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State and Local Government

by *Daryl J. McKinstry**

Introduction

During the year October 1, 1966 to October 1, 1967, approximately 100 cases concerning various phases of state and local government were decided by the appellate courts in California. Some of the cases concerned themselves with other fields of law as well, but only those aspects of the cases that directly relate to government are discussed here.

For the purpose of providing easy reference, the cases decided for the period have been arranged under six major headings, in outline form, according to the field covered.[1]

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The author extends his appreciation to David T. Loofbourrow, Jr., third-year Student at Golden Gate College, School of Law, for assistance in the preparation of this article.

1. Because of the volume of legislation affecting state and local government passed in the 1967 session, no attempt has been made to comment on this legislation. See Cont. Ed. Bar, REVIEW OF SELECTED 1967 CODE PROVISIONS (1967).

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GOVERNMENT OPERATIONS IN GENERAL

A. Municipal Corporations

1. Incorporation

In *Enyeart v. Board of Supervisors of Orange County,*[2] plaintiff sought, by mandamus, to compel the county board of supervisors to set aside an order terminating proceedings to incorporate a new city. The question presented was whether or not the holders of "oil and gas leases" qualify to file protests to terminate the incorporation proceedings. While the court held that oil and gas leases constitute "land" within the contemplation of the incorporation statutes for both petition and protest purposes, and protests by such owners can properly be considered by the board of supervisors, the court determined that the protests were not timely filed. Until the 1963 amendment to section 34311 of the Government Code, there was no provision for filing supplemental protests after the first hearing. In 1963, the following was added to that section:

> If at the time set for the first hearing, there are insufficient written protests filed with the board to terminate further proceedings, the meeting shall be recessed not less than 14 days, and supplemental protests may be filed within 10 days after the first hearing.

This amendment became effective 2 days after the first hearing was held by the board in this case. The protests in question were filed some 5 weeks after the first hearing and were disallowed by the court for failure to comply with the 10-day limitation of the 1963 amendment.

2. Issuance of Bonds

In *Omicini v. City of Eureka,*[3] plaintiffs sought to have declared invalid a municipal ordinance that provided for the improvement of public parking facilities through the issuance of bonds. Their complaint stated that the proceedings that

2. 66 Cal.2d 728, 58 Cal. Rptr. 733, 427 P.2d 509 (1967).

3. 246 Cal. App.2d 566, 54 Cal. Rptr. 774 (1966).

led to the adoption of the ordinance were invalid, and that the alleged need was not supported by the evidence. Defendants filed a general demurrer, and their motion for summary judgment was granted. In affirming the summary judgment, the appellate court stated that where a challenge is to be made on the legality of an ordinance providing for the issuance of bonds for the acquisition and improvement of public parking facilities, those contesting such an action must follow the statutory procedure as found in section 35271 of the Streets and Highways Code. Section 35271 requires the filing of written objections prior to the council hearing; because plaintiffs had failed to comply with this section, the objections were considered waived by virtue of the provisions of Government Code section 35275.

In *City of Santa Monica v. Grubb*,[4] the petitioner adopted an ordinance authorizing the issuance and sale of bonds to finance the construction of a water treatment plant. The ordinance, however, excluded the provision of the state Revenue Bond Law of 1941,[5] which required an election to authorize the issuance of revenue bonds. Respondent, as Clerk of the City of Santa Monica, had been directed to publish notice inviting sealed proposals for the purchase of the revenue bonds. He refused to issue the notice as directed because of the petitioners' failure to, among other things, comply with the election provisions of the Revenue Bond Law of 1941.

The court stated that a chartered city has the power to issue bonds subject only to the limitations imposed by its charter or by the California Constitution. The fact that a city, acting within the scope of its municipal affairs and pursuant to its home-rule power, adopted only a portion of the provisions of the Revenue Bond Law of 1941 and did not adopt the requirement for an election to authorize the issuance of revenue bonds payable from a special fund, did not constitute a violation of the provisions of Article XI, Section 18 of the California Constitution.

4. 245 Cal. App.2d 718, 54 Cal. Rptr. 210 (1966).

5. Cal. Gov't Code §§ 54300 *et seq.*

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3. Initiative and Referendum

In *Bragg v. City of Auburn,*[6] the district court affirmed the principle stated in *Mervynne v. Acker*[7] that the power of initiative is not available to residents of a city to repeal parking meter ordinances. Without the initiative power, which is the power of the voters to place a measure on the ballot, the petitioners have no means to effect a change in the ordinance; while there is the possibility of referendum, this latter power is limited to the governing body. In *Bragg,* the petitioners, sponsors of an initiative petition, contended that the 1961 amendment to Vehicle Code section 22508, enacted after the *Mervynne* decision, was intended to restore "local" control to meter regulations, and thus limited the *Mervynne* decision. The court in *Mervynne* had held that regulation of public streets remained a matter of statewide concern, not a "municipal affair," and the power of initiative is not available to residents of a city to repeal parking meter ordinances. The 1961 amendment added the words, "any ordinance establishing a parking meter zone shall be subject to local referendum in the same manner as if such ordinance dealt with a matter of *purely local concern.*" (Emphasis added.) The suggestion, summarily rejected by the court, was that the addition of the language "purely local concern" modifies *Mervynne,* thereby also allowing an initiative petition.

4. Elections

In *Farley v. Healey,*[8] the California Supreme Court considered section 179 in the charter of the City and County of San Francisco, which provides:

> [R]egistered voters shall have the power to propose by petition, and to adopt or reject at the polls, any ordinance, act or other measure which is within the power conferred upon the board of supervisors to enact, or

6. 253 Cal. App.2d 45, 61 Cal. Rptr. 284 (1967).

7. 189 Cal. App.2d 558, 11 Cal. Rptr. 340 (1961).

8. 67 Cal.2d 324, 62 Cal. Rptr. 26, 431 P.2d 650 (1967).

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> any legislative act which is within the power conferred upon any other board, commission or officer to adopt, or any amendment to the charter. . . .
>
> Any declaration of policy may be submitted to the electors in the manner provided for the submission of ordinances; and when approved by a majority of the qualified electors voting on said declaration, it shall thereupon be the duty of the board of supervisors to enact an ordinance or ordinances to carry out such policies or principles into effect, subject to the referendum provisions of this charter.

The petitioners sought to place an initiative measure on the ballot urging a cease-fire and American withdrawal from Vietnam. The proposed measure read as follows:

> It is the policy of the people of the City and County of San Francisco that there be an immediate ceasefire and withdrawal of U.S. troops from Vietnam so that the Vietnamese people can settle their own problems.[9]

It was argued that the initiative could not be submitted to the electorate because it did not concern municipal affairs on which the board of supervisors could enact binding legislation. The Supreme Court, however, found that the section of the charter quoted above was not so limited. The court pointed out that as representatives of local communities, boards of supervisors and city councils have traditionally made declarations of policies on matters of concern to the community, whether or not they had power to effectuate such declarations by binding legislation. This being the case, the majority of the court held that the proposed measure, assuming the sufficiency of signatures, should be placed on the ballot for the municipal election. Burke, J. and McComb, J. dissented, pointing out that the obligation of the judiciary of this country is to interpret and apply the supreme law or sovereign will of the people, and that the court's failure to uphold the respondents in their refusal to permit municipal

9. 67 Cal.2d at 327, 62 Cal. Rptr. at 28, 431 P.2d at 652.

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elections to be used to legislate on issues exclusively federal in nature, is an abdication of that responsibility.

5. Qualification of Bidders

A determination by a public agency that only one bidder is qualified to carry out a redevelopment project is not subject to review by the appellate court in the absence of an abuse of discretion, fraud, collusion, or bad faith on the part of the public agency. In *Old Town Development Corp. v. The Urban Renewal Agency,*[10] proposals were solicited by the Urban Renewal Agency, an agency of the City of Monterey, for the redevelopment of property embraced in the project referred to as the Custom House Redevelopment Project. A redevelopment plan had been adopted, an alternate plan proposed, and a panel of experts was selected to review the qualifications of the prospective bidders. The party selected as the only qualified bidder was a party that failed to submit a proposal on the adopted redevelopment plan. Notwithstanding this fact, however, the court pointed out that the other bidder had no legal cause for complaint since the agency could have rejected that bidder's bid even if qualified. Where the public agency reserves the right to reject all or any proposals in whole or in part, even if the agency errs in exercising its discretion, other bidders have no legal cause for complaint, since all bids could have been rejected.

B. Counties

1. Streets and Highways

In *Tucker v. Watkins,*[11] the plaintiff refused the defendant access to a county roadway that passed through plaintiff's land and onto that of the defendant. The trial court granted the plaintiff an injunction because the parties' predecessors in interest had dealt with the roadway as if it were abandoned, by exercising exclusive dominion over the parts of the roadway that crossed their respective properties. The appellate court

10. 249 Cal. App.2d 313, 57 Cal. Rptr. 426 (1967).

11. 251 Cal. App.2d 327, 59 Cal. Rptr. 453 (1967).

reversed, stating that a county road, once properly established, continues to exist until abandoned as prescribed by statute.[12] The fact that a portion of the road in question had not been used by the public since 1938, and the fact that the county had expended no funds for the improvement of the road, did not constitute an abandonment.

Section 7901 of the California Public Utilities Code gives telephone and telegraph corporations the right to construct lines for telegraph or telephone along public roads or highways. The court, in *County of Los Angeles v. General Telephone Company of California,*[13] interpreted the term "highway" in that section to include highways supported by bridges, thereby authorizing the telephone company to use county bridges without being liable to the county for any charge.

2. Secret Meeting Law

Only two cases were decided in which the "Secret Meeting Law" (The Brown Act)[14] was considered. As this was legislation expressly inacted to insure that legislative action and deliberation be conducted openly, the holdings were in no way startling. In *Letsch v. Northern San Diego County Hospital District,*[15] the court stated that where an executive session concerning a personnel matter is held during a regular meeting of a public agency, and the action taken at the close of the executive session was taken at the regular meeting open to the public, there was no violation of the act. In *Old Town Development Corp. v. The Urban Renewal Agency,*[16] the alleged violation was summarily rejected for a failure to sufficiently allege a violation of secrecy.

3. Public Records

In *Bruce v. Gregory,*[17] a taxpayer sought to compel a county tax collector to make certain tax records regularly available

12. See Cal. Streets & Highways Code § 901.

13. 249 Cal. App.2d 903, 57 Cal. Rptr. 805 (1967).

14. Cal. Gov't Code §§ 54950 *et seq.*

15. 246 Cal. App.2d 673, 55 Cal. Rptr. 118 (1966).

16. 249 Cal. App.2d 313, 57 Cal. Rptr. 426 (1967).

17. 65 Cal.2d 666, 56 Cal. Rptr. 265, 423 P.2d 193 (1967).

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for inspection. The case required construction of section 1227 of the Government Code, which provides that public records in the office of any officer are subject to public inspection by any citizen of the state at all times during office hours. In addition, section 1892, Code of Civil Procedure, provides that every citizen has a right to inspect and take a copy of any public writing of this state. The court stated that a statute should not be given literal meaning if it would result in absurd consequences, since statutes are subject to implied rules of reason. A denial of inspection is proper only when necessary to prevent interference with a tax collector's office. In this case, the tax collector had rules for inspection, which were held to be reasonable. The records were available for inspection from 8:30 a.m. to 4:30 p.m. daily. (The office was open from 8:00 a.m. to 5:00 p.m.) The records were inspected in a special section of the office and access to the records was restricted during July and August, preceding and following the December 10 and April 10 delinquency dates, and preceding tax sales. The court held that these limitations were reasonable. Justice Mosk dissented on the basis of statutory construction and pointed out that nothing in the statute gave the tax collector the right to restrict public inspection. The dissent, in effect, rejected the "implied rule of reason."

4. Redistricting

In *Wiltsie v. Board of Supervisors,*[18] the Supreme Court of California once again considered the question whether the percentage of population in each supervisorial district was within allowable limits. The court cited *Miller v. Board of Supervisors,*[19] which relied in part on section 25001 of the Government Code; the Code provides for a change of boundaries of supervisorial districts so that they will be as nearly equal in population as possible. Section 25001 finds a presumption of validity in the districting of a county where no district is more than 23 percent or less than 17 percent of

18. 65 Cal.2d 314, 54 Cal. Rptr. 320, 419 P.2d 440 (1966).

19. 63 Cal.2d 343, 46 Cal. Rptr. 617, 405 P.2d 857 (1965).

the overall population of the county (a population ratio of 1.35 to 1). In the instant case, the percentage of population among the districts ranged from 9.8 percent to 33.9 percent, a population ratio between the most and least populated districts of 3.46 to 1. Since the population distribution failed to meet the standards of the *Miller* case, and there was no sufficient factor existing to command any particular division in the county, the Court required redistricting.

The appellate court, in *Thompson v. Board of Directors,*[20] considered the question of whether a board of directors of an irrigation district was compelled to change the boundaries of the divisions within the district, where the percentage of total population for the divisions ranged from 7 percent to 35 percent. The question considered was whether the "one man, one vote" doctrine of the federal apportionment cases applies to an irrigation district. The court determined that the application of the doctrine to a special district depends on such factors as the purpose of the district, the nature of its functions, and the manner in which they are exercised. It stated that if the principal purpose of the district is to provide a service that can be provided by a private or quasi-public corporation (for example, a public utility company), and if the district does not exercise general powers of government, it is not subject to the "one man, one vote" rule. The court concluded that the irrigation district possessed none of the essential characteristics that would require the application of the "one man, one vote" doctrine. The court pointed out, however, that section 21605 of the Water Code states that the board of directors of an irrigation district *may* change boundaries of the divisions when the board deems it advisable and in the best interests of the district to do so. The court stated that the word "may" in that section does not grant unlimited discretion to act.[1] The court then compelled the redistricting of the divisions within the district because of the abuse of discretion shown by the board's drastic deviations in population ratios among the divisions.

20. 247 Cal. App.2d 587, 55 Cal. Rptr. 689 (1967).

1. See Griffin v. Board of Supervisors, 60 Cal.2d 318, 33 Cal. Rptr. 101, 384 P.2d 421 (1963).

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EMPLOYEE RELATIONS

A. Discharge Cases

In *Wisuri v. Newark School District of Alameda County,*[2] the court dealt with section 13583 of the Education Code, which, prior to its repeal, required an employment contract for classified employees, who are defined in section 13581 of the Education Code as full-time noncertified employees. The court stated that a permanent employee in the classified service of a school district can be discharged only for cause and after a hearing. The district distributed to each employee, upon hiring, a handbook describing the rules and regulations governing employment. The handbook did not contain those provisions normally included in a contract of employment. The court found that the district would be bound by the common ordinary meaning of the word "permanent," and required the plaintiff to be afforded a hearing. The court stated that by construing the handbook as a contract, the handbook described plaintiff's classified position as being permanent, and, therefore, he was subject to dismissal for cause only. The court further stated that a notice of intent to dismiss an employee in the classified service of a school district is sufficient if it adequately informs the employee of the charges against him so that he may prepare a defense and not be surprised at the hearings.

In another discharge case, *Board of Trustees v. Hartman,*[3] the court stated that cohabitation with a married woman who had left her husband, and later cohabitation with another woman, is sufficient cause to dismiss a certified teacher for immoral conduct and unfitness for service.

B. Transfer Cases

In *American Federation of Teachers v. Oakland Unified School District,*[4] a teacher was transferred from his teaching

2. 247 Cal. App.2d 239, 55 Cal. Rptr. 490 (1966).

3. 246 Cal. App.2d 756, 55 Cal. Rptr. 144 (1966).

4. 251 Cal. App.2d 91, 59 Cal. Rptr. 85 (1967).

position in one high school to a similar position in another high school. The transfer was set aside on the basis that the school district failed to comply with the provisions of an administrative bulletin adopted pursuant to the authority of section 925 of the Education Code. The court stated that the rules and regulations adopted by a board of education are, in effect, a part of a teacher's employment contract and the teacher is entitled to enforcement.[5]

C. Conduct of Public Employees: Political and Union Activities

In *Ball v. City Council of the City of Coachella,*[6] the employment of a chief of police was terminated because of his membership and participation in union activities. Since the chief was appointed and held office at the pleasure of the city council,[7] the court stated that he had no vested right to retain his employment. The court continued, however, that it does not follow that the power to terminate his services is an unbridled one, free of all legal restraints. Where the dismissal of a public employee indicates that it resulted from the exercise by the employee of a constitutional right, the courts are empowered to review the dismissal. The appellate court affirmed the trial court's finding that the action of the city council in firing the police chief was arbitrary and illegal in that it deprived the employee of his rights under Government Code sections 3500 *et seq.* The power to terminate a public employee's services without cause and without notice

5. The tenure of a school teacher, however does not bestow on the teacher a vested right to teach at a specific school or to teach a specific class level of students. See Adelt v. Richmond School District, 250 Cal. App.2d 149, 58 Cal. Rptr. 151 (1967). But where a teacher was transferred from classroom teaching to home teaching for the reason that the teacher wore a beard and was not, therefore, setting a good example for the students in school, the transfer will be set aside. The court stated in Finot v. Pasadena City Bd. of Ed. 250 Cal. App.2d 189, 58 Cal. Rptr. 520 (1967) that the teacher has a constitutional right to wear a beard. See Leahy, CONSTITUTIONAL LAW, in this volume.

6. 252 Cal. App.2d 136, 60 Cal. Rptr. 139 (1967).

7. Cal. Gov't Code §§ 36505–36506.

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or a hearing may not be exercised arbitrarily in disregard of the employee's constitutional[8] or statutory rights.[9]

D. Salaries and Wages

In *Cosgrove v. County of Sacramento*,[10] the court considered a charter provision of the County of Sacramento, which reads as follows:

> In fixing compensation, the Board of Supervisors shall at least annually, by ordinance, provide in each instance for the payment of not less than the prevailing or general current rate of compensation or wages paid by private employers in the County of Sacramento for similar quality or quantity of service, in case such prevailing compensation or wages can be ascertained. Preference in all cases shall be given to Sacramento County residents.

A salary ordinance was passed for the year 1963, to which the petitioners took objection. The superior court issued a writ of mandate directing the board of supervisors to reexamine available data and to procure new data, if necessary, in order to determine prevailing salaries and wages in private employment in Sacramento County. Later, the superior court determined that the county had complied with the writ of mandate. The appellate court stated that the board of supervisors, as the legislative branch of the government in the county, is entitled to the exercise of discretion in judging facts that constitute the basis of its resolutions and ordinances. There is little, if any, leeway left to the appellate court to control the action of the trial court where the trial court had before it substantial evidence on which to act. The court therefore affirmed the action of the trial court and determined that the county had complied with the writ of mandate.

8. Bagley v. Washington Township Hospital District, 65 Cal.2d 499, 55 Cal. Rptr. 401, 421 P.2d 409 (1966). For further discussion of this case, see Leahy, CONSTITUTIONAL LAW, in this volume.

9. See International Ass'n of Firefighters v. County of Merced, 204 Cal. App.2d 387, 22 Cal. Rptr. 270 (1962).

10. 252 Cal. App.2d 45, 59 Cal. Rptr. 919 (1967).

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The court in *Sanders v. City of Los Angeles*[11] had before it a similar charter provision in the Charter of the City of Los Angeles. A salary survey was made by the city administrative officer and thereafter the council adopted an ordinance fixing the salaries. The mayor vetoed the ordinance, and the council failed to override the veto. No salary increases were provided for that year. The appellate court found that the city ignored the salary data evidence gathered, which established that in many of the city jobs, salary increases were due. The court pointed out that this was not only an abuse of discretion, but also a flagrant breach of duty, and reversed the order discharging a writ of mandate.

EMINENT DOMAIN

A. Inverse Condemnation

Morse v. County of San Luis Obispo[12] came to the appellate court on the question of whether a cause of action had been stated in the complaint against the defendant county. Plaintiff had purchased land that was zoned A-1, permitting a density of one residential dwelling per acre. The plaintiff submitted a tentative subdivision map requesting that the County Planning Commission rezone the property to R-1, a zoning under which the maximum allowable density of residential structures per acre would be increased from one to five. The planning commission, however, after a review, recommended a zoning of A-1-5, a classification requiring 5 acres per single-family dwelling. The board of supervisors accepted the recommendation and rezoned the area to A-1-5. The court stated that the complaint failed to allege that the ordinance establishing the zoning was a property-taking device rather than a regulation of the use of land, and cited *Anderson v. City Council*[13] to reaffirm the proposition that landowners have no vested right in existing or anticipated

11. 252 Cal. App.2d 531, 60 Cal. Rptr. 539 (1967).

12. 247 Cal. App.2d 600, 55 Cal. Rptr. 710 (1967).

13. 229 Cal. App.2d 79, 40 Cal. Rptr. 41 (1964).

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zoning ordinances. Unless the complaining party pleads facts to show that an ordinance is unreasonable as a matter of law, a court will neither presume the invalidity of a zoning ordinance nor consider the substitution of its judgment on the issue of zoning for that of the public authority.

Also of interest is *Smith v. County of San Diego,*[14] where the court held that although an owner of land abutting a highway is not entitled to access at all points along his boundary, destruction of a right of access by the construction of a drainage ditch on a highway easement owned by a public agency may give rise to damages for inverse condemnation.

B. Damages

In *County of Santa Clara v. Curtner,*[15] the county condemned property for freeway purposes. The property owner claimed and was awarded severance damages. The county appealed the award of severance damages on the grounds that it included damages that resulted from a plan adopted by the City of Mountain View to relocate certain streets closed by the county's construction of the freeway. The court stated that the property owners were entitled to severance damages resulting from the county condemnation proceedings to the extent that the fair market value of the remainder of their property was depreciated, but that any damages accruing to the landowners by the action of the City of Mountain View must be compensated for by the city and not the county.

The court in *Community Redevelopment Agency v. Henderson*[16] held that in arriving at a determination of the market value of land subject to condemnation, it is improper to consider the increase in the value of such land by reason of the proposed improvements to be made by the party condemning the land. Sales of property used in forming an expert's opinion of valuation, to be admissible, must be sales of property similar to the property being condemned, but need

14. 252 Cal. App.2d 466, 60 Cal. Rptr. 602 (1967).

15. 245 Cal. App.2d 730, 54 Cal. Rptr. 257 (1966).

16. 251 Cal. App.2d 336, 59 Cal. Rptr. 311 (1967).

not be identical. The factors that should be considered in determining such similarity are a combination of time, association, character, size, suitability, usability, and improvements. Where there is conflicting evidence on the probability of a zone change, it is proper to leave the issue of such probability to the jury to be considered in reaching the valuation of the property.[17]

In *People ex rel. Department of Public Works v. Vallejos*,[18] appellants contended that by allowing the state to take one of the streets bordering the appellant's property for a freeway off-ramp, the county had abandoned that street, and that the appellants, as owners of the adjacent property, were entitled to the unencumbered fee out to the middle of the former street. Appellants were awarded damages for their loss of access, but not for the loss of their alleged unencumbered fee. The court stated that where streets are closed at or near their intersection with any freeway pursuant to sections 100.2 and 941.2 of the Streets and Highways Code, there is no "abandonment," and therefore there can be no reversion of the easement to the owner of the underlying fee as would be the case under sections 954 and 960.2 of the Streets and Highways Code. This being the case, the owner of the fee was not entitled to compensation for the taking where the fee was burdened with an easement that the county had transferred to the state and that had not been abandoned or extinguished. Due to the burden of the easement, the underlying fee was of nominal value only. Where evidence of value is remote, speculative, or conjectural, it is inadmissible as evidence of proof of fair market value of land.[19]

17. See also People *ex rel.* Dept. Pub. Works v. Arthofer, 245 Cal. App.2d 454, 54 Cal. Rptr 878 (1966).

18. 251 Cal. App.2d 414, 59 Cal. Rptr. 450 (1967).

19. See City of Santa Cruz v. Wood, 252 Cal. App.2d 52, 60 Cal. Rptr. 26 (1967).

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State and Local Government

POLICE POWER

A. Ordinances Regulating Conduct

1. Drinking

The court, in *People v. Butler*,[20] considered an ordinance making it a misdemeanor to drink beer, wine, or other intoxicating beverages on any street, sidewalk, alley, highway, or playground. The issue was whether the state had exclusively preempted the field and therefore prohibited the city from passing legislation concerned with the consumption of alcohol in the streets. The court pointed out that state law proscribes the drinking of liquor in a vehicle on a public highway,[1] drinking on public school grounds,[2] drinking on licensed or unlicensed premises,[3] and drinking by minors in any on-sale licensed premises.[4] The court stated that by the adoption of such selective laws, the legislature did not intend to say that it had covered all those areas wherein the consumption of alcoholic beverages might create police problems. Unless the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern, or the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action, or the subject matter has been partially covered by general law and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefits of the municipality, then the municipality may adopt regulatory legislation. The court held that the state had not preempted the entire field of consumption of alcoholic beverages and that the provisions of the municipal code were not exclusively a matter of statewide concern, and it thereby upheld the ordinance in question.

20. 252 Cal. App.2d Supp. 772, 59 Cal. Rptr. 924 (1967).

1. Cal. Vehicle Code § 23121.

2. Cal. Bus. & Prof. Code § 25606.

3. Cal. Bus. & Prof. Code §§ 25632 and 25604.

4. Cal. Bus. & Prof. Code § 25658.

2. *"Topless" Entertainment*

In *Carolina Lanes, Inc. v. City of Los Angeles,*[5] the appellate court was confronted with an ordinance that, in part, prohibited striptease acts in bowling alleys and poolrooms. The court held that the ordinance was not unconstitutional, since the purpose of the ordinance was not the regulation of sexual conduct, but an attempt to safeguard the peace, health, safety, convenience, morals, and welfare of minors attracted to plaintiff's bowling establishment.

Whether or not the presence of a topless waitress constituted entertainment was considered in *People v. Kukkanen.*[6] The ordinance required that a written permit be obtained before any person could operate any public place where food or beverages were sold or any form of live entertainment provided, and stated that any female attendant who was topless was included in the term "live entertainment." The court pointed out that the licensing of live entertainment is a field that is not preempted by the state, and found that the presence of a topless waitress was, in fact, "entertainment."

In *People v. Hansen,*[7] the court considered a municipal ordinance that prohibited topless waitresses because of an alleged health problem that the ordinance was designed to correct.[8] The court found that the ordinance was a regulation of sexual activity, and therefore was preempted by the state.

In *Robins v. County of Los Angeles,*[9] the trial court enjoined the defendant county from enforcing a county ordi-

5. 253 Cal. App.2d 930, 61 Cal. Rptr. 630 (1967).

6. 248 Cal. App.2d Supp. 899, 56 Cal. Rptr. 620 (1967).

7. 245 Cal. App.2d 689, 54 Cal. Rptr. 311 (1966).

8. The prosecution's argument may have had more validity than the court accorded it. See footnote 3, People v. Kukkanen, 248 Cal. App.2d Supp. at 905, 56 Cal. Rptr. at 624 (App. Dept. Sup. Ct. 1967). See also Bellflower Mun. Code § 5108, ord. #204.

9. 248 Cal. App.2d 1, 56 Cal. Rptr. 853 (1966).

The *Robins* opinion was by Division 1 of the Court of Appeal for the Second Appellate District; the Justices disagreed with their brethern of Division 4, who had decided the *Hansen* case. The *Robins* court doubted that "criminal sexual activity associated with the public display of the naked human body has been preempted by state law."

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nance requiring restaurants and bars employing topless waitresses to obtain an entertainment license. This order was reversed by the appellate court on the basis that the action of respondents seeking an injunction was premature. The court pointed out that one who is required to take out a license will not be heard to complain, in advance of making an application, that there is a danger of refusal. The court stated further that entertainment licenses are a valid source of revenue to finance the expenses of regulating problems arising in the conduct of establishments offering entertainment.

3. Streets and Highways

Ratkovich v. City of San Bruno[10] dealt with an ordinance that regulated trucking on the city streets, by providing in substance that, with the exception of certain streets marked as truck routes, the use, operation, and maintenance on all remaining city streets of any vehicle or truck of a gross weight of 27,000 pounds or more is unlawful. Vehicles hauling materials exceeding the maximum weight limits were permitted to file an application with the city clerk after the payment of a filing fee. The permit, when issued, required that 2 cents per ton be paid to the city for the privilege of using the streets. The stated purpose of the fee was to establish a fund to be used for the repair of damages done to the city streets by vehicles carrying excessive loads. The trial court found that the city did not at any time make any repairs to the street in question for any damages caused by the plaintiff. The appellate court, however, upheld the ordinance and pointed out that the plaintiff presented no evidence to show that the city's regulations for waiving the weight limitations were unreasonable or arbitrary, or that heavy loads could have no possible effect on the pavement, or that there was no rational support for the 2-cents-per-ton charge. The court further pointed out that in the exercise of its police power, a legislative body is vested with a broad discretion to

10. 245 Cal. App.2d 870, 54 Cal. Rptr. 333 (1966).

determine not only what the public interests require, but what measures are necessary for the protection of such interests. It was held that the inquiry of the court is limited to determining whether the object of the ordinance is one for which the police power may properly be invoked, and if so, whether the ordinance bears a reasonable and substantial relation to the objects sought to be obtained.

PLANNING AND ZONING

A. Conditional Use Permits

The court upheld a conditional use permit that required a landowner to grant to the city, without compensation, an easement for road purposes in *Gong v. City of Fremont.*[11] The court stated that it could announce no holding concerning the validity of the conditions attached to the use permit, because that issue had not yet been properly presented to the trial court. The court, however, observed that the imposition of conditions upon the granting of a use permit is at worst equivalent to a denial of the permit, and the courts have no authority to interfere with the denial of a variance or use permit except on a clear and convincing showing of fraud, illegality, or abuse of discretion. The court commented that conditions requiring dedication of land for street purposes had been repeatedly upheld in the absence of a showing of fraud, illegality, or abuse of discretion.

B. Billboards

After discussing the history of planning and zoning laws, the court, in *County of Santa Barbara v. Purcell, Inc.,*[12] stated that the legislature, by the adoption of the Outdoor Advertising Act,[13] intended that local governments might still regulate billboards under zoning laws. The ordinance in question limited the size and character of signs and advertising

11. 250 Cal. App.2d 568, 58 Cal. Rptr. 664 (1967).

12. 251 Cal. App.2d 169, 59 Cal. Rptr. 345 (1967).

13. Cal. Bus. & Prof. Code § 5227.

structures, and stated that nonconforming outdoor advertising signs or structures could remain on the property for 5 years from the date of the adoption of the ordinance. The defendant contended that the ordinance was based upon aesthetics, and that zoning laws may be used only to protect economic interests, and not to "preserve the priceless beauty of a countryside for all men."[14] The court stated that it was unnecessary to meet that argument, for in Santa Barbara County, scenic environment is commercial, since people come to the county because of its natural beauty. Therefore, the maintenance of billboards may reasonably be believed to have an adverse effect upon that economy.

C. Retroactive Zoning Regulations

In an action to determine the constitutionality of a retroactive zoning ordinance, the court in *Melton v. City of San Pablo*[15] stated that if the necessity or propriety of a zoning regulation is a question on which reasonable minds might differ, the legislative determination will not be disturbed. Where there are considerations of public health, safety, morals, or general welfare that the legislative body may have had in mind, and that would justify the regulations, it must be assumed by the court that the legislative body had those considerations in mind, and that those considerations justified the regulation. The ordinance in question required all portable or temporary vending establishments to obtain a use permit. The plaintiff operated a restaurant in a remodeled bus located in a commercially zoned area. The court found that the ordinance was aimed at preventing not only unsafe or dangerous use of the property, but also an untidy appearance and a diminution of property values that might attend the unregulated parking and use of old vehicles at commercial establishments in commercially zoned areas. The court pointed out that the principle of neighborhood aesthetics is related to property values, and is a proper subject of zoning where such aesthetics bear in a substantial way on the utiliza-

14. 251 Cal. App.2d at 173, 59 Cal. Rptr. at 348.

15. 252 Cal. App.2d 862, 61 Cal. Rptr. 29 (1967).

tion of land. Insofar as the retrospective application of the ordinance, the court pointed out that *ex post facto* clauses of both the State and Federal Constitutions apply only to criminal statutes punishing conduct committed prior to their enactment. The court stated further that the state's inherent sovereign power includes the right to interfere with vested rights whenever reasonably necessary for the protection, health, safety, morals, and the well-being of the people.

D. Variances

The Supreme Court stated, in *Broadway, Laguna, Vallejo Association v. Board of Permit Appeals,*[16] that the presumption that an agency's rulings rest on the necessary findings and that such findings are supported by substantial evidence, does not apply to agencies who must expressly state their findings and must set forth the relevant supporting facts. The court, in citing *Cow Hollow Improvement Club v. Board of Permit Appeals,*[17] stated that in a mandate proceeding to review the granting of a variance, the variance order may be sustained only if the board's findings suffice to establish compliance with all of the statutory criteria and are supported by substantial evidence in the record. The court distinguished *Siller v. Board of Supervisors.*[18] The *Siller* case stands for the proposition that a zoning board's action in granting a variance must be sustained in the absence of a clear and convincing showing of arbitrariness or caprice. The court pointed out that in *Siller,* the board was not required by its governing provisions to specify its findings and ultimate conclusions. In the instant case, however, the code provided for five conditions that had to be met in order to obtain the variance. The zoning administrator found none of these conditions to exist, and the court, upon review, found that only three of the conditions existed. Since there was no specific finding on all of the conditions, as required by the planning code,

16. 66 Cal.2d 767, 59 Cal. Rptr. 146, 427 P.2d 810 (1967).

17. 245 Cal. App.2d 160, 53 Cal. Rptr. 610 (1966).

18. 58 Cal.2d 479, 25 Cal. Rptr. 73, 375 P.2d 41 (1962).

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the court granted a writ of mandate compelling the Board of Permit Appeals to reverse its decision granting a variance.

E. Building Permits

In *Russian Hill Improvement Association v. Board of Permit Appeals,*[19] the controversy involved an attempt by the Board of Permit Appeals to authorize the construction of a building that would rise to over twice the height permitted by the governing ordinances of the City and County of San Francisco. The court held that even though the permit had been approved by the planning commission, it was not final until the 10-day appeal period provided by statute had elapsed, and, since the permit application was still pending before the Board of Permit Appeals when the new height limitation became effective, the permit was not "granted" in time to confer immunity under section 150 of the City of San Francisco Planning Code.[20] The code states that any building for which a permit has been lawfully "granted" prior to the effective date of an amendment to the code may be completed and used in accordance with approved plans, provided that the construction is started and diligently prosecuted to completion, and it shall thereafter be deemed to be a lawfully existing building or use. The restrictive ordinance in question became effective after the permit had been issued by the planning commission but before the appeal period had elapsed and the permit became final.

LIABILITY OF PUBLIC AGENCIES

A. Filing of Claims

1. Late Claims

In *Viles v. State of California,*[1] the plaintiff was erroneously informed by an insurance adjuster that he had 1 year to bring

19. 66 Cal.2d 34, 56 Cal. Rptr. 672, 423 P.2d 824 (1967).

20. City of San Francisco Planning Code § 150.

1. 66 Cal.2d 24, 56 Cal. Rptr. 666, 423 P.2d 818 (1967).

an action for wrongful death, when the claim was subject to a claim statute that required the claim to be presented not later than 100 days after the accrual of the cause of action.[2] The court found that there was no prejudice to the public agency since the accident had been fully investigated, and the failure to file the claim within the 100-day period was excused. Burke, J. dissented on the ground that the only asserted mistake was one of law, and stated that this decision would open the door to evasion and eventual erosion of the claims legislation for all practical purposes.

In *Tammen v. County of San Diego,*[3] the cause of action accrued on February 18, 1963. The 1963 Tort Claims Act,[4] with its 100-day statute of limitations, had become effective September 20, 1963. By its own terms, the Tort Claims Act applied to all causes of action "heretofore or hereafter accruing." In view of this provision of the act, the 100-day limitation commenced on September 20, 1963, and expired on December 30, 1963. Plaintiffs presented a claim to the board of supervisors on January 8, 1964, which was rejected, and thereafter unsuccessfully applied to the county for leave to present a late claim. Section 912 of the Government Code provides, in part, that the superior court shall grant leave to file a late claim, unless the public entity establishes that it would be prejudiced if leave to present the claim were granted, if the court finds that the application to the board to file a late claim was made within a reasonable time, not to exceed 1 year after the accrual of the cause of action, and that the failure to present the claim was through mistake, inadvertence, surprise or excusable neglect. The superior court denied the petition, and found the application to the board had not been made within a reasonable time and that the plaintiff's failure to present her claim had not been excusable. The appellate court, in affirming the lower court decision, pointed out that the showing required under Government Code section 912

2. Cal. Gov't Code § 911.2. In 1965, section 912 was repealed, and a new procedure for obtaining judicial relief is set forth in section 946.6 of the Government Code.

3. 66 Cal.2d 468, 58 Cal. Rptr. 249, 426 P.2d 753 (1967).

4. Cal. Gov't Code §§ 900 et seq.

to establish mistake or inadvertence as a ground for a leave to file a late claim against the county is the same as the showing required under section 473 of the Code of Civil Procedure for relieving a party from a default judgment. The court went on to state that the controlling factor in obtaining relief from a mistake of law is the reasonableness of the misconception of the law under the circumstances as viewed by the trial court. The refusal to grant relief is within the trial court's discretion, and the appellate court will not disturb the lower court's finding, without a showing of abuse of that discretion.[5]

In another case dealing with an attorney's error, in which a claim should have been filed on or before April 7, 1964, but was actually filed on May 19, 1964, the court held that a calendaring error in the attorney's office was excusable neglect within the provisions of section 912(b)(1). There was no showing that the city would have been prejudiced by allowing the late claim to be filed.[6]

2. Filing a Claim Required

In an action to recover damages for extra work and materials furnished in connection with the construction of a highway, it is not necessary for the plaintiff to exhaust his administrative remedies against the State of California as a prerequisite to the filing and pursuing of a claim against the county. The contention in *Calabrese v. County of Monterey*[7] was that the cause of action did not accrue until the administrative remedies against the State Board of Control had been exhausted. The fact that the plaintiff was, in part, misinformed by state officials could not be used by the plaintiff as an excuse for failing to comply with the time requirements for filing a verified claim for money damages against the county. In this case, involving a federally aided secondary development project, the state supervised the project and

5. See also, Garcia v. City & County of San Francisco, 250 Cal. App.2d 767, 58 Cal. Rptr. 760 (1967).

6. Nilsson v. City of Los Angeles, 249 Cal. App.2d 976, 58 Cal. Rptr. 20 (1967).

7. 251 Cal. App.2d 131, 59 Cal. Rptr. 224 (1967).

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awarded the construction contract, but was only a nominal contracting party. The county was the real party in interest. Extra compensation would have had to be paid out of county funds; therefore a claim had to be filed with the county. The claim, of course, must be filed with the proper governmental agency, and in a case where a claim was filed with the city rather than the school board, the doctrine of "substantial compliance" was held to be not applicable.[8]

In *Miller v. Hoagland*,[9] a city attorney, representing a city that had been a party to a lawsuit,[10] was sued by the plaintiff for money damages. In the prior action, the attorney had written a letter to the judge, which was alleged in this action to contain slanderous statements. The plaintiff failed to file a claim against the city and a judgment sustaining a demurrer to the complaint without leave to amend was affirmed. It was alleged by the plaintiff in the later action that the attorney had acted outside the scope of his employment in writing this letter. The court found that the attorney had been acting in his official capacity as the legal advisor to the city and was therefore not subject to suit. Under the claim law,[11] in order to obtain relief the plaintiff would have had to file a claim against the city, which he failed to do, and a judgment sustaining the demurrer to the complaint without leave to amend was affirmed.

B. Liability for Torts

The concept of civil immunity for a "discretionary act" by a public official, provided for in section 820.2 of the Government Code, was considered in the case of *Burgdorf v. Funder*.[12] The plaintiff sued a state official for libel based upon a letter containing alleged defamatory statements. The letter was sent to the plaintiff by the tax collector, advising the plaintiff that his claim was considered excessive and therefore the

8. See Jackson v. Board of Education, 250 Cal. App.2d 856, 58 Cal. Rptr. 763 (1967).

9. 247 Cal. App.2d 57, 55 Cal. Rptr. 311 (1966).

10. City of Bakersfield v. Miller, 64 Cal.2d 93, 48 Cal. Rptr. 889, 410 P.2d 393 (1966).

11. Cal. Gov't Code §§ 950.2 and 911.2.

12. 246 Cal. App.2d 443, 54 Cal. Rptr. 805 (1966).

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state was refusing to make a tax refund. The court, in sustaining a judgment of dismissal, stated that it was reasonably apparent from the pleadings that the defendant had exercised his judgment in passing on the plaintiff's claim for a tax refund, and that the defendant was protected when acting within the scope of his authority, even if the defendant had exercised poor judgment or abused his discretion. The court pointed out that since there was an insufficient showing that the official was acting outside the course and scope of his employment, the plaintiff was required to file a claim for damages within the time limits prescribed by statute.

In *Sanders v. County of Yuba,*[13] the plaintiff, an inmate in defendant's county jail, received an eye injury as a result of coming in contact with a towel rack attached to his bed. The court was faced with the problem of reconciling sections 845.6 and 844.6 of the Government Code. Section 845.6 provides that the public entity will be liable if an employee of the entity or the entity has reason to know that a prisoner is in need of immediate medical care and thereafter fails to take reasonable action to summon such medical care. Section 844.6 states, in part, that notwithstanding any other provisions of law, a public entity is not liable for an injury to any prisoner. The court reasoned that section 844.6 intended a public entity not to be liable for an impact type of injury. In other words, the county would not be liable for the injury that occurred to the plaintiff when he originally injured his eye. However, under section 845.6, the defendant county would be liable when an employee knows or has reason to know of the need of immediate medical care and fails to summon such care. Liability attached, therefore, not as a result of the original injury, but for the failure to provide medical attention.

The court also considered section 844.6 of the Government Code in the case of *Garcia v. State of California.*[14] In that case, a prisoner had died of injuries received by the collapse of certain equipment at a state prison. His surviving wife

13. 247 Cal. App.2d 748, 55 Cal. Rptr. 852 (1967).

14. 247 Cal. App.2d 814, 56 Cal. Rptr. 80 (1967).

and children brought an action for wrongful death. It was the state's position that since the prisoner could have no cause of action under section 844.6(a)(2), the heirs could have no cause of action. The court relied on subsection (c), which states:

> Nothing in this section prevents a person, other than a prisoner, from recovering from the public entity for an injury resulting from the dangerous condition of public property under Chapter 2 (commencing with § 830) of this part . . . ,

and section 377 of the Code of Civil Procedure,[15] and held that the heirs had the right to recover damages by reason of the decedent's wrongful death, assuming proof establishing a dangerous condition on public property.

In *Gardner v. City of San Jose,*[16] the plaintiff was injured while crossing a heavily traveled, unmarked intersection. The court concluded that a subway, constructed for the purpose of providing a passage under the street, was unlighted and in an unsanitary condition, thus constituting a dangerous condition that forced the plaintiff to cross the intersection at street level. The dangerous condition of the subway and the lack of crosswalks in the intersection created in effect a trap for the pedestrian, and both driver and pedestrian could have claimed a right-of-way according to the provisions of the Vehicle Code.[17] Draper, J. dissented on the basis that the subway was not a dangerous condition within the contemplation of sections 830 and 835 of the Government Code, as there was no evidence that the plaintiff's election not to use the subway was occasioned by the condition of the subway.

In *Sava v. Fuller,*[18] the court stated that the rule in *Muskopf v. Corning Hospital District,*[19] that "when there is negligence, the rule is liability, immunity is the exception," had been

15. Cal. Code Civ. Proc. § 377 provides for suit for wrongful death by or against heirs or personal representatives.

16. 248 Cal. App.2d 798, 57 Cal. Rptr. 176 (1967).

17. Cal. Vehicle Code § 21953.

18. 249 Cal. App.2d 281, 57 Cal. Rptr. 312 (1967).

19. 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961), modified 57 Cal.2d 488, 20 Cal. Rptr. 621, 370 P.2d 325 (1962).

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reversed by the adoption of the Tort Claims Act of 1963. Now immunity is the rule, and the exceptions are to be found in the act. The court considered the meaning of "exercise the discretion vested in him" as found in section 820.2, which grants governmental immunity to public employees when they are acting within the scope of their authority. In *Sava,* a state botanist was alleged to have negligently analyzed a plant substance, thereby causing the death of a child. The court reversed a judgment of dismissal after a demurrer was sustained without leave to amend, and stated that the botanist had exercised his discretion when he agreed to analyze the substance and thereafter liability would attach if he failed to use ordinary care in making his analysis. The court cited *Morgan v. County of Yuba,*[20] a case where a sheriff had repeatedly been told a man threatened to kill the deceased. The sheriff failed to give the warning to the victim and the man who had threatened him carried out his threat. The court stated in that case that the sheriff could not claim discretionary immunity as a defense. Once he had promised to act, he had already exercised his discretion and, by failing to give the promised warning, he negligently omitted to perform an act voluntarily assumed.

In *Callahan v. City and County of San Francisco,* an injury occurred on a street maintained by the defendant city that was undergoing maintenance work by an independent contractor who had agreed to post warning devices on the street.[1] The court stated that where an activity involving possible danger to the public is carried on under public authority, the one engaging in the activity may not delegate to an independent contractor the duties or liability imposed on him by public authority. Government Code section 830.8, declaring public entities immune from liability for injuries caused by the failure to provide traffic or warning signals, signs, markings, or devices described in the Vehicle Code, is inapplicable when a warning sign is necessary to warn of a concealed trap.

20. 230 Cal. App.2d 938, 41 Cal. Rptr. 508 (1964).

1. 249 Cal. App.2d 696, 57 Cal. Rptr. 639 (1967).

In *Hibbs v. Los Angeles County Flood Control District*,[2] the issue was whether the failure of the defendants to fence a waterway that passed through a residential area containing an elementary school amounted to the maintenance of a dangerous condition. The court stated that the defendant could have reasonably anticipated that children would play in and about the area, even though the storm drain was not constructed for that purpose.[3] Since evidence that the actual use of the area as a play area was known to the defendant, judgment for the defendant was reversed.

The claim of discretionary immunity as a defense under section 820.2 of the Government Code was disallowed in *Scruggs v. Haynes*,[4] where a police officer used unreasonable force in making an arrest. The court stated that discretionary immunity does not automatically operate to protect a police officer from every error of judgment.

Section 830.6 of the Government Code was considered in the case of *Cabell v. State of California*.[5] A student was injured while attempting to open a glass door in a dormitory building. He injured his hand when it slipped and went through the glass in the door. The defendant relied on the immunity granted by section 830.6. Plaintiff contended that since the adoption of the plans and specifications that approved the construction of the doors, glass had been broken and replaced with glass of the same specifications as required under the original plans. Plaintiff contended that this constituted a maintenance of a dangerous condition by the defendant to which the plan or design immunity does not apply. The court pointed out that as long as the maintenance was in conformity with the original plans and specifications, the reasonableness of the adoption or approval of plans must be measured as of the time of such adoption, and the immunity

2. 252 Cal. App.2d 166, 60 Cal. Rptr. 364 (1967).

3. See Cal. Gov't Code § 831.8, which provides a public entity with immunity from liability for the conditions of its reservoirs if the person injured was not using the property for a purpose for which the entity permitted or intended the property to be used.

4. 252 Cal. App.2d 271, 60 Cal. Rptr. 355 (1967).

5. 67 Cal.2d 174, 60 Cal. Rptr. 476, 430 P.2d 34 (1967).

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of section 830.6 would apply. In his dissenting opinion, Justice Peters stated that the discretionary immunity of section 830.6 was intended to be an immunity similar to the immunity granted by judicial decision in New York, which held that plan and design immunity was not intended to apply to negligent maintenance after the agency was on notice that the improvement created a dangerous condition.[6]

In *Becker v. Johnston,*[7] the plaintiff was injured in an intersection accident and claimed that the intersection constituted a dangerous condition within the contemplation of section 835 of the Government Code. The court pointed out that although the plaintiff made out a case under section 835, section 830.6 provided for plan and design immunity to the county in this case. Justice Peters dissented on the same basis as he did in the *Cabell* case.

The Supreme Court, in *Pfeifer v. County of San Joaquin,*[8] considered section 830(a) of the Government Code, which defines a "dangerous condition." Under the facts, the court found that the plaintiff did not prove that the condition of the crosswalk markings created an unreasonable risk of injury to the public. Because of this finding, it was unnecessary for the Court to consider the plan and design immunity of section 830.6, urged by the county as a defense.

6. See Weiss v. Fote, 7 N.Y.2d 579, 167 N.E.2d 63 (1960).

7. 67 Cal.2d 187, 60 Cal. Rptr. 485, 430 P.2d 43 (1967).

8. 67 Cal.2d 201, 60 Cal. Rptr. 493, 430 P.2d 51 (1967).