OFFICE OF THE CLERK
Court of Appeal
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

HENRY ESPINOZA
ASSISTANT CLERK/ADMINISTRATOR

STEPHEN M. KELLY
CLERK/ADMINISTRATOR

DIVISION TWO
3389 TWELFTH STREET
RIVERSIDE, CALIFORNIA 92501
TELEPHONE (951) 248-0200

April 22, 2011

NOTICE

Dear Counsel:

You are invited to participate in oral argument, and you will be notified approximately 30 days in advance of the date and time of oral argument. Enclosed is the tentative opinion of the panel hearing the case to help you focus your argument.

The following procedures and policies apply to oral argument:

(1) Since the tentative opinion focuses oral argument, no more than 15 minutes of oral argument will be allowed for each side, except for good cause. (Cal. Rules of Court, rule 8.256(c); Ct. App., Fourth Dist., Div. Two, Misc. Order 11-6.)

(2) Counsel should respond to the tentative opinion and avoid unreasonable repetition of arguments raised in counsel's briefs.

(3) No supplemental briefing will be accepted because counsel may raise those issues during oral argument. However, counsel should refrain from raising new issues not briefed. (*People v. Pena* (2004) 32 Cal.4th 389, 403.)

(4) No continuances will be permitted except for good cause shown.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CITY OF CHINO HILLS, Plaintiff and Appellant, v. SOUTHERN CALIFORNIA EDISON COMPANY, Defendant and Respondent.	E051033 (Super.Ct.No. CIVRS901914) TENTATIVE OPINION

APPEAL from the Superior Court of San Bernardino County. Keith D. Davis, Judge. Affirmed.

Jenkins & Hogin, Mark D. Hensley, John C. Cotti, and Elizabeth M. Calciano for Plaintiff and Appellant.

Leon Bass, Jr.; Latham & Watkins, James L. Arnone, Laura A. Godfrey, Adrianna B. Kripke; Willenken, Wilson, Loh & Lieb, Jason S. Wilson and Nhan T. Vu for Defendant and Respondent.

The Public Utilities Commission (Commission or PUC) issued a certificate of public convenience and necessity and adopted a final environmental impact report for a proposed electrical transmission line running from Kern County to Los Angeles County. In the course of doing so, it approved a route that involved running the line through the City of Chino Hills (the City), using easements that the proponent of the project, Southern California Edison Co. (SCE), already owned.

Meanwhile, the City had filed this action against SCE. The City alleges that the construction of the transmission line would exceed the scope of the easements, would interfere with the use of the City's property, and would threaten the safety of people and buildings nearby. The trial court ruled that the action was barred by Public Utilities Code section 1759 (section 1759), which forbids a trial court "to review, reverse, correct, or annul any order or decision of the commission . . . ."

The City appeals. It contends that section 1759 does not apply because the Commission has no authority to adjudicate private property rights, and therefore allowing this action to proceed would not interfere with any order or regulatory policy of the Commission. It further contends that the trial court's ruling is unconstitutional because it violates the judicial powers clause of the California Constitution, it results in a taking of property without just compensation, and it violates the right to trial by jury.

We will hold that this action did threaten to interfere with multiple policies of the Commission, as embodied in its decision, and hence that the action was barred under section 1759. Assuming the Commission lacks jurisdiction to "adjudicate" private

property rights, it does have the authority to make a finding regarding such rights, when doing so is cognate and germane to the exercise of its broad constitutional and statutory powers to regulate public utilities. And even if, under section 1759, a decision of the Commission bars an action regarding private property rights, that does not mean that the Commission has improperly "adjudicated" those rights, has violated the judicial powers clause, has taken property without just compensation, or has violated the right to trial by jury.

Hence, we will affirm.

I

FACTUAL BACKGROUND

Because this is an appeal from a judgment on the pleadings, we take the facts from the City's complaint, as supplemented by matters of which the trial court took judicial notice. (See *Shimmon v. Franchise Tax Bd.* (2010) 189 Cal.App.4th 688, 692-693.)

SCE owns a series of contiguous easements that collectively cut a swath 150 feet wide and five miles long across the City. {JA 1/3, ¶ 8; 1/5, ¶ 16} SCE is entitled to use them to "'construct, reconstruct, maintain, operate, enlarge, improve, remove, repair and review an electric transmission line . . . ." {JA 1/3, ¶ **9**} Within the easements, SCE has built a 220-kilovolt transmission line (not currently used), including towers that are 100 feet tall and 30 feet wide. {JA 1/4, ¶ 13} The City owns much of the property underlying the easements; it uses this property for parks-and-recreation purposes, such as "tot lots," trails, and open spaces. {JA 1/2, ¶ 6; 1/3, ¶ 8}

SCE plans to build what it calls the Tehachapi Renewable Transmission Project (the Project) to deliver electricity from wind farms in Kern County to the Los Angeles area. {JA 1/4-5, ¶ 14} As part of the Project, SCE proposes to replace the existing 220-kilovolt line with a 500-kilovolt line, which would require towers 198 feet tall and 60 feet wide. {JA 1/5, ¶ ¶ 15-16}

The City alleges that 198-foot tall towers cannot be safely built in the 150-foot wide easements. {JA 1/5-6, ¶¶ 17-18, 20-21} A tower could fall; if it did, it could land over 120 feet outside the easements. This would pose a threat to nearby homes, schools, churches, parks, and streets. {JA 1/5-6, ¶¶ 16, 18; 1/6, ¶¶ 20-21} The 198-foot towers will also have "a significant negative aesthetic impact on the City and its residents." {JA 1/5, ¶ 17} The Project will limit the use of the parks, trails, and open spaces that are located in the easements. {JA 1/5, ¶ 17} It will also limit the City's ability to use certain property that it leases for use as a community center. {JA 1/2-3, ¶ 7, 1/5, ¶ 17, 1/6, ¶ 19}

According to the City, there are less burdensome alternatives to the construction of the Project as planned, including (a) rerouting the line through Chino Hills State Park, (b) running the line at least partially underground, or (c) converting the line as it passes through the City from AC to DC, as DC towers would be roughly similar to the existing towers. {JA 1/7, ¶ 22}

In 2007, SCE applied to the Commission for a certificate of public convenience and necessity for the Project. (See Pub. Util. Code, § 1001.) This required the Commission to prepare an environmental impact report, pursuant to the California

Environmental Quality Act (CEQA). The City participated in the proceedings before the Commission. {JA 5/946-947} The Commission considered contentions, raised by the City and others, that the construction of the Project within the easements would be unsafe {JA 5/992-1000}, would have a negative aesthetic impact {JA 7/1551}, and would interfere with the use of local parks {JA 5/988-989}. The Commission also considered alternatives to the proposed Project, including alternatives proposed by the City. {JA 5/945, 967, 971-978; 7/1503-1569}

In December 2009, the Commission certified a final environmental impact report and issued a certificate of public convenience and necessity. {JA 5/939-1050} It concluded that a route running through the easements was the "Environmentally Superior Alternative." {JA 5/982-983, 1004} It also specifically determined that the easements were wide enough to permit the Project to be built and operated safely. {JA 5/992-999} Hence, it authorized SCE to construct the Project using a route that ran through the easements. {JA 5/982-983, 1004}

The City had argued that the Commission should consider the fact that this then-pending action was likely to delay construction of the Project. It specifically argued that this action was not barred by section 1759. Citing *Koponen v. Pacific Gas & Electric Co.* (2008) 165 Cal.App.4th 345, it asserted that section 1759 would not apply unless the Commission specifically investigated and rejected its claims. {JA 5/1030}

The Commission responded, "We disagree with [the City]'s interpretation of § 1759. Nevertheless, we have considered [the City]'s arguments regarding the

[easements]." {JA **1030**} Based on the sole written easement that the City had offered in evidence, the Commission concluded that the Project was "consistent with the language of the easement . . . ." {JA 5/**1030**}

II

PROCEDURAL BACKGROUND

In February 2009, the City filed this action against SCE, seeking only injunctive and declaratory relief. {JA 1/1-41} The trial court stayed the case "pending a determination by the PUC of the route for the [Project]." {JA 4/**781**; RT 2-3, 13-15} In January 2010, after the Commission had approved the route, the trial court lifted the stay. {JA 4/783; RT 18-22} SCE filed an answer {JA 4/784-793} alleging, among other things, that the action was barred by section 1759. {JA 4/789, ¶ 1}

SCE then filed a motion for judgment on the pleadings based, in part, on section 1759. {JA 4/908-7/1681} The trial court granted the motion without leave to amend. {JA 8/1764-1770; RT 26-27, 32-35} Accordingly, in May 2010, it entered judgment in favor of SCE and against the City. {JA 8/1785-1786}

III

THE TRIAL COURT CORRECTLY RULED

THAT THIS ACTION IS BARRED BY SECTION 1759

The City contends that the trial court erred by ruling that it lacked jurisdiction over the City's claims. {AOB 11-28}

A. *This Action Would Hinder or Interfere with Multiple Commission Policies.*

We begin by placing section 1759 in context. "[T]he Constitution and statutes of this state grant the commission wide administrative, legislative and judicial powers. [Citations.]" (*Southern Pac. Transportation Co. v. Public Utilities Com.* (1976) 18 Cal.3d 308, 311, fn. 2.)

"The Constitution confers broad authority on the commission to regulate utilities, including the power to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures. [Citations.] The commission's powers, however, are not restricted to those expressly mentioned in the Constitution: 'The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission . . . .' [Citation.]

"Pursuant to this grant of power the Legislature enacted Public Utilities Code section 701, conferring on the commission expansive authority to '*do all things*, whether specifically designated in [the Public Utilities Act] *or addition thereto*, which are necessary and convenient' in the supervision and regulation of every public utility in California. . . . The commission's authority has been liberally construed. [Citations.] Additional powers and jurisdiction that the commission exercises, however, 'must be cognate and germane to the regulation of public utilities . . . .' [Citations.]" (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905.)

Section 1759, subdivision (a) provides: "No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties . . . ." A decision of the Commission is subject only to writ review by a Court of Appeal or the Supreme Court. (Pub. Util. Code, §§ 1756, subd. (a), 1757, 1757.1, 1759.)

"[A]n action for damages against a public utility . . . is barred by section 1759 not only when an award of damages would directly contravene a specific order or decision of the commission, i.e., when it would 'reverse, correct, or annul' that order or decision, but also when an award of damages would simply have the effect of undermining a general supervisory or regulatory policy of the commission, i.e., when it would 'hinder' or 'frustrate' or 'interfere with' or 'obstruct' that policy." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 918, fn. omitted (*Covalt*).)

In *Covalt*, the Supreme Court established a three-part test for determining whether an action is barred under section 1759: (1) "whether the commission has the *authority* to adopt a policy" (*id.* at p. 923; see also *id.* at pp. 923-925); (2) "whether the commission has *exercised* th[at] authority" (*id.* at p. 926; see also *id.* pp. 926-934); and (3) "whether the present superior court action would hinder or interfere with that policy" (*id.* at p. 935; see also pp. 935-943).

Covalt's three-part test, to some extent, begs the question: What is the relevant policy? The City argues that a "policy" is something more than a mere ruling or decision. {AOB 4-5} We agree. "When the bar raised against a private damages action has been a ruling of the commission on a single matter such as its approval of a tariff or a merger, the courts have tended to hold that the action would not 'hinder' a 'policy' of the commission . . . and hence may proceed. But when the relief sought would have interfered with a broad and continuing supervisory or regulatory program of the commission, the courts have found such a hindrance and barred the action under section 1759." (*Covalt*, *supra*, 13 Cal.4th at pp. 918-919.)

Hartwell Corp. v. Superior Court (2002) 27 Cal.4th 256 illustrates the distinction nicely. There, the Commission had issued an opinion, following an investigation, that (1) existing drinking water quality standards were adequate to protect the public health and safety, (2) water utilities had complied with these standards, and (3) the water these utilities had provided was "'"in no way harmful or dangerous to health."' . . . " (*Id.* at p. 265.) Meanwhile, the plaintiffs sued some of the utilities, alleging that they had supplied contaminated water and seeking damages and injunctive relief. (*Id.* at p. 261.)

Significantly, the Supreme Court held that section 1759 barred some of the plaintiffs' claims, but not others. For example, it held that their claim for injunctive relief was barred. (*Hartwell Corp. v. Superior Court*, *supra*, 27 Cal.4th at p. 278.) "As part of its water quality investigation, the PUC determined, not only whether the regulated utilities had complied with drinking water standards for the past 25 years, but also

whether they were currently complying with existing water quality regulation. [Citation.] . . . Based on that factual finding, the PUC impliedly determined it need not take any remedial action against those regulated utilities. A court injunction, predicated on a contrary finding of utility noncompliance, would clearly conflict with the PUC's decision and interfere with its regulatory functions in determining the need to establish prospective remedial programs." (*Ibid.*)

Section 1759 also barred any claim for damages sought on the theory that water provided in the past, even though it complied with the existing standards, was unhealthy. (*Hartwell Corp. v. Superior Court*, *supra*, 27 Cal.4th at pp. 275-276.) Such a claim "would interfere with a 'broad and continuing supervisory or regulatory program' of the PUC. [Citation.] . . . [T]he [existing] standards have been used by the PUC in its regulatory proceedings for many years as an integral part of its broad and continuing program or policy of regulating water utilities. As part of that regulatory program, the PUC has provided a safe harbor for public utilities if they comply with the . . . standards. An award of damages on the theory that the public utilities provided unhealthy water, even if the water met [the] standards, 'would plainly undermine the commission's policy by holding the utility liable for not doing what the commission has repeatedly determined that it and all similarly situated utilities were not required to do.' [Citation.]" (*Id.* at p. 276.)

On the other hand, however, section 1759 did *not* bar any claim for damages sought on the theory that water provided in the past failed to comply with the existing

standards. (*Hartwell Corp. v. Superior Court*, *supra*, 27 Cal.4th at pp. 276-278.) The Commission's "retrospective finding" that the utilities had complied with these standards in the past "was not part of an identifiable 'broad and continuing supervisory or regulatory program of the commission' [citation], related to such routine PUC proceedings as ratemaking [citation] or approval of water quality treatment facilities." (*Id.* at pp. 276-277.) The Commission itself had characterized its investigation as "'an information gathering process,'" rather than "'a rulemaking proceeding'" or "'an enforcement proceeding.'" (*Id.* at p. 277.) The court concluded that the Commission's finding of past compliance was not "part of a broad and continuing program to regulate public utility water quality . . . ." (*Ibid.*) Thus, "[a]lthough a jury award supported by a finding that a public water utility violated . . . PUC standards would be contrary to a single PUC decision, it would not hinder or frustrate the PUC's declared supervisory and regulatory policies . . . . [I]t would also not constitute a direct review, reversal, correction, or annulment of the decision itself." (*Id.* at pp. 277-278.)

Under *Hartwell*, then, a given Commission ruling or decision may or may not constitute a "policy," depending on the nature and effect of the plaintiff's particular claims. In other words, in applying the three-part *Covalt* test, rather than starting by identifying a "policy" and then asking whether the plaintiff's action would "hinder or interfere" with that policy, we may start by identifying what the plaintiff's action would "hinder or interfere" with, and then determine whether that is a "policy."

Here, the injunctive and declaratory relief that the City is seeking would interfere with the Commission's decision approving the route for the Project. In *Hartwell*, the Supreme Court held that the utilities could not be held liable for not doing what the Commission had determined that they were not required to do. Here, similarly, SCE should not be held liable for doing what the Commission has determined that it is entitled to do. Indeed, although the Commission has not *required* SCE to construct the Project, it *has* determined that public convenience and necessity require the construction of the Project.

Unlike the "retrospective finding" in *Hartwell*, this decision was part of a broad and continuing program of regulation. Under Public Utilities Code section 1001, SCE could not construct a transmission line unless and until the Commission issued a certificate of public interest and necessity. Under former Public Utilities Code section 399.25, subdivision (a), a new transmission line was deemed necessary "if the commission finds that the new facility is necessary to facilitate achievement of [specified statewide] renewable power goals . . . ." (See now Pub. Util. Code, § 399.2.5, subd. (a).)

The Commission had previously established that "to rely on [Public Utilities Code section] 399.25 to establish the need for a project, . . . a proponent must demonstrate: (1) that a project would bring to the grid renewable generation that would otherwise remain unavailable; (2) that the area within the line's reach would play a critical role in meeting the [renewable power] goals; and (3) that the cost of the line is appropriately balanced against the certainty of the line's contribution to economically rational [renewable power]

compliance." (*Southern California Edison Co.* (2007) Cal.P.U.C. Dec. No. 07-03-012 [2007 Cal. PUC LEXIS 282, *165].) It concluded that the Project satisfied all three of these requirements. {JA 944, 950, 952-959}

Moreover, the Commission had to approve the route for the entire Project. In doing so, it had to consider various policy goals, in conformity with CEQA, including not only a myriad of environmental policy goals, but also the feasibility and necessity of the Project. In the process, it specifically considered the "adverse visual impact" of the Project {JA 985-**986**}, the effect of the Project on recreational and park areas {JA 988-990}, and the risk that a tower might fall {JA 5/995-999}.[1] Indeed, the City concedes that the Commission was *required* to consider these objections to the Project. {AOB **22**}

It also had to consider the so-called "Garamendi principles." These are an uncodified declaration of legislative intent; they state that it is in the public interest "[w]hen construction of new transmission lines is required, [to] encourage expansion of existing rights-of-way, when technically and economically feasible." (Stats. 1988, ch. 1457, § 1, p. 4995; see also Cal. Code of Regs., tit. 20, § 2320.) {JA 960} The Commission determined that "[a]ny individual community's preference to avoid development of transmission infrastructure in its boundaries cannot outweigh these important statewide policy goals . . . ." {JA 5/**960-961**, 988}

---

[1] We do not consider administrative collateral estoppel, which was not raised below. We mention these specific findings because they illustrate how comprehensive the Commission's consideration of the various competing policies was.

In sum, the Commission had to consider, balance, and make tradeoffs among numerous competing policies, including the state's renewable energy policies, its policy in favor of placing new transmission lines in existing rights of way, and its environmental policies. The route that the Commission approved embodies its resolution of a host of policy considerations. The injunctive and declaratory relief that the City is seeking would interfere with that policy determination.

B. *The Commission Had the Authority to Make Findings Concerning the City's Claimed Private Property Rights.*

The City responds that the Commission did not have "the authority to resolve property disputes between utilities and private land owners . . . ." {AOB **17**} We recognize that "section 1759 deprives the courts of jurisdiction only as to acts undertaken by the commission 'in the performance of its official duties' and not acts in excess of its jurisdiction. [Citations.]" (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1571.) The City, however, does not take the position that the Commission exceeded its jurisdiction. To the contrary, it affirmatively asserts that the Commission did not purport to resolve a private property dispute. {AOB 19} Instead, the City's argument seems to be that this action would not interfere with a policy determination because the Commission could not — and, a fortiori, it did not — determine the parties' property rights. {AOB 16-20}

The City relies — as it did before the Commission — on *Koponen v. Pacific Gas & Electric Co.*, *supra*, 165 Cal.App.4th 345. In *Koponen*, the Commission had approved

agreements between an electric utility and various telecommunications companies allowing the latter to install fiber optic lines in the utility's easements. (*Id.* at p. 351.) The plaintiffs, who owned the land burdened by the easements, alleged that the installation of fiber optic lines would exceed the scope of the easements. (*Id.* at p. 349.)

The court held that section 1759 did not bar the action.[2] First, it held that the plaintiffs could seek damages, because "the commission has no authority to determine the property dispute between plaintiffs and [the utility], and it does not matter that the commission has approved [the utility]'s applications. The commission certainly can determine that the applications are in the public interest, . . . but neither that finding nor the commission's approval of the applications in any way determined the extent of [the utility]'s rights in the easements. Moreover, even if the commission's decisions might be interpreted as finding [the utility]'s interest in the easements permitted [the utility] to enter into the leases or licenses, [the utility] has not established that the commission's regulatory authority actually allows it to adjudicate private property rights." (*Koponen v. Pacific Gas & Electric Co.*, *supra*, 165 Cal.App.4th at pp. 355-356.)

It also held that the plaintiffs could seek injunctive relief. It distinguished *Hartwell* on the ground that "[i]n that case . . . , the commission had investigated the plaintiffs' claims, had concluded they were unfounded, and effectively found no need to

---

[2] With one exception: Because the Commission had determined how the utility had to allocate its revenues from the agreements, the plaintiffs' claim for "disgorgement" of those revenues was barred. (*Koponen v. Pacific Gas & Elec. Co.*, *supra*, 165 Cal.App.4th at p. 358.)

take any remedial action against the utilities. It followed that '[a] court injunction, predicated on a contrary finding of utility noncompliance, would clearly conflict with the PUC's decision and interfere with its regulatory functions in determining the need to establish prospective remedial programs.' [Citation.] In the present case, the commission has made no investigation into the validity of plaintiffs' claims, has made no finding [the utility] has complied with the terms of the grants of its rights-of-way, and has made no determination further action has been rendered unnecessary." (*Koponen v. Pacific Gas & Electric Co.*, *supra*, 165 Cal.App.4th at p. 358.)

Koponen is not controlling here, for two reasons. First, in *Koponen*, the Commission had not made any determination regarding the plaintiffs' claims. Indeed, in an amicus brief, the Commission had conceded that its authorization had been based on "' . . . the assumption that [the utility] possesses the legal right to lay [fiber optic] cable alongside its electrical lines. That issue was not presented to the Commission for determination, and no such determination was made. . . . [T]he Commission did not (and could not) authorize [the utility] to do more than what is legally permitted under the scope of [the utility]'s existing easements.'" (*Koponen v. Pacific Gas & Electric Co.*, *supra*, 165 Cal.App.4th at p. 356.) By contrast, here — much as in *Hartwell* — the Commission did investigate the City's claims; moreover, it rejected them, and it ruled that they should not affect the routing of the Project.

Second, in *Koponen*, there was no interference with any policy of the Commission. The utility argued that there was a regulatory policy in favor "of promoting the joint use

of utility property for general telecommunications purposes." (*Koponen v. Pacific Gas & Electric Co.*, *supra*, 165 Cal.App.4th at p. 351.) In its amicus brief, however, the Commission essentially conceded that this policy did not apply unless the utility had the legal right to permit the joint use. Here, we have the exact opposite situation — the Commission has taken the position that allowing this action to proceed *would* undermine its policies and specifically that section 1759 *does* apply.

According to the City, *Koponen* "establishes" the principle that "the PUC does not have the requisite authority to decide property rights claims raised by a non-regulated entity . . . ." {AOB **16**} Not so. Admittedly, *Koponen* did state: "Plaintiffs contend the commission has no regulatory authority or interest in private disputes over property rights between [a utility] and private landowners. *We agree.*" (*Koponen v. Pacific Gas & Electric Co.*, *supra*, 165 Cal.App.4th at p. 353, italics added.) Later, however, the court expressed the same concept in more cautious and limited terms. It concluded that, by determining that the utility's applications were in the public interest, the Commission had not actually determined the extent of the utility's interest in the easement; but alternatively, even if it had, "[the utility] *has not established* that the commission's regulatory authority actually allows it to adjudicate private property rights." (*Id.* at pp. 355-356, italics added.) This left open the possibility that this proposition *could* be established in another case.

If the *Koponen* court really did intend to declare that there was no *possible* decision within the Commission's jurisdiction that could *ever* require it to make a finding

concerning private property rights, that declaration was dictum. "[T]he language of an opinion must be construed with reference to the facts presented by the case; the positive authority of a decision is coextensive only with such facts. [Citation.]" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1097, fn. omitted.)

Actually, "[t]he PUC may, and indeed sometimes must, consider areas of law outside of its jurisdiction in fulfilling its duties." (*Greenlining Institute v. Public Utilities Com.* (2002) 103 Cal.App.4th 1324, 1333, fn. 10.) Subject to the "cognate and germane" test (see *Consumers Lobby Against Monopolies v. Public Utilities Com.*, *supra*, 25 Cal.3d at p. 905), it can even make determinations regarding private property rights.

For example, in *Limoneira Co. v. Railroad Commission* (1917) 174 Cal. 232, the Commission[3] set the rate that a water utility could charge a particular customer (Limoneira). (*Limoneira*, at p. 233.) Limoneira claimed that it was entitled to receive the water for free, because a deed from its predecessor in interest to the utility's predecessor in interest had reserved a right to the water. (*Id.* at pp. 239-241.) The Commission ruled that the reservation in the deed was void. (*Id.* at p. 242.)

---

[3] At the time, the PUC was known as the Railroad Commission: "In 1911, the PUC was established by Constitutional Amendment as the Railroad Commission. In 1912, the Legislature passed the Public Utilities Act, expanding the Commission's regulatory authority to include natural gas, electric, telephone, and water companies as well as railroads and marine transportation companies. In 1946, the Commission was renamed the California Public Utilities Commission." (<http://www.cpuc.ca.gov/PUC/aboutus/puhistory.htm>, as of Apr. 5, 2011.)

The Supreme Court agreed that the reservation was void. (*Limoneira Co. v. Railroad Commission of Cal.*, *supra*, 174 Cal. at pp. 241-242.) However, it also stated, "A large part of the briefs of learned counsel for petitioner is devoted to discussion of a claim that the . . . commission was without jurisdiction to determine any question as to the validity of petitioner's asserted rights of property in regard to the waters claimed by them in good faith. In view of the provisions of our constitution and the Public Utilities Act, and our decisions thereunder, we do not see how it can be doubted that the . . . commission had the power to determine for the purposes of the exercise of its jurisdiction to regulate a public utility by the fixing of rates, subject to such power of review as is possessed by this court, all questions of fact essential to the proper exercise of that jurisdiction." (*Id.* at p. 242, italics omitted.)

More recently, in *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, a water utility sought a rate increase, arguing that it needed to lease wells on certain property. (Significantly, the owners of the utility were also the owners of the property.) The Commission denied the rate increase, finding that, under two 1951 deeds, the utility already owned an easement entitling it to water from the same property. (*Id.* at pp. 850-851; see also *id.* at pp. 852-861.)

The Supreme Court defined the issue as "whether . . . the [Commission] has jurisdiction to adjudicate interests in real property, and, if so, the effect of such adjudication on the interests of persons who are not regulated utilities in that property." (*Camp Meeker Water System, Inc. v. Public Utilities Com.*, *supra*, 51 Cal.3d at p. 849.)

As the court noted, "The commission acknowledges that it does not have jurisdiction equivalent to that of a court, to adjudicate incidents of title . . . ." (*Id.* at p. 850.) "Rather, it purports only to have construed the existing legal rights of [the water utility], and disclaims any power to create new rights. The commission expressly recognizes that its functions do not include determining the validity of contracts, whether claims may be asserted under a contract, or interests in or title to property, those being questions for the courts. [Citations.] It claims only the power to construe, for purposes of exercising its regulatory and ratemaking authority, the existing rights of a regulated utility." (*Id.* at p. 861.) The court concluded: "In construing the 1951 deeds for that purpose, the commission acted within its constitutional and statutory jurisdiction." (*Ibid.*)[4]

Camp Meeker did not involve any issue regarding section 1759. It is conceivable that, through the operation of section 1759, a determination by the Commission may have the practical effect of "adjudicating" a private property right. For example, in *Hartwell*, the Commission's findings precluded the plaintiff's from bringing certain tort claims (see *Hartwell Corp. v. Superior Court*, *supra*, 27 Cal.4th at p. 261) on certain theories, and thus, in a sense, "adjudicated" those claims.

---

[4] The water utility also argued that the Commission's finding violated the property owners' due process rights. The Supreme Court refused to decide this issue, because it was an "attempt to assert the rights of other parties . . . ." (*Camp Meeker Water System, Inc. v. Public Utilities Com.*, *supra*, 51 Cal.3d at p. 852, fn. 3.) We address the City's due process argument in part III.C.2, *post*.

Similarly, in *Ford v. Pacific Gas & Electric Co.* (1997) 60 Cal.App.4th 696, the Commission had adopted a policy regarding electromagnetic fields, which included a finding that current scientific evidence did not establish that electromagnetic fields were dangerous. (*Id.* at pp. 701-703.) The plaintiff filed a tort action, alleging that her husband had died of brain cancer because his employer — an electrical utility — had failed to warn him about the dangers of working around electromagnetic fields. (*Id.* at pp. 699-700.) The appellate court held that section 1759 barred the action. (*Ford*, at pp. 703-704.) The plaintiff argued, among other things, that the Commission "does not have authority to award tort damages . . . ." (*Id.* at p. 707.) The court rejected this argument, noting that the Commission had been acting within the scope of its constitutional and statutory authority. (*Ibid.*)

Although *Hartwell* and *Ford* both involved tort actions, we see no reason why a property action should be treated any differently. The bottom line is that *every time* section 1759 applies, it bars a court action. This does not mean that the Commission has improperly "adjudicated" the plaintiff's claims.

C. *Our Holding That the Commission's Decision Bars This Action Does Not Violate the Constitution.*

1. *The judicial powers clause.*

The City argues that the trial court's application of section 1759 violates the judicial powers clause of the state Constitution. (Cal. Const., art. VI, § 1.) {AOB 23-26}

"Article VI, section 1 of our Constitution provides: 'The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts. . . .' Article III, section 3 provides: 'The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.' These two provisions preclude exercise of judicial power by 'nonconstitutional' administrative agencies — i.e., those agencies whose authority is derived solely from a grant of power by the state or local governmental entity — but they do not limit the power of those agencies whose authority is derived from the Constitution itself. [Citations.]" (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 404.)

The Commission is a constitutional agency. (Cal. Const., art. XII; *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 355.) Its authority "includes not only administrative but also legislative and judicial powers [citation]." (*Covalt, supra,* 13 Cal.4th at p. 915.) "[W]hile it is true that the commission is not a judicial tribunal in a strict sense, it does not follow that it does not possess well established and well understood judicial power." (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 632.) The City does not contend that the Commission exceeded its constitutionally delegated powers. {See AOB 18-20} Thus, article VI adds nothing to the analysis.

Separately and alternatively, even a nonconstitutional agency "may constitutionally hold hearings, determine facts, apply the law to those facts, and order relief — including certain types of monetary relief — so long as (i) such activities are authorized by statute

or legislation and are reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes, and (ii) the 'essential' judicial power (i.e., the power to make enforceable, binding judgments) remains ultimately in the courts, through review of agency determinations." (*McHugh v. Santa Monica Rent Control Bd.*, *supra*, 49 Cal.3d at p. 372, italics omitted.) Here, the Commission's decision was subject to judicial review. And, once again, the City does not contend that the Commission's decision was unauthorized or that it was not reasonably necessary to effectuate the Commission's primary purposes. Accordingly, it has not shown any violation of article VI.[5]

2. *The right to due process.*

Next, the City argues that a holding that this action is barred by section 1759, if taken to its ultimate extent, could (or would) result in a taking of property without just compensation, in violation of due process. {AOB 27-28}

---

[5] In making this argument, the City asserts that this case "illustrate[s]" the "danger in ceding judicial powers to an administrative body" because supposedly (1) the PUC itself was an interested party, and (2) the PUC official who directed the CEQA review had a conflict of interest. {AOB **25**-26}

The City does not appear to be raising these as independent claims of error; for example, it has not raised them under a separate point heading. (See Cal. Rules of Court, rule 8.204(a)(1)(B).) Moreover, it has not shown that it raised them in the trial court. Hence, we do not discuss them further.

This argument appears[6] to rest on three premises: First, that the Commission has effected a taking of the City's property; second, that the Commission lacks jurisdiction to award just compensation; and third, that section 1759 would bar the City from seeking just compensation in court. The City offers some authority to support the second premise (*S.H. Chase Lumber Co. v. Railroad Com.* (1931) 212 Cal. 691, 701-706), but not the first or the third.

The first premise — that the City's property has somehow been taken — assumes that the City actually has the property rights that it claims. The Commission, however, has determined otherwise. The City does not explain how this is a taking, any more than if a court determined the same issue against the City.

The third premise — that section 1759 would bar an inverse condemnation action — also appears to be incorrect. (See *Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 662; *Union City v. Southern Pac. Co.* (1968) 261 Cal.App.2d 277, 280.) The Commission has previously acknowledged that any inverse condemnation issues arising out of its actions would have to be resolved subsequently in court. (*In re Livermore Car Wash* (1976) 80 Cal. P.U.C. 342.) We need not decide the question, however, because,

---

[6] The City's argument is not totally clear. If we fail to respond to some point the City intended to make, it is because that point simply was not apparent to us and thus has been forfeited. (See *Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 313 ["[r]espondent's failure 'to make a coherent argument' in support of its suggestion 'constitutes a waiver of the issue on appeal'"].)

once again (see part III.C.2, *ante*), the City has not asserted an inverse condemnation claim in this action.

Finally, the City lacks standing to assert that the Commission has taken its property without due process. The City is, after all, a public agency, not a private party. "[S]ubordinate political entities, as 'creatures' of the state, may not challenge state action as violating the entities' rights under the due process or equal protection clauses of the Fourteenth Amendment . . . . 'A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator. [Citations.]' [Citations.]" (*Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 6; accord, *Reclamation District v. Superior Court* (1916) 171 Cal. 672, 679.) "'The same reasoning applies to the due process protections afforded under the California Constitution.' [Citation.]" (*City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (1999) 72 Cal.App.4th 366, 380.)

The City cites the venerable case of *Grogan v. San Francisco* (1861) 18 Cal. 590, which held that a state statute requiring a city to sell land previously granted to it by the state violated the federal contract clause. (*Id.* at pp. 612-614.) Even with respect to the federal contract clause, however, *Grogan* is no longer good law. (*Trenton v. New Jersey* (1923) 262 U.S. 182, 185-192 [43 S.Ct. 534, 67 L.Ed. 937] [city cannot invoke federal contract clause against state].)

We therefore reject the assertion that we are somehow countenancing an unconstitutional taking.

3. *The Right to Trial by Jury.*

Finally, the City also contends that "if the PUC decided property disputes with non-regulated entities, the City would be precluded from receiving its right to a jury trial . . . ." {AOB **28**} In this particular case, however, because the City was seeking injunctive and declaratory relief regarding the scope of an easement, it does not appear that it had any right to a jury trial. (See *Baugh v. Garl* (2006) 137 Cal.App.4th 737, 741; *Wolford v. Thomas* (1987) 190 Cal.App.3d 347, 354.)

The City also appears to be arguing that it has been deprived of a jury trial on a claim for the taking of its property without just compensation. However, it raised no inverse condemnation claim in this action.

In any event, "administrative adjudication of a matter otherwise properly within the agency's regulatory power [does not] violate the constitutional guarantee of a jury trial. [Citation.]" (*Ford v. Pacific Gas & Electric Co.*, *supra*, 60 Cal.App.4th at p. 707; see generally *McHugh v. Santa Monica Rent Control Bd.*, *supra*, 49 Cal.3d at p. 380-386.) As we held in part III.B., *ante*, the City has not shown that the commission exceeded its authority.

IV

DISPOSITION

The judgment is affirmed. SCE is awarded costs on appeal against the City.