



where the court has found that a state body has violated the provisions of the Act. FSP argues that the Third District's decision constitutes a "finding" that BFDE violated Bagley-Keene. Accordingly, FSP contends that it should recover costs and fees against BFDE because section 11130.5 was designed to encourage private enforcement of Bagley-Keene for public benefit. BFDE notes that section 11130.5 is discretionary, and argues that two special circumstances exist which render an award of costs and fees unjust. First, any monetary award against the Board would divert funding from its enforcement budget and harm the public by crippling its already diminished enforcement efforts. Second, BFDE argues there is no reason to award costs and fees because the public was not harmed by its conduct in this case.

Second, FSP relies upon Code of Civil Procedure (CCP) section 1021.5, which provides that plaintiffs may recover attorneys' fees in an action which has resulted in the enforcement of an important right affecting the public interest if (1) a significant benefit has been conferred on a large class of persons, or (2) the necessity of private enforcement makes the award appropriate. FSP makes three arguments under this provision: (1) its action has resulted in the enforcement of one of the state's major "sunshine" laws; (2) its action benefits the large class of funeral directors and consumers; and (3) private enforcement was necessary because no governmental agency would challenge BFDE's conduct. BFDE makes three arguments in opposition to FSP's claim under CCP section 1021.5: (1) section 1021.5 should not be used when a specific statute (such as Bagley-Keene) authorizes attorneys' fees; (2) the appellate court decision was depublished and may not be used as precedent in future cases—accordingly, the decision does not confer a benefit on a large class of people; and (3) FSP should not recover attorney's fees under this provision because its suit was brought to protect FSP's interests in the matter, and not the interests of the public.

At this writing, no decision has been made on FSP's motion for attorneys' fees.

RECENT MEETINGS

At its June 22, September 22, and December 8 meetings, BFDE discussed the use of the word "society" in the name of a licensee. After conducting a survey on the matter, the Board found that the public tends to associate the word "society" with a nonprofit organization. At the December meeting, one Board member opined that no licensee should be permitted to use the word in the name of his/her business, and

that existing businesses should have to phase out the use of that name. Another board member agreed that no new licensees should be permitted to use the word, but argued that existing licensees should be able to continue to use it because it would be too great a financial burden on them to have to change their name. As only two members were present at the December meeting, the Board lacked a quorum and could take no action; Executive Officer Yanes agreed to present the comments made at the meeting to DCA once it assumes responsibility for BFDE's functions.

FUTURE MEETINGS

To be announced.

BOARD OF REGISTRATION FOR GEOLOGISTS AND GEOPHYSICISTS

Executive Officer: Dalton Pollard (916) 263-2113

The Board of Registration for Geologists and Geophysicists (BRGG) is mandated by the Geologist and Geophysicist Act, Business and Professions Code section 7800 *et seq.* The Board was created by AB 600 (Ketchum) in 1969; its jurisdiction was extended to include geophysicists in 1972. The Board's regulations are found in Division 29, Title 16 of the California Code of Regulations (CCR).

BRGG licenses geologists and geophysicists, and certifies engineering geologists and hydrogeologists. In addition to successfully passing the Board's written examination, an applicant must have fulfilled specified undergraduate educational requirements and have the equivalent of seven years of relevant professional experience. The experience requirement may be satisfied by a combination of academic work at a school with a Board-approved program in geology or geophysics, and qualifying professional experience. However, credit for undergraduate study, graduate study, and teaching, whether taken individually or in combination, cannot exceed a total of four years toward meeting the requirement of seven years of professional geological or geophysical work.

The Board may issue a certificate of registration as a geologist or geophysicist without a written examination to any person holding an equivalent registration issued by any state or country, provided that the applicant's qualifications meet all other requirements and rules established by the Board.

BRGG is authorized to investigate and discipline licensees who act in violation of the Board's licensing statutes. The Board may issue a citation to licensees or unlicensed persons for violations of Board rules. These citations may be accompanied by an administrative fine of up to \$2,500.

The eight-member Board is composed of five public members, two geologists, and one geophysicist. BRGG's staff consists of five full-time employees. The Board's committees include the Professional Affairs, Legislative, and Examination Committees. BRGG is funded by the fees it generates.

MAJOR PROJECTS

BRGG Undergoes Sunset Review.

On November 28, the necessity and performance of BRGG and its licensing and certification programs were reviewed by the Joint Legislative Sunset Review Committee (JLSRC), created pursuant to the terms of SB 2036 (McCorquodale) (Chapter 908, Statutes of 1994). [15:2&3 CRLR 59; 14:4 CRLR 20, 58] If the Board fails to convince the legislature and the Department of Consumer Affairs (DCA) that its licensing requirement is justified and that its performance has been effective and protective of consumers, BRGG will cease to exist on July 1, 1997.

Throughout the summer and fall, BRGG members and staff worked to complete a comprehensive sunset report required by the JLSRC. The Board delivered the completed report to the JLSRC on October 5, and subsequently approved it at its October 20 meeting. The 174-page report set forth the history of the Board, described its two licensing (geologists and geophysicists) and two certification (engineering geologists and hydrogeologists) programs, provided detailed budget information, and set forth statistical information on its examination and enforcement programs.

BRGG's report also addressed the justification for licensure of geologists and geophysicists. In response to assertions that the "consumers" of the services of geologists and geophysicists are sophisticated corporations and government agencies who are capable of judging competence without the assistance of the state, BRGG argued that it protects "a variety of consumers, most of whom are not the immediate client of the geologist or geophysicist. Who are these non-paying or indirect consumers of the geologist's or geophysicist's services? First, they are the future owners of the property being investigated, and the present and future neighbors of the property. Second, they are the agencies (city, county, and state) administering



laws written to protect the populace from geological hazards. Third, they are the people who drink groundwater in the general area of a contamination site, and the future users of the particular groundwater basin. Fourth, they are the taxpayers who will pay for the reconstruction of roads, utilities, etc. damaged by geological disasters. All of these are the consumers being protected by the geologist and geophysicist licensing program."

BRGG also argued that the potential for public harm due to incompetent geologic work is great; although the licensing of geologists cannot prevent earthquakes, landslides, floods, or other natural disasters, the Board contended that competent geologic investigations and reports can recognize the forces causing these processes and minimize or avoid the damage and/or loss of life frequently caused by these events.

BRGG's report also noted that several other governmental agencies support its continued existence. On September 14, the State Mining and Geology Board (SMGB) adopted a resolution supporting the continuance of BRGG and its licensing and certification programs. Additionally, on October 17, the Seismic Safety Commission (SSC) agreed that—especially in light of the January 1994 Northridge earthquake—BRGG should be continued and strengthened.

At the JLSRC hearing on November 28, Board President Robert Lindblom, Vice-President Seena Hoose, and public member Monta Huber presented the Board's case to the Joint Committee. Lindblom noted that BRGG was created by the legislature after a series of landslides in the 1950s led Los Angeles County and many cities within the County to establish certification panels to evaluate the qualifications of individual geologists practicing in the area. This system resulted in a "crazyquilt of local certification programs" which required individuals to secure eight or ten "approvals" in order to practice in that particular area. BRGG was created in 1969 after Los Angeles' system became unworkable; since that time, both the state and local governments have enacted legislation or ordinances requiring the use of only "registered" (licensed) geologists on government projects.

Seena Hoose addressed the Board's enforcement program, acknowledging that it is a "major area for improvement." BRGG's enforcement activity is low because the Board rarely, if ever, receives any complaints. She explained that the Board would like a fee increase so it can hire a full-time enforcement coordinator who can proactively "ferret out incompetence" so BRGG

does not have to rely solely on consumer complaints, and provide avenues for public agency personnel to submit complaints to BRGG regarding substandard geologic practice.

Following BRGG's presentation, JLSRC members peppered Board members with questions and comments. Committee Chair Ruben Ayala wondered why the pass rate on the Board's exam (19% for first-time takers) is so low given the fact that examinees must have seven years of education and experience. Senator Dan Boatwright noted that the exam is largely subjective and that licensees grade the exam: "Have you ever considered the possibility that they're grading these people out of the industry, and that's why you only have a 19% pass rate?" Senator Boatwright and Assemblymember Jackie Speier stated that they were not impressed with the Board's enforcement statistics; of 6,100 licensees, the Board has filed only four accusations in the past four years. Speier noted that BRGG has had citation and fine authority for nine years, but did not implement it until 1995 (*see below*); when BRGG representatives stated that they could not explain the failure of past board members to adopt citation and fine regulations, Speier stated, "I can. The philosophy of this Board is to protect current licensees. I'm beginning to see a pattern that is fairly pernicious. What we've done is create extremely high standards for entry; once you're in the club, very little is done in the way of standards of practice and enforcement."

Following the Board's presentation, representatives of several governmental agencies—including SMGB and SSC—testified in support of the continuance of BRGG. However, upon questioning by Senator Boatwright, representatives of both agencies admitted that at no time have they ever reported any complaint about substandard geologic work to BRGG. Representatives of several geologist trade associations, including the National Association of Engineering Geologists, the California Association of Engineering Geologists, the Association of State Boards of Geology (ASBOG), and the California Association of Professional Scientists, also testified in support of continuing the Board and its licensing requirements.

Also presenting both oral and written testimony was Julianne D'Angelo Fellmeth of the Center for Public Interest Law (CPIL). She acknowledged that incompetent geologic work may result in very serious harm, both to the "direct" consumer who contracted for the work and the "indirect consumer" whose life and/or property may be affected by an undetected or unaddressed

geological hazard. Thus, CPIL concluded that some sort of licensure or certification program is probably warranted and that state-level licensure/regulation appears preferable to duplicative certification programs carried out at the local level; however, CPIL questioned whether BRGG has ever fulfilled, or is capable of fulfilling, that function.

With regard to BRGG's performance in its 25 years of existence, D'Angelo Fellmeth first noted that BRGG's now-stringent barrier to entry has not always been enforced. Although BRGG currently requires seven years of education and experience and passage of a written examination, it generally did not require passage of the exam from 1969 to 1984. During that time period, the Board licensed almost 5,600 individuals but required only 800 of those people to take and pass its licensing exam. Because these "grandparented" individuals have composed the bulk of the geology workforce during a time when there have been virtually no complaints of incompetence or negligence (*see below*), the examination—a requirement which is now strictly enforced—may be an overly restrictive barrier to entry. D'Angelo Fellmeth noted other problems with the Board's current exam, including its plummeting pass rate, the fact that BRGG spends over one-half of its budget on the exam, and the fact that BRGG recently joined ASBOG but has declined to use its exam.

D'Angelo Fellmeth also argued that the Board does no standard-setting for the practice of geology, geophysics, engineering, or hydrogeology in California. She noted that BRGG's sunset report contains an extensive list of the functions of geologists, and that BRGG has clear disciplinary jurisdiction over "negligence [and] incompetence" in Business and Professions Code section 7860(b); however, the Board has not adopted one regulation which sets standards for the performance of any of those functions, or which defines "negligence" or "incompetency" for purposes of keeping the license to practice geology in California.

As for enforcement, D'Angelo Fellmeth cited the Board's own letter of April 8, 1994 to the Senate Business and Professions Committee, in which the Board acknowledged that during the first 24 years of its existence, it had received a total of 466 complaints. Of these, 332 were against unlicensed practitioners (presumably filed by BRGG licensees). Thus, only 134 complaints were lodged against licensees in 24 years—about five per year. During this 24-year period, BRGG revoked two licenses; two others were surrendered.



D'Angelo Fellmeth conveyed CPIL's recommendation that the Board be abolished in light of its performance record. She further recommended that, if the legislature believes that statewide licensure of geologists should continue, it should be administered by (1) a geology bureau within DCA which is solely concerned with licensing and uses the ASBOG exam; (2) a merged geologist/engineer bureau within DCA which is solely concerned with licensing; or (3) SMBG, SSC, or some other agency where it can be combined with a related program to achieve economies of scale and efficiencies.

At this writing, the JLSRC is expected to release its findings and recommendations to DCA on January 16; thereafter, DCA has sixty days in which to return to the legislature with its recommendations on the fate of BRGG.

Citation and Fine Regulations Finally Approved. On June 23, the Office of Administrative Law (OAL) disapproved BRGG's adoption of new sections 3062-3063.4, Title 16 of the CCR, its citation and fine regulations. OAL found that the rulemaking file failed to comply with the clarity, consistency, and necessity standards of the Administrative Procedure Act, and that BRGG's final statement of reasons failed to respond to all public comments on the proposed regulations. BRGG subsequently modified the proposed rules, released them for a 15-day public comment period, and resubmitted them to OAL, which approved them on November 22. Over two years in the making, the regulations permit the Board to issue citations and/or fines to registrants for minor violations of the Geologist and Geophysicist Act and the Board's regulations, and to nonlicensees for engaging in activities for which registration or certification is required. [15:1 CRLR 57; 14:4 CRLR 58; 14:2&3 CRLR 59]

LEGISLATION

AB 778 (Aguiar), as amended July 14, reinstates BRGG's July 1, 1997 sunset date (which was inadvertently chaptered out due to the passage of other legislation in 1994), thus making BRGG subject to review by the Joint Legislative Sunset Review Committee (see above) and to repeal. This bill was signed by the Governor on October 4 (Chapter 599, Statutes of 1995).

SB 914 (Alquist), as amended April 6, would require BRGG, the Board of Architectural Examiners, and the Board of Registration for Professional Engineers and Land Surveyors to develop, adopt, and enforce regulations on or before July 1, 1996, applicable to state and local enforcement agencies that regulate building standards

and that, pursuant to the bill, have, on staff or under contract, appropriately licensed architects, registered geologists, and registered professional engineers with demonstrated competence to review plans, specifications, reports, or documents for the design and construction of all architectural, engineering, and geological work regulated by building standards.

This bill would also provide that, notwithstanding existing law, every state and local enforcement agency shall have, on staff or under contract, appropriately licensed architects, registered professional geologists, and registered professional engineers with demonstrated competence to review the plans, specifications, reports, or documents for the design and construction of all architectural, geological, or engineering work related by building standards, prior to agency approval of this work. The bill would also provide that, notwithstanding existing law, all state and local enforcement agencies shall return any incomplete building plans, specifications, reports, or documents, accompanied by a statement to the applicant identifying the part or parts of the plans that are incomplete, and specifying the actions required to be taken by the architect, engineer, geologist, or building designer to complete the plans, specifications, reports, or documents prior to any resubmission. [S. H&LU]

RECENT MEETINGS

The Board recently announced that, effective January 10, 1996, its offices would move to 2535 Capitol Oaks Drive, Suite 300A, Sacramento, CA 95833.

FUTURE MEETINGS

February 16 in South San Francisco.
April 4 in Sacramento.
April 19 in Los Angeles.
June 14 in San Diego (tentative).

BOARD OF LANDSCAPE ARCHITECTS

Executive Officer: Jeanne Brode
(916) 445-4954

Authorized in Business and Professions Code section 5615 *et seq.*, the Board of Landscape Architects (BLA) licenses those who design landscapes and supervise implementation of design plans. Prior to 1993, applicants were required to pass the written examination of the national Council of Landscape Architectural Registration Boards (CLARB) in order to qualify for licensure. However, following years of dissatisfaction, BLA decided in May 1992 to discontinue its use of CLARB's

exam; commencing in 1993, applicants must instead pass the Board's own Professional Examination for Landscape Architects (PELA) in order to qualify for licensure. [12:4 CRLR 86] In addition, an applicant must have the equivalent of six years of landscape architectural experience. This requirement may be satisfied by a combination of education at a school with a Board-approved program in landscape architecture and field experience.

In addition to licensing landscape architects, the Board investigates verified complaints against landscape architects, prosecutes violations of the Practice Act, and establishes criteria for approving schools of landscape architecture. BLA's regulations are codified in Division 26, Title 16 of the California Code of Regulations (CCR).

BLA consists of seven members who serve four-year terms. One of the members must be a resident of and practice landscape architecture in southern California, and one member must be a resident of and practice landscape architecture in northern California. Three members of the Board must be licensed to practice landscape architecture in the state of California. The other four members are public members and must not be licentiates of the Board.

At its July 14 meeting in Irvine, BLA welcomed two new members—public member Dell Yelverton of Whittier and landscape architect member Tom Lockett of Marina del Rey—and announced that landscape contractor Greg Burgener, who serves as a public member, has been reappointed for a second term. Also on July 14, landscape architect member Marian Marum resigned from the Board, leaving BLA with one vacancy.

MAJOR PROJECTS

BLA Undergoes Sunset Review. Throughout the summer and early fall, BLA members and staff, two regional "blue-ribbon" task forces of landscape architects, and two paid consultants worked to complete the lengthy report required by the Joint Legislative Sunset Review Committee (JLSRC) in preparation for BLA's sunset review. On November 27, BLA became the first Department of Consumer Affairs (DCA) board to undergo a sunset review hearing by the JLSRC under the terms of SB 2036 (McCorquodale) (Chapter 908, Statutes of 1994), which requires a comprehensive evaluation of the necessity and performance of DCA boards every four years. If BLA does not convince the JLSRC and the Wilson administration that its licensing requirement is necessary and that its overall regulatory program is ef-