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Expediting the Permitting Process for Desert Solar Projects

Kevin A. James

Code Sections Affected

Fish and Game Code §§ 2069, 2099, 2099.5 (new); Government Code § 11430.70 (amended); Public Resources Code § 25524 (new).
SBX8 34 (Padilla); 2010 STAT. Ch. 9 (*Effective March 22, 2010*).

I. INTRODUCTION

California's deserts are receiving more attention than ever before.¹ The pristine desert landscapes have set the stage for an emotive showdown between conservationists who want to protect the untouched habitats of California's deserts and solar energy companies trying to harness the nearly uninterrupted, renewable power of the sun's rays.²

Other than during a brief period of mining operations in the late 1800s and early 1900s,³ developers have traditionally viewed the California desert region as too harsh an environment to sustain commercial expansion.⁴ This historical outlook on the desert landscape has left "[v]ast stretches of desert . . . relatively untouched by development, and millions of acres . . . under federal or state protection, with more conservation areas planned."⁵

Yet, in a recent dash to the desert, solar and photovoltaic developers have become eager to establish a foothold in a landscape perfectly suited for solar power.⁶ Part of the rush for development can be attributed to a quickly-approaching eligibility deadline,⁷ which the solar power plants must meet in order to qualify for American Recovery and Reinvestment Act (ARRA) funds.⁸

1. See Michael Balchunas, *Sand and Fury: Siting Solar Power Plants on Desert Lands*, SOLAR HOME & BUS. J., Apr. 26, 2010 (on file with the *McGeorge Law Review*) (discussing the recent attention California's deserts have received from scientists, developers, conservationists, economists, and scholars).

2. See Rebecca Smith, *Green Battle Rages in the Desert*, WALL ST. J., Dec. 23, 2009, at A6 (describing the conflict between conservationists who want to protect the desert landscape and solar developers who want to establish solar power plants on the land).

3. See GARY L. SHUMWAY, LARRY VREDENBURGH & RUSSEL HARTILL., *DESERT FEVER: AN OVERVIEW OF MINING IN THE CALIFORNIA DESERT CONSERVATION AREA 66-69 (1980)* (discussing how the Mojave District mine produced "more than \$12,000,000 in gold and silver" between 1932 and 1942").

4. See Mojave Desert Timeline, <http://mojavedesert.net/history/timeline.html> (last visited Mar. 22, 2011) (on file with the *McGeorge Law Review*) (showing no commercial development other than mining operations beginning in the 1860s).

5. Balchunas, *supra* note 1.

6. Megan Treacy, *Energy Companies Competing for Desert Land*, ECOGEEK.ORG, Dec. 1, 2009, <http://www.ecogeeek.org/content/view/full/2469/83/> (on file with the *McGeorge Law Review*).

7. Press Release, Senator Alex Padilla's Office, Padilla Bill That Will Create Up to 15,000 Jobs Signed into Law (Mar. 22, 2010) (on file with the *McGeorge Law Review*) ("ARRA grants require that projects be

Due to the recent economic downturn and the push for more green energy, an unprecedented amount of solar developers submitted permit applications to claim a share of the billions of dollars in ARRA funds being offered to renewable energy projects.⁹ With the eligibility deadline rapidly approaching, it was clear the regulating agencies could not complete the permitting process, which includes compliance with habitat protection under the California Endangered Species Act (CESA),¹⁰ before the federal funding deadline expired.¹¹ If the deadline expired before permits were issued, many projects would have missed federal funding opportunities, and California would have missed the opportunity to create thousands of jobs and further the state's renewable energy goals.¹²

In order to speed up the permitting process without bypassing CESA's habitat protection requirements, Senator Padilla introduced Chapter 9.¹³ This allows eligible solar power companies to qualify before the ARRA funding deadline expires, while still requiring a rigorous environmental impact report.¹⁴ Chapter 9's success in satisfying the wishes of both solar power developers and environmentalists is exemplified by the overwhelming support it received from members of both political parties.¹⁵

II. LEGAL BACKGROUND

A. State Environmental Laws

California stands at the forefront of legislation implemented to increase the state's use of renewable energy sources and protect natural habitats.¹⁶ The Legislature's passage of CESA demonstrates the state's commitment to this stringent protection¹⁷ and exemplifies its dedication to defending the environments of endangered species.¹⁸

under construction by [December, 31, 2010]").

8. Julie Schmit, *Today's Gold Rush: Solar California Hurries to Get Green-Energy Projects Going Before Subsidies Expire*, USA TODAY, Mar. 31, 2010, at 1B.

9. *Id.*

10. CAL. FISH & GAME CODE §§ 2050-2068 (West 2010).

11. Schmit, *supra* note 8.

12. *Id.*

13. SENATE ENERGY, UTILITIES AND COMMUNICATIONS COMMITTEE, COMMITTEE ANALYSIS OF SBX8 34, at 1 (Feb. 16, 2010) ("This bill requires the CEC to establish an expedited process so that final decisions on permits for American Reinvestment and Recovery Act (ARRA) eligible solar thermal powerplants can be issued prior to December 31, 2010.").

14. SENATE ENERGY, UTILITIES AND COMMUNICATIONS COMMITTEE, COMMITTEE ANALYSIS OF SBX8 34, at 1 (Feb. 16, 2010).

15. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SBX8 34, at 11 (Mar. 11, 2010).

16. Renewables Committee, California's Renewable Energy Programs, <http://www.energy.ca.gov/renewables/index.html> (last visited Mar. 6, 2010) (on file with the *McGeorge Law Review*).

17. See CAL. FISH & GAME CODE § 2069 (enacted by Chapter 9) (discussing regulation of development projects affecting the habitats of endangered, threatened or candidate species).

18. SUSAN GEORGE & WILLIAM J. SNAPE III, ENDANGERED SPECIES ACT: LAW, POLICY AND

In addition to strictly regulating development within natural habitats, California is also committed to increasing its usage of renewable energy.¹⁹ In 2002, the Legislature passed Senate Bill 1078 to create a Renewable Portfolio Standard (RPS) and measure the amount of renewable energy used within the state.²⁰ Since adopting the RPS, California has steadily increased its goal for renewable energy production and emphasized the expansion of renewable energy sources.²¹

B. Federal Environmental Laws

In line with California's history of ambitious species protection laws and renewable energy goals, United States Senator Diane Feinstein also advanced aggressive federal legislation aimed at protecting the state's desert regions.²² Senator Feinstein sponsored the California Desert Protection Act (CDPA) in 1994, which created Death Valley National Park and Joshua Tree National Park, and outlined the Mojave national preserve.²³ Overall, the CDPA provides lasting protection for approximately 7 million acres of land.²⁴ In addition to these millions of acres, Senator Feinstein negotiated an agreement in the early 2000s to purchase land from the Catellus Development Group specifically for the purpose of desert conservation.²⁵ "As part of that agreement . . . the Wildlands Conservancy contributed \$40 million in private donations, and the federal government provided \$18 million in Land and Water Conservation Fund dollars to acquire and donate approximately 600,000 acres to the Department of the Interior" for the purpose of conservation.²⁶

PERSPECTIVES 346 (Donald C. Baur & WM. Robert Irvin eds., 2009) (noting that the CESA is modeled after the Federal Endangered Species Act and outlines the most comprehensive protection of habitats in any state).

19. Press Release, Office of the Governor of the State of California, Gov. Schwarzenegger Signs Executive Order to Advance State's Renewable Energy Portfolio Standard to 33 Percent by 2020 (Sept. 15, 2009) (on file with the *McGeorge Law Review*).

20. 2002 Cal. Stat. ch. 516, § 3 (adding CAL. PUB. UTIL. CODE § 399.12(c)).

21. See Press Release, Office of the Governor, *supra* note 19 (explaining the signing of several executive orders meant to increase the overall production of renewable energy sources). This steady increase began in 2007 when "the Governor called for an acceleration of the RPS, and signed SB 1078 . . . requiring investor owned utilities to have 20 percent of their electricity come from renewable sources by 2010." *Id.* Again, in September 2009, Governor Schwarzenegger demonstrated the state's commitment to increase the state's renewable energy sources by signing Executive Order S-21-09, mandating that thirty-three percent of the state's energy should come from renewable sources. *Id.*

22. Press Release, Office of Senator Dianne Feinstein, Statement of Senator Feinstein on Fifteen-Year Anniversary of the California Desert Protection Act (Oct. 30, 2009) (on file with the *McGeorge Law Review*).

23. *Id.*

24. *Id.*

25. Todd Woody, *Desert Vistas vs. Solar Power*, N.Y. TIMES, Dec. 22, 2009, at B1 [hereinafter Woody, *Desert Vistas*].

26. Letter from Senator Feinstein, U.S. Senator from Cal., to Ken Salazar, Sec'y, Dep't of the Interior (Mar. 3, 2009), reprinted in Press Release, Office of Senator Dianne Feinstein, Senator Feinstein Announces Intention to Introduce Measure to Protect Former Catellus Lands Through a Monument Designation (Mar. 18, 2009) (on file with the *McGeorge Law Review*).

Most recently, in May of 2010, Feinstein sponsored and introduced Federal Bill S2921, also known as the CDPA of 2010.²⁷ The bill was meant to “provide for the conservation, enhanced recreation opportunities, and development of renewable energy in the California Desert Conservation Area.”²⁸ It also required the Secretary of the Interior to create positions to oversee the distribution of federal permits allowing for the incorporation of renewable energy projects and the construction of transmission lines necessary to the projects’ viability.²⁹ With Senator Feinstein’s federal legislation still pending, Chapter 9 seeks to fulfill the wishes of both developers and environmentalists by expediting the mitigation process without sacrificing any environmental protections.³⁰

III. CHAPTER 9

Chapter 9 allows the Department of Fish and Game (DFG) to “purchase . . . land and conservation easements [and] . . . fully mitigate” environmental damage to the habitats of an endangered, threatened, or candidate species resulting from the development of eligible³¹ solar or photovoltaic power plants within the Desert Renewable Energy Conservation Plan (DRECP) planning area.³² The DFG designs this mitigation in consultation with the California Energy Commission (CEC), and Chapter 9 instructs that it shall be part of a provisional strategy³³ to be reviewed by independent scientists working under the DRECP.³⁴ To facilitate the completion of the permit process, Chapter 9 allows the DFG to collect a \$75,000 permit application fee to cover the expenses required to create such a detailed report.³⁵

Once the mitigation strategy is completed and approved by the DRECP, the developers provide the funds required to purchase the mitigation land and restore the predicted environmental damage.³⁶ These reimbursement funds are placed in

27. Press Release, Office of Senator Dianne Feinstein, Senator Feinstein Introduces Legislation to Balance Conservation, Recreation and Renewable Energy Development in the Mojave Desert (Dec. 21, 2009) (on file with the *McGeorge Law Review*).

28. S. 2921, 111th Cong. § 201 (2010).

29. *Id.*

30. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SBX8 34, at 15 (Mar. 11, 2010).

31. CAL. FISH & GAME CODE §2069 (enacted by Chapter 9) (defining “eligible” as those projects that qualify and have completed applications for American Recovery and Reinvestment Act (ARRA) funding).

32. SENATE ENERGY, UTILITIES AND COMMUNICATIONS COMMITTEE, COMMITTEE ANALYSIS OF SBX8 34, at 1 (Feb. 16, 2010).

33. CAL. FISH & GAME CODE § 2069(c)(2)(B) (enacted by Chapter 9). The mitigation strategy shall include an estimate of all costs necessary to acquire the mitigation land and restore any damage caused by development. *Id.*

34. *Id.* § 2069(c)(2)(A)-(B) (enacted by Chapter 9).

35. *Id.* § 2099.5(a) (enacted by Chapter 9).

36. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SBX8 34, at 1 (Mar. 10, 2010) (“Allows the developer of an eligible solar power plant to be built in the DRECP planning area to pay a fee in an amount, as determined by California Energy Commission (CEC), sufficient to pay for projects to mitigate any negative effects of the solar power plant on endangered or threatened species.”).

the Renewable Energy Resources Development Fee Trust Fund (RERDFTF),³⁷ which is initially established by loans from the Renewable Resources Trust Fund (RRTF).³⁸ Developers are able to put money into the RERDFTF instead of buying the actual mitigation land prior to development, which “[allows] renewable developers to meet their [mitigation requirements] . . . without directly improving habitat for species.”³⁹ This “expedite[s] permitting of a limited number of proposed solar power plants to be built in a resource rich but environmentally sensitive desert habitat . . . allowing these projects to qualify for grant funding from the federal [ARRA fund].”⁴⁰ This provision, in combination with others,⁴¹ expedites the permit process required to begin development of solar power plants and ensures that projects eligible for ARRA funding have the requisite permits in time to receive it.⁴²

IV. ANALYSIS

Chapter 9 attempts to alleviate the widening gap between the need to develop new lands to meet renewable energy goals and the need to protect the limited number of natural habitats left in the state.⁴³ Chapter 9 is largely unopposed, but there are some concerns with the impact of solar developments on the natural desert scenery and the habitats of species such as bighorn sheep and desert tortoises.⁴⁴

37. *Id.* at 1-2.

38. *See id.* (noting the RERDTF will initially be funded by a \$10 million loan from the RRTF, to be paid back no later than Dec. 31, 2012, and allow the DFG to purchase land with money from the trust fund before the solar companies provide their own mitigation fees).

39. *Governor and Feds Make Statement in the Desert*, CENTER FOR ENERGY EFFICIENCY AND RENEWABLE TECHNOLOGIES, Mar. 24, 2010, <http://www.ceert.org/ceertblog/tag/sbx8-34/> (on file with the *McGeorge Law Review*) (explaining how developers may deposit money into the RERDFTF in lieu of directly buying mitigation lands).

40. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SBX8 34, at 3 (Mar. 10, 2010).

41. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SBX8 34, at 3 (Mar. 16, 2010). Chapter 9 allows ex parte communication by an employee of a state agency to the “agency head or other person [holding] the power to hear or decide on the proceeding . . . if the content of the communication is disclosed on the record and all parties are given an opportunity [to be heard].” CAL. GOV’T CODE § 11430.70 (amended by Chapter 9). Previous law generally prohibited communication between agencies during a pending proceeding without prior notice of the communication. *Id.* § 11430.70 (West 2010).

42. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SBX8 34, at 8 (Mar. 11, 2010).

43. *Id.* at 3.

44. Schmit, *supra* note 8.

A. *Protection of Desert Habitats and an Oasis of Green Jobs*

Despite some limited opposition, Chapter 9 has received overwhelming support from both environmental groups and developers.⁴⁵ Chapter 9 provides developers with a way to build solar energy plants without compromising the integrity of the natural habitats affected by such development.⁴⁶ Because it does not amend CESA, Chapter 9 guarantees the natural habitats affected by development will receive the same level of protection they previously enjoyed.⁴⁷ As such, development will occur with a minimal or non-existent impact on the environment.⁴⁸

In addition to protecting natural habitats, proponents of Chapter 9 stress that it allows many proposed projects to move forward by ensuring they receive ARRA funding.⁴⁹ Chapter 9 expedites the permit process, allowing solar companies to begin developing projects before the deadline for ARRA funds passes and the window of opportunity expires.⁵⁰

Advocates of Chapter 9, primarily energy developers, have pointed out flaws in Senator Feinstein's policies, which call for "renewable energy at any cost," but "[holler] 'not in my backyard' when looking at the map."⁵¹ This argument stems from Senator Feinstein's support for the CDPA of 2010, which only prohibits development of desert habitats in the state of California, even though many of the most pristine and prized plots of desert land are found in Nevada, Arizona, and Utah.⁵² Failing to move forward on these solar projects would impair both California's renewable energy goals and its economy.⁵³ If the projects are not built within the state, Californians would lose "11,000 megawatts of electricity a year . . . enough to supply 7 million California homes and give California utilities a big boost in meeting mandates to get 33% of their energy from renewable sources . . ." ⁵⁴ The jobs, technology, and electricity would likely go to another state, and California would lose a golden opportunity.⁵⁵

45. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SBX8 34, at 11 (Mar. 11, 2010).

46. *Id.* at 2.

47. *Id.* at 3.

48. See CAL. FISH & GAME CODE § 2069 (enacted by Chapter 9) (mandating various mitigation practices required to minimize or eliminate any environmental impact as a result of development).

49. Schmit, *supra* note 8.

50. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SBX8 34, at 7 (Mar. 11, 2010).

51. Daniel Stone, *Not in Anyone's Backyard: Protect the Environment or Create Renewable Energy? A New Bill Shows They Are Far from the Same Thing*, NEWSWEEK, Jan. 13, 2010, <http://www.newsweek.com/2010/01/12/not-in-anyone-s-backyard.html> (on file with the *McGeorge Law Review*).

52. *Id.*

53. Schmit, *supra* note 8.

54. *Id.*

55. See Todd Woody, *It's Green Against Green in Mojave Desert Solar Battle*, Feb. 1, 2010, available at <http://e360.yale.edu/content/print.msp?id=2236> [hereinafter Woody, *Green Against Green*] (on file with the *McGeorge Law Review*) (describing the negative impact such regulation would have on California's

Further, supporters of Chapter 9 stress that development of California's desert region has the potential to create thousands of jobs and billions of dollars in revenue.⁵⁶ Energy technology investor and former oilman, T. Boone Pickens, "characterized the Southwest U.S. as the Saudi Arabia of solar power, offering the choicest elevation and sun strength in the world for optimal power generation."⁵⁷ In total, forty-nine projects are applying for federal stimulus funds and if all are built, "[t]he projects . . . would drive 10,000 construction jobs, 2,200 operational jobs and up to \$30 billion in investment"⁵⁸ If these solar projects are not built in California, they will likely be built in another state, causing California to forego an opportunity to provide thousands of new jobs in green technology and increase renewable energy use.⁵⁹

B. "Not in My Backyard"⁶⁰

The most strident opponents of Chapter 9 are Senator Dianne Feinstein and the Wildlands Conservancy.⁶¹ In a letter to Secretary of the Interior, Ken Salazar, Senator Feinstein expressed her concern that many of the planned solar projects would develop private lands donated to the federal government for conservation purposes only.⁶² Senator Feinstein also voiced her strong support for renewable energy, but highlighted that "many of the sites now being considered for leases are completely inappropriate and will lead to the wholesale destruction of some of the most pristine areas in the desert."⁶³ The lands currently sited for development are former holdings of Catellus, which is a "real estate subsidiary of the Santa Fe and Southern Pacific Railroad."⁶⁴ Furthermore, Catellus originally sold the land at a discount, contingent upon the idea that the land would be protected from development.⁶⁵

In an effort to stop what some believe to be inappropriate and destructive land development, Senator Feinstein introduced the CDPA of 2010, which would

economy—and how California's neighbors will take advantage of this impact).

56. Schmit, *supra* note 8.

57. Stone, *supra* note 51.

58. Schmit, *supra* note 8.

59. See Woody, *Green Against Green*, *supra* note 55 ("PG&E, FPL, and Iberdrola Renewables, the Spanish renewable energy giant, say they are either cautiously proceeding or re-evaluating their Mojave projects in light of the legislation. Most developers have staked multiple land claims elsewhere in the Southwest."). These actions are in response to Senator Feinstein's bill prohibiting development of solar power within the state of California. *Id.*

60. See Stone, *supra* note 51 (depicting Senator Feinstein and others' opposition as supportive in principle, but against the bearing any of the actual costs).

61. Smith, *supra* note 2.

62. Press Release, Office of Senator Dianne Feinstein, *supra* note 26.

63. *Id.*

64. Press Release, Office of Senator Dianne Feinstein, *supra* note 26.

65. *Id.*

create a monument area prohibiting any construction.⁶⁶ Although the bill would prohibit the development of land within the monument boundaries, certain provisions would make development of alternative lands easier.⁶⁷ “Instead of taking seven to nine years to do endangered-species act reviews on private land, [Senator Feinstein’s bill would allow] renewable-energy developers [to] qualify for reviews taking 18 months to three years.”⁶⁸

Other opponents of Chapter 9 claim the law gives too much land to solar developers and opens the door for the exploitation of desert lands.⁶⁹ According to California’s analysis, the state must develop approximately 128,000 acres of desert land in order to meet its renewable energy goals.⁷⁰ Yet, “there currently are projects proposed that would utilize nearly a million acres.”⁷¹

Senator Feinstein’s bill, backed by the Wildlands Conservancy, is the primary opposition to Chapter 9.⁷² Yet, Chapter 9 does not change the habitat protection guidelines of CESA; developers still must fully mitigate any habitat damage resulting from their development, which helps to calm the apprehensions of most environmentally concerned groups.⁷³

V. CONCLUSION

The potential for solar development in the desert has spurred a gold rush style sprint to the desert, resulting in an increase of solar project applications.⁷⁴ However, the previous permitting process and lack of funds have resulted in very few proposed projects actually breaking ground.⁷⁵ Hopefully, Chapter 9 will alleviate the difficulty of the permit process and push some projects forward.⁷⁶ With these projects comes the prospect of restored prosperity to those areas of California most harshly affected by the current economic downturn.⁷⁷

Despite the solar industry’s dash to the desert under Chapter 9’s expedited permitting process, a number of companies pulled out of the race in anticipation

66. Smith, *supra* note 2.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SBX8 34, at 11 (Mar. 11, 2010).

73. CAL. FISH & GAME CODE § 2069 (enacted by Chapter 9).

74. *See* Treacy, *supra* note 6.

75. *Id.* (“The bureau has seen a 78% increase in applications, now totaling 223. The applicants are all looking to capitalize on desert land in California, Arizona, Nevada, New Mexico, Utah and Colorado, with California leading with 107 applications alone. All of the projects are 10 MW or larger, with many proposing hundreds of megawatts. All together the projects would take up 2.3 million acres of land and would generate many, many gigawatts. (the 75 projects listed on the BLM website total 51.6 GW and that’s only a third of the applicants).”).

76. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SBX8 34, at 11 (Mar. 11, 2010).

77. Treacy, *supra* note 6.

of Senator Feinstein's pending legislation.⁷⁸ While the success of Feinstein's bill "is by no means assured, most of the solar developers—including BrightSource Energy, Goldman Sachs, and Tessera Solar—had abandoned their projects before the bill was formally introduced in late December."⁷⁹ This affect is not widespread, however.⁸⁰ Notwithstanding the introduction of Senator Feinstein's bill, many companies are still looking at solar sites in the California desert.⁸¹ Several developers still expect to capitalize on Chapter 9's expedited permitting process and break ground by the end of the year.⁸² Even if Feinstein's bill passes, it does not completely prohibit development, but instead forces developers to find "more appropriate site[s]."⁸³

The solar gold rush will likely continue into the near future.⁸⁴ Both developers and environmentalists will enjoy the benefits of Chapter 9.⁸⁵ Regardless of whether Senator Feinstein's bill is passed, Chapter 9 shows that "[w]e don't have to choose between having renewable energy development or complying with the Endangered Species Act. . .[w]e can have them both, and certainly the California experience is that we have the resources to do both."⁸⁶

78. Woody, *Desert Vistas*, *supra* note 25.

79. Woody, *Green Against Green*, *supra* note 55.

80. See Schmit, *supra* note 8 (describing the numerous projects still eagerly awaiting the go-ahead to begin developing renewable energy projects in California).

81. *Id.*

82. *Id.*

83. Elizabeth Rosenthal, *Disputed Solar Energy Project in California Desert Is Dropped*, N.Y. TIMES, Sept. 18, 2009, at A12 (quoting David Myers, executive director of the Wildlands Conservancy).

84. See Treacy, *supra* note 6.

85. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SBX8 34, at 11 (Mar. 11, 2010). No organizations have opposed Chapter 9 on the record, while both developers and environmental groups have expressed support in the official legislative record. *Id.*

86. Woody, *Green Against Green*, *supra* note 55 (quoting Johanna Wald, senior attorney with the Natural Resources Defense Council).
