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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH MELVIN BAREILLES,

Defendant and Appellant.

A138295

(Humboldt County
Super. Ct. No. CR083846AS)

Kenneth Melvin Bareilles appeals from a trial court judgment requiring him to pay restitution of \$150,000 to the County of Humboldt (County) following his no contest plea to a charge of selling a parcel of real property without a valid parcel map in violation of the Subdivision Map Act. (Gov. Code, § 66410 et seq. (Act).) He contends the restitution award was improper because the County was not a direct victim of his offense; the evidence did not support a finding that the County suffered damages in the amount ordered or any other amount; the restitution award violated his plea agreement; and the court lacked authority for the order because another judge of the same court had previously resolved the issue against the County. We affirm.

STATEMENT OF THE CASE

On June 27, 2008, the Humboldt County District Attorney filed a complaint charging appellant¹ with three counts of unlawfully selling a parcel of real property without a valid parcel map (Gov. Code, § 66499.30, subd. (b)), and one count of

¹ Appellant's wife, Melinda Bareilles, was charged as a codefendant on all counts. The charges against her were dismissed as part of appellant's plea agreement.

conspiracy to make unlawful land sales transactions in violation of Government Code section 66499.30, subdivision (b) (Pen. Code, § 182, subd. (a)(1)).² On October 30, 2008, appellant³ waived his right to a preliminary hearing and the parties stipulated that the complaint would be deemed to be the information.

On May 15, 2009, pursuant to a plea agreement, appellant entered a plea of no contest to the first count of violating Government Code section 66499.30, subdivision (b); counts 2 and 3 were dismissed with a *Harvey*⁴ waiver for purposes of restitution; and count four was dismissed outright. The parties agreed to engage in further negotiations that might result in a settlement with the charge reduced to a misdemeanor; if the negotiations were not successful, the court would hold a hearing pursuant to section 17, subdivision (b), to determine whether the charge should be so reduced.⁵ Appellant acknowledged that he would have to pay a restitution fine and might have to pay “actual restitution.”

At a hearing on August 7, 2009, the parties told the court (Judge Brown) they had agreed to the terms of a settlement under which appellant would pay into a trust account \$283,000 (the amount the County estimated it would cost to cure all the violations in the area) and grant conservation easements on 600 acres of timber he owned near the ranch property, after which the prosecution would move to reduce appellant’s offense to a

² Further statutory references will be to the Penal Code unless otherwise specified.

³ Appellant, an attorney, represented himself for the majority of the proceedings in this case. He was represented by counsel for a period of time in 2010, including at the April 2 hearing on appellant’s motion to reduce his offense to a misdemeanor and the June 18 restitution hearing.

⁴ *People v. Harvey* (1979) 25 Cal.3d 754, 758.

⁵ Section 17, subdivision (b), provides, in pertinent part: “(b) When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] . . . [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.”

misdemeanor. Details regarding implementation remained to be resolved, including that appellant wanted a written and binding statement about how the Planning Department would spend the money before he paid, and the matter was continued for the parties to complete the agreement. On October 16, as no agreement had been reached after further delays,⁶ the case was referred to probation for investigation and report, and a hearing was set for judgment and sentencing. Appellant stated his intention to file a Penal Code section 17, subdivision (b), motion.

On January 8, 2010, appellant filed the motion to reduce his offense to a misdemeanor, which the prosecutor opposed on the basis that appellant had not fulfilled the condition of the parties' agreement requiring appellant to pay \$283,000. Appellant told the court he had said from the outset he was not willing to make this payment without written assurance of the Planning Department's plans for correcting the problems because the County had previously failed to follow through with approval of a proposed subdivision after he spent several hundred thousand dollars to meet the stated conditions for approval. Appellant also wanted a professional engineer to determine whether the proposed plans would work.⁷

In denying appellant's motion to reduce the offense, the court noted that while the evidence did not indicate individual property owners believed they had been harmed,

⁶ A minute order for September 1, 2009, indicates that a status hearing was set for October 16 and states, "The court is showing some impatience with the delays that have been occurring. If further delays occur, the court will take into consideration the parties efforts to resolve the matter at the time of sentencing."

⁷ The prosecutor offered a letter dated September 11, 2009, in which she "memorialize[d]" the parties' agreement that appellant would pay \$283,000 into a trust account to be used for clearing the Act violations and the prosecution would not oppose reducing the offense to a misdemeanor, and stated that appellant's cooperation during the process of clearing the violations, including specific actions required of him, would be made a condition of his probation. Appellant introduced a follow-up letter dated September 24, 2009, in which the prosecutor acknowledged appellant's efforts to have a professional assess the steps necessary to bring the property into compliance with the Act, and related that the Planning Department had developed a plan for legalizing the parcels that would not require specific actions by appellant as conditions of probation.

appellant's conduct harmed the "public interest" in land use decisions, as members of the public had been denied the right to express their views and decision-makers the right to consider those views, and posed risk to purchasers due to uncertainty about their ability to use and transfer their properties. The court denied appellant's motion without prejudice, stating its intention to give appellant incentive to demonstrate he deserved a reduction.

Turning to sentencing, the court placed appellant on three years formal probation with specified conditions. One of the conditions recommended in the probation report was that appellant "make a payment of \$283,000.00, to a trust account set up by Humboldt County, to be used to mitigate violations of land laws in the Titlow Hill Area, and collected in a manner according to the discretion of the court." The County had submitted a restitution proposal describing a two-tier process under which appellant would initially pay \$283,000 to cover the costs of preparing an environmental impact report (EIR) for the three properties that were the subject of the charged offenses, followed by a payment of \$1,885,500 to cover the costs of applying for rezoning and subdivision of all the illegal lots appellant created and correcting the environmental harm associated with the illegal development.⁸ Appellant asserted his right to a full restitution hearing and the court reserved jurisdiction on the issue and set a hearing.⁹

Appellant filed another motion to reduce his offense to a misdemeanor on June 4, 2010, which was denied at the restitution hearing on June 18. With respect to the County's request for \$2,168,500 in restitution, the court found the direct victims of the offense were the property owners and not the County, denied restitution to the County without prejudice, and reserved jurisdiction "in case direct victims come forward and want restitution."

⁸ The proposal stated that although the criminal case was confined to three properties, "remedies for these parcels are inextricably linked to correction of the other [Act] violations and the overarching land use and environmental issues common to all."

⁹ The minute order for the sentencing hearing incorrectly indicated that the condition requiring an initial payment of \$283,000 was adopted; upon appellant's ex parte motion to correct the order of probation, the court ordered this provision stricken.

On March 21, 2011, appellant filed a motion to terminate probation (§ 1203.3), allow withdrawal of his guilty plea, reduce the offense to a misdemeanor (§ 17, subd. (b)) and dismiss charges (§ 1203.4). The court (Judge Schafer having replaced Judge Brown on the case) later deferred acting on this motion after appellant was alleged to have violated probation by violating a number of county regulations and provisions of the Fish and Game Code in July and September 2011.¹⁰ Appellant’s probation was summarily revoked and he was allowed to remain free on his own recognizance; after a hearing in February 2012, the court found he had violated probation by committing some of the alleged conduct and denied his section 17, subdivision (b), motion without prejudice. The court explained that before the probation violations, it had intended to grant the motion once appellant had served two full years on probation, and it still intended to reduce the offense to a misdemeanor “at some point.” Appellant’s probation was revoked and reinstated, and a remediation agreement he entered with the Fish and Game Department (FGD) was made a condition of probation.

On June 27, 2012, the prosecutor filed a motion seeking restitution in the amount of \$358,000¹¹ on behalf Gyle Maruska, who had purchased from appellant the parcel underlying count 1. At a hearing on August 1, Judge Schafer raised the question whether he had authority to “revisit” the issue of restitution to the County after Judge Brown’s

¹⁰ It was alleged that appellant violated probation on or about July 26, 2011, by altering a streambed without an agreement (Fish & Game Code, § 1602, subd. (a)), causing or permitting water pollution (Fish & Game Code § 5650, subd. (a)(6)) and grading without a permit (County Ordinance 331-14(d), as well as on September 28 and 30, 2011, by conducting timber operations outside the area of his exemption permit (Cal. Code Regs., tit. 14, § 1035.3), failing to have a sealed box of tools accessible in case of fire at the operations site (Pub. Res. Code, § 4428, subd. (a), and failing to install cross-drains on the skidtrails used in the timber operations (Cal. Code Regs., tit. 14, § 914.6, subd. (a)(1).) The July violations were also charged in a misdemeanor complaint which was subsequently dismissed at the prosecution’s request.

¹¹ This amount was based on the costs associated with legalizing a parcel (including preparing an EIR, conducting a site survey and environmental studies, submitting a General Plan Amendment to the Planning Commission and Board of Supervisors, processing a zone reclassification).

ruling that the County was not a direct victim. On December 6, noting that Judge Brown had reserved jurisdiction over restitution, Judge Schafer ruled that restitution as a condition of probation under section 1203.1 was not restricted to direct victims, a governmental entity could be the beneficiary, and payment of “some money to the County to vitiate the substantial cost of setting about to cure the mess made by defendant is both related to the crime and would serve the goal of deterring further criminality.” The court denied the motion for restitution for the benefit of Maruska because Maruska had disclaimed any interest, and directed the parties to attempt to agree on a dollar amount for restitution to the County that was “within the realm of expectation” of the parties at the time appellant entered his plea, with an evidentiary hearing to be conducted if they could not agree.

After a hearing on March 1, 2013, the court ordered appellant to pay restitution to the County in the amount of \$150,000 and granted his motion to reduce his offense to a misdemeanor. It was noted that appellant’s probation would terminate by operation of law on April 2, 2013.

Appellant filed a timely notice of appeal on March 29, 2013.

STATEMENT OF FACTS

The properties at issue in this case, in an area referred to as Titlow Hill, were once part of the Chezem Ranch, which appellant purchased and then attempted to subdivide during the late 1970’s and early 1980’s. Appellant originally proposed dividing 2,900 acres of the 7,800-acre ranch into 111 20-acre parcels. In 1978, after considering public input and environmental issues, the Board of Supervisors adopted a revised plan allowing for fewer lots of larger acreage.

As described in the probation report, in 1981, when a proposal was submitted for creation of the first 39 of an estimated 70 40-acre parcels, there was public opposition and changes were made by the County due to potential adverse environmental effects, concerns over geologic instability for some of the building sites and the prevalence of Native American artifacts and remains in the area. The project was approved subject to a number of conditions, as well as requirements that appellant place the majority of the

ranch into agricultural open space zoning, merge certain parcels and improve roads and grading. Because of the new conditions, appellant sued the County for damages; the case was dismissed. The tentative map conditions for the subdivision the County had approved were not instituted, and the tentative map expired. A final subdivision map was never submitted and no permits for development in the area could be obtained until the legal status of the parcels was resolved.

Appellant's view of these historical events adds that the public opposition arose two and a half years after he and all Board members had signed a contract stating that the subdivision would be approved as long as appellant completed all the conditions for the 70-parcel subdivision, after all conditions had been completed and the planning commission had approved the project. By this time, new members had been elected to the Board and the development was rejected. Appellant had spent \$300,000 to complete the conditions, as well having had to buy out his investment partners when they became unable to pay their share of the ranch purchase price, at a price that assumed approval of the subdivision. According to appellant, the County breached its contract with him by failing to approve the project after he fulfilled all the conditions. After the rejection, appellant began subdividing the property in parcels 40 acres or larger, as had been planned for the subdivision.

Government Code section 66499.3, subdivision (b), prohibits the sale of any parcel of real property for which a parcel map is required by the Act (Gov. Code, § 66410 or local ordinance until a parcel map in compliance with the Act and local ordinance has been filed.¹²

¹² Government Code section 66499.30, subdivision (b), states: "No person shall sell, lease or finance any parcel or parcels of real property or commence construction of any building for sale, lease or financing thereon, except for model homes, or allow occupancy thereof, for which a parcel map is required by this division or local ordinance, until the parcel map thereof in full compliance with this division and any local ordinance has been filed for record by the recorder of the county in which any portion of the subdivision is located."

On June 4, 2007, the County Code Enforcement Unit received referrals concerning code violations on 12 parcels in the Titlow Hill area. Inspections revealed that many of the properties had roads and building pads, greenhouses with growing marijuana, cabins or other structures, recreational vehicles being used as residences and pit toilets. It was discovered that appellant had conveyed the parcels to the current owners in violation of the Act. Appellant owned one of the 12 parcels.

During June and August of 2007, 60 notices were sent to owners of property that had once been part of the Chezem Ranch informing them that their property might have been illegally divided, resulting in the recording of 58 notices of Act violations. These notices prevented the owners from selling, leasing, financing or transferring their parcels or obtaining building permits.

Investigation revealed that appellant had sold four 40-acre parcels within the previous three years, the limitations period for violations of the Act. The three counts of unlawful sales alleged in the complaint were based on transactions that occurred on October 4, 2005, January 11, 2006, and December 4, 2006.

Appellant had been selling subdivided parcels since the 1980's. His subdivision of the ranch was not consistent with the plan that had been conditionally approved. That plan called for development to be clustered along a principal road, with the majority of the ranch to remain intact, but appellant sold small parcels principally in what was supposed to have remained agricultural open space, increasing the number of roads and amount of grading without regard to geologic stability or archeological sites.

In May 2009, when contacted by an investigator for the district attorney, several owners of land that had once been part of the ranch reported that appellant was circulating statements for the owners to sign stating that they knew they were purchasing illegal parcels and were content with their purchases. Some said appellant had advised them of the problems with the parcels; others had not heard about legal issues with the subdivision prior to receiving letters from the Planning Department. The landowners had been paying property taxes since purchasing their properties.

When interviewed by the probation officer, appellant did not deny having committed a crime but expressed his belief that it would be more appropriately punished as a misdemeanor. He acknowledged having sold 30 parcels over a period of 20 years that were not legally subdivided. The sales were recorded, assessor parcel numbers were assigned and property taxes were collected. Appellant believed there were no victims of his misconduct, and he provided signed declarations from purchasers stating they had been advised they would not be able to obtain building permits for their parcels unless they initiated and completed a subdivision with the County to formally create the parcel at the buyer's expense.

Appellant further stated that he was concerned about paying \$283,000 into a trust account without knowing what he was "going to get in return" and believed he should pay the money in installments as work to correct the violations was completed. His concerns were that he would have to borrow against his equity in the 1200 acres he retained to make the \$283,000 payment; he would not be able to sell his remaining land until the County made the corrections; and if the County took years to do so, it would gain money in interest while appellant would lose that interest. Appellant expressed lack of trust for the County due to his past experience. He would not agree to pay the \$283,000 as a penalty or restitution because this would affect his ability to retain his law license and would not be tax deductible.

The probation officer reported on views expressed by representatives from County counsel's office, Community Development and the Planning Department, who believed current landowners, the environment, county residents and taxpayers nationwide were all victims of appellant's offenses. In their view, landowners who knew at the time of purchase that there would be difficulty in obtaining building permits were nonetheless victims because they had "no idea of the time, money and uncertainty involved in trying to resolve their parcels' violations." Some owners of parcels in areas that would have been kept as ranch land under the original plan might lose their interests in their land, depending on how the Board of Supervisors decided to treat variances. Others who had used their savings for downpayments on the parcels would not be able to afford required

corrections. Concerns were raised about illegal uses of the properties, economic effects on legal parcels, environmental issues, and perpetuation of the illegal subdivision by purchasers further subdividing their lots.¹³ It was stated that while appellant had legally subdivided acreage in other parts of the county, with the Titlow Hill property he wanted to make more money than was possible with the small number of home sites the county would allow. Appellant therefore chose a “common way for local land owners to profit from marijuana growers,” who intended to use the property for a short time and were not concerned about its legality.¹⁴

The probation report attached 28 character references from members of the community, summarized by the probation officer as “emphasizing appellant’s ongoing history of charity.”

At the June 18, 2010, hearing on the County’s motion for restitution, Kirk Girard, a civil engineer and the Director of the County Planning and Building Department, testified that the tier one proposal was “the minimum necessary to even approach the resolution of the three violations.” Girard explained the process that would have to be used by a landowner wanting to determine the legality of a property: First, the owner

¹³ The expressed concerns included danger posed by people growing marijuana on their land and protecting it; pit toilets contaminating the water supply; trespass from illegal parcels onto legal ones; illegal roads graded without engineering; detrimental effects on the county’s economy from the loss of ranch land to support timber and cattle; burdens on legitimate sellers who could not sell their parcels as quickly or inexpensively as those selling illegal parcels without complying with the rules; environmental degradation including appellant’s grading increasing the sediment in a creek where the federal government was spending millions of dollars on sediment reduction to maintain or restore salmon habitat, and landowners’ withdrawal of water from the creek for personal use and marijuana crops decreasing the water available to mitigate the sediment.

¹⁴ According to the probation report, appellant would carry the note and the buyer would make payments until law or code enforcement became “too interested,” at which point the buyer would often abandon the land and appellant would reclaim it and sell to a new buyer. If a parcel was investigated for growing marijuana, appellant could claim he had no knowledge of the buyer’s activities. Alternatively, the parcel owner might sell to a new buyer, who might or might not know of the legal issues with the property. There was also concern that residents were reluctant to speak out against appellant because they were dependent on him for things like repairing roads.

would request a “Determination of Status” to see whether a property was created illegally; if so, the local land use authority would issue a “Conditional Certificate of Compliance” setting out the conditions required to legitimize the property.¹⁵ Once a Conditional Certificate of Compliance issued, the property could be transferred, but the required conditions would have to be satisfied before the property “could be recognized by the authorities.”

In the present case, trying to correct one illegal lot would entail preparation of an EIR for the entire subdivision. Based upon his experience and comparison with similar projects, Girard believed \$150,000 was a reasonable estimate for the cost of an EIR in this case. The other cost components of tier one of the County’s restitution proposal were a site inventory, estimated to cost \$30,000; special environmental studies, estimated at \$70,000; and processing the necessary general plan amendment through the Planning Commission and Board of Supervisors, estimated at \$33,000. The cost of the EIR and other components of the Tier One budget would be borne by the applicant. If tier one was completed, the illegal lots would have “a path towards legality because they would be found to be consistent with parent land use designation or general plan designation for the property.” In Girard’s opinion, considering the development that had been approved in the past and view that parts of the property were not suitable for residential development, it was “doubtful” that the Board would accept and legalize the lots as presently divided.¹⁶

Girard testified that the existing parcelization of the area was a “failed development” that was inconsistent with the general plan, had not been evaluated as required by state law with respect to protection of public health, welfare, safety and resources, and involved construction that had not been subjected to building permit

¹⁵ The owners of the three properties named in the complaint had not initiated this process, but other landowners in the area had done so.

¹⁶ Girard testified that the majority of the illegally sold lots were in the area that had been approved for open space, agriculture and timber under the development plan for which a tentative map had been approved in the early 1980’s.

review. The development undercut the purposes of subdivision laws and building codes—the protection of public safety, welfare and resources—with potential impacts including sediment discharge, impacts on critical habitat and salmon recovery plans, deterioration of agricultural and timber production and exacerbation of geologic instability.

DISCUSSION

I.

Appellant first argues that the County was not a victim of his offense and therefore was not entitled to restitution. In order to evaluate this contention, it is necessary to place his offense—illegal sale of real property in violation of the Act—in context.

“ ‘The Subdivision Map Act is “the primary regulatory control” governing the subdivision of real property in California.’ (*Gardner v. County of Sonoma* (2003) 29 Cal.4th 990, 996 [(*Gardner*)]). It has three principal goals: ‘to encourage orderly community development, to prevent undue burdens on the public, and to protect individual real estate buyers.’ (*Van ’t Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 563–564.) It ‘seeks “to encourage and facilitate orderly community development, coordinate planning with the community pattern established by local authorities, and assure proper improvements are made, so that the area does not become an undue burden on the taxpayer.” ’ (*Gardner*, at pp. 997–998.)” (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 798-799 (*Pacific Palisades*)).

The Act “sets suitability, design, improvement, and procedural requirements (e.g., Gov. Code, §§ 66473 et seq., 66478.1 et seq.)” and “allows local governments to impose supplemental requirements of the same kind (e.g., *id.*, §§ 66475 et seq., 66479 et. seq.). (*The Pines v. City of Santa Monica* (1981) 29 Cal.3d 656, 659.)” (*Pacific Palisades, supra*, 55 Cal.4th at p. 799.) It “ ‘vests the “[r]egulation and control of the design and improvement of subdivisions” in the legislative bodies of local agencies, which must promulgate ordinances on the subject.’ (*Gardner*[, *supra*,] 29 Cal.4th at p. 997, fn. omitted.)” (*Pacific Palisades*, at p. 799.) “Thus, ‘[o]rdinarily, subdivision under the Act

may be lawfully accomplished only by obtaining local approval and recordation of a tentative and final map pursuant to section 66426, when five or more parcels are involved, or a parcel map pursuant to section 66428 when four or fewer parcels are involved.’ (*Ibid.*)” (*Pacific Palisades*, at pp. 798-799.) The Act specifies circumstances requiring denial of a map, most of which “relate to whether the proposed project and its design are appropriate to the community or to the site, the project’s impact on the environment, or issues of health and safety.” (*Id.* at pp. 799-800.) The approval process includes review by the local government and public hearings, which are held after local government “ ‘staff have deemed the [proposed] map complete, approved the technical feasibility of the map, and prepared an appropriate environmental analysis.’” (*Id.* at p. 799.)

Appellants’ illegal sales of real property circumvented the protections imposed by the Act.

Judge Schafer ordered appellant to pay restitution as a condition of probation pursuant to section 1203.1. Section 1203.1 “gives trial courts broad discretion to impose probation conditions to foster rehabilitation and to protect public safety. ([*People v. Carbajal* [(1995)] 10 Cal.4th [1114,] 1120 [(*Carjabal*)].) The court may impose upon probationers ‘reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer. . . .’ (§ 1203.1, subd. (j).)” (*People v. Anderson* (2010) 50 Cal.4th 19, 26 (*Anderson*).)

“We determine whether the restitution order, as a condition of probation, is arbitrary or capricious or otherwise exceeds the bounds of reason under the circumstances. (*People v. Olguin* [(2008)] 45 Cal.4th [375,] 384; *Carbajal, supra*, 10 Cal.4th at p. 1121.) ‘A condition of probation will not be held invalid unless it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. . . .” ’ (*People v. Lent* [(1975)] 15 Cal.3d [481,] 486.)

Probation is ‘an act of clemency and grace’ (*People v. Rodriguez* (1990) 51 Cal.3d 437, 445), not a matter of right (*People v. Rubics* (2006) 136 Cal.App.4th 452, 459). ‘Because a defendant has no right to probation, the trial court can impose probation conditions that it could not otherwise impose, so long as the conditions are not invalid under the three *Lent* criteria.’ (*Id.* at p. 460.) If the defendant finds the conditions of probation more onerous than the sentence he would otherwise face, he may refuse probation. ([*Olguin*], at p. 379.)” (*Anderson, supra*, 50 Cal.4th at p. 32.)

“Restitution as a condition of probation has always been expressly authorized by section 1203.1.” (*Anderson, supra*, 50 Cal.4th at p. 27.) “While restitution under section 1203.1 may serve to compensate the victim of a crime, it also addresses the broader probationary goal of rehabilitating the defendant. ‘Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused.’” (*Carbajal, supra*, 10 Cal.4th at p. 1124.) Restitution ‘impresses upon the offender the gravity of the harm he has inflicted upon another, and provides an opportunity to make amends.’ ([See] *Charles S. v. Superior Court* (1982) 32 Cal.3d 741, 748.)” (*Anderson*, at p. 27.)

Appellant contends that restitution orders under section 1203.1 are subject to the limitation stated in section 1202.4 that a governmental entity is entitled to restitution only when it is a “direct victim” of crime. (§ 1202.4, subd. (k)(2).)¹⁷ Entities that are “direct” victims are those “ ‘against which the probationer’s crimes [were] committed’—that is, entities that are the ‘immediate objects of the probationer’s offenses.’ ” (*People v. Martinez* (2005) 36 Cal.4th 384, 393, quoting *People v. Birkett* (1999) 21 Cal.4th 226, 232-233 (*Birkett*) [emphasis in *Martinez*].) Appellant reasons that the provisions of section 1202.4 are incorporated into section 1203.1 because section 1203.1, subdivision (a)(3), provides that “[t]he restitution order shall be fully enforceable as a civil judgment

¹⁷ Section 1202.4, subdivision (k)(2), defines “victim,” for purposes of the section, as including a “corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity when that entity is a direct victim of a crime.”

forthwith and in accordance with Section 1202.4 of the Penal Code.” This argument was expressly rejected in *Anderson*, which held that the provision appellant relies upon pertains only to the enforceability of restitution orders, and “[t]he application of section 1203.1 is not limited by the terms of the later-enacted section 1202.4.” (*Anderson, supra*, 50 Cal.4th at pp. 26, 30.)

Section 1202.4 *requires* trial courts to order restitution where a victim has suffered economic loss as a result of the defendant’s conduct (§ 1202.4, subd. (f)), implementing a constitutional amendment adopted in 1982. (*Anderson, supra*, 50 Cal.4th at pp. 27-28.) Since the enactment of mandatory direct victim statutes, “[t]rial courts continue to retain authority to impose restitution as a condition of probation in circumstances not otherwise dictated by section 1202.4. In both sections 1203.1 and 1202.4, restitution serves the purposes of both criminal rehabilitation and victim compensation. But the statutory schemes treat those goals differently. When section 1202.4 imposes its mandatory requirements in favor of a victim’s right to restitution, the statute is explicit and narrow. When section 1203.1 provides the court with discretion to achieve a defendant’s reformation, its ambit is necessarily broader, allowing a sentencing court the flexibility to encourage a defendant’s reformation as the circumstances of his or her case require. (*Anderson*, at p. 29.)

Appellant views *Birkett, supra*, 21 Cal.4th 226, as having held that even as a condition of probation, restitution may be ordered only for direct victims of crime. The defendant in that case pled guilty to charges of owning and operating a “chop shop” and vehicle theft. Some of the victims’ losses had been partially reimbursed by insurance, and the trial court ordered the defendant to pay restitution to the insurers, as well as the victims. Then applicable former section 1203.04 required probationers to pay restitution to crime victims, including a “legal or commercial entity *when that entity is a direct victim of a crime.*” (*Birkett*, at p. 231.) The *Birkett* court rejected the contention that the insurers were entitled to restitution by right of subrogation, “stepping into the shoes” of the insureds who suffered losses as the direct result of the defendant’s crime. (*Id.* at pp. 230-231.) Based on the statutory language and legislative history, the court held that

“only ‘direct’ crime victims and their immediate families” had a *right* to restitution and “persons whose losses arose only as a result of crimes committed against others” had no such *entitlement*. (*Id.* at p. 243.) Further, the trial court’s discretion to order “nonstatutory restitution” as a condition of probation, did not permit it to “divert mandatory restitutionary awards from insureds to insurers,” (*id.* at p. 229) because “the Legislature intended to require a probationary offender, for rehabilitative and deterrent purposes, to make *full* restitution for all losses *his crime had caused, and* that such reparation should go entirely to *the individual or entity the offender had directly wronged*, regardless of that victim’s reimbursement from other sources.” (*Id.* at p. 246.)

The *Birkett* court expressly limited its decision to the “narrow” questions of whether insurers had a right to restitution for the amounts paid to their insureds, and whether the trial court had discretion to apportion mandatory restitution awards between insurers and insureds. Neither of these questions is at issue in the present case, nor is the situation at all similar. Here, the court made clear that it intended the restitution order to compensate for harm done to the County and public at large by appellant’s conduct. The amount ordered, \$150,000, was the amount Girard testified, based upon his experience and comparison with similar projects, was a reasonable estimate for the cost of an EIR in this case. The order was thus based upon what the evidence indicated would be the cost of the very first step toward correction of the problems caused by the offense, preparation of an EIR for the entire subdivision, which would be necessary before *any* of the parcels could be legalized. The loss addressed by the restitution order was not that of a commercial entity contractually required to reimburse an actual “direct” crime victim, but a loss that went beyond any one landowner and affected all owners in the subdivision, as well as others in the county, who were denied their statutory right to input on the development, and the County itself, which was deprived of its statutory obligation to oversee such development for the benefit of the community at large.

As we have said, *Anderson* expressly held that restitution under section 1203.1 is not limited by the “direct victim” requirement of section 1202.4, subdivision (k)(2). (*Anderson, supra*, 50 Cal.4th at p. 31.) There, convicted of leaving the scene of an

accident resulting in death, the defendant was ordered to pay restitution for the victim's final hospitalization expenses. (*Id.* at p. 22.) When the prosecutor informed the court that the victim's family lacked financial ability to pay those expenses, the court ordered payment directly to the hospital. (*Ibid.*) Upholding this order, the *Anderson* court explained: "Under the particular circumstances of this case, the injury done to Milligan by defendant's breach was redressed by fashioning a restitution order in which payment for medical expenses was made directly to the hospital. This was not a circumstance in which a restitution award was being diverted from the victim to satisfy a requested third party claim. (See [*People v.*] *Slattery* [(2008)] 167 Cal.App.4th [1091,] 1097.) [¶] As a result of the order, the family would not be further burdened by having to open or leave open probate of Milligan's estate to accommodate payment of the restitution award. The court's order also assured that amends be made to society for the criminal violation because the hospital would be paid for the care it was required by law to provide. Thus, the order was 'fitting and proper to the end that justice may be done.' (§ 1203.1, subd. (j).) Finally, restitution of the deceased victim's hospital expenses, paid directly to the hospital, renders defendant accountable for the financial harm he caused and contributes to his reformation and rehabilitation." (*Anderson*, at pp. 33-34.)¹⁸

The present case bears some analogy to *Anderson*. There, the Supreme Court reached a practical result. The amount of restitution ordered—the victim's hospital expenses—was clearly related to the defendant's conduct. The victim's family had not paid these expenses because it was financially unable to do so. Payment directly to the hospital compensated it for the costs it was legally required to incur and, unlike the

¹⁸ Appellant relies upon *People v. Slattery, supra*, 167 Cal.App.4th 1091, which reversed a restitution order directing the defendant to pay the deceased victim's hospital expenses directly to the hospital because the hospital was not a direct victim as defined in section 1202.4, subdivision (k)(2). (See *Anderson, supra*, 50 Cal.4th at p. 31.) As the *Anderson* court pointed out, because the defendant in *Slattery* was sentenced to prison and restitution ordered pursuant to section 1202.4, the case did not resolve whether restitution to the hospital would be permissible under the "broader, discretionary authority of section 1203.1." (*Anderson*, at p. 31.) It is no more helpful here.

situation in *Birkett*, did not divert restitution from a direct victim entitled to payment. In the present case, no owner of a parcel appellant illegally divided would be able to legalize the property before an EIR was prepared to evaluate the impacts of the entire area. True, the cost of preparing that EIR would fall upon the landowner and not the County. But this was only because the subdivision was not created in accordance with the requirements of the Act; if it had been, the cost would have been borne by the developer—appellant. The trial court’s point was that no single landowner should have to bear that cost when the same EIR would be necessary for legalization of any of the parcels.¹⁹ By requiring appellant to pay restitution to the County in the amount required for preparation of the EIR, the court held appellant accountable for a portion of the financial harm he caused by illegally subdividing the properties and “assured that amends be made to society for the criminal violation” by permitting the County to, in the words of the trial court, “figure out what needs to be done to resolve” the problems appellant created.

Appellant also argues that the County cannot be seen as a “victim” of his offense—direct or otherwise—because the Act provides remedies for landowners damaged by violations of the Act but not for governmental entities. The Act provides that when real property has been divided in violation of the Act, within one year of discovery of the violation, the purchaser may void the sale (Gov. Code, § 66499.32, subd. (a)) and may bring an action for damages against the person who divided the property (Gov. Code, § 66499, subd. (b)). Government Code section 66499.33 authorizes a government agency to sue to enjoin a sale in violation of the Act but, appellant urges, does not offer a governmental agency any remedy once a sale has occurred.

¹⁹ Judge Schafer based the order for \$150,000 in restitution on Girard’s testimony regarding “the cost of initiating the process, the startup process to get to that point where we can figure out what needs to be done to resolve these problems. [¶] That’s a cross, which I don’t think you in any sense of equity or fairness they can impose on any single—you cannot impose a total cost on any single applicant.”

In addition to its specific authorization of suits to enjoin illegal sales, Government Code section 66499.33 provides that “[t]his division does not bar any legal, equitable or summary remedy to which any aggrieved local agency or other public agency, or any person, firm, or corporation may otherwise be entitled[.]” And, of course, Government Code sections 66499.30 and 66499.31 authorize criminal prosecution for violation of the Act. The Act thus provides enforcement mechanisms for both individuals and local governments whose rights and interests it protects.

Appellant also emphasizes the fact that the trial court ordered restitution for costs the County had not yet incurred. Unlike the situation in *Anderson*, where restitution was ordered to compensate the hospital for the costs it incurred in treating the victim, here the order was based on evidence of what it *would* cost to remedy the problems created by appellant’s violations of the Act. Appellant argues that the County is seeking a windfall for costs that may never be incurred by anyone and, in any event, would be the responsibility of the land owners who sought to legalize their properties, and as damages for earlier illegal parcel sales that the County could have addressed through civil remedies but are now beyond the statute of limitations.

As we have said, the court’s authority to order restitution as a condition of probation is much broader than its authority over mandatory restitution ordered under section 1202.4 to reimburse a victim who has suffered economic losses. (See, *Anderson, supra*, 50 Cal.4th at p. 31.) Under section 1203.1, “ ‘California courts have long interpreted the trial courts’ discretion to encompass the ordering of restitution as a condition of probation even when the loss was not necessarily caused by the criminal conduct underlying the conviction.’ ([*Carbajal, supra*, 10 Cal.4th] at p. 1121.) As we explained: ‘Under certain circumstances, restitution has been found proper where the loss was caused by related conduct not resulting in a conviction (*People v. Miller* [(1967)] 256 Cal.App.2d [348,] 355–356), by conduct underlying dismissed and uncharged counts (*People v. Goulart* (1990) 224 Cal.App.3d 71, 79 [(*Goulart*)], and by conduct resulting in an acquittal (*People v. Lent*[, *supra*,] 15 Cal.3d [at p.] 483). There is no requirement the restitution order be limited to the exact amount of the loss in which

the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action. (See *In re Brian S.* (1982) 130 Cal.App.3d 523, 528–532, 534, fn. 4.)” (*Anderson*, at p. 27, quoting *Carbajal*, at p. 1121.)

The restitution order was clearly related to appellant’s crime; indeed, it was narrowly tailored to address only the first step in rectifying the damage to the County and the public caused by appellant’s conduct. The order was well within the bounds of the trial court’s discretion.²⁰

Appellant additionally argues that the trial court abused its discretion with respect to the amount of the restitution order. The gist of this argument is no different from those we have already discussed—that the County was not a direct victim of his offense and had not incurred any expenses as a result of it, and that the restitution order would give the County a windfall it would not be obliged to spend in any particular manner. Citing *People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542, for the points that the standard of proof in a restitution hearing is preponderance of the evidence, the victim must make a prima facie showing of economic losses and the burden then shifts to the defendant to disprove the amount, appellant argues there was no showing that the County suffered any economic losses as a result of his offenses. *Gemelli* involved mandatory restitution for economic losses under section 1202.4, which requires restitution “ ‘of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic

²⁰ We are not persuaded by appellant’s argument that the County was seeking a windfall in the form of restitution for illegal building on and uses of the parcels by their owners, for which appellant was not responsible. He argues that the County was no more entitled to such restitution than was the governmental agency in *People v. Martinez*, *supra*, 36 Cal.4th at page 386, which attempted to obtain restitution for its costs in cleaning up hazardous waste at the illegal drug laboratory of a defendant convicted of attempting to manufacture methamphetamine. *Martinez* held that the agency was not entitled to restitution under section 1202.4 because it was not a direct victim of the offense. (*Martinez*, at pp. 393-394.) As the case involved a defendant sentenced to prison, it did not discuss restitution under section 1203.1, and is inapposite to the present case.

loss incurred as the result of the defendant's criminal conduct . . . ' ” (*Gemelli*, at p. 1542.) As discussed above, the parameters for restitution orders under section 1203.1 are much wider and the required nexus to actual economic losses looser. Appellant's real complaint is that *any* restitution for the County was ordered. As he recognizes, the amount ordered was based on Girard's testimony that \$150,000 was a reasonable estimate for the cost of an EIR for the property at issue.²¹ Appellant points to no evidence undermining Girard's testimony that \$150,000 was a reasonable estimate for an EIR.

We affirm the trial court's order insofar as it requires that appellant pay \$150,000 in restitution to the County. In light of the unique circumstances of this case, however, it is appropriate that some mechanism be employed to ensure the funds will be used for the intended purpose. As we have discussed, earlier in this litigation the parties contemplated appellant placing a sum of money into a trust account for exactly the purpose now served by the restitution order. Indeed, at oral argument respondent represented that County Board of Supervisors at that time approved establishing the “Titlow Hills Trust Fund 3918” upon receipt of those funds, with stipulations that the funds be used for preparation of an EIR and specified related purposes. We remand the case to the trial court to explore use of a trust fund or other device to ensure the \$150,000 restitution payment will be used exclusively for preparation of an EIR for the subdivision or for other action necessary to rectify the consequences of appellant's illegal conduct, and modify its order to direct the appropriate implementing mechanism.

II.

Appellant entered his plea to one felony offense at the trial confirmation hearing on May 15, 2009, three days before the scheduled trial date, pursuant to a scenario he suggested. Appellant told the court that although his position “from the start” had been that he wanted to plead to a misdemeanor and there was “potential for settlement” in the agreement he had been discussing with the prosecutor, there were still unresolved

²¹ Girard acknowledged that the cost could range from \$90,000 to \$500,000.

questions and, to allow the parties to work out the details of their agreement, he was considering pleading to one felony count and setting a section 17, subdivision (b), hearing in 60 days. The prosecutor agreed, and appellant entered the plea with the understanding that the parties would attempt to reach a settlement under which the offense would be reduced to a misdemeanor, and, if they were unsuccessful, the court would hold a section 17, subdivision (b), hearing. Appellant acknowledged understanding that there would be a *Harvey* waiver as to counts 2 and 3 for purposes of restitution and that, as the court admonished, “[t]here could be actual restitution. So, if there was anyone actually damaged by this, you could be ordered to reimburse for that.”

Appellant now contends that because the plea agreement specified that the *Harvey* waiver was for purposes of restitution, it necessarily limited the scope of a restitution order to the property sale underlying the count of which he was convicted and the two dismissed with the waiver. If the court had the authority to order restitution based on other uncharged violations of the Act, appellant argues, his *Harvey* waiver would have been meaningless because the court would have been able to consider those counts even without a waiver.

People v. Harvey, supra, 25 Cal.3d at pages 758-759, held that where a defendant pled guilty to two counts of robbery pursuant to a plea agreement under which a third count was dismissed, the trial court erred in relying upon the facts of the dismissed count to find aggravating circumstances and impose an upper term prison sentence. The court explained that “it would be improper and unfair to permit the sentencing court to consider any of the facts underlying the dismissed count three for purposes of aggravating or enhancing defendant’s sentence. Count three was dismissed in consideration of defendant’s agreement to plead guilty to counts one and two. Implicit in such a plea bargain, we think, is the understanding (in the absence of any contrary agreement) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed count.” (*Id.* at p. 758.) “It was from the parenthetical in the quoted text that the notion of a *Harvey* waiver developed.”

(*People v. Snow* (2012) 205 Cal.App.4th 932, 937 (*Snow*); *Goulart, supra*, 224 Cal.App.3d at p. 80.)

Although *Harvey* was concerned with a prison sentence, its waiver rule applies as well to probationary conditions. “[W]hen under a plea agreement a defendant pleads guilty to one or more charges in exchange for dismissal of one or more charges, the trial court cannot, in placing the defendant on probation, impose conditions that are based solely on the dismissed charge or charges unless the defendant agreed to them or unless there is a ‘transactional’ relationship between the charge or charges to which the defendant pled and the facts of the dismissed charge or charges.” (*People v. Martin* (2010) 51 Cal.4th 75, 82 (*Martin*)). “[A] negotiated plea agreement is in the nature of a contract. Thus, when the trial court accepts it, the agreement is binding on the parties and the court.” (*Id.* at p. 80.)

Appellant argues that the court violated his plea agreement by basing its restitution order upon “more extensive alleged misconduct” than that associated with the count he admitted and the two he agreed could be considered for purposes of restitution. In his view, the plea agreement limited the scope of permissible restitution to actual economic injuries suffered by the owners of the three parcels described in the charges.

We are not persuaded. Clearly, the agreement contemplated that restitution could be based on the facts underlying the three counts. But nothing in the terms stated on the record referred to uncharged offenses or other relevant considerations. In *Snow*, the defendant, charged with a number of offenses involving domestic abuse of the victim, pled no contest to a count of false imprisonment pursuant to a plea agreement under which a number of other charges and allegations were dismissed with a *Harvey* waiver for purposes of restitution. On appeal, the defendant challenged a restitution order requiring him to pay the victim’s medical and related expenses resulting from his conduct, including expenses associated with an uncharged incident. Emphasizing the statement in *Harvey*, reiterated in *Martin*, that “[a]n implied term of a plea agreement is that a defendant will not be adversely affected “by reason of the facts underlying, and solely pertaining to, the dismissed count” (*Snow, supra*, 205 Cal.App.4th at p. 938,

quoting *Martin, supra*, 51 Cal.4th at p. 81), the *Snow* court stated that “the foundational basis for the *Harvey* rule is the reasonable expectations of the parties concerning counts dismissed as part of the plea bargain. (*People v. Franco* (1986) 181 Cal.App.3d 342, 349.)” (*Snow*, at p. 938.) The *Harvey* waiver in *Snow* expressly referred to the enumerated dismissed counts but made no reference to *uncharged* offenses. (*Snow*, at p. 937.)²² The court concluded, “The November 2005 incident was not charged in the information and thus, was not dismissed as part of the plea agreement. And since that incident was not dismissed as part of the negotiated resolution, there is no implied term of the agreement barring that incident’s use by the trial court.” (*Id.* at p. 938.)

Appellant argues that the only reasonable interpretation of his *Harvey* waiver is that it precluded restitution for anything beyond the three charged counts because if it were otherwise, there would have been no reason for him to bargain for this term in the plea agreement. The record belies appellant’s characterization. At the time he entered his plea, appellant did not want the *Harvey* waiver: He told the court, “The DA has always said she wanted a *Harvey* waiver on the other two counts. . . . [¶] I would rather not have one, your Honor.” It is thus clear that appellant did not bargain for this term of

²² *Snow* noted that “[a] defendant who signs the typical waiver form agrees to allow the sentencing judge to consider his entire criminal history, including any unfiled or dismissed charges.” (*Snow, supra*, 205 Cal.App.4th at p. 937, quoting *Goulart, supra*, 224 Cal.App.3d at p. 80.) “*Harvey* waiver language typically reads something like the following: ‘I agree that the sentencing judge may consider my entire criminal history, the entire factual background of this case, including any unfiled, dismissed, stricken charges or allegations, and all the underlying facts of this case when granting probation, ordering restitution, or imposing sentence.’ (See *People v. Munoz* (2007) 155 Cal.App.4th 160, 167; *People v. Baumann* (1985) 176 Cal.App.3d 67, 74, 75.)” (*Snow*, at p. 937, fn. 5.)

Appellant contrasts his “limited” *Harvey* waiver with the one in *People v. Baumann* (1985) 176 Cal.App.3d 67, 76, which expressly referred to “unfiled,” as well as “dismissed” charges. *Baumann* noted the language of the waiver in upholding an award of restitution based upon unfiled charges. (*Id.* at p. 76.) *Snow* noted that because the waiver in *Baumann* expressly covered uncharged incidents, the *Baumann* court “never reached the issue of whether a *Harvey* waiver was actually required for uncharged incidents not contemplated as part of the plea bargain.” (*Snow, supra*, 205 Cal.App.4th at p. 939.)

the plea agreement because he believed it provided him an advantage, but agreed to it only because the District Attorney insisted. A *Harvey* waiver generally works to the advantage of the prosecution by permitting the court to consider facts underlying counts it would otherwise be precluded from considering because the counts were dismissed as part of a plea agreement; the defendant, presumably, agrees to the waiver because he or she derives other benefits from the overall bargain. Appellant received obvious advantages from the agreement in that three of the four counts against him, and all of the charges against his wife, were dismissed. Nothing in the discussion on the record at the time of the plea indicates the parties intended it to govern the parameters of a restitution order beyond the fact that the court would not be precluded from considering facts related to the dismissed counts, as well as the one to which appellant pled no contest, with regard to restitution. It is well settled that restitution as a condition of probation may be ordered for uncharged conduct, including conduct for which the statute of limitations has run, as long as that conduct is reasonably related to the crime the defendant committed or to future criminality. (*Goulart, supra*, 224 Cal.App.3d at pp. 78-79; *People v. Percelle* (2005) 126 Cal.App.4th 164, 179-180.)

As earlier described, the parties at earlier stages of the case contemplated reaching a settlement under which appellant would pay the County \$283,000 for the purpose of correcting the subdivision violations, in exchange for appellant's offense being reduced to a misdemeanor. At the time appellant entered his plea, he represented to the court that he believed there was potential for settlement if the parties could work out some remaining details of their agreement, and for this reason the court did not immediately refer the matter to the probation department.

Respondent suggests, as the prosecutor expressly argued below, that appellant's agreement to pay \$283,000 to the County under the ultimately unsuccessful agreement the parties discussed demonstrates his expectation that he would pay restitution to the County. Appellant draws a sharp distinction between "restitution," which he asserts he never agreed to pay to the County (at least in part because it would not be tax deductible), and the "settlement" he attempted to negotiate with the prosecutor, which he views as

relating only to his payment in exchange for the prosecutor's non-opposition to the reduction of his offense to a misdemeanor.²³ Appellant, as the prosecutor also pointed out below, treated the parties' negotiation as a business arrangement, in which he was entitled to assurances that he would get his money's worth before he would provide the County with funds.

As respondent points out, in both name and in practical effect the "settlement" under discussion was an agreement for restitution: The \$283,000 figure was stated in the County's "Restitution Proposal" as the amount of the "first tier" restitution meant to address the costs of preparing an EIR for the three parcels involved in the criminal case and initial steps of the general plan amendment process. It is undisputed that the purpose of appellant's anticipated payment to the County was correction of the Act violations in the subdivision as a whole.

When appellant entered his plea in May 2009, he acknowledged that he could be ordered to pay restitution "if there was anyone actually damaged by this," and he was actually engaged in negotiations that would have resulted in his paying the County \$283,000 to correct the subdivision violations. Later, after the negotiations failed and Judge Brown had found the County was not a "direct victim," appellant told the court that at the time of his plea, none of the landowners had made any claims, it was never suggested he could be "subjected to any potential liability because somebody wanted to file a determination of status and legalize their parcel," and he would not have entered the plea if this possibility had been raised. Appellant stated, "the only thing that was discussed was the County wants restitution. They claimed to be a victim"

²³ Appellant argued below that in trying to settle the case, he told the district attorney he would not pay restitution but would "put up a sum of money . . . to pay the County to resolve the illegal parcels with the cooperation of the County, recommend a change in the general plan in that area, et cetera." Appellant said he agreed to the first figure the County suggested, \$147,000, but wanted a written agreement before depositing money into a trust account, then the County changed the figure to \$283,000, and he agreed. Appellant told the court, "[t]his wasn't restitution. This was going to be a correction fee put into a trust account to help pay the costs."

It appears that at the time of his plea and *Harvey* waiver, appellant believed he could not be ordered to pay restitution because, in his view, the landowners had not claimed losses due to his offense and the County was not a victim for which restitution could be ordered. While this may have been his subjective expectation and understanding, the record reflects his express acknowledgment that he could be ordered to pay restitution “if there was anyone actually damaged by this,” including restitution based upon the parcels underlying the dismissed counts. Ultimately, the court determined that the County and the public *had* been damaged by appellant’s conduct and that the restitution would serve the probation goals of deterrence and rehabilitation. The amount chosen by the court, as we have said, was what Girard testified was a reasonable estimate of the cost of the EIR necessary to begin the process of correcting the violations. While the court ordered restitution to the County and not the landowner on whose behalf the County had requested it but who himself disclaimed any losses, it is noteworthy that, according to the evidence, any owner attempting to legalize one of the illegal parcels—including the three named in the criminal case—would have incurred the cost of an EIR for the entire subdivision in order to meet the requirements of applicable environmental laws.

The restitution order did not violate the terms of appellant’s plea bargain.

III.

Appellant’s final contention is that Judge Schafer lacked authority to make a restitution order because Judge Brown had resolved the issue of restitution and neither party appealed Judge Brown’s order. Appellant asserts that the County forfeited its right to seek restitution by not appealing Judge Brown’s order, and that Judge Schafer improperly acted as a reviewing court purporting to overrule the order of a co-equal court.

Appellant’s argument depends upon the correctness of his premise that Judge Brown’s denial of restitution to the County was an appealable order. In none of the cases he relies upon, however, was the order in question made “without prejudice.” Appellant attempts to avoid the consequence of this fact by arguing that Judge Brown meant only

that his ruling was “without prejudice” to the right of “actual direct victims” to come forward and seek restitution. Contrary to appellant’s assertion, it is he and not respondent who is “misunderstanding or misrepresenting the record.”

The hearing before Judge Brown was on the prosecution’s initial request for restitution on behalf of the County, based on the County’s proposal for a “first tier” payment of \$283,000 to cover the initial steps of the process necessary to legalize the three properties at issue, followed by a second-tier payment of \$1,885,500 to legalize the other illegal lots and correct environmental harms caused by the illegal subdivision. At sentencing, the prosecutor and court had discussed the possibility of an initial restitution order for the first-tier amount with a reservation of jurisdiction as to additional amounts that might be proven once the effects of the illegal subdivision had been evaluated. Appellant then asserted his right to a full restitution hearing, raising the question who was the victim of his offense, and the court set the June 18, 2010 hearing date. In their briefing for the June hearing, both parties referred to section 1202.4, disputing whether the County was a “direct victim.”

This was the issue addressed at the hearing, at the conclusion of which Judge Brown expressed that appellant had “violated the public trust” and “stifled the public voice” but that the “direct victim[s]” of the specific conduct charged were the property owners and not the County. The following colloquy then occurred:

Judge Brown: “I’m not satisfied that the County is a direct victim in this case. [¶] So, my decision is that I’m not going to order restitution but I’m going to continue to reserve it because if a property owner should come forward, I think there’s a different issue that is presented to the court; but at least at this point, that’s the court’s decision. [¶] So, restitution to the county will not be ordered, but restitution will be reserved in case the direct victims, in the court’s opinion, come forward and want restitution.”

Prosecutor: “Your Honor, would you deny that request for restitution without prejudice if we develop further - -”

Judge Brown: “I think it’s an important issue, so I will deny without prejudice.”

The prosecutor’s request for the court to “deny that request for restitution without prejudice if we develop further . . .” was obviously a reference to the request for restitution to the County. The court had just reserved jurisdiction in case property owners were to seek restitution in the future. It would have made no sense for the prosecutor to request that the reservation of jurisdiction be denied “without prejudice” or for the court to so understand it. The court had denied the request for restitution to the County and left open the question of restitution to “direct victims”; the prosecutor’s request for a *denial* without prejudice could only have referred to the request for restitution to the County—which was, of course, the only restitution the prosecution had requested.

Judge Brown found the County was not a “direct victim” and, as stated in the court’s minute order, ordered “[r]estitution to the County DENIED, without prejudice.” This was not a final order the prosecution was required to appeal; it was the denial of a motion, without prejudice to further consideration.

Moreover, Judge Schafer did not alter the only decision Judge Brown made—that the County was not a “direct victim” within the meaning of section 1202.4. Judge Schafer explained, “Were it left to me, I would conclude that the County is, in fact, a direct victim, surrogate to the people of the entire county who, in my view, are the victims; but a Superior Court judge does not sit as an appellate court of other Superior Court judges, so I base my ruling, the order I’m about to make, based upon the rehabilitative and deterrent effect of restitution orders” As we have discussed, the “direct victim” requirement of section 1202.4 is not a part of section 1203.1. Judge Schafer did not “overrule” Judge Brown. Instead, he respected Judge Brown’s ruling and, pursuant to Judge Brown’s reservation of jurisdiction over the issue of restitution, ordered restitution under the authority of section 1203.1, which there is no indication Judge Brown considered when he denied restitution to the County.²⁴

²⁴ It may be noted that while he ultimately found the County was not entitled to restitution as a direct victim under section 1202.4, Judge Brown clearly shared Judge Schafer’s view of the harm caused by appellant’s conduct. At sentencing, Judge Brown discussed at length the harm done “in a broad sense to the citizens and voters of this

DISPOSITION

The judgment is affirmed insofar as it requires appellant to pay restitution of \$150,000 to the County. The judgment must be modified, however, to specify a mechanism to be implemented in order to ensure the funds are spent exclusively for preparation of the EIR or for other action necessary to rectify the consequences of the illegally created subdivision. The matter is remanded for further proceedings and modification of the judgment as described herein.

Kline, P.J.

We concur:

Richman, J.

Miller, J.

community. You have to kind of wonder if people were permitted to simply do whatever they wanted to do with their property, what the County would look like.” One of the reasons the judge gave for denying appellant’s motion to reduce the offense to a misdemeanor was that a “primary purpose” of the proceeding was “securing restitution. Making the community in the general sense whole.”