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State and Local Government

*by Daryl J. McKinstry**

Municipal Corporations

Legislative Authority

Does the publisher of a newspaper have a right under the First and Fourteenth Amendments of the United States Constitution to place a newspaper on private premises without the consent of the residents? Pacific Grove's city council did not think so; the reason advanced was that a collection of newspapers on the property of an absent owner might tend to attract persons with dissolute or criminal propensities. The court in *Di Lorenzo v. City of Pacific Grove*[1] expressed its agreement by upholding the council's ordinance prohibiting

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1. 260 Cal. App.2d 68, 67 Cal. Rptr. 3 (1968). For a further discussion of this case, see Leahy, CONSTITUTIONAL LAW.

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such unsolicited newspaper deliveries. Although the court conceded that the ordinance could not prohibit deliveries to which an occupant consented, it held that the ordinance did not violate any constitutional rights of the distributor, since it was narrowly drawn to prevent a specific evil which the council found to exist.

In another case dealing with newspapers, *Long v. City of Anaheim*,[2] the court decided that the newspaper *Weekly People* was a non-commerical, non-profit, purely political publication under the court's interpretation of the ordinances of Anaheim and Garden Grove and that the publication thus came under exemptions of non-profit organizations contained in the ordinance.

A city council has the duty of setting salaries of municipal employees. While the legislative body must resolve the fundamental issues as to such matters, the court in *Kugler v. Yocum*[3] held that established legislation is not rendered invalid as an unlawful delegation of power merely because some other entity, private or governmental, performs a role in application or implementation of the enactment. A proposed ordinance of the City of Alhambra, in the form of an initiative measure, provided that its firemen be entitled to receive as a minimum salary the average salary among members of the fire departments of the City and County of Los Angeles. The court found that this ordinance would not if enacted unlawfully delegate the power to fix future minimum salaries for Alhambra's firemen to the legislative bodies of the City and County of Los Angeles.

In *People v. Mason*,[4] the court held that, since sections 330.5 and 330(b) of the Penal Code exempt from state regulation pinball machines that are predominantly games of skill, a local ordinance making possession of a pinball machine illegal is valid if the machine qualifies as a game of skill. Whether or not a particular machine so qualifies is a factual

2. 255 Cal. App.2d 191, 63 Cal. Rptr. 56 (1967).

3. 69 Cal.2d 371, 71 Cal. Rptr. 687, 445 P.2d 303 (1968).

4. 261 Cal. App.2d 348, 68 Cal. Rptr. 17 (1968).

determination to be made in each case.[5] The appellant contended that because the state legislation exempts such machines its intent was to make their possession legal, and that any attempt by the City of Santa Fe Springs to regulate them violates the California Constitution. The court concluded that the legislative scheme was not intended to encompass all types of pinball machines and that machines not included are subject to local legislation.

Conflict of Interests

In *Millbrae Association for Residential Survival v. City of Millbrae*,[6] dealing primarily with procedural steps in rezoning lands under provisions of the Government Code,[7] the court was faced with an alleged conflict of interest prohibited by the Code.[8] This section prohibits certain officers and employees from being interested in contracts made in their official capacity. The court stressed the importance of broadly construing the word "made" to encompass such embodiments as preliminary discussions, negotiations, compromises, reasoning, planning, the drawing of plans and specifications, and the solicitation of bids. The court stated that no evidence was found that the city engineer, the employee in question, ever participated officially in the making of any of the contracts in dispute. Additionally, the court said it was unnecessary to show fraud or dishonesty for invalidating contracts coming within this section.

In *Gonsalves v. City of Dairy Valley*,[9] the city council granted a special use permit to a dairymen's cooperative to allow the stockpiling of fertilizer. Each of the five city councilmen were stockholders in the cooperative. The court pointed out that although an action by an administrative body that is arbitrary, capricious or fraudulent is void and subject to annulment, the fact that the councilmen owned stock in

5. See Knowles v. O'Connor, 266 Cal. App.2d —, 71 Cal. Rptr. 879 (1968).

6. 262 Cal. App.2d 222, 69 Cal. Rptr. 251 (1968).

7. Gov. Code §§ 65800–65805.

8. Gov. Code § 1090.

9. 265 Cal. App.2d —, 71 Cal. Rptr. 255 (1968).

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Cal Law Trends and Developments, Vol. 1969, Iss. 1 [1969], Art. 9

the applicant cooperative did not render their action arbitrary, capricious or fraudulent. It is well settled that where an administrative body has the duty to act upon a matter before it and is the only entity capable to act upon it, the members' personal interest does not disqualify them from performing their duty.[10] [No discussion of section 1090 of the Government Code arose since no argument was made that the special use permit constituted a *contract*.]

Retirement and Pension

Cases concerning retirement and pensions of public employees often deal merely with statutory construction of provisions relating to such matters in charters or ordinances. These cases are not considered important. The general rule is that pension provisions must be liberally construed in favor of the persons benefited by them.

The court in *Pathe v. City of Bakersfield*[11] decided that a city is authorized to retire an employee found to be physically or mentally incapacitated for the performance of duty, notwithstanding an Industrial Accident Commission finding that the employees suffered from no service-connected disability. It is well settled that where a city charter provision relating to retirement compensation conflicts with the compensation sections of the Labor Code, the Code sections must prevail. In *Pathe,* the jurisdiction of the Industrial Accident Commission overlapped the subject matter jurisdiction of the city pension board on the single issue of whether or not an injury or disability was service connected. But the court held that the pension board did not lose its inherent power to retire a city employee found to be incapacitated for the performance of his duty simply because the Industrial Accident Commission determined that the injury was not service connected. The rationale of the decision was that a charter provision allowing the city to retire an employee so incapacitated and a determination of whether or not the disability is service connected do not invade the province of the Workmen's Compensation

10. See Barnett v. Brizee, 258 Cal. App.2d 97, 65 Cal. Rptr. 493 (1968).

11. 255 Cal. App.2d 409, 63 Cal. Rptr. 220 (1967).

Law; the charter provision may merely add compensation benefits to employees who are compelled to retire for service connected disabilities.

The assignability of retirement funds was considered in *City of San Jose v. Forsythe.*[12] A section of the municipal code stated that money in an employee's retirement fund was unassignable. An employee had given a power of attorney to the county credit union in order to borrow money from the union. After the borrower had left city employment, the credit union demanded the accumulated contributions in his retirement fund. The court held that the credit union was not entitled to the money in the fund[13] because California law[14] favors the enforcement of regulations protecting retirement benefits from the claims of creditors.

Counties

County Service Areas

The question presented in *Byers v. Board of Supervisors*[15] was whether the maintenance and operation of a television translator station was authorized under the provisions of the County Service Area Law found in sections 25210.1 et seq. of the Government Code. Since the operation and maintenance of a television translator station is not expressly provided for in the County Service Area Law, the court had to decide whether or not such a function would qualify as an "extended service" that the county would be authorized by law to perform.[16] The county argued that establishment of the county service area was a legislative act, not to be disturbed by the court. The court cited *Marbury v. Madison,*[17] in which

12. 261 Cal. App.2d 114, 67 Cal. Rptr. 754 (1968).

13. Compare McDaniel v. City & County of San Francisco, 259 Cal. App. 2d 356, 66 Cal. Rptr. 384 (1968), where it was held that funds in a retirement system claimed by an employee after suspension could be attached and paid into court.

14. See Thomas v. Thomas, 192 Cal. App.2d 771, 13 Cal. Rptr. 872 (1961). See also Lande v. Jurisich, 59 Cal. App. 2d 613, 139 P.2d 657 (1943).

15. 262 Cal. App.2d 148, 68 Cal. Rptr. 549 (1968). For a further discussion of this case, see Friedenthal, CIVIL PROCEDURE.

16. See Gov. Code § 25210.4(d).

17. 1 Cranch (U.S.) 137, 2 L.Ed. 60 (1803).

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Mr. Justice Marshall contended that a legislature's act is void if it is beyond the legislature's power and that the judiciary is bound to uphold the limited grant of power by disregarding the legislative act. Finding no law authorizing the county to provide television translator service, the court in *Byers* said that if the board of supervisors is to be granted power to create districts for television translator stations, the state legislature should make this grant in specific terms.

Secret Meeting Law

Sacramento Newspaper Guild v. Sacramento County Board of Supervisors[18] contains a comprehensive analysis of the provisions of the Brown Act, found in sections 54950 et seq. of the Government Code. The decision is particularly important to attorneys representing public agencies because the court discussed the possible conflict of the provisions of the Brown Act with the attorney-client privilege under the Evidence Code.

The controversy in *Sacramento Newspaper Guild* centered upon a preliminary injunction restraining the Sacramento County Board of Supervisors and its committees from holding any closed meetings at which three or more members were present (provided the statutory exceptions for personnel and national security matters as set forth in the Government Code did not apply). Provoking the injunction was a luncheon meeting of five supervisors, the county counsel, the county executive, the county director of welfare, and several union members. The subject of discussion was a strike by the social workers union against the county and the effort by the county to enforce an injunction pertaining to the strike. Newspaper reporters were denied admission.

The decision settled an important question—does the Brown Act apply only to formal meetings of a public body held for the transaction of official business or does it also apply to informal meetings? In *Adler v. City Council of Culver City*,[19] it was held that the Brown Act did not apply to informal

18. 263 Cal. App.2d 41, 69 Cal. Rptr. 480 (1968).

19. 184 Cal. App.2d 763, 7 Cal. Rptr. 805 (1960).

meetings. Although the Attorney General had issued an opinion[20] stating that the 1961 amendments to the Brown Act nullified the *Adler* decision, the court in *Sacramento Newspaper Guild* resolved any doubt by expressly overruling *Adler*. It pointed out that section 54950 declares that deliberation as well as action must occur openly and publicly and that deliberation connotes not only collective discussion, but also the collective acquisition and exchange of facts preliminary to the ultimate decision. Thus, the term "meeting" construed in light of the Brown Act's objectives extends to informal discussions and conferences of board members designed for the discussion of business. Concluding that the luncheon meeting in this case was such a meeting, the court upheld the injunction.

Significantly, the court stated that the attorney-client privilege[1] was not abrogated by the Brown Act. To reach this conclusion the court had to reconcile provisions of the Brown Act demanding open meetings and those of the Evidence Code assuring confidential lawyer-client communications. The court recognized that these statutes manifest separate policies and, also, that neither expressly refers to the other as controlling. Nevertheless, the court had to answer the question whether the language of the Brown Act impliedly superseded the attorney-client privilege, since the Act was passed subsequent to the statutory recognition of the privilege. In resolving this issue, the court pointed out that the policy underlying the attorney-client privilege is as meaningful and as financially important to public clients as it is to private ones. The court concluded that the Act did not abolish the opportunity of boards of supervisors to confer privately with their attorneys on occasions properly requiring confidentiality, but it warned that the privilege should not be expanded beyond its proper scope to avoid public meetings. In keeping with its conclusion, the appellate court modified the trial court's injunction to allow closed meetings when the attorney-client privilege obtains.

20. 32 Ops. Cal. Atty. Gen. 240, 242.

1. See Cal. Evid. Code § 952.

Grand Jury

In *Board of Trustees of Calaveras School District v. Leach,*[2] the question before the court was whether or not a grand jury is entitled to inspect the personnel records of a school district pursuant to an inquiry other than the willful or corrupt misconduct of any public officer. The grand jury relied upon section 933.5 of the Penal Code which provides, "[A] grand jury may at any time examine the books and records of any special purpose assessment or taxing district located wholly or partly in the county". The court held that the grand jury was not entitled to examine the school district's personnel records because section 933.5 limits the grand jury's investigation to only the financial affairs of a district when it investigates matters other than public offenses or misconduct.

Legislative Authority

In *Cooper v. Michael,*[3] the court examined a county ordinance requiring auctioneers to obtain a business license. After noting that section 16100 of the Business and Professions Code authorizes a board of supervisors to license any kind of lawful business only for the purpose of regulating it, the court held that the ordinance's purpose was to raise revenue, not to regulate conduct, and that the ordinance therefore violated section 16100. (This statutory prohibition does not extend to cities.)

Care of Prisoners

Where an arrest is made by a city police officer of a person charged with murder and the accused requires medical attention, who has the obligation to pay for the medical treatment? This was the question in *Washington Township Hospital District v. County of Alameda.*[4] The person arrested was taken by a police officer to plaintiff hospital for medical treat-

2. 258 Cal. App.2d 281, 65 Cal. Rptr. 588 (1968).

3. 257 Cal. App.2d 176, 64 Cal. Rptr. 842 (1967).

4. 263 Cal. App.2d 272, 69 Cal. Rptr. 442 (1968).

ment and was later transferred to Alameda County Hospital. Plaintiff brought an action for declaratory relief on the ground that the county was liable for the cost of the accused's medical treatment. In construing section 29602 of the Government Code,[5] the court held that the county was liable for its emergency treatment of the prisoner since this treatment constituted "other services," in relation to criminal proceedings brought by the county, for which no compensation was prescribed by law.

Employee Relations

Schools and School Districts

In *Board of Trustees v. Porini,*[6] the court held that when suspension and notice of intention to dismiss are based upon incompetency due to a mental disability, the school district must prove that the teacher is incompetent *at the time of trial.* Although the court found that there was substantial evidence showing that the teacher was mentally disabled at the time she was suspended, the evidence was insufficient to show that the teacher was incompetent at the time of trial. Appellant had last consulted with respondent's psychiatrist 13 months before trial, and for this reason the respondent could not offer evidence of any change in the appellant's mental condition. However, the appellant had been seeing her own psychiatrist for some months prior to the time of trial, and was able to introduce evidence of her continued improvement based on current observations.

The court stated that the school district must show either that the disability was permanent or that it had lasted over two years. The lesser showing is permitted by Education Code

5. § 29602. Expenses of support of persons committed to county jail, rehabilitative programs, and other services relating to criminal proceedings.

The expenses necessarily incurred in the support of persons charged with or convicted of crime and committed to the county jail and the maintenance therein and in other county adult detension facilities of a program of rehabilitative services in the fields of training, employment, recreation, and prerelease activities, and for other services in relation to criminal proceedings for which no specific compensation is prescribed by law are county charges.

6. 263 Cal. App.2d 784, 70 Cal. Rptr. 73 (1968).

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Cal Law Trends and Developments, Vol. 1969, Iss. 1 [1969], Art. 9

section 13437,[7] which allows a two-year leave of absence in lieu of dismissal. In addition, the court noted that where the judgment grants a leave of absence, the school board has the burden of proving continued incompetency at the end of the two-year period in order to obtain the dismissal of a teacher. Finally, the court held that the statutory prohibitions against giving a teacher a notice of dismissal between May 15 and September 15[8] does not apply where the law authorizes suspension of a teacher as a prelude to dismissal.

In *Hutton v. Pasadena City Schools,*[9] a school custodian was suspended without pay after being charged with child molesting. He was dismissed after his conviction, but the conviction was reversed and he was found not guilty at a new trial. The superintendent of the school district sent the custodian a letter expressing a willingness to pay him for the period of this suspension if the district was authorized to do so. To determine the district's authorization, the custodian brought an action for declaratory relief. The court conceded that the district had the authority, in adopting its rules and regulations concerning benefits of classified personnel, to allow such a payment; but since there was no such rule in force when the employee was suspended, the school district could not now adopt a rule applying retroactively to him. To do so, the court said, would be making a gift of public money, contrary to the California Constitution.[10]

Cities and Counties

The legislature amended sections 3500 et seq. of the Government Code, effective January 1, 1969. It is anticipated

7. § 13437. Leave of absence due to incompetency.

If the cause is incompetency due to physical or mental disability, in lieu of dismissal the judgment may require the employee to take a leave of absence for only such period as may be necessary for rehabilitation from the incompetency. The leave of absence shall not exceed two years. During the leave of absence, the employee shall be entitled to the benefits authorized by this code to employees of school districts absent from their duties on account of sickness.

8. See Cal. Ed. Code § 13405; See also §§ 13408, 13410.

9. 261 Cal. App.2d 586, 68 Cal. Rptr. 103 (1968).

10. See California Constitution, Article XIII, Section 25.

that the amendments will have a significant impact upon relationships between public employees and public agencies. Basically, these changes require public agencies to confer in good faith with representatives of recognized employee organizations and to fully disclose to employees matters respecting wages, hours, and other terms of employment.

Planning and Zoning

Billboards and Outdoor Advertising

Billboards and esthetics as well as the Outdoor Advertising Act[11] were considered in *Desert Outdoor Advertising v. County of San Bernardino.*[12] The court cited *County of Santa Barbara v. Purcell, Inc.*,[13] holding that the presence of billboards along a highway could reasonably be believed to have an adverse effect on the economy of a county. Therefore, billboards may be controlled by ordinance, notwithstanding the fact that control of billboards is based, in part, upon esthetic considerations. In *Desert Outdoor Advertising,* there was evidence that the lack of billboards along freeways not only kept the county beautiful but also attracted tourists and industries to the country, thus conferring economic benefit. According to the court, the evidence was sufficient to put the case within the rule of *County of Santa Barbara v. Purcell.* The court also held that the Outdoor Advertising Act has not preempted the field as to all aspects of outdoor advertising in unincorporated county areas: counties still have the power to regulate billboards and outdoor advertising by zoning ordinances.[14]

In *West Coast Advertising Company v. City & County of San Francisco,*[15] petitioner sought approval from the city zoning administrator to erect a billboard on his property, which was adjacent to a freeway. The application for a permit was denied and the petitioner appealed to the Board of Permit

11. Cal. Bus. & Prof. Code, §§ 5200 et seq.

12. 255 Cal. App.2d 765, 63 Cal. Rptr. 543 (1967), app. dismd. 393 U.S. 8, 21 L.Ed.2d 10, 89 S.Ct. 45.

13. 251 Cal. App.2d 169, 59 Cal. Rptr. 345 (1967).

14. See Cal. Bus. & Prof. Code § 5227.

15. 256 Cal. App.2d 357, 64 Cal. Rptr. 94 (1967).

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Appeals, which overruled the zoning administrator. When the latter refused to comply with the board's order, the petitioner filed an application for a writ of mandate.

At the hearing on the application, all parties knew the city was considering an ordinance that would prohibit billboards on property adjacent to freeways. The lower court granted the writ of mandate. However, on the following day the proposed new ordinance was signed. Petitioner contended that the writ was properly issued since the new ordinance did not become effective until thirty days after the court below entered its order and that he therefore had a vested right in the building permit.

In ruling against the petitioner, the appellate court pointed out that even a permit which has received administrative finality can be revoked on the basis of a subsequent change in the zoning laws and that the permittee is immune from such retroactive application *only* if he constructs a substantial portion of the structure, as authorized by the permit, in good faith reliance upon prior law. In this case, there was no evidence that any substantial construction had been commenced; in fact, the permit had not even been issued.

Variances and Conditional Use Permits

In *Tush v. Board of Supervisors,*[16] the court affirmed the well settled rule that where specific findings are necessary to support the grant of a conditional use permit or variance, the findings must be recited in the ultimate decision of the governing body.

In *Moss v. Board of Zoning Adjustment,*[17] respondents owned a three-acre parcel that was zoned for residential purposes in San Fernando Valley. Respondents filed an application for a zoning variance with the zoning administrator to permit construction of a motel complex, including restaurant, coffee shop, cocktail lounge, and automobile service station. The zoning administrator denied respondent's application for a variance.

16. 262 Cal. App.2d 279, 68 Cal. Rptr. 505 (1968).

17. 262 Cal. App.2d 1, 68 Cal. Rptr. 320 (1968).

The city charter authorized the zoning administrator to grant a variance, provided that he make 4 enumerated findings in writing.[18] Additionally, the charter empowered a board of zoning adjustment to hear and determine appeals from rulings of the zoning administrator, subject to the same requirements with respect to findings. In considering an appeal from a ruling of the administrator, the board requested its secretary to prepare findings, which were to be presented at a future board meeting for granting the appeal and to set forth the conditions as shown in the record. The secretary prepared the necessary findings for granting the appeal, but the findings were never adopted by the board. At a later meeting, additional testimony was taken on the appeal; after a motion was made and seconded to grant the appeal, it failed to pass.

The lower court issued a peremptory writ of mandate compelling the board to execute, file, and distribute its findings as prepared by the secretary. The appellate court reversed, pointing out that even assuming the board intended to grant the variance, mandate was not the proper remedy, for the board failed to comply with the statutory requirements—the formalization of the findings required for grant of a variance. Again, the court asserted that where findings are required before the issuance of a conditional use permit or variance, they *must* be made.

In *Mid-Way Cabinet Fixture Manufacturing Company v. County of San Joaquin,*[19] a use permit was conditioned upon the applicant conveying certain property to the county for

18. Cal. Stats. 1957, ch. 274, § 98, pp. 4676–4677. The findings are (a) that the strict application of the zoning regulations or requirements would result in practical difficulties or unnecessary hardships inconsistent with the general purposes and intent of the regulations, (b) that there are exceptional circumstances or conditions applicable to the property involved or to the intended use or development of the property that do not generally apply to other property in the same zone or neighborhood, (c) that the granting of a variance will not be materially detrimental to the public welfare or injurious to property or improvements in such zone or neighborhood in which the property is located, (d) that the granting of a variance will not be contrary to the objectives of the Master Plan.

19. 257 Cal. App.2d 181, 65 Cal. Rptr. 37 (1967).

construction of a road. The basis for the condition was that if the use permit was granted, it would substantially increase the vehicular traffic and thereby necessitate a road. At the trial no testimony was taken: the trial judge relied solely on the evidence introduced before the planning commission. The judge determined that traffic would be increased and therefore concluded that the condition was valid. The appellate court, in reviewing the record, found no evidence that there would be any appreciable increase in traffic and held that the condition was arbitrary and not a legitimate exercise of police power. Citing *Gong v. City of Fremont,*[20] the court recognized that conditions may be imposed on the grant of a use permit, and that the courts have no authority to interfere with the denial of a variance or use permit except on a clear, convincing showing of fraud, illegality, or abuse of discretion. Nevertheless, it thought the lower court had abused its discretion. The appellate court's ruling is interesting in that it reversed the judgment with directions to the trial court to issue a peremptory writ of mandate compelling the defendant county to issue the use permit without the invalid conditions rather than directing the trial court to take evidence on the question of increased traffic flow and the necessity of constructing a road. In effect, the appellate court ruled on the factual issue of whether the permit would result in an increase in traffic and concluded that it would not and that nothing could be developed in an evidentiary hearing that would show otherwise.

Schools

Student Conduct

Although a male teacher has the constitutional right to wear a beard,[1] the court in *Akin v. Riverside Unified School District Board of Education*[2] held that this right does not extend to

20. 250 Cal. App.2d 568, 58 Cal. Rptr. 664 (1967). Discussed in *Cal. Law—Trends and Developments* (1967) at p. 445.

1. See Finot v. Pasadena City Board of Education, 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967).

2. 262 Cal. App.2d 161, 68 Cal. Rptr. 557 (1968).

male high school students. The court cited the criteria established in *Bagley v. Washington Township Hospital District,*[3] as necessary to allow a governmental agency to impose restrictions on the exercise of an individual's constitutional rights. As stated in *Bagley,* the governmental agency must show the following: (1) the government's restraint rationally relates to the enhancement of the public service; (2) the benefits the public gains by the restraint outweigh the resulting impairment of the constitutional right; (3) no alternative less subversive of the constitutional right is available. After reviewing the testimony introduced at the trial, the court held that in applying the *Bagley* formula, an "alternative less subversive" of the petitioner's right to grow a beard did not appear to be available. The evidence upon which the court relied tended to show that the wearing of mustaches, by male students had a disruptive influence in the educational process. In addition, the improved educational atmosphere created by an absence of beards was thought to outweigh by far the restraint on the "peripheral right" to grow a beard. Confronted with this evidence, the court concluded the school board had no other course available.

Liability of Public Entities or Agencies

Filing of Claims

In *Fonseca v. City of Santa Clara,*[4] plaintiff argued that a minor's cause of action arising in 1950, not recognized at that time because of the doctrine of sovereign immunity existing prior to the decision of *Muskopf v. Corning Hospital District,*[5] could not fall within the provisions of the claim statutes then in effect. Plaintiff filed her complaint in September, 1964, for an injury that occurred in July, 1950, when she was a minor. In July, 1964, a claim was filed with the County of Santa Clara. It was denied in August. The county relied

3. 65 Cal.2d 499, 55 Cal. Rptr. 401, 421 P.2d 409 (1966). Discussed in *Cal. Law—Trends and Developments* (1967) at pp. 338–342, 438.

4. 263 Cal. App.2d 257, 69 Cal. Rptr. 357 (1968).

5. 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961) modified on other grounds 57 C.2d 488.

on the provisions of sections 29700 et seq. of the Government Code, as those sections existed in 1950, to support the contention that a claim had to be filed. The court held that the action was barred because no claim was filed pursuant to provisions of the Code as they existed in 1950 and because there was nothing in subsequent legislation or in court decisions that would relieve the plaintiff from failure to file such a claim. The court noted that even a minor must present a claim within the period provided by law as a condition precedent to the accrual of a cause of action, citing *Williams v. Los Angeles Transit Authority*.[6]

A government entity's notice or knowledge of an accident does not excuse the failure of the claimant to file a timely claim as required by statute. Still, a claimant might assert estoppel as an excuse. In this connection, the court, in *Petersen v. City of Vallejo*,[7] held that in order to claim estoppel as an excuse for the failure to file a claim, there must be some affirmative representation or act by the public agency inducing reliance by the claimant.

Filing of Complaints

Section 945.6 of the Government Code provides that any suit brought against a public entity on a cause of action for which a claim must be presented should be commenced within 6 months after the date the claim was acted upon or was deemed to have been rejected by the public entity. Although the parties in *Isaacson v. City of Oakland*[8] negotiated for a settlement, no compromise settlement was made. The trial court thought that the city had compromised the claim pursuant to the provisions of section 912.6 (a)(4).[9] It reasoned that since negotiation is necessary to compromise, the city, by negotiating, was compromising the claim pursuant to sec-

6. 68 Cal.2d 599, 68 Cal. Rptr. 297, 440 P.2d 497 (1968).

7. 259 Cal. App. 2d 757, 66 Cal. Rptr. 776 (1968).

8. 263 Cal. App.2d 414, 69 Cal. Rptr. 379 (1968).

9. § 912.6(a)(4), providing that if legal liability of the public entity or the amount justly due is disputed, the board may reject or compromise the claim.

tion 912.6. The court concluded that the claim must be deemed rejected when the negotiations ended and that the filing of the complaint was therefore timely. The court found, however, that section 912.6 cannot properly be construed as equating negotiation with compromise and in the absence of a written agreement extending the time to act on a claim, the statute of limitations commences to run not later than 45 days after the filing of the claim.

In *Williams v. Los Angeles Metropolitan Transit Authority*,[10] the plaintiff, a minor, filed a timely claim with the defendant, who rejected it. He filed complaint over six months after the rejection. Section 945.6 of the Government Code, as it then read, required that suit be commenced within 6 months after a claim was rejected or deemed rejected by inaction of the governing board. The supreme court held that section 352 of the Code of Civil Procedure[11] preserves causes of actions of minors against the running of the statute of limitations and that nothing in section 945.6 abrogates that section or the public policy underlying it. The court concluded that a minor is required to file a claim with the public agency within the specified time requirements, but is not required to file suit within the limitation period provided by section 945.6.

When a complaint against a public employee is filed in a federal court sitting in the State of California, the complaint must allege compliance with the California Tort Claims Act.[12] The court in *Williams v. Townsend*,[13] asserted it to be a well established rule that where Congress failed to provide a period of limitations within which an action must be brought

10. 68 Cal.2d 599, 68 Cal. Rptr. 297, 440 P.2d 497 (1968).

11. § 352. Exception, as to persons under disabilities.

If a person entitled to bring an action, mentioned in chapter three of this title, be, at the time the cause of action accrued, either:

1: Under the age of majority; or,

2. Insane; or,

3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life; or,

4. A married woman, and her husband be a necessary party with her in commencing such action;

the time of such disability is not a part of the time limited for the commencement of the action.

12. Gov. Code § 950.2.

13. 283 F.Supp. 580 (D.C. [1968]).

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under the Federal Civil Rights Act,[14] the statute of limitations of the state where the cause of action arose is applied.

Estoppel

In *Denham v. County of Los Angeles,*[15] a claim was filed with the board of supervisors on November 16, 1964. The board argued that the claim should have been "deemed rejected" on December 31, 1964 (45 days after the claim was filed) by virtue of section 912.4 of the Government Code.[16] However, the board, on January 12, 1965, denied the claim and advised the defendant of this action by letter. The plaintiff thereupon filed his complaint. The county contended that the plaintiff was 9 days too late and the trial court agreed with this contention. The appellate court, in reversing the judgment and order of dismissal, pointed out that the board of supervisors, in reconsidering the claim on January 12, 1965, manifested an intent to waive its right to stand on a rejection by operation of law and an intent to rely on its later affirmative order of rejection. The court pointed out that the county embarked upon a course of conduct entirely inconsistent with treating the claim as rejected by inaction and thereby brought into play elements necessary to create an

14. 18 U.S.C.A. §§ 837, 1509, 20 U.S.C.A. §§ 241, 640, 42 U.S.C.A. §§ 1971, 1974–1974e, 1975d.

15. 259 Cal. App.2d 860, 66 Cal. Rptr. 922 (1968).

16. § 912.4 Board's action on claim: Time.

(a) The board shall act on a claim in the manner provided in section 912.6 or 912.8 within 45 days after the claim has been presented. If a claim is amended, the board shall act on the amended claim within 45 days after the amended claim is presented.

(b) The claimant and the board may extend the period within which the board is required to act on the claim by written agreement made:

(1) Before the expiration of such period; or

(2) After the expiration of such period if an action based on the claim has not been commenced and is not yet barred by the period of limitations provided in section 945.6.

(c) If the board fails or refuses to act on a claim within the time prescribed by this section, the claim shall be deemed to have been rejected by the board on the last day of the period within which the board was required to act upon the claim. If the period within which the board is required to act is extended by agreement pursuant to this section, whether made before or after the expiration of such period, the last day of the period within which the board is required to act shall be the last day of the period specified in such agreement.

equitable estoppel. Citing *Driscoll v. City of Los Angeles,*[17] the court set forth the four elements necessary for applying the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts, (2) he must intend that his conduct shall be acted upon or so act that the party asserting the estoppel had a right to believe it was so intended, (3) the other party must be ignorant of the true facts, and (4) he must rely upon the conduct to his injury. The court in *Denham* found that these four elements were proven by the plaintiff.

Liability for Dangerous Condition of Public Property

Unless a public agency has the legal authority to remedy a dangerous condition, it cannot be held liable for injuries caused by the condition. In *Avey v. County of Santa Clara,*[18] plaintiffs argued that the county should have installed a barricade to prevent children crossing from a bus stop to a store on the opposite side of 2 highways. The highways were separated by an island; one was owned by the state and the other by the defendant county. Plaintiffs contended that the dangerous condition was not limited to state property. The court held against the plaintiffs because they did not point out the type of barricade that was necessary and that would not interfere with the public right to enter the store, park vehicles, and use the adjacent curbs and sidewalk. The court concluded that section 835 of the Government Code[19] did not require the barricade.

17. 67 Cal.2d 297, 61 Cal. Rptr. 661, 431 P.2d 245 (1967).

18. 257 Cal. App.2d 708, 65 Cal. Rptr. 181 (1968).

19. § 835. When public entity liable for injury caused by dangerous condition of property: Requisite showing by plaintiff: Employee's negligent or wrongful act: Actual or constructive notice.

Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or

Another contention by the plaintiffs was that the defendants should have sought the state's consent to remove or shorten obscuring foliage on the island. The court answered this contention by saying that defendant's failure to ask the state for permission was not a breach of duty because it was under no duty to correct the condition.

In *Holmes v. City of Oakland,*[20] the court reversed a judgment of dismissal after a demurrer was sustained without leave to amend. The court held that a cause of action was stated where it was alleged that an unguarded railroad operation on a city street near a grammar school created a substantial risk of injury to children using the street. The court determined that the railroad crossing was under the control of the city, thereby distinguishing the *Avey* case.

The court in *Drummond v. City of Redondo Beach,*[1] held that a defect in a public street located off the usually traveled portions of a highway is not a condition that may be considered "dangerous" under the definition of that term found in section 830(a) of the Government Code.[2]

Discretionary Immunity

During the investigation of an automobile accident, a police officer employed by the City of Los Angeles and, at the officer's request the plaintiff, were in the middle of an intersection looking for skidmarks and other physical evidence when they were struck by an automobile. The city, in *McCorkle v. City of Los Angeles,*[3] appealed from an adverse judgment. It contended that the police officer was perform-

constructive notice of the dangerous condition under section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

20. 260 Cal. App.2d 378, 67 Cal. Rptr. 197 (1968).

1. 255 Cal. App.2d 715, 63 Cal. Rptr. 497 (1967).

2. § 830. "Dangerous condition": "Protect against": "Property of a public entity" and "public property."

As used in this chapter:

(a)"Dangerous condition" means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.

3. 265 Cal. App.2d —, 1 Cal. Rptr. 331 (1968).

ing a discretionary act, namely, the investigation of an automobile accident, and argued that section 820.2[4] of the Government Code exonerated the city from liability. The court pointed out that an act is ministerial if it consists only of obedience to orders or the performance of a duty in which the officer is left no choice of his own, and that an act is discretionary if it requires personal deliberation, decision and judgment. In citing *Sava v. Fuller*,[5] the court reasoned that classifying an act of a public employee as discretionary does not produce immunity if the injury results not from the employee's exercise of discretion vested in him to undertake the act, but from his negligence in performing the act after having made the discretionary decision to do so. Since the officer was negligent after the exercise of his discretion to investigate the accident, he was not immune from liability under section 820.2. Consequently, the city was not immune under section 815.2(b).[6]

In *Johnson v. State of California*,[7] plaintiff was assaulted by a boy released from the California Youth Authority to live in the plaintiff's foster home. The defendant knew that the boy had homicidal tendencies and a background of violence but did not disclose these facts to the plaintiff. The court held that the decision to parole the particular youth and the selection of a foster home are matters falling within the discretionary immunity section of the Government Code. It follows, the court stated, that the decision not to inform a prospective foster parent of certain tendencies of the ward must also be sheltered by immunity. The court reasoned that if homicidal tendencies must be disclosed, it might be impossible to draw the line between violent tendencies and others that might be of interest to prospective parents. The court

4. § 820.2 When employee not liable: Exercise of discretion.

Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

5. 249 Cal. App.2d 281, 57 Cal. Rptr. 312 (1967).

6. See also Widdows v. Koch, 263 Cal. App.2d 228, 69 Cal. Rptr. 464 (1968), for a further discussion of discretionary and ministerial acts.

7. 258 Cal. App.2d 65, 65 Cal. Rptr. 717 (1968) hearing granted 258 A.C.A.

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also pointed out that every decision to parole and place a parolee in a home could possibly result in a law suit if the court should hold to the contrary.

Liability for Acts of Independent Contractors

In *Van Arsdale v. Hollinger,*[8] an independent contractor violated his contract with the city by failing to construct barricades and warning devices on a street reconstruction project. The primary issue was the city's liability to a person injured as a result of this failure. The court found the answer in the tort liability provisions of section 815.4 of the Government Code,[9] in spite of the city's contractual delegation of responsibility. The court ruled that the undisputed facts showed that a risk of physical harm was likely without the safety precautions and concluded that this likelihood imposed on the city a nondelegable duty of care.

Eminent Domain

Inverse Condemnation

In *Sutfin v. State of California,* [10, 11] the court was faced with the question of whether damage to personal property was compensable on the theory of inverse condemnation where flooding had occurred from waters controlled by a flood control district and caused damage to automobiles owned by plaintiff. The plaintiff contended that the damage to his personal property was compensable under Article I, Section 14 of the State Constitution, which provides, in part, ". . . Private property shall not be taken or damaged for public use without just compensation having first been made to, or

353. See 69 Cal.2d —, 73 Cal. Rptr. 240, 447 P.2d 352 (69 A.C. 813) (1968).

8. 68 Cal.2d 245, 66 Cal. Rptr. 20, 437 P.2d 508 (1968).

9. § 815.4 Same: Tortious act or omission of independent contractor: Limitation.

A public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor of the public entity to the same extent that the public entity would be subject to such liability if it were a private person. Nothing in this section subjects a public entity to liability for the act or omission of an independent contractor if the public entity would not have been liable for the injury had the act or omission been that of an employee of the public entity.

10, 11. 261 Cal. App.2d 50, 67, Cal. Rptr. 665 (1968).

paid into court for the owner . . ." . The plaintiff argued that the phrase "public use" referred not to the property taken or damaged, but to the public project that caused the damage. The appellate court reversed the judgment of the trial court and allowed plaintiff to amend his complaint to determine if a cause of action in inverse condemnation could be stated. The court noted that in proper cases, there may be recovery for the taking or damaging of private property for public use whether the property is real or personal, stating that it was immaterial whether the property had been devoted to a public use. The distinction appears to be that in order to collect damages under inverse condemnation, it is necessary to show that the damage resulted from an inherent danger in the public operation (i.e., flooding, in this case) rather than as a result of negligence in the operation of a public project.

In *Colberg, Inc. v. State of California Ex Rel. Department of Public Works*,[12] the state proposed to build twin low-level freeway bridges across the mouth of an inlet that provided access between the Stockton Deep Water Channel and plaintiff's shipyards in the Upper Stockton Channel. The vertical clearance of these bridges would be approximately 45 feet above the water line. The plaintiff alleged that about 81 percent of its business involved ships standing more than 45 feet above the water line, and that the present minimum clearance between his shipyards and the Pacific Ocean is 135 feet, established by the Antioch Bridge.

The Supreme Court affirmed the lower court's decision that the impairment of access to the plaintiff's shipyards was not a "taking" or "damaging" of plaintiff's private property for which compensation was required within the meaning of Article I, Section 14 of the California Constitution. The court pointed out that the state, as owner of its navigable waterways, may act relative to those waterways in any manner consistent with the improvement of commerce and navigation. If the property of a private owner is consequently injured, the prop-

12. 67 Cal.2d 408, 62 Cal. Rptr. 401, 432 P.2d 3 (1967), cert. den. 390 U.S. 949, 19 L.Ed.2d 1139, 88 S.Ct. 1037.

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erty owner must, for the sake of the general welfare, yield with uncompensated obedience.

Justice Peters, joined by Justice Mosk, dissented with the contention that plaintiff's rights were substantially, not just technically, impaired and that the impairment was caused by the state not strictly to aid navigation but to improve a freeway and subsequent auto travel. It was pointed out in the dissent that had the freeway construction impaired land access to the same degree, such impairment would be compensable. The dissent reasoned that where the use by the state is not strictly for navigational purposes but, as here, for freeway purposes, the policies of compensation declared in the land access cases should apply.

Disputed Ownership

In an unusual situation where condemnor and condemnee both claimed title to land sought to be condemned, the court in *People Ex Rel. Department of Public Works v. Shasta Pipe & Supply Company,*[13] held that the rule set forth in *City of Los Angeles v. Pomeroy*[14] requires the condemnor to prove what its interest is in the property it seeks to condemn. The court found that the plaintiff had failed to set forth the nature and extent of its claim of ownership and that, assuming the defendants had satisfied this initial requirement by showing their color of title, payment of taxes, etc., the burden of going forward then shifted to the plaintiff and made it necessary for him to show the nature of his title. A new trial was ordered because the condemnor had failed to produce satisfactory evidence of title and the trial court had merely assumed that the condemnor owned the property in dispute.

Compensation

In *City of Los Angeles v. Allen's Grocery Company, Inc.,*[15]

13. 264 Cal. App.2d —, 70 Cal. Rptr. 618 (1968).

14. 124 Cal. 597, 57 P. 585 (1899), err. dismd. 188 U.S. 314, 47 L.Ed. 487, 23 S.Ct. 395.

15. 265 Cal. App.2d —, 71 Cal. Rptr. 88 (1968).

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the court affirmed the well established rule that the condemnor need only pay compensation for the property taken and not for every loss the condemnee may suffer as a result of the taking. The city sought to condemn property which the defendant had leased and was using as a grocery store. After some negotiations, the defendant gave the keys of the premises to the city but refused to move any removable items from the store. Defendant claimed damages for personal property on the ground that the city, by taking the real property and the attached fixtures, had forced him out of business and had consequently condemned the entire business. The court held that the city had condemned only the real property and that the loss of real property did not compel compensation for the stock in trade.

In *City of Whittier v. Aramian,*[16] the court was faced with the question of whether a dismissal of a condemnation suit by the condemnor was equivalent to an abandonment under section 1255a of the Code of Civil Procedure, which entitles defendants to their costs and attorneys' fees if an action in eminent domain is abandoned. Although the city was justified in this case, because of lack of funds, in dismissing the condemnation action, the court held that the dismissal constituted a voluntary abandonment even though the city expected to proceed with condemnation action at a future date.

Does the taking of property for an economic purpose violate Article I, Section 14 of the California Constitution on the basis that such a taking would not be for a "public use"? In *People Ex Rel. Department of Public Works v. Superior Court,*[17] the Department of Public Works required .65 acres of land for the construction of a freeway and brought an action in mandamus to compel the Superior Court to proceed with the condemnation of the parcel in question. This small portion was so located that 54 acres would be landlocked by the taking. The department argued that it should be allowed to condemn the entire parcel so the landowner would receive full value for the property and the risk of excessive sev-

16. 264 Cal. App.2d —, 70 Cal. Rptr. 805 (1968).

17. 68 Cal.2d 206, 65 Cal. Rptr. 342, 436 P.2d 342 (1968).

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erance damages would be avoided. Although the department conceded that the 54 acres were not necessary for the construction of the freeway, it argued that this acreage could be sold to reduce the total cost of the freeway project. In a split decision, the court held that section 104.1 of the Streets and Highways Code[18] authorized the condemnation of the 54 acre parcel. But it qualified the holding by stating that if the trial court should find the taking not justified to avoid excessive severance or consequential damages, then the taking would not be proper under the cited authority.

In dissenting, Justice Mosk, with whom Justice Peters concurred, stated, "Whenever an illustration of the voracious appetite of acquisitive government is desired, the action of the public agency here will serve as exhibit 'A'."

18. § 104.1 Same: Taking whole parcel and sale or exchange of unneeded remnant.

Wherever a part of a parcel of land is to be taken for state highway purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for state highway purposes.