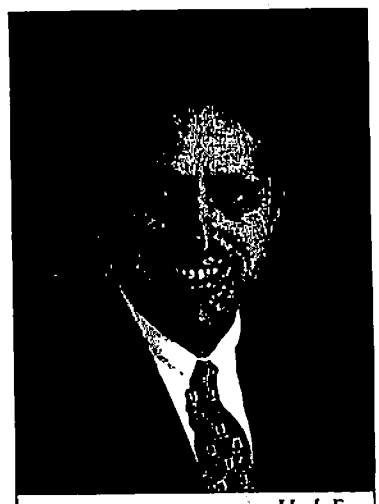
Risky Reliance on Clerk's Erroneous Advice

By Herb Fox

A would-be challenger to a Santa Barbara County subdivision permit learned the hard way a lesson all attorneys must heed: when in doubt, don't rely on the advice of a clerk of the court! The result here was a mandatory dismissal of the Petition challenging the County's action — a dismissal affirmed by the Court of Appeal.

The appellant, through her attorney, filed a petition for a writ of mandate challenging the County's approval of a subdivision of property. The petition was taken to the clerk's office for filing by the attorney's legal assistant. The legal assistant asked the superior court clerk if a summons was required. The court clerk replied that all that was needed to file the petition was a civil cover sheet. As a result, although the petition was filed and served timely, no summons was issued or served.

The County filed a motion to dismiss the petition for failure to serve a summons in compliance with Gov't Code §66499.37. The appellant opposed the motion by filing a declaration from the legal assistant and her attorney's paralegal stating that the court clerk told her no summons was required. The trial court — the Hon. James Brown presiding — granted the motion to dismiss.



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The Court of Appeal, in an unpublished opinion written by Justice Steven Z. Perren, affirmed the dismissal.

Gov't. Code §66499.37 — a portion of the Subdivision Map Act — sets forth a limitations period that requires the filing of a Petition for Writ of Mandate "*and service of summons effected*" within 90 days of the land use agency's decision. This is apparently a unique provision, as summonses are generally not issued in administrative mandamus actions. Nonetheless, the Court of Appeal rejected the appellant's estoppel argument, finding that in light of the explicit statutory requirement of a summons, reliance on the advice of the court clerk was not reasonable.

The Court also rejected appellant's impossibility argument.

Finally, the Court of Appeal declined Judge Brown's invitation to create an equitable remedy. In the order granting the motion to dismiss, Judge Brown stated that he "would welcome an appellate decision resolving the issue where a properly, and timely, served Petition simply lacks a Summons and authorizing this court when faced with a minor defect in jurisdictional service under its broad inherent power codified in Code of Civil Procedure section 128, 'to fashion new remedial procedures when it is advisable to do so, in order to deal with new issues or protect the rights of the parties.'"

But the Court of Appeal concluded that creating such discretion would be to rewrite the statute. "Our role is to interpret the laws, not make them."

In closing, the Court stated, "Section 66499.37 requires summons to be served. To the extent the court clerk is giving erroneous or misleading advice to parties or their counsel, the remedy lies with the administration of the clerk's office." ■

The case is *Gray v. Carbajal et al.*, Court of Appeal Case No. B204575, issued on December 30, 2008. Appellant was represented by Eric A. Woosley and Jordan T. Porter; the County was represented by Mary Pat Barry of County Counsel's Office.