effect to a resolution involving property lying outside the entity's territorial limits.¹⁰ Before 1975, extraterritorial takings were already justiciable; addition of the presumption did not alter this. Likewise, the decision to condemn within the public entity's boundaries remained the same as prior law; it is a quasi-legislative issue entitled to deference.

The addition of the rebuttable presumption to utility takings did not change or alter the fact that takings within a public entity's jurisdiction are quasi-legislative decisions subject to limited judicial review. As *TAV's* analysis of the legislative history reveals, there is no indication the Legislature intended to treat all utility taking cases similar to extraterritorial cases. (*TAV, supra*, 108 Cal. App. 5th at p. 87.)

L. The Gross Abuse of Discretion Standard Does Not Nullify the Legislative Intent in Adopting SB 1757.

PG&E and Liberty conclude the only way to give legislative effect to SB 1757's rebuttable presumption is for trial courts to independently determine necessity and more necessary public use. (*PG&E, supra*, 95 Cal. App. 5th 819,

¹⁰ Section 1245.250(b) became 1245.250(c) when SB 1757 was adopted but the Comment was not altered to reflect this.

834-835.) This conclusion fails to recognize a conclusive presumption operates as a substantive rule of law; once foundational facts upon which the presumption is based are established, the assumed fact may not be controverted by any contrary evidence. (*Plaza Hollister Ltd. v. County of San Benito* (1999) 72 Cal. App. 4th 1, 27.) Thus, the elimination of both the conclusive presumption and the allowance for extra-record evidence are significant protections for private utility owners that were not available prior to SB 1757.

Moreover, just because the trial court does not exercise independent judgment does not mean the taking of utility property is not subject to the meaningful judicial review intended by the Legislature. As explained in *California Hotel & Motel Assn. v. Industrial Welfare Commission* (1979) 25 Cal.3d 200 (“*California Hotel*”), while quasi-legislative acts are entitled to some deference “a court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between these factors, the choice made and the purposes of the enabling statute.” (*Id.* at p. 212.) The ability to utilize extra-record evidence to disprove the findings is an advantage not available in eminent domain cases of non-utility property where the conclusive presumption applies.

M. *PG&E*’s Distinction between Objections Pled Under Sections 1250.360 and 1250.370 and Objections Pled Under Section 1245.255(a) Imprudently Creates Different Standards of Review.

PG&E holds the Section 1245.255(a) abuse of discretion standard does not apply because the statute deals only with challenges to the resolution itself and that objections raised pursuant to Sections 1250.360(f) and 1250.370 are not “inherently” challenges to validity of the resolution. Therefore, the abuse of discretion standard does not apply. (*PG&E, supra*, 95 Cal. App. 5th at 833.)

This distinction puts form over substance and illogically leads to different standards of review based solely on how the objections are pled.

In *Burbank-Glendale-Pasadena Airport Auth. v. Hensler* (1991) 233 Cal. App. 3d 577 (“*Hensler*”). *Hensler* rejected the argument that pleading an objection under Section 1250.360(h) changed the standard of review and required a trial de novo. In *Hensler* the owner filed a cross-complaint on a CEQA issue and raised the same CEQA issue as an objection in his answer to the complaint in eminent domain. *Hensler* treated both the cross complaint and CEQA affirmative defense pled under 1250.360(h) as “attacks on the validity of the resolution of necessity.” (*Id.* at 589.) The Airport Authority contended it was entitled to a “full evidentiary trial” on the owner’s CEQA objection raised in the answer because it was brought pursuant to Section 1250.360(h) and the issue should not have been resolved on the owner’s cross complaint for a writ of mandate. (*Id.* at pp. 589-590.) *Hensler* rejected the Airport Authority’s argument and found the substantial evidence standard applied regardless of how the challenge was pled or litigated. (*Id.* at p. 589.)

Similarly, *Dusek, supra*, rejected a statutory interpretation that would permit a different standard of review when the objection to the resolution is raised by an answer instead of objecting by writ before the complaint is filed where the standard of review is Section 1085. (*Dusek, supra*, 193 Cal. App. 3d at p. 258.) *Dusek* determined that the argument for a different standard of review dependent on how the objection was pled was “incongruous.” (*Ibid.*) It would be equally incongruous to have a different standard of review for the findings of necessity based merely on how the objections are pled, but that is the effect of *PG&E*.

TAV properly finds that regardless of pleading semantics, an objection to the right to take is a challenge to the validity of the resolution and subject to

the abuse of discretion standard. (*TAV*, *supra*, 105 Cal. App. 5th at p. 84.) Whether the proposed taking is of a utility property does not change the fact that determinations have been made by the Town's legislative body and are presumed true under Sections 1245.250(b) and 1240.650(c) unless Liberty can disprove them. This is a logical interpretation because if Liberty is not attacking the resolution and evidence relied upon by the Town, what does Liberty have the burden of disproving?

III. CONCLUSION

PG&E did not consider the uncertainty and expense created by *PG&E's* improperly interferes with the ability of public entities to use eminent domain to provide public utility services for the public good. Amici respectfully request that this Court affirm the *TAV* decision and overrule *PG&E* to eliminate the confusion and inconsistency that currently exists regarding the proper standard of review applicable to utility takings.

Respectfully submitted,

/s/ Gerald Houlihan
GERALD HOULIHAN
Attorneys for Amici

/s/Doug Evertz
DOUG EVERTZ
Attorneys for Amici

CRC RULE 14(c) CERTIFICATE

I, GERALD HOUIHAN, hereby certify, in reliance on the word count of the computer program used to prepare this **APPLICATION TO FILE AMICI CURIAE BRIEF** that said Brief contains 7,565 words.