SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES	Reserved for Clerk's File Stamp FILED Superior Court of California Sherri R. Carter, Executive Officer / Clerk of Court By: N. DiGiambattista Deputy
COURTHOUSE ADDRESS: Stanley Mosk Courthouse 111 North Hill Street, Los Angeles, CA 90012	
PLAINTIFF/PETITIONER: California Fair Plan Association	
DEFENDANT/RESPONDENT: Ricardo Lara, in his official capacity as the Insurance Commissioner of the State of California et al	
CERTIFICATE OF MAILING	CASE NUMBER: 19STCP05434

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Minute Order (HEARING ON PETITION FOR WRIT OF MANDATE RULING ON SUBMITTED M...) of 07/12/2021 upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

John Charles Keith
Office of the Attorney General
300 S Spring St
Ste 1702
Los Angeles, CA 90013

Spencer Young Kook
Hinshaw & Culbertson LLP
350 S Grand Ave
Ste 3600
Los Angeles, CA 90071

Sherri R. Carter, Executive Officer / Clerk of Court

Dated: 07/12/2021

By: N. DiGiambattista
Deputy Clerk

CERTIFICATE OF MAILING

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 82

19STCP05434 July 12, 2021
CALIFORNIA FAIR PLAN ASSOCIATION vs RICARDO LARA, IN HIS OFFICIAL CAPACITY AS THE INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA 3:51 PM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N. DiGiambattista

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: HEARING ON PETITION FOR WRIT OF MANDATE RULING ON SUBMITTED MATTER

The court having taken the above matter under submission on June 24, 2021, now makes its ruling as follows:

Petitioner California FAIR Plan Association ("Petitioner" or "Fair Plan") petitions for a writ of ordinary mandate directing Respondent Ricardo Lara, Insurance Commissioner of the State of California ("Respondent" or "Commissioner") to vacate two orders he issued (the Orders) pursuant to his quasi-legislative powers over Petitioner, a statutorily created involuntary association of California property insurers. The court heard argument on th matter on April 29, 2021 and June 24, 2021. The court now issues its decision.

As analyzed below, the court concludes that the Commissioner has statutory authority to require FAIR Plan to offer insurance which includes liability coverage, if that coverage is related to the property. The court concludes that the HO-3 policy, absent some customization, contains some coverage that goes beyond that restriction.

The court does not find, however, that the Commissioner's orders were otherwise arbitrary, capricious, or lacking in evidentiary support in most respects. While the court finds the Commissioner could require FAIR Plan to provide payment options, the order lacked evidentiary support for the requirement that those options be provided "with no additional fees" to the insureds.

Exhibits Filed Conditionally Under Seal

Respondent filed redacted versions of Exhibits K-N of the Keith declaration, and notified

Petitioner that the documents would be publicly filed if Petitioner did not make a timely application to seal under California Rules of Court, Rule 2.551. No application to seal has been filed. Accordingly, the court orders the unredacted Exhibits K-N of the Keith declaration to be publicly filed.

Judicial Notice

Petitioner's RJN Exhibits A-H – Granted. (Evid. Code § 452(b)-(d), (h).)

Respondent's RJN Exhibit A – Granted. (Evid. Code § 452(c).)

Respondent's RJN Exhibits B-F – Granted. (Evid. Code § 452(h); see Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, 408; Colvin v. City of Gardena (1992) 11 Cal.App.4th 1270, 1283.)

Respondent's RJN of the following facts: (1) on March 20, 2018, the California Legislature's Joint Legislative Committee on Emergency Management and Senate Committee on Insurance held a hearing entitled: "Drought, Climate Change, and Fire: How is the California Homeowners' Insurance Market Responding?;" (2) on October 30, 2018, the Senate Insurance Committee and the Assembly Insurance Committee of the California Legislature held a hearing entitled: "Wildfires and In Recovery of Impacted Communities;" and (3) on May 8, 2019, the Senate Committ surance held a hearing entitled "Update on Wildfires and Homeowner's Insurance: nd Affordability" – Granted, contingent upon Respondent providing the court suffici mation in support of the request. (Evid. Code §§ 452, 453(a); Cal. Rules of Court, Rule 3.1306(c).) No objection has been received.

Petitioner's Suppl. RJN Exhibits A-J – Granted. No objection has been received.

Respondent's Evidentiary Objections

(1) Overruled. Sufficient foundation and personal knowledge to provide expert testimony. Respondent may rebut
(2) Overruled. Sufficient foundation
(3) Overruled. Sufficient foundation
(4) Overruled. Sufficient foundation
(5) Overruled. Sufficient foundation
(6) Overruled. Sufficient foundation

(7) Overruled. Sufficient foundation
(8) Overruled. Sufficient foundation
(9) Overruled. Sufficient foundation
(10) Overruled. Sufficient personal knowledge; not improper opinion testimony
(11) Overruled. Sufficient personal knowledge; not improper opinion testimony
(12) Overruled. Sufficient foundation and personal knowledge; not improper opinion testimony. In its writ briefing, Respondent may argue the weight that should be given to this and other evidence. (See Objections 3, fn. 1-3.)
(13) Overruled. Sufficient personal knowledge; not improper opinion testimony
(14) Overruled. Sufficient personal knowledge; not improper opinion testimony
(15) Overruled. Sufficient personal knowledge; not improper opinion testimony
(16) Sustained. Hearsay. While Petitioner characterizes Exhibit 41 as evidence of notice, Petitioner's Evidence Chart shows that Petitioner relies on Exhibit 41 for its truth, i.e. that "non-renewal data, ... as pointed out by the insurance industry, does not show that customers were otherwise unable to find HO-3 coverage...." (Pet. Appendix p. 24, PA67.)
(17) Overruled. Sufficient personal knowledge; not improper opinion testimony
(18) Overruled. Sufficient personal knowledge; not improper opinion testimony
(19) Overruled. Sufficient personal knowledge; not improper opinion testimony
(20) Overruled. Relevant; Respondent's exhaustion defense does not preclude Petitioner from submitting evidence to support its claims, should the court rule against Respondent on exhaustion.
(21) Overruled. Not improper opinion testimony
(22) Overruled. Not improper opinion testimony and no risk of undue prejudice. In its writ briefing, Respondent may argue the weight that should be given to this and other evidence. (See Objections 8, fn. 4.) Respondent does not show that it lacked opportunity to ask Scott additional questions after the restroom break
(23) Overruled. See # 22

Petitioner's Evidentiary Objections

(1) Overruled. Relevant, sufficient foundation. Overbroad objection to numerous declarations and exhibits without quoting objectionable material. Because no administrative hearing was held, Respondent and Petitioner may submit evidence for court's review under CCP section 1085. Petitioner's objection would require exclusion of its own evidence. See further analysis infra
(2) Overruled. Relevant; not hearsay because offered and admitted to show notice to Commissioner of constituents' concerns, not for truth; sufficient foundation; not speculative; not

improper expert testimony
(3) Overruled. See # 2; declarant may summarize the complaints and resolution thereof without violating secondary evidence rule
(4) Overruled. Not hearsay because communicating declarant's personal belief; declarant may state his belief based on documents he has reviewed without violating secondary evidence rule
(5) Overruled. Relevant. The parties should make their counter-arguments on the merits in the briefs, not in evidentiary objections.
(6) Overruled. Relevant. No undue prejudice or confusion. The parties should make their counter-arguments on the merits in the briefs, not in evidentiary objections.
(7) Overruled. See # 5

Background

The California Fair Plan

In 1968, following a number of inner-city riots across the nation and fire losses in California, Congress passed the Urban Property Protection and Reinsurance Act of 1968 ("UPPRA"), Public Law 90-448. (See generally Administrative Record ("AR") 420-422.) 1 "The stated Congressional purpose of this Act is to '(1) encourage and assist the various State insurance authorities and the property insurance industry to develop and carry out statewide programs which will make necessary property insurance coverage against * * * fire, crime, and other perils more readily available for * * * properties meeting reasonable underwriting standards; and (2) provide a Federal program of reinsurance against abnormally high property insurance losses resulting from riots and other civil commotion, placing appropriate financial responsibility upon the States to share in such losses.'" (District of Columbia Ins. Placement Facility v. Washington (D.C. Court of Appeals) 269 A.2d 45, 47, citing Public Law 9-448, § 1102, 82 Stat. 556 (1968).) "Congress left it to the various states to enact insurance plans to implement the Congressional purpose though in so doing it set forth minimum criteria to be met by the states." (Ibid.)

"In response to insurers' reluctance to write basic property insurance for homeowners who live in high risk or otherwise uninsurable areas, in 1968, the [California] Legislature enacted the 'Basic Property Insurance Inspection and Placement Plan' sections 10090 through 10100.2. The purposes of the statute are to (1) assure stability in the property insurance market, (2) assure the availability of basic property insurance as defined in the plan, (3) encourage the maximum use, in obtaining basic property insurance, of the normal insurance market, and (4) provide for the 'the equitable distribution among admitted insurers of the responsibility for insuring qualified

property for which basic property insurance cannot be obtained through the normal insurance market by the establishment of a FAIR Plan (fair access to insurance requirements), an industry placement facility and a joint reinsurance association.' (§ 10090.)" 2 (St. Cyr v. California FAIR Plan Assn. (2014) 223 Cal.App.4th 786, 792-793.)

"Under the statutory scheme, [Petitioner] is an involuntary joint reinsurance association of all insurers authorized to 'write and engage[ ] in writing in [California], on a direct basis, basic property insurance or any component thereof in multiperil policies.' (§§ 10094, 10098.) [Petitioner] is the insurer of last resort, that is, [Petitioner] is statutorily mandated to make available basic property insurance to any 'persons having an interest in real or tangible personal property who, after diligent effort ..., are unable to procure such insurance through normal channels from an admitted insurer.' (§ 10094.)" (St. Cyr, supra at 793-794.)

"[Petitioner] is statutorily mandated to propose a plan of operation that provides, among other things, for the allocation of profits and losses arising from the FAIR Plan among the insurers, based upon the respective insurer's proportion of the California insurance market. (§ 10095.) In setting the rates for the FAIR Plan, the statute mandates that the rates 'shall not be excessive, inadequate, or unfairly discriminatory, and shall be actuarially sound so that premiums are adequate to cover expected losses, expenses and taxes, and shall reflect investment income of the plan. If the plan returns premiums to members annually, the rates shall not include any component relating to surplus enhancements.' (§ 10100.2)" (St. Cyr, supra at 793-794.)

"The Commissioner is authorized to review and approve (or disapprove) [Petitioner's] plan of operation." (St. Cyr, supra at 793-794.) "The commissioner may, at any time, withdraw tentative approval or the commissioner may, at any time after giving final approval, revoke that approval if the commissioner feels it is necessary to carry out the purposes of the chapter." (§ 10095(f).)

Petitioner's Dwelling Policy

Petitioner offers property insurance through its Dwelling Property form ("Dwelling Policy"). This residential dwelling insurance product provides a set list of perils covering the dwelling property and its contents. Petitioner's residential Dwelling Policy covers the perils of fire, smoke, and internal explosion, and includes the option to add extended coverage (EC) to broaden the covered perils to include damage from wind/hail, explosion unrelated to fire, riot or civil commotion, aircraft, and vehicles. There is also the option of adding coverage for vandalism and malicious mischief (VMM). (AR 656, 292, 316-339.)

The Dwelling Policy also includes "other coverages" for debris removal; improvements, alterations and additions; world-wide coverage (loss to personal property around the world); reasonable repairs; property removed; and fire department service charge. (AR 321-322.)

Petitioner's Businessowners Policy

Since 1994, Petitioner has offered a Businessowners policy ("BOP"). (AR 364-367, 298, 368-409.) The BOP includes a businessowners standard property coverage form. Covered causes of loss under this property form include fire, lighting, explosion, windstorm or hail, smoke, aircraft or vehicles, riot or civil commotion, vandalism, sprinkler leakage, sinkhole collapse, volcanic action, and transportation. (AR 368-409.) Additional coverages include actual loss of business income from a suspension in operations caused by direct physical loss of or damage to property at the premises. (AR 375-376.)

As relevant to this writ petition, the BOP also includes a businessowners liability coverage form that provides coverage for "business liability." (AR 391-409.) The form defines business liability as "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury', 'property damage', 'personal injury' or 'advertising injury' to which this insurance applies, but only if such 'personal injury' or 'advertising injury' arises out of the ownership, maintenance or use of the premises ... and operations necessary or incidental to those premises, or arises out of the project shown in the Declarations ...." (AR 391.) Coverage for liability for bodily or advertising injury, or for medical expenses arising from bodily injury, applies if the occurrence, offense, or accident takes place in the "coverage territory," which is defined to include the United States of America, Puerto Rico, Canada, and in some cases elsewhere in the world. (See AR 393-394; see also AR 405-406 [definition of "Coverage Territory"].)

Insurance Services Office Standardized Insurance Forms

Petitioner's Dwelling Policy and BOP were modeled after standardized forms issued by the Insurance Services Office ("ISO"). (AR 350, 656-657.) The set list of perils provided by Petitioner's Dwelling Policy are those found on ISO's DP-1 Basic Property Form. (AR 656.) In addition to the DP-1 Basic Property Form, ISO also offers:

• DP-2 Broad Property Form: Property Insurance with broad named perils for both dwelling and contents.

• DP-3 Special Property Form: Property Insurance with comprehensive for dwelling and broad named perils for contents. This form provides the broad list of perils on contents and provides comprehensive coverage on the dwelling. Comprehensive coverage means that the dwelling is provided coverage for all property perils except for the exclusions listed in the policy. It is a more comprehensive coverage than the list of perils covered in the DP-1 Basic Property Form and the DP-2 Broad Property Form. Petitioner and the ISO residential dwelling property forms also offer endorsements to broaden coverage such as increasing the dwelling settlement basis from actual cash value to replacement cost. (AR 656-657.)

In addition to residential dwelling insurance program forms, ISO also offers homeowners multi-peril insurance package forms as follows:

• HO-1 Basic Package Form: Section I Property Insurance basic named perils for both dwelling and contents, in addition to Section II Liability Insurance (summarized below).
• HO-2 Broad Package Form: Section I Property Insurance broad named perils for both dwelling and contents, in addition to Section II Liability Insurance.
• HO-3 Special Package Form: Section I Property Insurance comprehensive for dwelling and broad named perils on contents, in addition to Section II Liability Insurance.
• HO-5 Comprehensive Package Form: Section I Property Insurance comprehensive coverage on both dwelling and contents, as well as Section II Liability Insurance.
• HO-8 Actual Cash Value Basic Package Form: Section I Property Insurance named perils on dwelling on an actual cash basis instead of replacement cost (generally used for special risk situations like a heritage home where the replacement cost is difficult to estimate), in addition to Section II Liability Insurance. (AR 658-659.)

Section II Liability Insurance includes coverage for Personal Liability which pays on behalf of an insured for loss arising out of the insured's legal liability to others; Medical Payment To Others which pays necessary medical expenses incurred from an accident causing bodily injury; and Workers Compensation insurance for residence employees. (AR 659.)

Liability coverage under the ISO HO-3 Special Package Form provides coverage when "a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by a covered occurrence." Under that form, an "occurrence" "means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in Bodily injury or Property damage." Under the ISO HO-3 Special Package Form, there is no requirement that the "bodily injury" or "property

damage" occur on the insured premises. (AR 659-661.)

Providing Liability Insurance requires underwriting to ensure that the homeowner has taken appropriate precautions regarding liability exposure, such as installing a fence around a pool to avoid a neighbor's child from accessing the pool, installing railings along steps in accordance with building codes, verifying that the policyholder's dog does not have a history of biting and is properly secured, and verifying that day care operations creating a significant liability exposure are not being operated on the premises. (AR 659.)

The overwhelming majority of homeowners in California purchase homeowners' policies, such as the HO-3 policy, not dwelling fire policies similar to what Petitioner sells. (AR 1428, 1441.)

The Difference in Conditions ("DIC") Policy

Customers who wish to obtain coverages akin to those provided under an HO-3 Policy, but are only able to obtain a FAIR Plan Dwelling Policy, may be able to obtain such coverages by also purchasing a residential Difference in Conditions ("DIC") policy. By design, DIC policies provide liability coverages and an expanded list of covered perils that may cause property loss not covered by the FAIR Plan Dwelling Policy. (AR 663-664, 163-164, 69.)

Order Nos. 2019-2 and 2019-3

On November 14, 2019, Respondent issued Order No. 2019-2 ("Order 2). (AR 6-10.) Order 2 sets forth Respondent's partial revocation of approval of certain aspects of Petitioner's then-existing Plan of Operation and Respondent's demand that Petitioner (1) submit a revised Plan of Operation to effect three changes to its business operations and (2) take certain related actions to advance the three operational changes as follows:

First, Order 2 required Petitioner to submit, within 30 days (i.e., by December 14, 2019), a revised Plan of Operation to Respondent for his approval that will require the Petitioner to offer for sale to California consumers by June 1, 2020 a comprehensive homeowners' property insurance (i.e., an HO-3) policy or a policy with coverages equivalent to those included in an HO-3 policy, with a combined coverage limit of $3.3 million, including up to $300,000 in optional liability coverage. Order 2 also required Petitioner to file a rate application with Respondent for his approval of rates to be used in connection with the sale of the HO-3 policy. (AR 8-9.)

Second, Order 2 required Petitioner to submit, within 30 days of the order, a revised Plan of Operation to Respondent for his approval that will require Petitioner to offer increased combined coverage limits for its dwelling fire and allied lines policies from $1.5 million to $3 million. (AR 9.) Petitioner no longer challenges this aspect of Order 2. (Opening Brief ("OB") 11.)

Third, Order 2 required Petitioner to submit, within 30 days of the order, a revised Plan of Operation to Respondent for his approval that will require Petitioner, no later than February 1, 2020, to offer applicants or policyholders the options of paying premiums "in monthly installments, with no additional fees, and … the ability to pay by credit card and electronic funds transfer with no additional fees." (AR 9-10.)

On December 19, 2019, Respondent issued Order No. 2019-3 ("Order 3"), which promulgates a revised Plan of Operation setting forth the operational changes described above. Respondent issued this order pursuant to Insurance Code section 10095(f) after Petitioner failed to submit a revised Plan of Operation consistent with Order 2. (AR 14-17.)

Procedural History

On December 13, 2019, Petitioner filed its verified petition for writ of mandate pursuant to CCP section 1085.

On January 3, 2020, Petitioner filed its motion for preliminary injunction. The court received opposition and reply.

On January 24, 2020, Petitioner filed a first amended petition ("FAP") for writ of mandate pursuant to CCP section 1085.

On February 18, 2020, after a hearing, the court granted in part, and denied in part, Petitioner's motion for preliminary injunction.

On November 20, 2020, Petitioner filed a verified second amended petition. On December 15, 2020, Respondent filed an answer.

On February 26, 2021, Petitioner filed its opening brief in support of the petition for writ of mandate. The court has received Respondent's opposition, Petitioner's reply, the parties'

administrative record and joint appendix, the parties' evidentiary objections, and the parties' responses to evidentiary objections.

On April 29, 2021, the petition came before hearing before the court. The court issued a written tentative ruling that addressed Respondent's statutory authority to require Petitioner to offer a HO-3 policy. After oral argument, the court ordered counsel to file simultaneous supplemental briefs "on the issues of whether each of the liability coverage in the HO-3 policy form is an insurance coverage 'with respect to' the insured property, whether the coverages in the HO-3 policy are materially different than the liability coverages in the BOP and whether there is a standard policy of insurance which limits liability coverage to property related occurrences." (Minute Order dated 4/29/21.)

On May 27, 2021, Petitioner and Respondent filed their supplemental briefs and supplemental evidence. The court cites to Petitioner's supplemental appendix as AR 1850-1970 and to Respondent's declaration of Jerome Tu as "Tu Decl." The court held a hearing on June 24, 2021 after which it took the matter under submission.

Standard of Review

There are two essential requirements to the issuance of an ordinary writ of mandate under Code of Civil Procedure section 1085: (1) a clear, present and ministerial duty on the part of the respondent, and (2) a clear, present and beneficial right on the part of the petitioner to the performance of that duty. (California Ass'n for Health Services at Home v. Department of Health Services (2007) 148 Cal.App.4th 696, 704.) "An action in ordinary mandamus is proper where ... the claim is that an agency has failed to act as required by law." (Id. at 705.)

Petitioner "bears the burden of proof in a mandate proceeding brought under Code of Civil Procedure section 1085." (California Correctional Peace Officers Assn. v. State Personnel Bd. (1995) 10 Cal.4th 1133, 1154.)

"Normally, mandate will not lie to control a public agency's discretion, that is to say, force the exercise of discretion in a particular manner. However, it will lie to correct abuses of discretion. In determining whether a public agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld." (County of Los Angeles v. City of Los Angeles (2013) 214 Cal.App.4th 643, 654.)

"An ordinary mandamus action under Code of Civil Procedure section 1085 permits judicial review of ministerial duties as well as quasi-legislative acts of public agencies.... Mandamus may issue to correct the exercise of discretionary legislative power, but only if the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law. This is a highly deferential test." (Carrancho v. California Air Resources Board (2003) 111 Cal.App.4th 1255, 1264-65.) "A court must ask whether the public agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, or whether the agency failed to follow the procedure and give the notices the law requires." (County of Los Angeles v. City of Los Angeles (2013) 214 Cal.App.4th 643, 654.)

"'On questions of law arising in mandate proceedings, [the court] exercise[s] independent judgment.' .... Interpretation of a statute or regulation is a question of law." (Christensen v. Lightbourne (2017) 15 Cal.App.5th 1239, 1251.)

Analysis

Respondent's Authority to Require Petitioner to Offer HO-3 Policy

Petitioner contends that Respondent lacks statutory authority under the Basic Property Insurance Inspection and Placement Plan, Insurance Code §§ 10090 et seq. (the "Act") to require Petitioner to sell a comprehensive HO-3 policy. (Opening Brief (OB) 13-16.)

Petitioner raises issues of statutory construction. "The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (Nolan v. City of Anaheim (2004) 33 Cal.4th 335, 340.)

When interpreting a statute, the court must construe the statute, if possible to achieve harmony among its parts. (People v. Hall (1991) 1 Cal. 4th 266, 272; Legacy Group v. City of Wasco (2003) 106 Cal.App. 4th 1305, 1313). "When the legislature has carefully employed a term in

one place and has excluded it in another, it should not be implied where excluded." (Wasatch Property Management v. Degrate (2005) 35 Cal.4th 1111.) "When interpreting statutory language, we may neither insert language which has been omitted nor ignore language which has been inserted." (See People v. National Auto. and Cas. Ins. Co. (2002) 98 Cal.App.4th 277, 282.)

To the extent "purely legal issues involve the interpretation of a statute an administrative agency is responsible for enforcing, [the court] exercise[s] [its] independent judgment, 'taking into account and respecting the agency's interpretation of its meaning.'" (Housing Partners I, Inc. v. Duncan (2012) 206 Cal.App.4th 1335, 1343; see also Yamaha Corp. of America v. State Bd. Of Equalization (1998) 19 Cal.4th 1, 11.)

General Overview of Property and Liability Insurance

Generally speaking, insurance policies include first-party coverage, third-party coverage, or both. "'First party' coverage is for losses suffered directly by the insured. 'Third party' coverage is for losses suffered by other persons for which the insured may be legally responsible." (Rutter, Cal. Prac. Guide, Insurance Litigation § 6:1.) "In some situations, both first and third party coverages are combined in a single policy (e.g., homeowners insurance)." (Ibid.)

First-party property insurance "is an agreement, a contract, in which the insurer agrees to indemnify the insured in the event that the insured property suffers a covered loss. Coverage, in turn, is commonly provided by reference to causation, e.g., 'loss caused by ...' certain enumerated perils. [¶] The term 'perils' in traditional property insurance parlance refers to fortuitous, active, physical forces such as lightning, wind, and explosion, which bring about the loss." (Garvey v. State Farm Fire & Casualty Co. (1989) 48 Cal.3d 395, 406.) "On the other hand, the right to coverage in the third-party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty. This liability analysis differs substantially from the coverage analysis in the property insurance context, which draws on the relationship between perils that are either covered or excluded in the contract. In liability insurance, by insuring for personal liability, and agreeing to cover the insured for his own negligence, the insurer agrees to cover the insured for a broader spectrum of risks." (Id. at 407.)

Plain Language of Definition of "Basic Property Insurance"

The parties agree that the scope of Respondent's authority to require Petitioner to provide an HO-3 policy depends largely on the definition of "basic property insurance" in the Act.

The purposes of Chapter 9 include "(a) To assure stability in the property insurance market for property located in the State of California. (b) To assure the availability of basic property insurance as defined by this chapter. (c) To encourage maximum use, in obtaining basic property insurance, of the normal insurance market provided by admitted insurers and licensed surplus line brokers." (§ 10090(b), (c) [emphasis added].) Additionally, section 10095(f), concerning adoption of a Plan of Operation, provides that the Commissioner may "at any time after giving final approval, revoke that approval if the commissioner feels it is necessary to carry out the purposes of the chapter."

Section 10091(c) defines "Basic property insurance" as follows: "insurance against direct loss to real or tangible personal property at a fixed location in those geographic or urban areas designated by the commissioner, from perils insured under the standard fire policy and extended coverage endorsement and vandalism and malicious mischief and such other insurance coverages as may be added with respect to such property by the industry placement facility with the approval of the commissioner or by the commissioner, but shall not include insurance on automobile or farm risks."

In its writ brief, Petitioner contends that "Section 10091(c) requir[es] that basic property insurance be 'insurance against direct loss to real or tangible personal property' and only for loss caused by certain perils." (OB 14-15.) Petitioner also argues that "liability coverages are not insurance 'against direct loss to real or tangible property' and, therefore, do not constitute 'basic property insurance.'" (OB 14.) However, Petitioner acknowledges that it has offered some liability coverage since 1994 in the BOP, and it suggests that the liability coverage in the BOP is within the scope of the Respondent's statutory authority because it is limited to "premises or project liability," as opposed to general liability coverage. (Reply 6 and OB 10-11.) Accordingly, the writ brief raises four main statutory issues: (1) whether Respondent has authority to expand the covered perils beyond those specifically mentioned in section 10091(c); (2) whether Respondent can order Petitioner to insure indirect losses relating to the property; (3) whether Respondent has authority to require Petitioner to provide liability coverage; and (4) if Respondent has such authority, the extent to which such liability coverage must be connected or related to the insured premises.

Section 10091(c) can be reasonably separated into three sub-parts based on commas and grammatical structure. (See Renee J. v. Sup. Ct. (2001) 26 Cal.4th 735, 747 ["the presence or absence of commas is a factor to be considered in interpreting a statute"].)

Part A: "insurance against direct loss to real or tangible personal property at a fixed location in those geographic or urban areas designated by the commissioner,"

Part B: "from perils insured under the standard fire policy and extended coverage endorsement and vandalism and malicious mischief and such other insurance coverages as may be added with respect to such property by the industry placement facility with the approval of the commissioner or by the commissioner,"

Part C: "but shall not include insurance on automobile or farm risks."

Breaking down the statute into three parts arguably suggests that the covered loss must be "direct loss to real or tangible personal property at a fixed location." Part B, which is book-ended by commas, can be interpreted as listing the "perils" that may cause direct property loss discussed in Part A and the sources of insurance for such perils. Reading Part B together in this fashion suggests that "other insurance coverages" is a catchall and should, like the specific coverages listed, be limited to direct loss to property and should not include liability coverage.

However, as asserted by Respondent, there are significant weaknesses in this narrow interpretation of section 10091(c). The use of commas in section 10091(c) is not necessarily indicative of legislative intent to group the catchall provision with the listed perils. The "and" before "such other insurance coverages" could serve a similar grammatical function as a comma. Notably, the catchall provision refers to "such property," which suggests it modifies Part A. Thus, Petitioner's Part B could potentially be broken into two parts in which the catchall provision – "such other insurance coverages as may be added with respect to such property" – represents a separate clause that modifies Part A and perhaps also the "from perils" provision.

Regardless of how section 10091(c) is divided, the catchall provision cannot be ignored and suggests broad authority for Respondent to determine, in his discretion, whether Petitioner should insure additional perils, indirect losses, and perhaps even liability coverages that have some connection to the property. (See Oppo. 11-12.) The use of open-ended language in section 10091(c) also suggests legislative intent to authorize Respondent to make policy choices with respect to which insurance coverages to include in the FAIR Plan. (See American Coatings Assn. v. South Coast Air Quality Management Dist. (2012) 54 Cal.4th 446, 461-462.)

In light of the broad catchall provision in section 10091(c), Petitioner does not show that the

statute should be interpreted to constrain Respondent's authority to require Petitioner to insure against additional perils, including comprehensive property coverage similar to the ISO DP-3 Special Property Form. Section 10091(c) expressly authorizes Respondent to require insurance of "perils insured under the standard fire policy and extended coverage endorsement and vandalism and malicious mischief," which are the same perils covered under ISO's DP-1 Basic Property form. (See AR 656-658.) Because no limitation is placed on additional perils, and because discretion is vested in Respondent to determine and approve "such other insurance coverages," Respondent's authority with respect to additional perils appears broad.

Similarly, Petitioner does not show that section 10091(c) should be interpreted to constrain Respondent's authority to require Petitioner to insure indirect losses that relate to a direct loss to property. Indeed, Petitioner acknowledges that the "such other insurance coverages" provision of section 10091(c) "has been historically exercised to allow for the addition of other coverages that still relate to a direct loss to property from a covered peril," such as debris removal; improvements, alterations and additions; world-wide coverage (loss to personal property around the world); reasonable repairs; property removed; and fire department service charge. (OB 15.) Some of these losses, such as the fire department service charge, can only be viewed as indirect losses. Evidence supports that coverage for indirect losses are commonly included in dwelling policies. (AR 705-706, 660-661.)

The closer issues are whether section 10091(c) authorizes Respondent to require Petitioner to provide liability coverage and, if so, the scope of such authority. As discussed below, section 10091(c) is ambiguous with respect to liability coverage.

Petitioner contends that "[o]ne core characteristic of 'basic property insurance' is that it is 'insurance against direct loss to real or tangible personal property.'" (OB 13-14.) Petitioner contends that liability coverages "are not insurance 'against direct loss to real or tangible property' and, therefore, do not constitute 'basic property insurance.'" (Ibid.) This interpretation is plausible when one focuses only on the first part of section 10091(c) (i.e. Part A) and the phrase "basic property insurance," but becomes problematic when one considers the catchall provision that authorizes Respondent to require insurance coverages "with respect to" the property. Furthermore, Petitioner does not harmonize its narrow interpretation with coverages for indirect losses in its own Dwelling Policy and in ISO property forms. Finally, as discussed further below, Petitioner's interpretation of section 10091(c) to exclude all liability coverages from the scope of Respondent's authority conflicts with the BOP, Petitioner's current Plan of Operation that includes the BOP, Respondent's historic interpretation of section 10091(c) to

authorize some types of liability coverage, and Petitioner's and the Legislature's acceptance of the BOP, all of which merit significant weight in the court's statutory interpretation of an otherwise ambiguous statute.

Respondent contends that section 10091(c) should be interpreted to authorize some liability coverages because the statute specifically excludes insurance on automobile and farm risks, and because automobile insurance policies "are primarily third party insurance against liability." (Oppo. 14 and fn. 13.) Respondent cites evidence that automobile insurance policies include both first party and third party coverages, including property coverage, but are primarily third party insurance against liability. (See AR 1611, 706.) Petitioner does not respond to this argument or evidence in reply. (See Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc. (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"].) Because auto insurance includes liability coverages, the final clause of section 10091(c) provides some evidence that the legislature believed "basic property insurance" could be construed as including liability insurance. However, it also seems possible that the legislature simply desired to exclude all automobile and farm risks – both property and liability coverages – from the FAIR Plan policies.

Petitioner interprets "basic property insurance" under the Act to be the minimum coverage required by lending institutions as a prerequisite for making loans. (OB 8, 15.) Petitioner does not cite any language from section 10091(c), the related statutory scheme, or the legislative history of section 10091(c) (as opposed to subsequent statements of the Department of Insurance) to support that interpretation. Even if such inference could be drawn, that is not the only purpose of the Act. (See § 10090.) Petitioner does not show from any statutory language or legislative history that the Legislature intended to strictly limit the scope of "basic property insurance" to the minimum coverage required to obtain a mortgage or other loan.

Under Respondent's interpretation, the Commissioner has authority to compel Petitioner to provide liability coverage if there is "a more than minimal nexus between the coverage and the insured property, such as by limiting coverage to occurrences at or related to an insured location, or to household residents, residence employees, or others similarly situated." (Oppo. 12-13.) This interpretation is plausible from the broad, open-ended language used in the catchall provision of section 10091(c) and from the phrase "with respect to such property." However, Respondent's broad interpretation arguably conflicts with the first clause of section 10091(c), which refers to insurance "against" direct loss to property, and use of the word "basic," which connotes a simple or essential property insurance form.

Based on the foregoing, Petitioner does not present a persuasive interpretation of section 10091(c) under which Respondent lacks authority to require Petitioner to insure against perils to property not named in the statute and also against indirect losses related to the insured property. However, section 10091(c) is ambiguous with respect to Respondent's authority to require Petitioner to include comprehensive liability coverages in its policies. Accordingly, the court considers various extrinsic aids to resolve that ambiguity.

Statutory Scheme

Section 10095(a) states: "Within 30 days following the effective date of this chapter, the association shall submit to the commissioner, for his or her review, a proposed plan of operation, consistent with the provisions of this chapter, creating an association consisting of all insurers licensed to write and engaged in writing in this state, on a direct basis, basic property insurance or any component of basic property insurance in homeowners or other dwelling multiperil policies." (See § 10095(a) [emphasis added]; see also § 10091(e) ["'Premiums written' means gross direct premiums charged with respect to property in this state on all policies of basic property insurance and the basic property insurance premium components of all multiperil policies"].)

The emphasized language from sections 10095(a) and 10091(e) arguably suggests that "basic property insurance" is contemplated to be a part, or component, of a multi-peril policy. In that interpretation, "basic property insurance" is not the same, but something less, than a multi-peril policy, such as an HO-3 Policy.

On the other hand, these provisions should be harmonized with the definition of "basic property insurance" in the Act. As Respondent argues, the distinction between "basic property insurance" and a "multiperil policy" suggested in section 10095(a) and 10091(e) can be understood as reflecting a historical fact regarding the scope of Fair Plan policies required by the Commissioner. Those sections do not necessarily mean that the catchall phrase in 10091(c) cannot be invoked by the Commissioner to require additional coverages similar to a multiperil policy.

Respondent also contends that Petitioner's interpretation results in surplusage of the definition of "insurer" in section 10091(f), which includes "any person who undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." (Oppo. 14.) This

provision provides limited support for Respondent's interpretation, since the definition of "insurer" appears to be generic and not intended to control the scope of Respondent's authority.

Petitioner cites to AB 3012, enacted in September 2020, which added section 10095(i) to the Act. (OB 12; Reply 13.) Section 10095(i) provides in part: "To reduce the association's concentration and number of policies, and to encourage maximum use of the normal insurance market consistent with subdivision (c) of Section 10090, the association shall develop and implement a clearinghouse program on or before July 1, 2021, to help reduce the number of existing FAIR Plan policies and provide the opportunity for admitted insurers to offer homeowners' insurance policies to FAIR Plan policyholders." While section 10095(i) suggests further intent to encourage maximum use of the normal insurance market (see Reply 13), the Act includes other purposes not addressed by the amendment. (See § 10090(a), (b).) The Legislature knew of Orders 2 and 3, as well as the BOP, when in enacted AB 3012 and yet did not amend the Act to constrain Respondent's authority to require Petitioner to provide liability coverages. Accordingly, AB 3012 does not resolve the ambiguity in the definition of "basic property insurance."

Legislative History

Neither Petitioner nor Respondent has cited the court to instructive legislative history leading up to passage of the Act in 1968 that supports their interpretations of the definition of "basic property insurance."

Petitioner cites to statements of intent in the federal Urban Property Protection and Reinsurance Act of 1968 ("UPPRA"), Public Law 90-448. (OB 6-8, 15.) "Congress left it to the various states to enact insurance plans to implement the Congressional purpose though in so doing it set forth minimum criteria to be met by the states." (District of Columbia Ins. Placement Facility v. Washington (D.C. Court of Appeals) 269 A.2d 45, 47, citing Public Law 9-448, § 1102, 82 Stat. 556 (1968).) Indeed, the FAIR Plans of some other states offer homeowners policies. (See Oppo. 13 and Reply 10.) The cited language from UPPRA provides no evidence of whether the California Legislature intended to authorize Respondent to include liability coverages within "basic property insurance," and, if so, the scope of such liability coverages.

Petitioner cites a joint letter, dated December 12, 2019, from Chairs of the California Senate and Assembly Insurance Committees which cited St. Cyr v. FAIR Plan (2014) 223 Cal. App. 4th 786, 791 as evidence that the California Department of Insurance ("CDI") "affirmatively

represented to the Court that the FAIR Plan does not have the statutory authority to issue an HO3 policy." (OB 12, citing AR 414.) The email of CDI attorney Christopher Citko, cited in St. Cyr, is discussed infra with respect to the deference owed to Respondent's interpretation of the Act. This letter, from two individual legislators in 2019, is not persuasive evidence of legislative intent of the relevant provisions in the Act.

Petitioner refers to statements of Respondent from 1972 as evidence of legislative history. (OB 8-9.) The Act was passed in 1968. Respondent's subsequent interpretations of the Act are not "legislative history," but may be relevant administrative construction, as discussed below.

Administrative Construction; and Deference to Respondent's Interpretation

The parties disagree on the amount of deference, if any, the court should give to Respondent's interpretation of section 10091(c). The California Supreme Court has explained, as follows, the circumstances in which judicial deference to an agency's interpretation may be warranted:

When an agency is not exercising a discretionary rulemaking power but merely construing a controlling statute, " '[t]he appropriate mode of review ... is one in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction.'" How much weight to accord an agency's construction is "situational," and greater weight may be appropriate when an agency has a " 'comparative interpretive advantage over the courts,' " as when " 'the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion.' " Moreover, a court may find that "the Legislature has delegated the task of interpreting or elaborating on a statute to an administrative agency," for example, when the Legislature "employs open-ended statutory language that an agency is authorized to apply or 'when an issue of interpretation is heavily freighted with policy choices which the agency is empowered to make.' "... In other words, the delegation of legislative authority to an administrative agency sometimes "includes the power to elaborate the meaning of key statutory terms." Nevertheless, the proper interpretation of a statute is ultimately the court's responsibility. (American Coatings Assn. v. South Coast Air Quality Management Dist. (2012) 54 Cal.4th 446, 461-462 [citations omitted].)

Additionally, "consistent administrative construction of a statute, especially when it originates with an agency that is charged with putting the statutory machinery into effect, is accorded great weight.'" (Ste. Marie v. Riverside County Regional Park & Open-Space Dist. (2009) 46 Cal.4th

282, 292-293.) "Significant factors to consider include whether the administrative interpretation has been formally adopted by the agency or is instead in the form of an advice letter from a single staff member, and whether the interpretation is long-standing and has been consistently maintained." (Ibid.) Moreover, giving great weight to an agency's interpretation is particularly appropriate "where the Legislature and other interested parties have long acquiesced in the interpretation." (Thornton v. Carlson (1992) 4 Cal.App.4th 1249, 1257.) "Under these circumstances, the administrative practice will be upheld 'unless it is clearly erroneous or unauthorized.'" (Ibid.)

The parties discuss the following statements and actions of the California Department of Insurance ("CDI" or "Department"), post-passage of the Act, to support their respective interpretations of the definition of "basic property insurance."

1972 Reports. Petitioner contends that the CDI "made clear in its 1972 report [to the California legislature] that 'basic property insurance' does not include all the coverages offered under a comprehensive homeowners insurance policy." (OB 8, citing AR 431, 441, 457.) Petitioner cites to CDI's October 31, 1972, Report to the California Legislature regarding the Availability, Adequacy, and the Cost of Property Insurance in High Risk Areas. This report stated in part:

The FAIR Plan has been criticized for not making many of the coverages that could be purchased in the normal market available to its insureds. The most notable deficiency is the lack of the homeowners type package policy for personal risks and the lack of business interruption and other time element coverages for commercial risks. In both of these cases, the justification of the lack of broader coverage is embodied in the narrow scope of legislative intent at the time the FAIR Plan was created. It is clear from the Federal legislation, which in turn mandated the State law, that the intent of Congress was to require the availability of only such insurance as would facilitate financing of construction and rebuilding programs and private investment in inner city areas. In general, the required coverage of lending institutions financial real or personal property investment in inner city areas can be satisfied by the coverages offered by the California FAIR Plan Association. (AR 441.)

Petitioner also cites a 1972 report of CDI's rate analyst, which states: "Basic insurance is the minimum coverage required by lending institutions as a prerequisite for making loans." (AR 457.) The analyst's report also states: "The areas where the Fair Plan writes insurance are under constant review and may expand or contract according to availability of insurance in the normal markets." (AR 459.)

These statements by CDI, especially the 1972 report to the legislature, provide some evidence that CDI interpreted the Act more narrowly in the early 1970s. However, the 1972 Report to the Legislature did not provide a definitive or comprehensive interpretation of the statutory question presented here, which is whether Respondent has the authority under California law to order Petitioner to provide additional coverages if Respondent determines such additional coverages are necessary to carry out the purposes of the Act. (§ 10095(f); § 10090.) The Department's statements to the Legislature cited above focused on the intent of Congress in adopting the federal legislation. As discussed earlier, the federal legislation imposed minimum thresholds that states had to meet in adopting state legislation.

The statements of CDI's rate analyst appended to the report also did not address that question. To the extent the rate analyst set forth a definition of "basic property insurance" which is different than the plain language of the statute, that interpretation is not entitled to any weight.

It seems clear that from the cited report that CDI believed in 1972 that additional coverages were not necessary to carry out the purposes of the Act. It also seems clear that CDI's position has changed since the 1972 report, including with respect to "business interruption" coverage, which is now provided in the BOP. (See AR 375-376.) That CDI's position has developed since 1972 does not, standing alone, show that Respondent is not entitled to deference in his current interpretation of the Act. Indeed, Petitioner's cited evidence supports that the scope of the Fair Plan may change depending on "availability of insurance in the normal markets." (AR 459.)

CDI's Approval of the BOP. As noted by Petitioner and Respondent, CDI's statements and actions in 1992-1994 related to its approval of the BOP, as well as Petitioner's acquiescence in that expanded coverage, are relevant to the deference owed to Respondent in this writ action. While the BOP is not the same as a HO-3 policy, the BOP includes liability coverage and materially expanded the property insurance coverage previously offered by Petitioner.

Minutes of a meeting for Petitioner's Governing Committee, dated May 20, 1992, reflect that following the Los Angeles riots in 1992, CDI expressed its concern over the availability of suitable business insurance in the inner-city areas. Petitioner learned that CDI was in discussions with the Legislature to extend coverages offered by the FAIR Plan. Petitioner's then General Manager asserted "that a better way to handle this would be for the Department and the FAIR Plan to enter into discussions to solve perceived problems, rather than deal through the legislature." (AR 341-342.) The Department and Petitioner met on May 12, 1992 to discuss the

availability of insurance for businesses in the riot torn areas of Los Angeles. At that time, the Department indicated its interest that the FAIR Plan offer businessowners insurance providing (1) replacement cost coverage, (2) business interruption, (3) general liability, and (4) a premium plan. (Ibid.) Petitioner's then General Manager "informed the Governing Committee that the section relative to the FAIR Plan in the Insurance Code appeared to be broad as far as the powers of [Respondent] were concerned, and requested Mr. Wolf, the FAIR Plan counsel, to give his opinion as to [Respondent's] power." (Ibid.)

Wolf responded, in a March 12, 1993 letter Petitioner forwarded to senior CDI staff, that, "without any new legislation, the FAIR Plan may, with the Commissioner's approval, add the business owners package policy to the coverages it offers, so long as the FAIR Plan does not offer any insurance on automobile or farm risks." Wolf reasoned, inter alia, that "in enacting the FAIR Plan legislation, the Legislature appears to have recognized that 'basic property insurance' could be expanded to include liability insurance ... by finding it necessary to exclude from that definition insurance on automobile risks, almost all of which constitutes liability insurance." (AR 1610-11.) The May 20, 1992, minutes also state that Wolf opined at the meeting that comprehensive general liability "would probably necessitate action by the legislature to include this in the FAIR Plan." (AR 342.)

The May 20, 1992, minutes reflect that Petitioner's Governing Committee, i.e. not CDI or Respondent, concluded that "[general] liability coverage was readily available in the voluntary market" and that "[general] liability insurance was entirely outside the scope of the Association." The Committee also concluded that the FAIR Plan could offer business interruptions coverage. (AR 342-343.) The Governing Committee decided that general liability coverages would be "made through a [voluntary] market assistance program ["MAP"], and that this be communicated to the Department of Insurance." (AR 343.)

For reasons not directly relevant here, Petitioner's Government Committee subsequently reconsidered setting up a MAP, and determined that some liability coverage, particularly related to businesses, could be included in a FAIR Plan policy. At a meeting held February 25, 1993, Petitioner's Governing Committee approved development of a businessowners package policy. (AR 347-348.)

In crafting the BOP, Petitioner relied upon an ISO form and made various changes to the form. As relevant here, an endorsement was added to limit the liability coverages on the form to those premises, operations, and projects specifically designed by the insured. (AR 350-354, 358.)

According to Petitioner's minutes from May 1993, CDI's Assistant Commissioner at the time, Richard Roth, "requested a review of the liability coverages to ensure that the coverage given is narrowed to premises related coverage" and asserted that this would "ensure that the liability coverage would comply to that permitted to the current FAIR Plan legislation." (AR 358.)

On July 2, 1993, Petitioner announced that a 2/3 majority of the insurance company members approved a plan to expand the FAIR Plan to offer a BOP. On March 7, 1994, the CDI issued a letter approving the BOP program and related amended plan of operation. (AR 364-367.)

Respondent asserts that its interpretation of section 10091(c) "as authorizing liability coverages dates back to the early 1990s and has been maintained consistently since, as Petitioner has continuously offered the BOP." (Oppo. 11, fn. 4.) In reply, Petitioner asserts that CDI's actions related to the BOP show that CDI "itself believed that legislative action was necessary to require the FAIR Plan to offer general liability coverage under a BOP." (Reply 5-6.)

The administrative history related to the BOP generally supports giving deference to Respondent in his current interpretation of the Act. Since at least 1994, CDI has interpreted the Act to authorize Respondent to require Petitioner to provide liability coverage related to business operations on the insured premises. The liability coverage in the BOP conflicts with Petitioner's narrow interpretation of "basic property insurance" to be limited to direct loss to property or to the bare minimum insurance necessary to obtain a mortgage. It is significant that Respondent has taken a broader interpretation of "basic property insurance" for more than 25 years.

As noted by Petitioner, the administrative history of the BOP includes at least one statement of a CDI representative, Roth, that general liability coverage may not be authorized by the Act. (See Reply 5-6, citing AR 358.) However, it is unclear if that statement of Roth was intended as a definitive interpretation of the Act by CDI or the Commissioner. The cited evidence is minutes from a meeting of Petitioner's Government Committee and not a formal written opinion of CDI. While Petitioner has not presented a transcript of Roth's statement, Roth essentially restates this interpretation in the declaration Petitioner submitted in this action. The statement cited by Petitioner should be given some weight in the court's analysis of the deference owed to Respondent.

In reply, Petitioner states that "the fact that the FAIR Plan voluntarily agreed in the past to offer limited liability coverage under the BOP is irrelevant to the issue of whether Lara has authority under the law to compel the FAIR Plan to offer the non-property liability coverages provided

under an HO-3 policy here." (Reply 6.) The court disagrees. It is significant that both Petitioner and the California Legislature have acquiesced, for more than 25 years, to Respondent's interpretation of the Act to grant him authority to require Petitioner, through approval of the Plan of Operation, to provide liability coverage in the BOP. (See Thornton v. Carlson (1992) 4 Cal.App.4th 1249, 1257 [weight should be given to agency's interpretation "where the Legislature and other interested parties have long acquiesced in the interpretation"]; Save Our Heritage Org. v. City of San Diego (2018) 28 Cal.App.5th 656, 668 ["The Legislature is presumed to be aware of a long-standing administrative practice .... If the Legislature, as here, makes no substantial modifications to the [statute], there is a strong indication that the administrative practice [is] consistent with the legislative intent."].)

2012 Statement of CDI Staff Attorney Christopher Citko. Finally, Petitioner cites to a statement of CDI attorney Christopher Citko, in separate litigation in 2012, in response to a question from Honorable William Highberger "[w]hether the FAIR Plan was or should be required by the Commissioner to issue the ISO HO-3 2000 (Special Form) homeowner's insurance policy as basic property insurance for residential property under California Insurance Code Section 10091(c)....?" (OB 15, citing AR 91-92.) In an email to the court and various attorneys, CDI attorney Citko responded in part: ""It is not clear how the FAIR Plan could issue an HO-3 form since it was not submitted as part of its rate plan nor is the FAIR Plan authorized to issue some of the coverages under that form." (AR 1405, 1413.)

Petitioner appears to interpret the statement that the FAIR Plan was not "authorized" to issue some of the coverages under HO-3 to be a legal conclusion that the applicable statutes do not authorize that coverage. Citko's statement could also be reasonably interpreted as a factual statement that the Commissioner had not, at that time, authorized Fair Plan to offer that type of coverage. This latter interpretation is consistent with Citko's declaration submitted in this action. In light of the informality and ambiguity of the email, the court is not persuaded that this email deserves much weight in a determination of deference owed to Respondent in this action.

While the evidence shows that the Department has not had a consistent interpretation of the Act since its original adoption, the evidence does support a finding that since at least the early 1990s, the Department has interpreted the Act to authorize the Commissioner to require FAIR Plan to provide at least some forms of liability insurance.

The wording of section 10091 itself weighs in favor of deference to Department's interpretation. The catchall provision in section 10091(c) is open ended and, therefore, confers discretion on

Respondent to make policy choices with respect to the insurance coverages that should be added "with respect to" the insured property. (American Coatings Assn. v. South Coast Air Quality Management Dist. (2012) 54 Cal.4th 446, 461-462). Since its approval of Petitioner's Plan of Operation in 1994, CDI has consistently and formally interpreted the Act to authorize Respondent to compel Petitioner to provide certain liability coverages related to the insured property. That interpretation, to which Petitioner has acquiesced and the Legislature has not modified, is entitled to substantial deference. (Ste. Marie v. Riverside County Regional Park & Open-Space Dist. (2009) 46 Cal.4th 282, 292-293.) At least with respect to the authority of the Commissioner to require property-related liability coverage, Respondent's current interpretation is generally consistent with the Commissioner's prior approval of liability coverage in the BOP.

However, Respondent ordered Petitioner to provide a comprehensive HO-3 policy that includes several different liability coverages, some of which are dissimilar from the BOP liability coverages. (AR 6-7.) Petitioner's actuary, Sheri Lee Scott, generally discusses the Personal Liability, Medical Payment to Others, and Workers Compensation coverages in the HO-3 policy form. (AR 656-661.) Similar to the BOP liability coverage, some of the HO-3 liability coverages appear to have a clear connection to the insured property, such as limiting coverage to occurrences at or related to the insured location; activities of a residence employee; or injuries to a residence employee. (AR 659-661, 1705-1735.) The connection is tenuous as to other coverages, as discussed further below. Even in its broadest interpretation, section 10091 only authorizes the Commissioner to add insurance coverages "with respect to such property." At some point, required coverage could exceed the parameters of section 10091.

In the original writ briefs, neither Petitioner nor Respondent provided an analysis of whether each of the liability coverages in the HO-3 policy form is an insurance coverage "with respect to" the insured property. Accordingly, the court ordered supplemental briefs related to that issue. For reasons discussed below, the court concludes that some coverages in the HO-3 policy are not "with respect to" the insured property. Respondent exceeded his statutory authority in ordering Petitioner to provide a comprehensive HO-3 policy that includes some coverages not authorized by section 10091.

The HO-3 Form – Key Liability Provisions

HO-3 policies "usually contain three [liability] coverages:" (1) "Medical payments to others;" (2) "Workers' compensation and employers' liability coverage for 'residential employees;'" and (3) "Personal liability." (AR 1703 [Rutter, California Practice Guide: Insurance Litigation.) These

coverages are found in Section II – Liability coverages of the ISO form.

Personal Liability coverage (titled "Coverage E") applies "if a claim is made or a suit is brought against an 'insured' for damages because of 'bodily injury' or 'property damage' caused by an 'occurrence' to which this coverage applies." (AR 1866.) "Occurrence" is defined under the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: a. 'Bodily injury'; or b. 'Property damage'." (AR 1851.) With some narrow additions for specific circumstances, the "insureds" under an HO-3 are limited to: (1) the named insured and cohabiting spouse (i.e., the homeowners); (2) household residents that include "relatives" or "other persons under the age of 21 and in your care or the care of a resident of your household who is your relative"; and (3) certain full-time students who were household residents. (AR 1850-51.)

The HO-3 form also contains, among others, exclusions from personal liability coverage for:
• "Motor Vehicle," "Watercraft," "Aircraft," and "Hovercraft" Liability (AR 1866-67);
• bodily injury or property damage arising out of: (1) "a 'business' conducted from an 'insured location' or engaged in by an 'insured';" (2) "the rendering of or failure to render professional services;" or (3) a premises owned by (or rented to or by) an insured, that is not an "insured location" defined in the policy (AR 1868); and
• with certain exceptions, liability "[u]nder any contract or agreement entered into by an 'insured'" that does not "directly relate to the ownership, maintenance or use of an 'insured location'" (AR 1869).

For Medical Payments to Others (Coverage F), the HO-3 form provides in relevant part:

We will pay the necessary medical expenses that are incurred or medically ascertained within three years from the date of an accident causing "bodily injury".... This coverage does not apply to you or regular residents of your household except "residence employees". As to others, this coverage applies only:
1. To a person on the "insured location" with the permission of an "insured"; or
2. To a person off the "insured location", if the "bodily injury":
a. Arises out of a condition on the "insured location" or the ways immediately adjoining;
b. Is caused by the activities of an "insured";
c. Is caused by a "residence employee" in the course of the "residence employee's" employment by an "insured"; or
d. Is caused by an animal owned by or in the care of an "insured". (AR 1866.)

Under Section II – Liability Coverages, the standard ISO HO-3 form does not expressly include separate "workers' compensation" and/or "employers' liability" coverage for "residential employees." However, under Insurance Code section 11590, homeowners insurance policies in California must provide limited workers' compensation coverage for residence employees, and ISO rules provide for the use in California of a "Workers Compensation Residence Employees – California" endorsement. (Tu Decl. ¶ 9, Exh. B: Ins. Code § 11590; see generally AR 1710 [Cal. Prac. Guide].) The endorsement requires payment of all benefits required of an "insured" by the California Workers' Compensation law. (Tu Decl. Exh. B.) Workers' compensation insurance covers injuries suffered in the course of employment "without regard to negligence" by the employer or the employee. (AR 1710; see Labor Code § 3600(a).) By statute, workers' compensation "coverage is required for all employees whose 'duties are incidental to the ownership, maintenance or use' of a residential dwelling … 'or whose duties are personal' … provided that: [a] those duties are 'not in the course of the trade, business, profession, or occupation of the owner or occupant'; and [b] no other workers' compensation coverage is available." (AR 1710; Cal. Prac. Guide Ins. Litig. Ch. 7I-B ¶ 7:2162 [citing Ins. Code, § 11590; Lab. Code, § 3351(d); State Farm Fire & Cas. Co. v. Workers' Comp. App. Bd. (1997) 16 Cal.4th 1187, 1194-1198.)

The BOP – Key Liability Provisions

The insuring clause for the BOP's Business Liability coverage provides in relevant part:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies, but only if such "bodily injury", "property damage", "personal injury", or "advertising injury" arises out of the ownership, maintenance or use of the premises shown in the Declarations and operations necessary or incidental to those premises, or arises out of the project shown in the Declarations. (AR 391.)

The insuring clause for the Medical Expenses coverage provides in relevant part:

We will pay medical expenses as described below for "bodily injury" caused by an accident: (1) On premises you own or rent; (2) On ways next to premises you own or rent; or (3) Because of your operations [subject to the same "arises out of the ownership, maintenance or use of the premises" limitation as for Business Liability]. (AR 394.)

Subject to the premises limitation quoted above, the Business Liability and Medical Expenses coverages are limited to occurrences that take place somewhere in the "coverage territory." (AR 393-394.) The BOP defines "coverage territory" to include the United States, Puerto Rico and Canada, as well as, in some cases, "international waters or airspace" and even "all parts of the world." (AR 405-406.) Specifically, the coverage territory includes "all parts of the world" if:

(1) The injury or damage arises out of:
(a) Goods or products made or sold by you in [the United States, Puerto Rico, and Canada] or
(b) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; and
(2) The insured's responsibility to pay damages is determined in a "suit" on the merits in the territory described in a. above or in a settlement we agree to. (AR 405-406.)

There are multiple exclusions from Business Liability and Medical Expenses coverages, none of which appears dispositive to the analysis here. (AR 395-401.)

Are all HO-3 Liability Coverages "With Respect To" the Insurance Property?

The parties disagree on the extent to which Hartford Casualty Ins. Co. v. Travelers Indemnity Co. (2003) 110 Cal.App.4th 710, presents useful guidance on how to interpret the phrase "with respect to such property" as used in section 10091(c). The court also has grappled with this question. In Hartford, the Court was called on to interpret an insurance policy providing coverage to an additional insured "but only with respect to " the [insured's] work or operations or facilities owned or used by [the insured]". The Hartford court concluded that the phrase did not require a showing of direct liability caused by the insured. Id. at 716. The court concluded that the policy language required no more than a "minimal causal connection or incidental relationship between the liability and the insured's presence as a tenant" in the leased premises upon which the incident occurred.

In Hartford, the policy required an event to be "with respect to" the insured work, or operations, or facilities owned or used by the insured, a fairly expansive list. It is in that context, that the court decided that the "with respect to" language required only a minimal causal connection between the incident giving rise to liability and the insured's tenancy in a building. The language of Section 10091(c) differs as it only authorizes the Commission to add coverages "with respect to such property," not an expansive list of qualifiers. The court concludes Hartford provides

limited guidance as to the legal interpretation of the phrase "with respect to" in Section 10091.

Even under a broad interpretation of the statute, section 10091 only authorizes the Commissioner to add insurance coverages "with respect to such property." The court interprets this language to require some relationship, nexus, or connection between the property and the liability coverage. Respondent's interpretation of section 10091 to allow addition of property-related liability coverages is consistent with the Commissioner's prior approval of liability coverage in the BOP and the legislature's and Petitioner's acquiescence to that interpretation. Petitioner's interpretation of Section 10091 to exclude all property-related liability coverage conflicts with the BOP. Although section 10091(c) is ambiguous, a broader interpretation better harmonizes all language in the statute and is entitled to substantial deference for the reasons stated above.

Some of the liability coverages in the HO-3 policy are consistent with this interpretation of section 10091. For example, the requisite nexus for an accident off the insured location is present if the accident "[a]rises out of a condition on the 'insured location' or the ways immediately adjoining." (See AR 1866.) Similarly, the nexus is present for bodily injury to a residence employee that occurs at the insured location and arises in the course of employment of the residence employee by the insured. (See AR 1866, 1869.)

Other liability coverages in the HO-3 policy conflict with this interpretation of section 10091. For example, there is no meaningful relationship, nexus, or connection between the insured property and "bodily injury" that occurs to a person off the "insured location," that is caused by the activities of an insured, and that does not arise out of a condition of the insured location or the ways immediately adjoining. (See AR 1866.) Respondent contends that the nexus is based on the insureds' ownership or residence at the insured property. (Resp. Suppl. Br. 5-6.) Such connection is so attenuated that the words "with respect to" in section 10091 have little meaning.

As illustrated in Petitioner's supplemental brief, courts regularly find liability coverage under homeowners' policies for conduct of the insured that has no connection to the insured's property. (See, e.g., Ohio Cas. Inc. Co. v. Hartford Accid. & Indem. Co. (1983) 148 Cal. App.3d 641, 644-8 [re: insured's negligent supervision and control over child in permitting her to dive into lake that resulted in injury to child by a nearby boat]; Safeco Ins. Co. of America v. Parks (2009) 170 Cal. App. 4th 992, 1010- 12 [re: insured's negligent acts to cause a person to be left on the side of the highway who was then subsequently struck by another car]; Aetna Cas. & Surety Co. v. Safeco Ins. Co. (1980) 103 Cal. App. 3d 694, 696-701 [re: insured's negligent handling of another persons' rifle that resulted in an accidental discharge and shooting of insured's friend];

Congregation of Rodef Sholom v. American Motorists Ins. Co. (1979) 91 Cal. App. 3d 690, 697-8 [re: insured's setting of a fire in a wastebasket at a synagogue that resulted in property damage to synagogue].) In its writ briefs, Respondent has provided no cogent argument for interpreting the "with respect to" language of section 10091 to include these types of liability coverages that have no connection to the property. Nor does Respondent cite case law supporting its interpretation of section 10091 to extend to such liability coverages.

For other liability coverages in the HO-3 policy, colorable arguments could be made on either side as to whether such coverages are "with respect to" the insured property. The strength of the connection could depend on the factual circumstances. Examples include bodily injuries to a person off the insured location that are caused by a residence employee in the course of employment or caused by an animal of the insured. (See AR 1866.) Depending on the nature of the off-location duties performed by the residence employee or the circumstances of an injury caused by an animal, it seems possible that such liability coverages could, or could not, have a sufficient connection to the insured property to fall within the scope of section 10091(c). The parties do not brief all possible liability coverages or their connections to the insured property. For purposes of this writ petition, the court need not analyze whether each possible liability coverage in the HO-3 policy falls within the scope of section 10091(c).

Based on the language of section 10091 and the HO-3 policy, as well as cases interpreting HO policies, some of the liability coverages in the HO-3 policy exceed Respondent's statutory authority under section 10091 because they have no connection to the insured property and are not "with respect to" such property. Because of the deference owed to Respondent's interpretation of section 10091 as reflected in the BOP, the court also considers whether there is a material difference between liability coverages in the standard California HO-3 policy and the BOP.

Are Liability Coverages in the HO-3 and BOP Materially Different?

While conceding that the liability coverages in the HO-3 and BOP are different, Respondent contends that the differences are immaterial because both policies provide for coverage for liability resulting from qualifying occurrences that need not occur at the property. Respondent contends that the "premises limitation" in the BOP, i.e. the above-referenced requirement that an occurrence must arise out of the ownership, maintenance, or use of the insured premises, does not distinguish the BOP because a house, unlike a business, "does not send people, products, or services out into the world on its behalf." (Resp. Suppl. Br. 7.) Respondent contends: "Right

now, the BOP and an HO-3 do materially the same thing. Both insure the activities: (1) of persons with a connection to the insured location; and (2) having to do with that connection, and not some other capacity in which those persons might act." (Ibid.)

Respondent's contentions are not supported. Respondent does not persuasively show, with discussion of the operative policy language, that all liability coverages in the BOP and HO-3 "do materially the same thing." For example, as discussed above, liability coverage in an HO-3 policy could apply to conduct of an insured that occurs off the insured location and has no connection to the property. Liability coverages in the HO-3 policy could even extend to the activities of full-time students, who no longer live in the residence. (AR 1850.) In contrast, the liability coverages in the BOP must arise out of the "ownership, maintenance or use of the premises." (AR 391, 394.) Even though the coverage territory is broadly defined (see AR 405-406), the premises limitation in the BOP requires some meaningful connection to the insured property.

In its supplemental brief, Petitioner contends, citing case law, that the premises limitation "is material as it imposes a significant precondition to coverage; specifically, a premises liability qualification requires a 'causal connection' between the injury and 'ownership, maintenance, or use' of the premises." (Pet. Suppl. Br. 9, citing Turner v. State Farm & Cas. Co. (2001) 92 Cal. App. 681, 686; Kramer v. State Farm Fire & Cas. Co. (1999) 76 Cal. App. 4th 332, 340; Peters v. Firemen's Ins. Co. (1998) 67 Cal. App. 4th 808, 811-13; see also Ohio Cas. Inc. Co. v. Hartford Accid. & Indem. Co. (1983) 148 Cal. App.3d 641, 646.) The premises limitation in the BOP has similar legal effect.

Insuring clauses often limit coverage to liability "arising out of the ownership, maintenance or use of [described premises, equipment or vehicles] ... and operations necessary or incidental to those purposes." (Rutter, Cal. Prac. Guide, Insurance Litigation, § 7:160.20, citing Feurzeig v. Insurance Co. of the West (1997) 59 Cal.App.45h 1276, 1280.) Application of this limiting phrase can make a difference in whether certain events are covered by the policy. See, e.g., Feurzig, supra, 59 Cal.App.4th at 1285; Kramer, supra, 76 Cal.App.4th at 334-35.

Applying this case law here, the liability coverages in the standard HO-3 policy are materially distinct from the liability coverages in the BOP. The BOP's "Business Liability" coverage is limited to damage or injury that "arises out of the ownership, maintenance or use of the premises shown in the Declarations and operations necessary or incidental to those premises, or arises out of the project shown in the Declarations." (AR 391.) The BOP's Medical Expenses coverage is

also limited to injury caused by an accident that occurs on the insured premises or the adjoining "ways", or arises out of the "ownership, maintenance or use of the premises … and operations necessary or incidental to those premises" or the "project shown in the Declarations." (AR 394.) Kramer and related cases support that the premises limitations in the BOP liability coverages require some causal connection with the insured premises.

In contrast, the liability coverages in the HO-3 policy are not limited to the premises and do not require a causal connection to the premises. (AR 1866; see, e.g., Ohio Cas. Inc. Co. v. Hartford Accid. & Indem. Co. (1983) 148 Cal. App.3d 641, 644-8.)

Because there is a material distinction between the liability coverages in the HO-3 policy and BOP, the deference owed to Respondent in its interpretation of section 10091 does not support Respondent's decision to order Petitioner to provide a HO-3 policy that includes liability coverages with no connection to the insured property. Respondent has no history of interpreting section 10091 to include broad liability coverages with no connection to the insured property. Unlike with respect to the narrower liability coverages in the BOP, Petitioner and the legislature have not acquiesced to Respondent's current interpretation of section 10091 to include broad liability coverages with no connection to the insured property.

Is There a Standard Form with More Limited Liability Coverage?

The court asked the parties to brief whether there is a standard policy of insurance which limits liability coverage to property related occurrences. From the briefing provided, the court concludes the answer is no.

Petitioner's current Plan of Operation (Ed. 05/31/19) requires that all policy forms be on standard forms, except as modified with the Commissioner's permission. (AR 302.) Standardized forms for certain types of insurance policies have been developed by industry organizations, including the Insurance Services Office ("ISO"). (See AR 656-659; Tu Decl. ¶ 6.)

Respondent submits evidence that "there is no standard homeowners insurance form, whether from ISO or otherwise, that contains more limited liability coverage than the ISO HO-3 form." (Tu Decl. ¶ 13.) Petitioner states that it has found three commercial forms on the Department of Insurance website, issued by three different insurance carriers, that provide an option for liability coverage injury or damage arising out of the ownership, maintenance, or use of the insured premises. (Pet. Suppl. Br. 10, citing AR 1913-19, 1931-37, 1960-66.) However, Petitioner "does

not represent whether these forms are considered 'standard' as it lacks information to makes this statement." (Ibid.)

It appears there may be no standard HO form limiting liability coverage to property-related occurrences. However, as Respondent concedes, Petitioner's plan of operation states that the Commissioner may modify the standard forms. Respondent also admits that insurers can modify the ISO forms they license. (Tu Decl. ¶ 13.) In crafting the BOP, Petitioner relied upon an ISO form and made various changes to the form. (AR 350-354, 358.) As discussed above, insurance policies often limit coverage to liability "arising out of the ownership, maintenance or use of [described premises, equipment or vehicles] ... and operations necessary or incidental to those purposes." (Rutter, Cal. Prac. Guide, Insurance Litigation, § 7:160.20.) Accordingly, the existence or non-existence of a standard form limiting liability to property-related occurrences is not dispositive to the court's resolution of the writ petition.

Conclusion: Respondent Exceeded His Statutory Authority in Ordering Petitioner to Provide a Comprehensive HO-3 Policy that includes Coverages Unrelated to the Property

For the reasons discussed above, Respondent exceeded his statutory authority in ordering Petitioner to provide a comprehensive HO-3 policy that includes some liability coverages that have no relationship, nexus, or connection to the insured property. Accordingly, that part of Orders 2 and 3 must be set aside.

Was Respondent's Order Requiring Petitioner to Offer an HO-3 Policy Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support?

In the alternative to the court's ruling above, if Respondent has authority to order Petitioner to provide a comprehensive HO-3 policy, the court considers below whether that part of Orders 2 and 3 was arbitrary, capricious, or entirely lacking in evidentiary support.

Respondent justified his order that Petitioner offer a comprehensive HO-3 policy on the following grounds:

WHEREAS, to ensure the availability of basic property insurance, the FAIR Plan's current Plan of Operation (Ed 05/31/19) requires the FAIR Plan to offer, under its Division I program, dwelling fire and allied lines policies containing, inter alia, the coverages set forth in section 10091, subdivision (c), but such policies do not include the majority of coverages included in a

typical homeowners' policy available in the voluntary market;

WHEREAS, the data compiled and released publicly by the Commissioner in August 2019 shows that the FAIR Plan's market share has increased significantly as the voluntary market non-renewed significant numbers of homeowners policies in areas throughout the State of California exposed to wildfire;

WHEREAS, the Commissioner has determined that the coverages offered in the FAIR Plan's Division I dwelling fire and allied lines policies as required by the FAIR Plan's current Plan of Operation are insufficient to meet the growing demand for comprehensive homeowners' insurance in wildfire prone areas and other areas of the state where the voluntary market has and likely will continue to non-renew significant numbers of homeowners policies;....[¶]

WHEREAS, the Commissioner feels it is necessary, in order to carry out the purposes of Chapter 9, to revoke his approval of the FAIR Plan's current Plan of Operation (Ed. 05/31/19) to the extent the current Plan of Operation is inconsistent with this Order to add additional coverages to the definition of basic property insurance and to the extent that it does not require the FAIR Plan to offer the option to purchase an HO-3 policy or a policy with coverages equivalent to those included in an HO-3 policy, in addition to the Division I dwelling fire and allied lines policies the FAIR Plan offers as of the date of this Order, to respond to the unmet demand for homeowners insurance in the state. (AR 6-7.)

Petitioner contends that "[b]ecause there is no evidence of an unmet demand for HO-3 coverages in California ... this aspect of the Orders is void as an abuse of discretion." (OB 16.) Petitioner also contends that Respondent's HO-3 order is irrational and contrary to public policy because it will disrupt the voluntary market for HO-3 and DIC policies. (OB 17.)

"Mandamus may issue to correct the exercise of discretionary legislative power, but only if the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law. This is a highly deferential test." (Carrancho v. California Air Resources Board (2003) 111 Cal.App.4th 1255, 1264-65.)

"In ordinary mandamus proceedings courts exercise very limited review 'out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority.' The court may not weigh the evidence adduced before the administrative

agency or substitute its judgment for that of the agency, for to do so would frustrate legislative mandate. An agency acting in a quasi-legislative capacity is not required by law to make findings indicating the reasons for its action, and the court does not concern itself with the wisdom underlying the agency's action any more than it would were the challenge to a state or federal legislative enactment." (Shapell Industries, Inc. v. Governing Board (1991) 1 Cal.App.4th 218, 230 [citations omitted].)

"A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." (Shapell Industries, supra at 232.)

This abuse of discretion standard is a "rational basis" test. (County of Los Angeles Department of Public Health v. Sup. Ct. (2021) 61 Cal.App.5th 478, 761.) The quasi-legislative decision "must have a real and substantial relation to the object sought to be obtained." (Ibid.)

Scope of Administrative Record

In its objections to evidence, Petitioner contends that a determination whether the decision was arbitrary, capricious or entirely lacking in evidentiary support must be based on the "evidence" considered by the administrative agency. (Pet. Objections 2, citing Shapell Industries, supra at 233-34.) On that basis, Petitioner seeks to strike essentially all of the material evidence relied upon by Respondent to prove that his decision was not arbitrary, capricious, or entirely lacking in evidentiary support. This objection is OVERRULED.

"An unbroken line of cases holds that, in traditional mandamus actions challenging quasi-legislative administrative decisions, evidence outside the administrative record 'extra-record evidence' is not admissible. (Western States Petroleum, supra, 9 Cal.4th at p. 574, 38 Cal.Rptr.2d 139, 888 P.2d 1268; Shapell Industries, supra, 1 Cal.App.4th at pp. 230–234, 1 Cal.Rptr.2d 818.) However, the Supreme Court said in Western States Petroleum that since 'informal actions' are not entitled to judicial deference, 'we will continue to allow admission of extra-record evidence in traditional mandamus actions challenging ministerial or informal administrative actions if the facts are in dispute.' (Western States Petroleum, supra, 9 Cal.4th at p. 576, 38 Cal.Rptr.2d 139, 888 P.2d 1268.) The court was persuaded by commentators who pointed out that 'the administrative record developed during the quasi-legislative process is usually adequate to allow the courts to review the decision without recourse to such evidence,' and that 'extra-record

evidence is usually necessary only when the courts are asked to review ministerial or informal administrative actions, because there is often little or no administrative record in such cases.'" (Carrancho v. California Air Resources Board (2003) 111 Cal.App.4th 1255, 1269.) "The court in Western States Petroleum did not define the characteristics of an 'informal' agency action, but the commentators it cited ... indicate 'informal' actions are those that do not involve a hearing." (Id. at 1269.)

As applied here, Petitioner does not show that a hearing was held or required by law before the Commissioner issued Orders 2 and 3. Nor does Petitioner cite any statute or regulation that required Respondent to prepare an administrative record of evidence that he relied upon in issuing the orders. In these circumstances, the instant case is distinguishable from Shapell Industries, supra in which the Board's challenged resolution was "based upon evidence and testimony presented at a public hearing." (Shapell Industries, supra at 227-228.) Here, because there was no formal hearing or proceeding in which an administrative record was prepared, the parties – i.e. both Petitioner and Respondent – may submit evidence in this ordinary mandate proceeding.

Petitioner argues that Orders 2 and 3 were irrational or not supported by evidence because CDI's witnesses could not confirm that Respondent considered the evidence discussed in their declarations. (Reply 11.) This argument is not persuasive. "In an ordinary mandamus review of a legislative or quasi-legislative decision, courts decline to inquire into thought processes or motives, but evaluate the decision on its face because legislative discretion is not subject to judicial control and supervision." (San Joaquin County Local Agency Formation Comm. V. Sup. Ct. (2008) 162 Cal.App.4th 159, 171.) "[T]he [mental processes] principle is ... the 'more fundamental, historically enshrined legal principle that precludes any judicially authorized inquiry into the subjective motives or mental processes of legislators.' [Citation] ....[¶] In this state, evidence that relates to the mental processes of individual legislators is 'irrelevant to the judicial task.'" (Sutter's Place v. Sup. Ct. (2008) 161 Cal.App.4th 1370, 1377-78.) Accordingly, to adjudicate Petitioner's claim for ordinary mandate, the court need not decide whether Respondent, acting in a quasi-legislative capacity, considered the specific statements or evidence cited in Respondent's declarations and appendix.

Unless the court has sustained a specific evidentiary objection (see rulings above), the court considers all evidence submitted by the parties.

Evidence of Significant Non-Renewals of Homeowners Policies in Areas Exposed to Wildfire;

and of Unmet Demand for Homeowners Policies

Order 2 is based, in part, on Respondent's determination that "the FAIR Plan's market share has increased significantly as the voluntary market non-renewed significant numbers of homeowners policies in areas throughout the State of California exposed to wildfire." (AR 7.) Respondent also justified the HO-3 order based on "unmet demand for homeowners insurance in the state." (Ibid.)

Respondent submits evidence that, in the years immediately prior to his issuance of Order 2, a substantial number of homeowners in California had their homeowners' policies non-renewed in the voluntary markets as a result of wildfire risk. (See e.g. AR 1560-1600, 1425-28, 701-703, 746-747.) Thus, for instance, Luciano Gobbo, Division Chief of CDI's Data Analytics and Reporting Division, summarizes his division's analysis of data it collected related to "new, renewed, and nonrenewed (insurer- and insured-initiated) policy counts for experience years 2015 through 2018 by California ZIP code." (AR 1425.) According to Gobbo, this data revealed:

- "a six percent increase in insurer-initiated homeowner policy nonrenewals in CalFire State Responsibility Areas from 2017 to 2018, while ZIP codes affected by the devastating fires from 2015 and 2017 experienced a 10 percent increase in insurer-initiated nonrenewals in 2018"
- "from 2015 to 2018, the number of new and renewed homeowners' policies insured by the voluntary market fell by 8,700 in the 10 counties with the most homes in high or very high-risk areas (Tuolumne, Trinity, Nevada, Mariposa, Plumas, Alpine, Calaveras, Sierra, Amador, and El Dorado), while those same counties saw a steady increase in new FAIR Plan policies during that timeframe, growing 177 percent, compared to only a four percent increase for the five counties with the lowest risk (Yolo, Merced, Sutter, Imperial, and Kings)"; and
- "nearly 57 percent of new FAIR Plan policies (12,353 policies) are now written in State Responsibility Areas, which is up from 47 percent (10,750) in 2015." (AR 1426-27.)

Some of this data was attached to the August 20, 2019 press release cited in Order 2. (Ibid.; see AR 1430-1441.) Petitioner has not challenged any of this evidence or shown that it does not rationally support Respondent's finding of significant non-renewals of homeowners' policies in areas with high wildfire risk. (See OB 16-17; Reply 11-13.)

Based on Gobbo's declaration and other evidence, Respondent contends: "There is ample evidence to form a rational basis to believe that non-renewed customers were unable to replace their HO-3 coverage in the voluntary insurance market. This includes indisputable evidence that tens of thousands of customers who were nonrenewed due to wildfire risk could not replace their

HO-3 policy in the voluntary insurance market." (OB 15, citing AR 1560-1600, 1619-20, 1425-28, 701-704, 746-747, 752, 1494-1554.)

Given the deferential standard of review, sufficient evidence supports Respondent's finding of an "unmet demand" for HO-3 policies and related homeowners' policies in wildfire prone areas of the state. Gobbo's declaration and cited evidence, as well as Petitioner's own internal data, supports a reasonable inference that many homeowners in fire-prone areas have recently switched to Petitioner's Dwelling Policy because they were non-renewed for a homeowners' policy and could not find a replacement on the normal insurance market. (AR 1560-1600, 1425-1441.) Because the vast majority of California homeowners hold homeowners' policies, a reasonable inference can be made that homeowners generally prefer such policies and may have switched to Petitioner's Dwelling Policy at increasing rates in fire-prone areas because of the unavailability or prohibitive expense of homeowners' policies. (See Ibid.; see also AR 1517-18 [noting cost prohibitive HO-3 policy].) Respondent also submits evidence of complaints from consumers about nonrenewals and difficulty being able to find or afford replacement HO-3 coverage. (AR 746-780, 1494-1504.)

Petitioner contends that Respondent's data showing non-renewals in wild-fire areas, "as pointed out by the insurance industry ..., does not show that customers were otherwise unable to find HO-3 coverage elsewhere." (OB 16, citing AR 272-274.) The cited press release from insurers regarding CDI's non-renewal data is hearsay to the extent offered for its truth. To the extent offered for reasons other than truth (i.e. notice), the press release is irrelevant to the question of whether Respondent could rationally conclude that many non-renewed customers were unable to find replacement HO-3 coverage in the normal insurance market.

Petitioner contends that "there is no data, study, analysis or investigation into whether customers who were non-renewed were unable to obtain replacement HO-3 coverages from (1) another carrier in the admitted market, (2) a carrier from the surplus lines market or (3) the FAIR Plan and an insurer offering a DIC policy." (OB 16, citing AR 119-129, 165-166, 264-265.) DIC coverage is analyzed infra. With respect to Respondent's determination that there is unmet demand for HO-3 coverage in fire-prone areas, Petitioner cites testimony from CDI witnesses suggesting that CDI has not conducted an investigation or study to determine the number of customers in 2019 that were unable to find replacement HO-3 coverage from the admitted market, the surplus lines market, or through the combination of Petitioner's Dwelling Policy and a DIC policy. (See AR 165-166, 264-265, 119-129.)

Petitioner's cited evidence does not show that Respondent's determination about an unmet demand for HO-3 policies was arbitrary, capricious, or entirely lacking in evidentiary support. While a formal study or analysis of the extent of unmet demand may have been helpful, Petitioner cites no authority that a formal study was required by law for Respondent to make a determination under section 10091(c) and the Act to modify the insurance coverages offered by Petitioner. Moreover, as summarized above, Respondent's evidence suggests that CDI employees, including Division Chief Gobbo, did analyze relevant data related to non-renewals of HO-3 policies and some of that data was cited in Order 2.

Petitioner cites evidence that DIC coverage options are available throughout the state. (OB 17:1, citing evidence.) The court analyzes that contention and the cited evidence infra. Petitioner cites no evidence that comprehensive HO-3 policies are available in all fire-prone areas of the state.

Based on the foregoing, Respondent's determination that "the FAIR Plan's market share has increased significantly as the voluntary market non-renewed significant numbers of homeowners policies in areas throughout the State of California exposed to wildfire" was not arbitrary, capricious, or entirely lacking in evidentiary support. Furthermore, Respondent's finding of an unmet demand for comprehensive homeowners' policies, like the HO-3 policy, was not arbitrary, capricious, or entirely lacking in evidentiary support.

Petitioner's Contention that DIC Policies are Widely Available in Fire-Prone Areas and Adequately Replace Non-Renewed HO-3 Policies

Petitioner contends: "DIC coverage options are also available in all areas of the state.... This means that every customer – even if denied by every carrier in the admitted and surplus lines market – can obtain HO-3 type coverages through the combination of a FAIR Plan Dwelling Policy and DIC Policy." Thus, according to Petitioner, there is no evidence of "unmet demand" for homeowners' insurance in fire-prone areas. (OB 17; see also Reply 11.)

In opposition, Respondent contends that there is "abundant evidence to form a rational basis to believe that many customers could not obtain what Petitioner posits as 'replacement HO-3 coverage' through the combination of a FAIR Plan dwelling policy and a DIC." (Oppo. 15.) Respondent also contends "the claimed availability of DICs is simply irrelevant" because (1) "[t]he Orders do not mention DICs ... [and] require the Petitioner to offer ... an HO-3, not the combination of a FAIR Plan dwelling policy and a DIC"; and (2)"the combination of a FAIR Plan dwelling policy and a DIC is a problematic, inadequate substitute for an HO-3 policy ...

[that is] confusing to consumers and often leave consumers with unintended gaps in coverage." (Oppo. 16.)

While the Orders do not mention DICs, they do find "unmet demand for homeowners insurance in the state." (AR 7.) A DIC policy is insurance that fills a gap for customers who wish to obtain coverages akin to those provided under an HO-3 Policy, but are only able to obtain a FAIR Plan Dwelling Policy. By design, DIC policies provide liability coverages and an expanded list of covered perils that may cause property loss not covered by the FAIR Plan Dwelling Policy. (AR 663-664, 163-164, 69.) Thus, if DIC policies are readily available from the normal insurance market in fire-prone areas, that could suggest a FAIR Plan HO-3 option is not necessary to carry out the purposes of the Act, including to assure stability in the property insurance market and availability of basic property insurance. (See § 10090.)

Respondent submits evidence of the following, inter alia, with respect to the availability of DIC policies in fire-prone areas.

Kenneth Allen, Deputy Insurance Commissioner, Rate Regulation Branch ("RRB") of CDI, declares: "RRB's review and analysis of underwriting information provided by insurers in connection with their rate filings reveals that, due to insurers' individual underwriting restrictions, there are serious limitations on the availability to FAIR Plan policyholders of complementary Difference in Conditions (DIC) policies in many areas of the state. For example, in some areas of the state, certain voluntary-market insurers will simply not write DIC policies. DIC carriers have individual underwriting restrictions which prevent them from writing DICs in certain ZIP Codes, Protection Class codes ..., areas without access to emergency equipment, or flood exposed areas. Examples include State Farm General, Travelers, Pacific Specialty, and Seaview. State Farm, for example, the largest writer of homeowners insurance in California, will not write any new business, HO-3 or DIC, in certain ZIP codes (they call them Managed Growth Areas) and will only write DICs (or FAIR Plan companion policies as they call them) in a limited number of ZIP Codes all in Southern California." (AR 703-704.)

Allen also declares: "Information provided to the Department by insurers also reveals that the admitted DIC market is small compared to the admitted HO-3 and dwelling fire market. Approximately 20 admitted carriers write DICs, whereas approximately 80 admitted carriers write $5 million or more in dwelling fire and HO-3 premium, with additional admitted carriers writing premiums in smaller amounts." (AR 704.) "As determined by RRB pursuant to its investigation and analysis of these issues, DIC policies have also frequently tended to be very

expensive, with most of the limited number of insurers who offer a DIC policy charging a premium that is 70% of the premium charged for their HO-3 policy. The largest homeowner's insurer, State Farm, charges 95% of the HO-3 premium for their DIC." (Ibid.)

Allen declares: "The DIC writers incur greater levels of underwriting, marketing, and risk management expenses which the FAIR Plan does not have today in its Dwelling Fire program and would not have if it were to offer an HO-3 program.... By purchasing a FAIR Plan HO-3, consumers would also tend to save money by avoiding the need to pay for certain expenses as part of the premium when purchasing both a FAIR Plan policy and a DIC policy. Some of these expenses are duplicative if a policyholder buys a FAIR Plan dwelling fire and a DIC (such as general underwriting expenses which would be incurred by both the FAIR Plan and the DIC carrier) and which of these expenses would be eliminated or reduced (such as profit, marketing, and higher commissions that are only charged by the DIC carrier)." (AR 704-705.)

Tony Cignarale, Deputy Insurance Commissioner in charge of Consumer Services discusses examples of consumer complaints that he believes show the confusion that can be caused by DIC policies. (AR 748-752.) Thus, for instance, he summarizes one consumer complaint, investigation, and mediation in which "the policyholder was buying a home and had purchased a DIC policy from the company in December 2017 through an online insurance agency, but did not purchase a companion FAIR Plan policy.... It was not until after the home was totally lost in the Camp Fire and Pacific Specialty denied the claim that the policyholder realized they had no fire coverage." (AR 748.) Cignarale also declares: "I have heard or received many complaints and/or comments from consumers (for example, at the town-hall events describe[d] above and in private conversations) that they were not aware of the existence of DIC policies or that they could not get a DIC policy, could not find a DIC, could not afford a DIC and FAIR Plan policy combined, or their insurer or agent/broker did not offer a DIC so they did not know how to get a DIC." (AR 752.)

Petitioner submits evidence, inter alia, of the following. Phillip Irwin, president of two insurance agencies and Public Relations Representative for the FAIR Plan, has worked in the insurance industry for 22 years. He declares: "In 2019, my agency obtained quotes for more than 1,000 customers for DIC policies. Ultimately, I sold about 100 DIC policies to California customers in 2019. In 2020, my agency obtained quotes for more than 1500 customers for DIC policies. Of those in 2020, I sold about 130 DIC Policies to California customers." (AR 641.) "In connection with this action, it has been suggested by an employee of the California Department of Insurance (the 'Department') that, in some areas of the state, voluntary market insurers will not write

residential DIC policies due to the fact that the home may be in high fire hazard area. I strongly disagree with this suggestion. I have had thousands of customers come to my agency seeking DIC coverage. I have always been able to find DIC coverage options for my customers. This is because there are DIC carriers that do not consider the location of the property in determining whether to issue or not issue a DIC policy." (AR 641.) Irwin declares that Allen's statements about the potential lower cost of a FAIR Plan HO-3 policy are speculative because "the cost of a FAIR Plan HO-3 policy is unknown." (Ibid.)

Irene Sabourin, an experienced insurance agent, declares: "We have had well over 250 clients non-renewed by their homeowner's insurers due to brush exposure; however, we have been successful in placement of these clients with other admitted carriers or with non-admitted carriers such as Lloyds markets." (AR 637.) "While there may be certain insurance carriers in the admitted market that may consider location of the risk in determining a customer's eligibility for a residential DIC policy, there are others that will not deny a consumer a DIC policy on the ground that the property is in a fire hazard area. Furthermore, residential DIC insurance policies are also available from insurance carriers in the surplus lines market that also do not consider location of the risk for determining whether a customer is eligible for a DIC Policy." (AR 637; see also AR 280-290 [deposition of Donna Bacarti, an underwriter that works with surplus lines carriers, and who declares she is unaware of instance where a DIC policy was declined because of fire risk].)

Petitioner cites the following deposition testimony of Ken Allen, the Deputy Insurance Commissioner of RRB, whose declaration is summarized above:

Q. Okay. Do you have any personal knowledge of specific places in the state where you believe individuals cannot get an HO-3 policy, but also cannot get a DIC policy? ...
A. Not of a specific area. ...
Q. Do you have specific knowledge of any individuals in the state of California that have not been able to get a DIC policy? ...
A. No. (AR 229.)

Respondent cites deposition testimony of Irwin, Sabourin, and Bacarti to rebut or undermine their declarations. (See AR 1494-1503, 1517-1523, 1550-54.) Of note, Irwin testified that he attended multiple town hall meetings as a representative for Petitioner; that he heard general complaints about the cost of DIC policies; and "cases of confusion" about the availability of DIC policies. (AR 1494-1503.) Irwin was asked, "What sorts of comments about the general cost did

you hear at one or more town hall meetings?" (AR 1496.) In response, Irwin testified: "Initially, it was shock, because it was right when the nonrenewals occurred. So they went from a $1,200 policy, as an example, to maybe a $3,000 solution. So it was shock over the significant change of cost from the prior insurance policy to the combination of the FAIR Plan with a DIC policy." (AR 1496.)

Sabourin testified about a recent insured that was non-renewed for a HO-3 policy and could not find another HO-3 policy, from admitted or surplus lines carriers, because the cost was prohibitive ($50,000 a year). (AR 1517-18.) Sabourin testified that roughly 50% of clients were opting for "the FAIR Plan with the DIC." (AR 1518-19.) Bacarti testified that "DIC is going to be less expensive [than a HO-3 policy] because there are perils that are removed ...." (AR 1550.) She estimated that the DIC would be about 10 percent less than the HO-3 policy. (Ibid.)

From the parties' record citations, the court finds no evidence from which Respondent could have rationally concluded that DIC policies are entirely unavailable to customers in high-risk areas. Respondent's strongest evidence on this issue appears to be the declaration of Ken Allen, summarized above. However, Allen only declared that some voluntary-market insurers will not write DIC policies, not that such policies are completely unavailable in any area in the state. Allen conceded at deposition that he was unaware of any specific places in the state where individuals cannot get an HO-3 policy, but also cannot get a DIC policy; or any individuals in the state of California that have not been able to get a DIC policy. (AR 229.) Petitioner's cited evidence, in contrast, supports that DIC policies are available in all parts of the state, although sometimes at "prohibitive" cost. While the court does not weigh the evidence, there appears to be no evidentiary support for Respondent's implied determination that DIC policies are entirely unavailable in parts of the state.

However, the availability of DIC policies does not, standing alone, establish that Respondent's Order 2 is arbitrary, capricious, or entirely lacking in evidentiary support. As relevant here, the purposes of the Act include "assur[ing] stability in the property insurance market for property located in the State of California [and] assur[ing] the availability of basic property insurance as defined by this chapter." (§ 10090.) The Commissioner could rationally conclude that the stability of the property insurance market, and also the availability of insurance from a practical perspective, materially depend on the cost of insurance available to consumers. If an insurance policy is prohibitively expensive, it may be effectively unavailable. (See e.g. AR 1517-18 [noting cost prohibitive HO-3 policy].) Insurance products that are confusing and that frequently result in unintended gaps in coverage could also plausibly cause instability in the insurance

market or lack of availability of property insurance.

The court's analysis of these issues is complicated by the fact that Order 2 includes no express findings related to DIC policies. However, the Act includes no findings requirement, and Petitioner cites no authority that Respondent was required to make findings for all relevant issues. (See Shapell Industries, Inc. v. Governing Board (1991) 1 Cal.App.4th 218, 230 ["An agency acting in a quasi-legislative capacity is not required by law to make findings indicating the reasons for its action"].) On the other hand, the court is not persuaded by Respondent's contention that DICs are "irrelevant" simply because they were not mentioned in the Order. (Oppo. 16.)

The legal question is whether Respondent could rationally conclude that ordering Petitioner to provide a comprehensive HO-3 policy "is necessary to carry out the purposes of" the Act. (§ 10095(f).) The court does not concern itself with the wisdom of the agency's quasi-legislative decision, weigh the evidence, or substitute its judgment for that of the agency. (Mike Moore's 24-Hour Towing v. City of San Diego (1996) 45 Cal.App.4th 1294, 1305.)

As summarized above, Respondent cites undisputed evidence that DIC policies are expensive on a relative basis compared to HO-3 policies. Indeed, Petitioner's own evidence suggests that DIC policies are often purchased from surplus lines carriers. Bacarti estimated that a DIC policy would only be about 10 percent less than the HO-3 policy. (AR 1550.) Since the consumer must also purchase Petitioner's Dwelling Policy to replace the non-renewed HO-3 policy, paying 90 percent of the cost of the HO-3 policy solely for the DIC policy could result in a substantial increase in the yearly premium to obtain a true replacement. (See e.g. AR 672 [showing average Dwelling Policy premium of $1,147].) Irwin testified to consumer complaints about the "significant change of cost from the prior insurance policy to the combination of the FAIR Plan with a DIC policy." (AR 1496.) As an example, Irwin cited a hypothetical policy increase of $1,200 to $3,000, more than doubling of the cost. (Ibid.) While Petitioner's actuary states that "there is no reason to believe that a FAIR Plan HO-3 [policy] would cost less than the" combination of a DIC policy and the FAIR Plan Dwelling Policy (AR 664), she cites no detailed analysis or evidence in support. There is also evidence to the contrary, including Allen's testimony about additional underwriting, marketing, and risk management expenses of DIC writers. (AR 704-705.) Based on the cited evidence, Respondent could rationally conclude that a combined FAIR Plan HO-3 policy would be substantially less expensive than the DIC-Dwelling Policy combination and similar in cost to the non-renewed HO-3 policies; that Order 2 could help address market deficiencies by making HO-3 policies available in fire-prone areas; and that

Order 2 would thereby carry out the purposes of the Act. (See Ibid; AR 7; § 10090.)

As summarized above, Respondent also submits evidence of consumer complaints about confusion caused by DIC policies, which exclude the standard fire policy, and about unintended gaps in coverage. When considered with the cost and availability issue discussed above, Respondent could rationally conclude from such complaints that ordering Petitioner to provide a HO-3 policy was necessary to carry out the purposes of the Act. (AR 748-752.)

Petitioner's Contentions that the HO-3 Order will Disrupt the Normal Insurance Market, and Discourage Maximum Use of the Normal Insurance Market

Petitioner also contends that Respondent's HO-3 order is irrational and contrary to public policy because "[a] FAIR Plan HO-3 option will compete with the voluntary market and discourage insureds from purchasing (1) an HO-3 policy from the voluntary market ... and (2) a DIC policy from the voluntary market...." (OB 17.) Petitioner contends that "requiring the FAIR Plan to offer all the coverages under an HO-3 policy form is not rationally related to the goals underlying the Act." (OB 17.)

Petitioner cites evidence, inter alia, of the following. Actuary Scott declares that "if the CDI imposes limitations on the expense and profit that the FAIR Plan can consider in the HO-3 rate, ... then a lower priced FAIR Plan HO-3 would incent homeowners to purchase a FAIR Plan HO-3 based on price alone, even if they can purchase an HO-3 in the voluntary market through admitted or surplus lines agents." (AR 665.) "Furthermore, a FAIR Plan homeowners HO-3 product offering that is forced to be lower priced through regulatory action would disincentivize the purchase of insurance through the voluntary market, and would shrink the voluntary DIC and HO-3 market. This in turn could lead to a significant reduction in the pool of business in the voluntary market, increased volatility, threaten the stability of the voluntary market, and eventually destabilize the voluntary market." (Ibid.; see also AR 425-426 [former Assistant Commissioner Roth opining that "a FAIR Plan homeowners HO-3 policy would compete with the voluntary HO-3 and DIC market"]; AR 638 [Sabourin: same]; AR 641 [Irwin: same].)

Insurance agent Sabourin also declares: "[M]y personal speculation is that the Fair Plan homeowner premiums would likely have to increase dramatically with increased losses. More importantly the premiums/losses for the Fair Plan would negatively impact the private market carriers (specifically members companies) thus increasing the premiums for the consumers in the non-hazard/non-Fair Plan risk areas." (AR 638.)

Respondent contends that Petitioner's evidence is speculation and does not prove the Orders were irrational and contrary to public policy. Respondent cites to the various purposes of the Act and contends that "if having Petitioner offer an HO-3 brings Chapter 9's different policies into conflict, the Court should defer to Respondent to achieve the proper balance." (OB 16-17.) The court agrees.

Petitioner has the burden of proof under CCP section 1085. Petitioner's evidence of potential harm to the voluntary market is speculative and insufficient to support a finding that Respondent abused his discretion. Actuary Scott opines that the proposed FAIR Plan HO-3 policy might cost more than the current market solution of a DIC combined with the FAIR Plan Dwelling Policy. (AR 664.) On the next page of her declaration, however, she speculates about the potential harm to the voluntary market "if the CDI imposes limitations on the expense and profit that the FAIR Plan can consider in the HO-3 rate," resulting in a lower-priced policy than could be purchased through the voluntary market. (AR 665.) Scott provides no evidentiary foundation for her opinion about destabilization to the voluntary market. Neither does Roth, Sabourin, or Irwin. (AR 425-426; AR 638; AR 641.)

Petitioner raises questions about how Respondent should weigh competing policies under the Act. As discussed above, there is evidence of insurer-initiated non-renewals of HO-3 policies in fire-prone areas; unavailability of HO-3 policies in such areas; and lack of accessibility of DIC policies as a result of cost or other factors. Under the Act, these questions of market stability and insurance availability must be balanced against the risk that agency intervention could discourage maximum use of the voluntary market. (§ 10090.) Respondent and CDI are better suited than the courts to weigh such policies. The court cannot conclude on this record that Respondent's weighing of such policies was arbitrary, capricious, or entirely lacking in evidentiary support.

Based on the foregoing, Respondent could rationally conclude that ordering Petitioner to provide a HO-3 policy was necessary to carry out the purposes of the Act. Petitioner does not show that part of Order 2 was arbitrary, capricious, or entirely lacking in evidentiary support. Accordingly, if Respondent has authority to order Petitioner to provide a comprehensive HO-3 policy, there was no abuse of discretion.

Did Respondent Abuse his Discretion by Requiring Petitioner to Offer Payment Options "With No Additional Fees"?

Petitioner contends that "[r]equiring the FAIR Plan to offer customers the ability to pay premiums on an installment basis or via a credit card without charging those specific customers a fee to cover the costs caused harm to the FAIR Plan as it placed the FAIR Plan at risk of not recouping sufficient premium to cover the costs of providing these options." (OB 18.) Thus, Petitioner contend that the Payment Options part of Order 2 ("Payment Options Order") (1) is unlawful because the FAIR Plan's rates will be actuarially unsound and unfairly discriminatory; (2) lacks evidentiary support; and (3) is irrational.

Section 10100.2(a)(1) provides in pertinent part: "Rates for the FAIR Plan shall not be excessive, inadequate, or unfairly discriminatory, and shall be actuarially sound so that premiums are adequate to cover expected losses, expenses and taxes, and shall reflect investment income of the plan." Also relevant is section 10096(2), which provides: "All orders or decisions of the commissioner made pursuant to this chapter shall be subject to judicial review."

Exhaustion of Administrative Remedies

Respondent contends that Petitioner failed to exhaust administrative remedies with respect to its challenges to the Payment Options Order. (Oppo. 18-19.) The court agrees in part.

Exhaustion of administrative remedies is "a jurisdictional prerequisite to judicial review." (Cal. Water Impact Network v. Newhall County Water Dist. (2008) 161 Cal.App.4th 1464, 1489.) "The principal purposes of exhaustion requirements include avoidance of premature interruption of administrative processes, allowing an agency to develop the necessary factual background of the case, letting the agency apply its expertise and exercise its statutory discretion, and administrative efficiency and judicial economy." (Id. at 1489.) "The rule requiring exhaustion of administrative remedies does not apply where an administrative remedy is unavailable [citation] or inadequate.' (Tiernan v. Trustees of Cal. State University & Colleges (1982) 33 Cal.3d 211, 217.)

In its opposition brief, Respondent cites no statute or regulation providing an administrative remedy for Petitioner's challenge to the Payment Options Order. However, the absence of an administrative remedy in the statutory scheme does not resolve whether an exhaustion requirement applies. (See Williams & Fickett v. County of Fresno (2017) 2 Cal.5th 1258, 1271 ["We have inferred an exhaustion requirement even within statutory schemes that 'do not make the exhaustion of the [administrative] remedy a condition of the right to resort to the courts'"].)

Respondent contends that Petitioner should have raised its challenge to the Payments Option Order "as part of the rate filing it submitted to CDI for approval last September (the Rate Filing)." (Oppo. 18, citing AR 782-791.) In the cited evidence, Edward Cimini, a senior casualty actuary for CDI, declares that "[t]he process surrounding FAIR Plan rate applications has become well settled over the years between FAIR Plan and the Department, and it is, moreover, a robust one." (AR 783.) "As part of this review process, the rate analyst and/or actuary carefully considers any claims made by FAIR Plan that certain assumptions and/or courses of action may result in rates that would be excessive, inadequate, and/or unfairly discriminatory." (AR 784.)

The rate filing application provides an administrative remedy for Petitioner to present claims that rates are unfairly discriminatory or actuarially unsound. (Ins. Code § 10100.2.) That administrative remedy has not been exhausted with respect to Petitioner's contentions that any rates associated with the Payment Options Order are unfairly discriminatory or actuarially unsound. (See AR 786-791.) CDI should have the opportunity to apply its expertise to such contentions and to the issue of whether the rates comply with section 10100.2(a)(1). In reply, Petitioner has not disputed that this "robust" administrative procedure exists for its claims that Orders 2 and 3 would result in excessive, inadequate, or unfairly discriminatory rates. Nor does Petitioner dispute that it regularly participates in the rate filing procedure and has not exhausted its contentions under section 10100.2(a)(1) related to the Payment Options Order, as explained by Cimini. (See AR 782-791 and Reply 13.)

However, the rate filing application is inadequate for Petitioner to challenge the legality of the Payment Options Order. A rate analyst or actuary reviewing a rate application has no authority to set aside an order of Respondent that fails to comply with the law or is arbitrary, capricious, or entirely lacking in evidentiary support. While Respondent is entitled to substantial deference in the Payment Options Order, and while the court does not interfere with the administrative rate-setting process, judicial review of the legality of the Order is appropriate pursuant to section 10096(2).

Respondent's exhaustion defense is granted in part and denied in part. The court reviews the Payment Options Order for abuse of discretion pursuant to section 10096(2) and CCP section 1085. However, Petitioner has not exhausted administrative remedies with respect to its highly technical and specific rate-setting arguments under section 10100.2(a)(1), and the sufficiency of its rates are not properly before the court in this writ action. In the analysis below, the court only considers Petitioner's arguments under section 10100.2(a)(2) to the extent they are relevant to

the court's determination of whether the Payments Option Order was arbitrary, capricious, or entirely lacking in evidentiary support.

Evidentiary Support and Rationale for Prohibition of Fees?

In Order 2, Respondent stated that "the FAIR Plan currently only permits applicants and policyholders to pay in quarterly installments and does not offer applicants or policyholders the ability to pay their insurance premiums for Division I in monthly installments or to remit payment by credit card and electronic funds transfer, thus creating a financial burden on applicants and reducing insureds' ability to afford and obtain basic property insurance, contrary to the purposes of Chapter 9." (AR 21.) Respondent ordered Petitioner to offer applicants or policyholders the option to pay their insurance premiums "in monthly installments with no additional fees ... [and] to pay by credit card and electronic funds transfer with no additional fees." (AR 22-23.)

Petitioner contends that "requiring the FAIR Plan to offer no fee payment options is based upon a factual finding that is entirely lacking in evidentiary support." (OB 19.) Petitioner submits evidence that, at the time of the order, it allowed customers to pay premiums in three yearly installments for a fee of $2.50 per payment. (AR 296, 650.) Petitioner estimated that it would charge 2.99% for payment by credit card in response to the Order. (AR 296, 650.) Petitioner submits evidence that CDI witnesses could not identify any investigation, study, or analysis into whether such fees created or would create a financial burden on customers. (AR 169-170, 125, 150-151, 269.) Petitioner also submits evidence that carriers in the voluntary market have been historically allowed to charge fees when providing payment options to cover the costs of providing these options. (AR 142-150, 245-249, 267-268.)

Relatedly, Petitioner contends that the "no fees" order is irrational and arbitrary because CDI's witnesses could not identify a reason why Petitioner should not be permitted to charge a fee to cover the cost of payment options; and because the fees would need to be passed on as rates. (OB 20.) Petitioner cites testimony of CDI's actuary that he could think of no reason why the FAIR Plan should not be permitted to charge a fee to cover the cost of these payment options, as opposed to covering this costs by "baking" payment expenses into the rate and spreading the cost to all FAIR Plan customers. (AR 248-249, 147-149.) As CDI's actuary admitted, the payment costs would eventually need to be passed on in rates, if not recouped as fees, to ensure the actuarial soundness of FAIR Plan's rates. (See AR 145-146; § 10100.2(a)(1).)

In opposition, Respondent points out, correctly, that the Order did not make an express finding that the fees or credit card charges imposed a financial burden on customers. Rather, the Order only found that the absence of certain payment options created a financial burden. (Oppo. 19.) However, there must be some evidentiary support and rationale for the "no additional fees" part of the order, and Respondent's order must have some rational connection to the purposes of the Act. If there is not, then that part of the order would be arbitrary and capricious.

In opposition, Respondent does not identify the evidentiary support or rationale for the "no additional fees" part of the order. Respondent seems to contend that the fees could make property insurance unaffordable, and thus unavailable to some customers, but the argument is not developed and Respondent cites no supporting evidence. (Oppo 19-20.) Petitioner made a sufficient showing in the opening brief that the "no additional fees" order was lacking in evidentiary support. Thus, the burden shifted to Respondent to defend that part of the order. Its failure to respond meaningfully in opposition is significant. (See Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc. (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"].) It is not the court's function to make the parties' arguments for them. (Nelson v. Avondale HOA (2009) 172 Cal.App.4th 857, 862-863 [argument waived if not raised or adequately briefed].)

Respondent does not dispute that the costs of installment, credit card, or EFT payments would need to be paid by customers in some manner, either through higher rates or fees. It may be that Respondent could rationally determine that the costs of processing installment, credit card, or EFT payments should be paid through a rate increase, as opposed to fees, to promote the purposes of the Act. (§ 10090.) However, in an ordinary mandate proceeding, "[a] court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." (Shapell Industries, supra at 232.) Based on the arguments presented and evidence cited, Respondent did not rebut Petitioner's argument of lack of evidence of a rational connection between the "no additional fees" order and the purposes of the Act.

The court concludes that the "no additional fees" part of the Payment Options Order was arbitrary, capricious, and entirely lacking in evidentiary support.

Evidentiary Support and Rationale for New Payment Options?

In a footnote, Respondent contends that "Petitioner does not challenge per se having to offer the

New Payment Options, only having to do so without charging fees to those customers who use the options." (Oppo. 19, fn. 25.) In arguing that there was no evidentiary support for Respondent's factual findings, Petitioner's opening brief focused mostly on the "no fees" part of the order. (OB 18-19.) However, Petitioner also made arguments about the costs of the new payment options, which are inherently intertwined with Respondent's order prohibiting fees. (Ibid.) In that regard, Petitioner placed in issue Respondent's decision to order new payment options.

Respondent cites at least some evidence that Petitioner's existing payment options, yearly or in three installments, may result in a financial burden on some customers. (See Oppo. 19, fn. 25, citing RA 33 and AR 747, 778-779.) Specifically, Tony Cignarale, Deputy Insurance Commissioner for Consumer Services, declares that in town hall meetings, "[s]everal homeowners expressed significant concern over the large down payment required by the FAIR Plan, which was 40% of the annual premium, since FAIR Plan did not allow for the premium to be paid in monthly installments like their prior insurance company had offered." (AR 747.) Petitioner's President, Anneliese Jivan, also stated the following in an email to Cignarale about monthly installment and credit card payment options: "This is clearly an issue for our policyholders so we want to provide some relief as soon as we are able ... We recognize both the need and urgency and will develop a plan and get back to you as soon as we figure this out." (AR 778-779.) Respondent could rationally conclude from the consumer complaints, as well as from the large premiums owed in fire-prone areas, that the absence of more payment options could cause financial burden for customers. Such financial burden is a relevant factor for Respondent to consider under section 10090, as it relates to the availability of property insurance.

The requirement in Order 2 that Petitioner provide additional payment options was not arbitrary, capricious, or entirely lacking in evidentiary support.

Petitioner's Contentions Under Section 10100.2(a)(1)

Petitioner contends that "[p]roviding these options without charging a fee to those who elected to use them rendered the FAIR Plan's rates to be inadequate in conflict with the mandate that rates be 'actuarially sound so that premiums are adequate to cover expected losses, expenses and taxes.'" (OB 18, citing AR 655.) Relatedly, Petitioner contends that "baking" the payment costs into rates "will render the FAIR Plan's rates to 'unfairly discriminatory' – that is, when the premium charged to a customer 'is not based upon a sound estimate of the risk of loss and future cost of a risk transfer'."

As discussed above, a rate filing application provides an administrative remedy for Petitioner to present claims that rates are unfairly discriminatory or actuarially unsound. (Ins. Code § 10100.2.) That administrative remedy has not been exhausted with respect to Petitioner's contentions that any rates associated with the Payment Options Order are unfairly discriminatory or actuarially unsound. (See AR 786-791.) For that reason, the court does not further consider Petitioner's claims about the actuarial soundness or alleged discriminatory nature of its rates.

The petition is granted in part as to the New Payment Options order. The court will issue a writ directing Respondent to set aside that part of the order requiring Petitioner to offer applicants or policyholders the option to pay their insurance premiums in monthly installments, with credit card, or with electronic funds transfer "with no additional fees." (AR 22-23.)

Conclusion

The petition is GRANTED IN PART.

The court will issue a writ directing Respondent to set aside those parts of Orders 2 and 3 requiring Petitioner to offer a comprehensive, HO-3 policy. (AR 6-17.)

The court will issue a writ directing Respondent to set aside that part of the Orders requiring Petitioner to offer applicants or policyholders the option to pay their insurance premiums in monthly installments, with credit card, or with electronic funds transfer "with no additional fees." (AR 22-23.)

At the June 24, 2021 hearing, the parties questioned the appropriate wording of the writ to be issued, especially whether the court's order should require reconsideration of specific issues. The parties are to meet and confer regarding the wording of the judgment and writ. Petitioner is to lodge a proposed judgment and writ within ten days. If the parties do not agree on the proposed wording, Respondent may file written objections within ten days after the proposed judgment and writ have been lodged.

The petition is DENIED in all other respects.

Petitioner's exhibit 1 is ordered returned forthwith to the party who lodged it, to be preserved unaltered until a final judgment is entered in this case and is to be forwarded to the court of

appeal in the event of an appeal.

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FOOTNOTES:

1- Petitioner's appendix of evidence is Bates-stamped "AP" 1-698 and Respondent's appendix is Bates-stamped "AR" 699-1751. For clarity, the court cites to the two appendices as AR 1-1751.
2- Unless otherwise stated, all statutory references are to the California Insurance Code.

A copy of this minute order is mailed via U.S. Mail to counsel of record.

Certificate of Mailing is attached.