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July 28, 2004

Ms. Denise Wakefield
Finance and Facilities Analyst
Brentwood Union School District
255 Guthrie Lane
Brentwood, CA 945 13

And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

Re: **Draft Staff Analysis and Hearing Date**
Acquisition of Agricultural Land for a School Site, 98-TC-04
Brentwood Union School District, Claimant
Education Code sections 172 13.1, 172 15.5 and 3 9006
Statutes 1996, chapter 509, Statutes 1999, chapter 1002 and
Statutes 2000, chapter 135 and 443

Dear Ms. Wakefield:

The draft staff analysis for this test claim is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by **August 18, 2004**. You are advised that the Commission's regulations require comments filed with the Commission to be simultaneously served on other interested parties on the mailing list, and to be accompanied by a proof of service on those parties. If you would like to request an extension of time to file comments, please refer to section 1183.0 1, subdivision (c)(l), of the Commission's regulations.

Hearing

This test claim is tentatively set for hearing on Thursday, **September 30, 2004** at 9:30 am in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about September 9, 2004. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Special Accommodations

For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

If you have any questions on the above, please contact Eric Feller at (916) 323-8221.

Sincerely,

PAULA HIGASHI
Executive Director

Enc. Draft Staff Analysis
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ITEM__

TESTCLAIM
DRAFTSTAFFANALYSIS

Education Code Sections 17213.1, and 17215.5 (former § 39006)
Statutes 1996, Chapter 509
Statutes 1999, Chapter 1002
Statutes 2000, Chapters 135 and 443

Acquisition of Agricultural Land for a School Site
(98-TC-04, amended by 0 l-TC-03)

Brentwood Union School District, Claimant

EXECUTIVE SUMMARY

STAFF WILL INSERT THE EXECUTIVE SUMMARY IN THE FINAL ANALYSIS.

STAFF ANALYSIS

Claimant

Brentwood Union School District

Chronology

7/22/98	Claimant Brentwood Union School District files original test claim with the Commission on State Mandates (Commission).
1/26/99	Department of Finance (DOF) files comments on the test claim.
9/18/01	Claimant Brentwood Union School District files amendment to test claim to add Education Code section 17215.5 (formerly section 39006, renumbered by Statutes 2000, chapter 135) and section 172 13.1, as added by Statutes 1999, chapter 1002.
12/5/01	Department of Finance files comments on amendment to test claim.
7/28/04	Commission issues draft staff analysis.

Background

Test claim legislation: The amended test claim includes claims made under two separate sections of the Education Code.

Education Code section 172 15.5 [1] requires that prior to acquiring property for "a new schoolsite in an area designated . . . for agricultural use and zoned for agricultural production, the governing board of a school district shall make all of the following findings:"

1) That the district has '"notified and consulted" with the local zoning agency (city and/or county) which has jurisdiction over the proposed school site; and,
2) That the final selection has been evaluated "based on all factors affecting the public interest and not limited to selection on the basis of the cost of the land," and,
3) That the district will "attempt to minimize any public health and safety issue resulting from the neighboring agricultural uses.. . ."

The California Farm Bureau sponsored the test claim legislation because restrictions imposed on pesticide use on agricultural land bordering schools resulted in a net loss of profitable land from the neighboring parcel. The sponsor argued that school districts locate schools in agricultural areas often, and that the intent of the legislation is not to stop siting schools in these areas, but rather to, ". . . require dialogue and exchange of

[1] Former Education Code section 39006 enacted by Statutes 1996, chapter 509, was renumbered to section 17215.5 by Statutes 2000, chapter 135, between the original and amended test claim filings.

information between the school district and the city or county when a school is proposed for an agricultural area."[2]

Education Code section 172 13.1 [3] requires that if a school district wishes to apply for state funds under the Leroy F. Greene School Facilities Act of 3998, it must perform a number of activities. The Leroy F. Greene School Facilities Act established a new state program in which the State Allocation Board would provide state per pupil funding for new school facilities construction and school facilities modernization. The act included Proposition 1 A, passed by voters in November 1998, that authorized the sale of $9.2 billion in general obligation bonds for K-12 schools ($6.7 billion) and higher educational facilities ($2.5 billion.) The proposition also limited, with some exceptions, the fees school districts could levy on developers and homeowners to finance school facilities. [4] The activities required by section 172 13.1 include the following:

1) Prior to acquiring the site, the school district must contract with an environmental assessor' (assessor) to supervise the preparation of, and sign, a Phase I environmental assessment[6] or the school district may choose to forgo a Phase I assessment and proceed directly to a preliminary endangerment assessment.[7]

2) If the district chooses to complete a Phase I environmental assessment and the assessment concludes that further investigation of the site is not necessary the district must then submit the assessment to the Department of Toxic Substances Control (DTSC).

   a) If the DTSC finds the assessment sufficient, it will notify the California Department of Education (CDE) that the assessment has been approved,

   b) If the DTSC does not find the assessment sufficient, it will instruct the district on what steps need to be taken to complete the assessment.

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[2] Senate Committee on Education, Analysis of Assembly Bill No. 1724 (1995-96 Reg. Sess.) as amended June 12, 1996, page 2.

[3] Education Code section 17213.1 was amended by Statutes 2001, chapter 865 and Statutes 2002, chapter 935 subsequent to the amended test claim filing to make public review voluntary under subdivisions (a)(6)(A)-(a)(7).

[4] Office of the Legislative Analyst, analysis of Proposition 1 A, Class Size Reduction Kindergarten-University Public Education Facilities Bond Act of 1998, pages 3-4. <http://www.lao.ca.gov/ballot/1998/1A_11_1998.htm> [as of July 19, 2004].

[5] Defined by Education Code section 17210, subdivision (b).

[6] Defined by Education Code section 17210, subdivision (g).

[7] Defined by Education Code section 172 10, subdivision (h), as an "activity that is performed to determine whether current or past hazardous material management practices or waste management practices have resulted in a release or threatened release of hazardous materials, or whether naturally occurring hazardous materials are present, which pose a threat to children's' health, children's learning ability, public heath or the environment."

c) The DTSC may also conclude that a preliminary endangerment assessment is required based on the findings of the Phase I environmental assessment.

3) If the Phase I environmental assessment concludes that further investigation of the site is necessary or if the district chooses to forgo a Phase I assessment and to move directly to a preliminary endangerment assessment, the district has two options:

a) it must either contract with an assessor to supervise the preparation of, and sign, a preliminary endangerment assessment, or,

b) it must enter into an agreement with the DTSC to prepare this assessment (including an agreement to compensate DTSC for their costs for this assessment).

4) The preliminary endangerment assessment shall conclude EITHER:

a) further investigation is not required; or,

b) that a release of hazardous materials has occurred or there is a threat of a release of hazardous materials at the site.

5) The school district must publish notice that the preliminary endangerment assessment has been submitted and shall make the assessment available for public review according to guidelines provided by subdivision (a)(6).[8]

6) The DTSC shall then either find:

a) that no further study of the site is required; or,

b) that the preliminary endangerment assessment is not satisfactory and further action is necessary; or,

c) if a release of hazardous materials has been found to have occurred and the district wishes to go forward with the project the district must:

i) prepare a financial analysis of the costs of response action required at the school site; and,

ii) assess the benefits of the site; and,

iii) obtain approval from the CDE for the site.

Further, s&ion 17213. 1[9], subdivision (11) states that "costs incurred by the district" may be reimbursed in accordance with section 17072.13, Section 17072.13, which is also part of the Leroy F. Greene School Facilities Act of 1998, allows for 50% of costs incurred by the district during the proposal and siting process to be reimbursed under the act. Section 172 13.1 was enacted in response to Joint: Legislative Audit Committee (JLAC) hearings held in 1992. JLAC concluded that the existing procedures for approval of school site acquisition must be "immediately reconfigure[d], . . to ensure local compliance with the laws." Specifically the bill was in response to the actions of the Los Angeles Unified School District, which a legislative committee report alleged requested state approval for

[8] Since the filing of the amended test claim, Statutes 2001, chapter 865 amended this to make public review voluntary under section 172 13.1, subdivisions (a)(6)(A)-(a)(7).

[9] All statutory references are to the Education Code unless otherwise indicated,

at least nine schools with knowledge that the sites may have contained toxic contamination, [10]

School District Facilities: Under current California law, school facilities can be constructed with or without state financial assistance. The School Facility Program (SFP) was created in 1998 under the Leroy F. Greene School Facilities Act" to administer state funds for school facility construction. The SFP was created to streamline the process for receiving state bond money for public school facilities construction. The program, which involves the State Allocation Board (SAB), Office of Public School Construction (OPSC), the School Facilities Planning Division (SFPD) of the CDE and the Division of the State Architect (SA), allocates funding to local school districts from statewide general obligation bonds passed by the voters of California.

The first funding for the SFP came from Proposition 1 A, approved in 1998, which provided $6.7 billion for K-12 facilities. The second funding came from Proposition 47, which included $11.4 billion for K-12 facilities. An additional $12.3 billion was added to this fund with the passage of Proposition 55 in March of 2004.

A school district wishing to receive state funding submits a funding application package to the SFP. The OPSC then reviews the package, and evaluates it under its regulations and policies. Approval of the plans by both the SA and the SFPD are required before the SAB approves the apportionment. [12] The money is then released to the district, which is required to submit expenditure reports to the OPSC, which audits all allocations.[13]

In order to receive the required approval of the CDE, the school district must follow the appropriate guidelines under California Code of Regulations, title 5, division 1, chapter 13, subchapter 1 .[14] These regulations include guidelines on site selection,[15] design of education facilities[16] and procedures for plan approval. [17]

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[10] Conference Report on Senate Bill No. 162 (1999-2000 Reg. Sess.) as amended July 12, 1999, page 4.

[11] This statute (Stats. 1998, ch. 407), among others, is the subject of test claim 02-TC-30, *School Facilities Funding Requirements.*

[12] The New Construction Program provides state funds on a 50150 state and local basis for public school projects while the Modernization Program provides funds on a 60/40 basis.

[13] See School Facility Program Guidebook. <http://www.documents.dgs.ca.gov/OPSC/PDF-Handbooks/SFP_GdBk.pdf> [as of July 19, 2004]. This document is also part of test claim 02-TC-30, *School Facilities Funding Requirements.*

[14] See School Site Selection and Approval Guide. <http://www.cde.ca.gov/ls/fa/sf/schoolsiteguide.asp> [as of July 19, 2004].

[15] California Code of Regulations, title 5, section 14010.

[16] California Code of Regulations, title 5, section 14030.

[17] California Code of Regulations, title 5, sections 1401 1 and 14012.

Claimant's Position

Claimant contends that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code 175 14. In the original claim, claimant alleges that the test claim legislation requires school districts to engage in the following reimbursable state-mandated activities:

1. Develop and adopt policies and procedures in accordance with Education Code section 39006 (now § 17215.5) for the acquisition of real property for a school site.
2. Train school district personnel regarding the requirements of acquiring real property designated as agricultural land.
3. Evaluate the property based on all factors affecting the public interest, not limited to selection based on the cost of the land.
4. Prior to the commencement of purchasing property for any school site:
    a. research city and/or county general plans to determine if the desired parcel of land is designated in either document for agricultural use; and,
    b. research city and/or county zoning requirements to determine if the desired parcel of land is zoned for agricultural production.
5. If the land sought to be purchased by the school district is designated in a city, county, or city and county general plan for agricultural use and zoned for agricultural production:
    a. notify the city, county, or city and county within which the prospective school site is located; and,
    b. consult with the city, county or city and county within which the prospective school site is located.
6. Prepare a report for the governing board that will allow the governing board to make the following findings:
    a, the school district has notified and consulted with the city, county, or city and county within which the prospective school site is to be located; and,
    b. the final site selection has been evaluated by the governing board of the school district based on all factors affecting the public interest and not limited to selection on the basis of the cost of the land; and,
    c. the school district wi ll attempt to minimize any public health and safety issues resulting from the neighboring agricultural uses that may affect the pupils and employees at the school site,
7. Conduct a meeting of the governing board to make the findings required by Education Code section 39006 (now § 17215.5).

8. Prepare and draft a board resolution with the follow findings:

   a. the school district has notified and consulted with the city, county, or city and county within which the prospective school site is to be located; and,

   b. the final site selection has been evaluated by the governing board of the school district based on all factors affecting the public interest and not limited to selection on the basis of the cost of the land; and,

   c. the school district will attempt to minimize any public health and safety issues resulting from the neighboring agricultural uses that may affect the pupils and employees at the school site.[18]

In the amended test claim, claimant states that based on the Department of Finance (DOF) letter filed on January 26, 1999," the claimant now believes that the following activities "were part of prior law and therefore removes them from [the] amended test claim filing:" (3) evaluating the property based on all factors, (4) researching city and/or county zoning requirements and current use and (5) notifying the city and/or county within which the site is located.[20] Further claimant amended the test claim to included new alleged state-mandated activities, as follows:

1) contract with an environmental assessor to supervise the preparation of and sign a Phase I environmental assessment of the proposed school site unless the governing board decides to proceed directly to a preliminary endangerment assessment (§ 1723 1.1, subd. (a)); or,

2) if the governing board of the school district decides to proceed directly to a preliminary endangerment assessment, the school district shall contract with an environmental assessor to supervise the preparation of and sign a preliminary endangerment assessment of the proposed school site and enter into an agreement with the DTSC to oversee the preparation of the preliminary endangerment assessment (§ 17213.1, subd. (a)(4)).[21]

State Agency Position

In its January 1999 comments on the original test claim (in regards to § 39006, now § 17215.5), DOF states that the alleged state-mandated activities of developing policies and procedures and training staff both appeared to be state-mandated activities of

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[18] Original test claim (98-TC-04), pages 13- 14.

[19] In a letter dated January 26, 1999 the DOF advised that activities [1] and [2] were reimbursable mandates, that activities [3], [4] and [5] were activities already required by state law and therefore not reimbursable mandates and that activities [6], [7] and [8] where not required by section 17215.5 and therefore also not reimbursable mandates.

[20] Amended test claim (0 1-TC-03), page 7.

[21] Amended test claim (01-TC-03) page 16. A different numbering scheme is assigned to these activities on pages 9-10 of the amended test claim, but for this analysis the numbering scheme on page 6 will be used.

minimal cost. DOF states that the alleged state-mandated activities of evaluating the site on all factors and determining if the site is zoned for agriculture are already incorporated into state law under Education Code section 17212. And the requirement that the district notifies and consults with a city and/or county is also incorporated into state law under Education Code section 172 13, subdivision (b). DOF states that since all three are required activities they are not new programs or higher levels of service. DOF also states that alleged state-mandated activities, preparing a report, holding a meeting, and, passing a resolution, were not required by Education Code section 172 15 .5. DOF states that section 172 15.5 only requires the governing board to make a finding; it does not require staff to prepare a report, conduct a specific meeting or prepare and pass a resolution.[22]

In its December 2002 comments on the amended test claim statutes (in regards to both § 172 15.5 and § 172 13.1), DOF reiterates its prior statements on policy development and training, stating that both appear to be state-mandated activities that impose minimal cost, DOF argues that the newly alleged state-mandated activities, such as contracting for a Phase I environmental assessment, and contracting for a preliminary endangerment assessment are not state-mandated. DOF points out that the entire section 17213.1 begins with "As a condition of receiving funding pursuant to Chapter 12.5. . ."[23] Therefore, DOF argues that section 172 13.1 sets out the requirements for an optional funding source and does not constitute state-mandated activities.

However, DOF reverses its position on the alleged state-mandated activities of preparing a report and a resolution, arguing that although they are not specifically required by the section 17215.5, these activities are "reasonable and consistent with the intent of the statute."[24] However, DOF states that in accordance with its previous comments, holding a meeting is not specifically required by section 172 15.5 and the board could make the required finding at "a regularly scheduled board meeting."[25]

Finally, DOF points out that, "[t]he appropriate period in the State Mandates process for identifying reimbursable activities is the Test Claim phase . . . [i]t is inappropriate to transform the Parameters and Guidelines phase . . . into a venue for Claimants to seek reimbursement for activities they failed to identify in their test claims."[26]

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[27] recognizes the state constitutional restriction on the powers of local government to tax

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[22] DOF comments on test claim 9%TC-04, dated January 26, 1999, pages l-3.

[23] Education Code section 172 13.1.

[24] DOF comments on test claim 0 l-TC-03, dated December 5, 200 1, page 3.

[25] DOF comments on test claim 0 1 -TC-03, dated December 5, 200 1, page 2.

[26] DOF comments on test claim 0 l-TC-03, dated December 5, 200 1, page 3.

[27] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not,

and spend.[28] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[29] A test claim statute or executive order may impose a reimbursable state program if it orders or commands a local agency or school district to engage in an activity or task.[30] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service."

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[32] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirement in effect immediately before the enactment of the test claim legislation.[33] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[34]

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provide such subjection of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders of regulations initially implementing legislation enacted prior to January 1, 1975 ."

[28] *Department of Finance* v. *Commission on State Mandates* (2003) 30 Cal.4th 727, 735,

[29] *County of San Diego v. State of California (1997)* 15 Cal.4th 727, 735.

[30] *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates, supra, 30* Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsions or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.* at page 754.)

[31] *Lucia Mar Unified School Dist. v. Honig, supra, 44* Cal.3d 830, at page 835.

[32] *County of Los Angeles v. State of California* (1981) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig, supra, 44* Cal.3d 803, at page 835.

[33] *Lucia Mar Unified School Dist. v. Honig, supra, 44* Cal.3d 830, at page 835.

[34] *County of Fresno v. State of California (1991) 53* Cal.3d 482, 187; *County of Sonoma v. Commission on State Mandates (2000) 84* Cal.App.4th 1265, 1284; Government Code sections 175 14 and 17556.

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[35] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[36]

Issue 1: Do the test claim statutes impose a state-mandated activity on school districts within the meaning of article XIII B, section 6?

The California Supreme Court and the courts of appeal have held that article XIII B, section 6 was not intended to entitle local agencies and school districts to reimbursement for all costs resulting from legislative enactments, but only those costs "mandated" by a new program or higher level of service imposed upon them by the state.[37] Thus, the issue is whether the test claim statutes impose a state-mandated activity on school districts.

Education Code section 17215.5: This section requires the governing board of a school district to make three findings if the board wishes to acquire and build a new school on land zoned for agricultural use, The section states that before acquiring land zoned for agricultural use the governing board of a school district must find:

1) That the school district has notified and consulted with the city and/or county within which the site is located; and,

2) That the final site selection has been evaluated by the school governing board based on factors other than costs; and,

3) That the school district will attempt to minimize any public health issue resulting from neighboring agricultural uses.

Staff finds that this section is not subject to article XIII B, section 6 because the decision to construct a new school as well as the decision on where to site that school is a discretionary decision made by the local governing board of a school district. Section 172 15.5 does not require the acquisition of any land for a school, nor does it specify the type of land to be acquired (including land zoned for agricultural use.)

Although California law does express the intent of the legislature that public education shall be a priority in the state and provided by the state,[38] there are no statutes or regulations requiring a school district or county board of education to construct school facilities, School districts are given the power by state law to lease [39]or purchase[40] land

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[35] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 33 l-334; Government Code sections 17551 and 17552.

[36] *City of San Jose v. State of California, supra,* 45 Cal.App.4th at page 1817; *County of Sonoma, supra,* 84 Cal.App.4th at page 1280.

[37] *Lucia* Mar *Unified School Dist., supra*, 44 Cal.3d 830, 835; *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816.

[38] Education Code sections 1600 1, 1670 1 and 17001.

[39] Education Code section 17244.

for school facilities, to construct school facilities"' and to establish additional schools in the district.[42] However, in all of these statutes permissive language is used when describing the role of the governing board of the school district, In sections 17244 and 17245 the board ". . . is authorized, . ." and section 17342 states that the, "governing board of any school, whenever in its judgment it is desirable to do so, may establish additional schools in the district."

California courts have also found that the construction of school facilities within a school district is a discretionary decision of the school district, In *People v. Oken*[43] the court found that, "[w]here, when or how, if at all, a school district constructs school buildings is a matter within the sole competency of its governing board to determine. "[44] This reasoning was reiterated in a state Attorney General opinion in 1988.[45]

> With the conventional construction of school facilties, the question of "where, when or how, if at all, a school district shall construct [a] a school building [ ] is a matter within the sole competency of its governing board to determine ." *(People v. Oken* (1958) 159 Cal.App.2d 456, 460.) The same is essentially true with the construction of a school facility under the Leroy F. Greene State School Building Lease-Purchase Law.""

This language indicates that all aspects of new school facilities, including when they are constructed and if they are constructed at all, is a decision left to local school boards.

In recent cases the courts have again held that the power to site a school belongs to the local school district and not the state. In *Town of Atherton v. Superior Court of San Ma teo,* [47] the court found that "[u]nder the statutes . . . the state has expressly granted the power of location to its agencies, the school districts."[48] In *City of Santa Clara v. Santa Clara Unified School District*,[49] the court found that "the selection of a school site

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[40] Education Code sections 17340 and 35 162.

[41] Education Code sections 17245 and 17340.

[42] Education Code sections 17342.

[43] *People v. Oken (1958)* 159 Cal. App. 2d 456.

[44] *Id,* page 460.

[45] Both the California Supreme Court and the Ninth Circuit Court of Appeals have stated that, "Although Attorney General opinions are not binding, they are entitled to great weight." *Freedom Newspapers, Inc. v. Orange Coun ty Employees Retirement, (1993)* 6 Cal. 4th *829, 832. Prescott v. United States,* (1984) 73 1 F.2d 1388, 1393.

[46] 7 1 Opinions Attorney General of California 332 (1988) pages 17-18.

[47] *Town of Atherton v. Superior Court of San Mateo,* (1958) 159 Cal.App. 2d 417.

[48] *Id.* page 428.

[49] *City of Santa Clara v. Santa Clara Unified School District* (197 1) 22 Cal.App. 3d 152.

by a school district involves an exercise of legislative and discretionary action and may not be challenged as to its wisdom, expediency or reasonableness.. ."[50]

Additionally, there are no statutes that direct school districts on the placement of schools, Former Education Code sections 37000 through 37008 did relate to the specific location of schools, but were repealed by Statutes 1989, chapter 1256. Currently, the only section that pertains to state agency involvement in school site selection is section 1752 1. However, section 17521 only requires that the CDE create standards for use by school districts in the selection of school sites and allows school districts to request advice on the acquisition of a proposed site.

Therefore, based both on statutes and case law, the decision to acquire land on which to site a school and the decision as to which land to acquire are both decisions that are made at the discretion of the school district. If a district's decision is discretionary, no state-mandated costs will be found.

In *City of Merced v. State of California,*[51] the court determined that the city's decision to exercise eminent domain was discretionary. The court found that no state reimbursement was required for loss of goodwill to businesses over which eminent domain was exercised, the court reasoned as follows:

> We agree that the Legislature intended for payment of goodwill to be discretionary, The above authorities reveal that whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county rather than a mandate of the state. *The fundamental concept is that the city or county is not required to exercise eminent domain.*[52] [Emphasis added.]

In *Department of Finance v. Commission on State Mandates*[53], the California Supreme Court found that costs associated with notices and agendas required by state law were not entitled to reimbursement if the requirements for notice and agendas were part of a program in which the school district had chosen to participate. In that case, the California Supreme Court affirmed the reasoning of the *City of Merced* case as follows:

> [T]he core point articulated by the court in *City of Merced* is that activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds — even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice.[54]

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[50] *Id.* at page 16, footnote 4.

[51] *City of Merced v. State of California* (1984) 153 Cal, App. 3d 777, 783.

[52] *Ibid.*

[53] *Department of Finance v. Commission on State Mandates, supra, 30* Cal.4th 727.

[54] *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th 727, 742.

The Supreme Court left undecided whether a reimbursable state mandate "might be found in circumstances short of legal compulsion-for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program."[55] There is no evidence in the record, however, that school districts are "practically compelled" to acquire agricultural land to build schools, The test claim statute does not impose a penalty for noncompliance.

The decision of the California Supreme Court interpreting state-mandate issues is relevant to this test claim. The Commission is not free to disregard the clear statement of the California Supreme Court. Thus, pursuant to state law, school districts remain free to site new schools where they choose. The statutory duties imposed by section 17215.5 flow from the decision to site a school on land zoned for agricultural use. Based on the *Department of Finance* case, since this decision is a local discretionary activity, any requirements imposed by the state on the local decision do not constitute a reimbursable state mandate.

Therefore, staff finds that section 17215.5 does not impose a state-mandated activity on school districts within the meaning of article XIII B, section 6,

Education Code section 17213.1: This section, enacted in 1999, lays out the additional requirements[56] that school districts must satisfy in order to receive funding from the Leroy F. Greene School Facilities Act of 1998.[57] It requires school districts to contract for a Phase I environmental assessment or if necessary a preliminary endangerment assessment if the school district wishes to request state funding for the facility. These requirements specifically address the study of new school sites for natural, previous or potential releases of hazardous or toxic substances.

When construing a statute, we must ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. At the same time, we do not consider , . statutory language in isolation. Instead, we examine the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts. Moreover, we react every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'*

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[55] *Ibid.*

[56] Basic requirements for school siting can be found in California Code of Regulations, title 5, sections 1400 1- 140 12 and Education Code section 1725 1.

[57] Section 17072.13 provides that a school district may request up to 50% of the cost of implementing this section if it chooses to request funding from the State Funding Program (SFP). If a school district qualifies as eligible for financial hardship under section 17075. 10 or if the site meets the environmental hardship criteria in section 17072.13, subdivision (c)(l), then up to 100% of this cost can be requested from the SFP.

[58] *State Farm Mutual Automobile Ins. Co. v. Garamendi (2004) 32* Cal.4th 1029, 1043.

Section 172 13. l's first sentence states, "As a condition of receiving state funding.. . ." The plain meaning of this section is that the requirements in section 172 13.1 only apply to school districts that decide to request funding through the Leroy F. Greene School Facilities Act of 1998, although the section includes district requirements that apply regardless of where a school is sited. Thus, the district's decision to seek funds under this act is discretionary and not mandatory, DOF alleges that approximately 58% of districts do not apply for funding under the 1998 Leroy Greene Act.[59]

As stated above, if a district's decision is discretionary, no state-mandated costs will be found.[60]

Therefore, the requirements imposed on the conditional funding from the Leroy F. Greene School Facilities Act of 1998 are not state-mandated activities, so section 17213.1 is not a reimbursable mandate on school districts within the meaning of article XIII B, section 6 of the California Constitution.

Conclusion

Staff finds that the test claim statutes, Education Code sections 172 15.5 and 17213.1, do not impose a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 175 14. This conclusion is based on the following findings:

1) For Education Code section 172 15.5, the specified findings the school district must make if the proposed school site is on land zoned for agricultural use is not state-mandated because the decision to build a school, as well as where to locate it, including the acquisition of agricultural land for a school, is a discretionary decision left to local school districts by state law,

2) For Education Code section 172 13.1, the procedures a school district must follow when it seeks state funding pursuant to the Leroy Greene School Facilities Act of 1998 (commencing with Education Code § 17070.10) are not state-mandated because the school district is not required to request state funding under section 17213.1.

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[59] DOF comments on test claim Ol-TC-03, dated December 5, 200 1, page 2.

[60] *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th 727, 742. City *of Merced v. State of California, supra,* 153 Cal. App. 3d 777, 783.

SENATE COMMITTEE ON EDUCATION
Leroy F. Greene, Chairman
1995-96 Regular Session

BILL NO: AB 1724
AUTHOR: McPherson
'AMENDED: June 12, 1996
FISCAL COMM.: Yes HEARING DATE: June 12, 1996
URGENCY: No CONSULTANT: Diane Kirkham

SUMMARY

This bill requires school districts to make specified findings prior to acquiring school sites in agricultural areas after January 1, 1997.

BACKGROUND

Current law provides that a school district, by a two-thirds vote of its governing board, may choose not to comply with local zoning ordinances when locating a new school. However, it must comply with ordinances related to drainage, road improvements and grading for onsite improvements for school projects.

Current law also requires school districts to evaluate a proposed school site at a public hearing using the site selection standards established by the State Department of Education.

ANALYSIS

This bill requires that school districts make the following findings prior to acquiring a school site in an agricultural area, for any school site approved by the Department of Education after January 2, 1997:

1) The school district has notified and consulted with the city or county in which the prospective school site is located.

2) The site has been evaluated on factors affecting the public

interest, not just cost.

3) The school district will attempt to mitigate any public health and safety issues resulting from neighboring agricultural uses.

STAFF COMMENTS

1) Concerns of Farmers
The sponsor (the California Farm Bureau) argues that farmers effectively lose the use of the portion of their land which is adjacent to a new school due to restrictions imposed on use of agricultural chemicals. They are proposing through this bill that school districts be required to address issues that arise from locating in agricultural areas.

2) How Big is the Problem?
The sponsor asserts that new schools are located in agricultural areas more often than one would think. Representatives of schools indicate that they believe there are relatively few new schools located in these areas. No reliable statewide estimates of the true number of new schools located in agricultural areas are readily available.

3) Can a City or County Stop a School Site from Being Located in an Agricultural Area? According to the authoros office, the bill is not intended to give the city or county the power to stop the siting of a school in an agricultural area. Rather, it is the intent of the author to 'require dialogue and exchange of information between the school, district and the city or county when a school is proposed for a agricultural area.' Under the current wording of the bill, a city or county may have the authority to halt the siting of a school in an agricultural area. Accordingly, staff recommends that the bill be amended to clearly indicate that a city or county would not have the authority to halt such a school site acquisition.

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SUPPORT

None received

OPPOSITION

None received

LAO 60 YEARS OF SERVICE | legislative analyst's office

November, 1998

Proposition 1A
Class Size Reduction Kindergarten-University
Public Education Facilities Bond Act of 1998.

Background

Public education in California consists of two distinct systems. One system includes local school districts that provide elementary and secondary (kindergarten through twelfth grade, or K-12) education to about 5.7 million students. The other system (commonly referred to as "higher education") includes local community colleges, the California State Universities, the University of California, and the Hastings College of the Law. The higher education system provides a wide range of education programs beyond the twelfth grade to about 1.9 million students.

K-12 Schools

School ***Facilities.*** The state, through the State School Building Lease-Purchase Program, has provided much of the money for school districts to buy land and to construct, reconstruct, or modernize school buildings in the K-12 system. In order to receive money under this program, school districts must meet certain requirements. Districts receive a higher priority for state funding of a project if they provide 50 percent of the project cost with local funds.

Since 1986, the voters have approved $8.8 billion in state general obligation bonds to fund K-12 school construction and renovation. As of July 1998, there was about $70 million remaining from these funds.

In addition to obtaining money from the state, local school districts raise funds for school buildings in three main ways:

- ***Local General Obligation Bonds.*** School districts are authorized to sell bonds to finance school construction projects, with the approval of two-thirds of the voters in the district. In these cases, the bonds are paid off by taxes that are levied on property located within the school district.
- ***Special Local Bonds (Known as "Mello-Roos" Bonds).*** School districts are authorized to form special districts in order to sell these bonds for school construction projects, with approval of two-thirds of the voters in the special district. (The special districts generally do not encompass the entire school district.) The bonds are paid off by charges assessed to property owners in the special district.

- Developer Fees. State law authorizes *school districts* to impose developer fees on new construction. As of January 1998, the maximum allowable fee under state law is $1.93 per square foot on residential buildings and 31 cents per square foot on commercial or industrial buildings. These fees may be used only for construction and reconstruction of school buildings. In addition to these fees imposed by school districts, decisions by the courts have allowed *cities* and *counties*, when approving new residential- and commercial development, to impose additional developer fees for new school construction.

K-72 School Building Needs. There is no district-by-district estimate on the future demand for school facilities. The State Department of Finance estimates that the number of students attending K-12 schools statewide will increase by about 300,000 over the next five years. Given this projected growth, several billions of dollars will be needed statewide for new schools over the next five years. Additional billions of dollars will be needed for reconstruction or modernization of *existing* schools.

As of July 1998, applications submitted by school districts for state funding of land and new school buildings totaled approximately $2.9 billion. In addition, applications for state funding to reconstruct or modernize school buildings also totaled $2.9 billion.

Class Size Reduction. In 1996, the Legislature and the Governor enacted the Class Size Reduction Program, which made funds available to school districts to reduce kindergarten through third grade classes throughout the state to no more than 20 students. Districts implemented this program by purchasing or renting portable classrooms, making use of vacant space in schools, and converting into classrooms space that had been used for other purposes (such as libraries, child care facilities, and teacher lounges).

In 1996 and 1997, the state provided about $530 million for grants to districts to pay for facilities-related costs associated with reducing class size. A majority of these funds have been used to purchase portable classrooms. It is estimated that the program could result in added facilities costs (including the restoration of space that had been displaced to provide additional classrooms) of between $500 million and $700 million.

Higher Education

California's system of public higher education includes 139 campuses serving about 1.9 million students:

- The University of California has nine campuses, with a total enrollment of about 166,000 students. This system offers bachelor, master, and doctoral degrees, and is the primary state-supported agency for research.
- The California State University system has 22 campuses, with an enrollment of about 350,000 students. The system grants bachelor and master degrees.
- The California Community Colleges provide instruction to about 1.4 million students at 107 campuses operated by 71 locally governed districts throughout the state. The community colleges grant associate degrees and also offer a variety of vocational skill courses.
- The Hastings College of the Law is governed by its own board of directors and has an enrollment of about 1,300 students.

The state provides money to support these institutions of public higher education. This support

covers both ongoing operating and capital improvement costs. In addition to state funds, these institutions also receive nonstate funds for both operations and capital improvements.

Since 1986, the voters have approved nearly $3.3 billion in general obligation bonds for capital improvements at public higher education campuses. As of July 1998, there was about $28 million remaining from these funds. In addition, since 1986 the Governor and the Legislature have provided about $2.4 billion for public higher education facilities from lease-payment bonds.

Higher ***Education*** Building Needs. Each year the institutions of higher education prepare five-year capital outlay plans, in which they identify projects that they believe should be funded over the next five years. The most recent five-year plans identify a total of $6.5 billion in projects for the period 1998-99 through 2002-03.

Proposal

This measure authorizes the state to sell $9.2 billion in general obligation bonds for K-12 schools ($6.7 billion) and higher education facilities ($2.5 billion).

General obligation bonds are backed by the state, meaning that the state is obligated to pay the principal and interest costs on these bonds. General Fund revenues would be used to pay these costs. These revenues come primarily from state personal and corporate income taxes and sales taxes.

K-12 School Facilities

The $6.7 billion would be used to fund school construction over the next four years as follows:

- At least $2.9 billion to buy land and construct new school buildings. Districts would be required to pay for one-half of eligible project costs with local resources.
- At least $2.1 billion for reconstruction or modernization of existing school buildings. Districts would be required to pay for 20 percent of eligible project costs with local resources.
- Up to $700 million for facilities costs related to the Class Size Reduction Program.
- Up to $1 billion for projects where the state determines that a district either (1) is unable for financial reasons to provide sufficient local matching funds or (2) will. incur excessive school construction costs that are beyond the control of the district.

The above distribution of funds could be altered with the approval of two-thirds of the Legislature and the Governor.

Developer Fees. The legislation that placed this bond measure on the ballot also makes changes related to developer fees, These changes would take effect only if this bond measure is approved by the voters.

- School ***Districts.*** Districts would still be authorized to charge $1.93 per square foot on residential buildings and 31 cents per square foot on commercial or industrial buildings. They could, however, exceed these limits if they meet certain conditions regarding capacity problems and local bonding efforts. In these cases, districts could increase

developer fees to fund the 50 percent matching requirement for new school construction. If there were no state funds available for new school construction, districts could increase developer fees to fund 100 percent of a school project. If a district subsequently receives funds from the state, these funds (up to 50 percent of the project cost) could be reimbursed to the parties that originally paid the fee.

- Cities and ***Counties.*** In addition, between November 1998 and the primary election of 2006, cities and counties could not require additional fees for school construction as a condition of approving new developments. (Cities and counties could, however, designate land under their jurisdictions for school sites.) At the end of that period, cities and counties could require additional developer fees if any statewide school bond measure is rejected by the voters. They could continue to assess the fees until a subsequent statewide school bond measure was approved by the voters. The amount of fees that cities or counties could assess would be limited to (I) 50 percent of the cost of new school projects if state funds are also available for this purpose or (2) 100 percent of project costs if no state funds are available.

Homebuyer and Renter Assistance. The legislation placing this bond measure on the ballot also provides state funds to offset all or part of the cost of some developer fees. These funds would be available to:

- Homebuyers in areas with high unemployment.
- Buyers of homes costing less than $110,000.
- Low or very low-income first-time homebuyers.
- Developers of rental housing for very low-income tenants.

A total of $160 million in state funds would be available for these programs over a four-year period.

Higher Education Facilities

The measure includes $2.5 billion to construct new buildings, alter existing buildings, and purchase equipment for use in these buildings for California's public higher education system. Of this total, $165 million would be allocated specifically for (I) new campuses of the University of California and (2) new campuses, campuses with enrollments of less than 5,000 full-time equivalent students, and off-campus centers at the California State University and the California Community Colleges. The Governor and the Legislature would decide the specific projects to be funded by the bond monies.

Fiscal Effect

Bond Cosfs. For general obligation bonds, the state makes principal and interest payments from the state's General Fund typically over a period of about 25 years. If the $9.2 billion in bonds authorized by this proposition are sold at an interest rate of 5 percent, the cost over the period would be about $15.2 billion to pay off both the principal ($9.2 billion) and interest ($6 billion). The average payment for principal and interest would be about $600 million per year.

Homebuyer and Renfer Assistance. There would also be a state cost of $160 million ($40 million a year for four years) for these programs.

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SB 162
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PROPOSED CONFERENCE REPORT NO. 1 - September 3, 1999
SB 162 (Escutia)
As Amended July 12, 1999
Majority vote

SENATE: 23-9 (June 10, 1999) ASSEMBLY: (July 15, 1999)
(vote not relevant)

SENATE CONFERENCE VOTE : 2-o
ASSEMBLY CONFERENCE VOTE :2-0

Ayes:	Firebaugh, Wildman	Ayes:	Escutia, Hayden

Original Committee Reference: ED.

SUMMARY : Requires a school district that wants certain state bond funding for acquisition of or construction on a schoolsite to conduct an environmental review of the site and applies the state superfund laws to schoolsites with naturally occurring hazardous materials as well as those released on the site. Specifically, the conference committee amendments delete the Assembly amendments to this bill and modify the version that passed out of the Senate by narrowing its focus to the site environmental review process. For school sites seeking Prop 1A funding, the proposed amendments:

l)Condition funding eligibility on the governing board of school district (district) hiring an environmental assessor to conduct a Phase I environmental assessment:

a) Site sampling or testing is not part of a Phase I assessment;

b) Delineates specific credentials for the assessor that include both education and experience;

c) Phase 1 assessments may include review of public and private records of current and historical land use, visual surveys of the property and examination of available information about the past and present uses of the vicinity

of the site; and,

d) The assessment shall focus on the risks posed to children from the released or naturally occurring hazardous materials on the schoolsite.

2)Require the Phase 1 assessment to make a specific recommendation either that no preliminary endangerment assessment is necessary or that one is necessary to further determine: a) the extent of a release that has been found to have occurred; b) if there is a threat of a release of hazardous materials; or, c) if there is a naturally occurring hazardous material present.

3)Direct the district to send any preliminary assessment that concludes that further investigation is not necessary to the Department of Education (DOE). DOE then sends that material to the Department of Toxic Substances Control (DTSC) within 10 days. DTSC has 30 calendar days to notify DOE and the district that it concurs in or rejects the conclusion that no preliminary endangerment assessment is needed.

4)Require the district to elect not to proceed with the site acquisition if either the Phase I assessment or DTSC sees a reason for further study. Else, the district must have a preliminary endangerment assessment (PEA) prepared and the district must enter into an agreement with DTSC to oversee its preparation. This PEA must be made available to the public for 30 calendar days and certified by DTSC.

a) The PEA must examine site for both hazardous situations caused by a release or those that are naturally occurring. A PEA must include sampling and testing of the site;

b) When examining the risk, the PEA shall also have a particular focus on the risk posed to children;

c) The district shall not be held liable as a result of making the PEA available for public review; and,

d) If DTSC determines no further action is necessary it shall inform the district and DOE within 60 calendar days of receipt of'the PEA.

5)Require the district, if DTSC determines that there may be a

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risk of exposure to children on the site, to conduct the

following studies if it wants to continue to consider the site and seek Prop 1A funding for the project:

a) Complete a financial analysis estimating cost of any necessary response action;

b) Describe benefits of using this site over alternatives;

c) Obtain approval from DOE that the site does indeed meet schoolsite selection standards; and,

d) Evaluate the suitability of the schoolsite in light of the recommended alternative sites.

6)Require the district to reimburse DTSC for its response costs.

7)Specify that Carpenter-Presley-Tanner Hazardous Substances Account Act (state superfund) shall apply to naturally occurring hazardous materials as well as releases for these school site environmental reviews.

AS PASSED BY THE SENATE , this bill included a similar but less detailed environmental review process and also contained provisions regarding steps to be taken in any response action.

The Assembly amendments replaced the Senate version of the bill with intent language to facilitate a vote of non-concurrence that sent the measure and three others to conference committee. The other three measures: AB 137 (Firebaugh), AB 387 (Wildman) and AB 993 (Hayden) also address the exposure of children to hazardous substances at school.

FISCAL EFFECT : Unknown

COMMENTS : The amendments proposed by the Conference Committee are substantially similar to the version that passed out of the Senate, but the provisions of steps to be taken as a response or remediation action have been removed to eliminate the conflicts with AB 387. AB 387 handles the steps after the environmental review process contained in this bill are completed.

The steps required by this measure need only be done by a district that is seeking Prop 1A funds as part of financing for

acquisition of a school site or construction of a new facility.

The amendments proposed by the conference committee clarify that DTSC must review any Phase 1 assessment or PEA that is produced.

DTSC is also clearly placed in an oversight role pursuant to an agreement that is signed between DTSC and the district. This approach is designed to make sure that there is adequate review of these environmental assessments. The amendments also specify that the credentials of the environmental assessor must include certain educational and practical experience.

The other significant amendment is to apply state superfund provisions to naturally occurring instances of hazardous materials as well as those resulting from a release,

Brief Background: The Joint Legislative Audit Committee (JLAC) conducted hearings in 1998 and concluded that existing practices and procedures were inadequate to assure due diligence in the approval process for school site acquisition and new construction. JLAC recommended in its August 1998 report that "The state must immediately reconfigure its internal approval; protocol so that state oversight activities ensure local compliance with the law."

Proponents assert that there are at least nine schools in the Los Angeles Unified School District alone where local agencies suspected serious toxic contamination before state approval and that, even with knowledge that toxins were suspected at these sites, the state still approved acquisition of these sites.

This bill is double joined to AB 387.

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School Site Selection and Approval Guide

Prepared by
School Facilities Planning Division
California Department of Education

Contents

introduction

Selecting the most appropriate site for a school is an important consideration for a school district and the school community. The location, size, and shape of a school site can materially affect the educational program and opportunities for students. Because program needs differ, school districts must carefully develop selection criteria with the requirements of the local school program in mind. The selection must be based not only on current needs but also on projected needs, It is not a simple task. The primary purpose of this guide is to help school districts make the wisest selection possible.

Purpose

This document has been designed to help school districts (1) select school sites that provide both a safe and a supportive environment for the instructional program and the learning process; and (2) gain state approval for the selected sites. To help in the selection process, the guide includes a set of selection criteria that have proven helpful to site selection teams. The guide also contains information about safety factors that should be considered when evaluating potential school sites and about the procedures school districts must follow to gain approval from the Department for new sites and for additions of land areas to existing sites.

The Role of the California Department of Education

Education Code Section 17521 and the *California Code of Regulations* (*CCR*), *Title 5,* sections 14001 through 14012, outline the powers and duties of the Department regarding school sites and the construction of school buildings. Districts seeking state funding must comply with the Education Code and Title 5 sections cited above. Site approval from the Department must be granted before the State Allocation Board will apportion funds. Districts using local funds are encouraged to seek the Department's approval for the benefits that such outside, objective reviews provide to the school district and the community.

Selecting the Proper Site

When a school district decides to select a new school site, two basic questions must be addressed: (I) Who will be responsible for the school site selection process? (2) What criteria will be considered in selecting the site? This guide contains information that school districts can use to answer those questions.

Determining Who Will Select the Site

A key decision the school district must make is whether the site will be selected by district staff or through a selection team process. The Department suggests that a selection team recommend a site or sites to the local board of education. For that reason, the information provided in this guide is directed to team members but is equally applicable to district staff. If the school district establishes a site selection team, the team should include community members, teachers, administrators, public officials, and the architect selected by the school district to design the project, The community members should include people with and without children in the district, A consultant from the Department is available to advise the district on the formation of the team. Some school districts include a school board member as part of the team, By following this selection process, the committee may become somewhat large but should produce a better school site as a result. Once the composition of the selection team is determined, one of its first tasks will be to establish site selection criteria.

Developing Site Selection Criteria

School site selection is affected by many factors, including health and safety, location, size, and cost. Those persons responsible for the school site selection will have to evaluate both the present characteristics and the possible future characteristics of a site and its surrounding property. Because the site selection team often is unable to locate a site that meets all the criteria agreed on, it should set priorities and be prepared to make certain compromises. In addition, the team must weigh those site characteristics that may adversely affect the choice. Careful assessment takes time, but the importance of each decision justifies the attention. A public comment period should be incorporated into the process to receive information and support from the broader community for both the primary alternatives and the recommended site or sites.

Screening and Ranking Criteria

To help focus and manage the site selection process, the Department developed screening and ranking procedures. The procedures were created on the basis of the following criteria, which are listed in the general order of importance:

1. Safety
2. Location
3. Environment
4. Soils
5. Topography
6. Size and Shape
7. Accessibility
8. Public Services
9. Utilities
10. cost
11. Availability
12. Public Acceptance

An explanation of these criteria is in Appendix A, Site Selection Process. Appendix A also contains three work sheets created on the basis of a screening and ranking procedure developed by School Facilities Planning Division (SFPD) staff.

The first work sheet, Site Selection Criteria, outlines the 12 major criteria listed above, with several secondary criteria listed as subtopics. The secondary criteria have been designed to help the selection team define more clearly the factors that must be considered and understand better the types of data needed in the selection and acquisition of the school site. After considering both the primary and secondary criteria, the site selection team should be able to rank the sites in order of acceptability by completing the next two work sheets, Site Selection Evaluation and the Comparative Evaluation of Candidate Sites.

Although the criteria contained in Site Selection Criteria are not the only ones a site selection team should consider, the team might find those criteria useful when explaining to school boards and other interested entities how the selection process was accomplished. School districts purchasing the site with state funds will find the criteria helpful when screening available sites and in identifying at least three acceptable sites. Districts not applying for state funds are not required by Education Code Section 17251 to review a specific number of sites. However, the California Environmental Quality Act requires that alternative sites be reviewed in the Environmental Impact Report (EIR). Prudence suggests that identifying alternative sites is a desirable procedure, and the Department recommends it.

Recommended Resources

School administrators, members of school boards, site selection teams, and other persons involved in facilities planning may find the following documents useful:

School Site Analysis and Development (2000). Available from the California Department of Education, School Facilities Planning Division, 1430 N Street, Suite 1201, Sacramento, CA 95814.

The Guide for Planning Educational Facilities (1995). Available from the Council of Education Facility Planners International, 9180 E. Desert Cove Drive, Suite 104, Scottsdale, AZ 85260.

School Site Analysis and Development contains information the school site selection team can use to evaluate a potential site and determine whether it meets the needs of the particular school. The site standards in the book are based on historical school facilities funding programs. School planners should modify the requirements to fit current local educational program requirements.

The Department also recommends that the team select a site on the basis of the school district's facility master plan that reflects the district's demographics, potential growth rates, and capacities at existing school sites. In addition, many cities and counties have designated future school sites on general plan land use maps that the team should review.

Impacted Sites

The Department's recommendations for site size can be found in *School Site Analysis and Development.* A ratio of 1:2 between buildings and developed grounds is incorporated in all the tables. Unfortunately, in many cases, primarily in urban settings, sites must be smaller than the acreage that appears in the charts. Although open space on a school campus is desirable for athletic fields, free play, parking, emergency access, foot traffic circulation, supervision, and aesthetics, the district often cannot feasibly acquire enough land. Using eminent domain to condemn property is possible; however, displacing families to gain land for a school is a difficult decision for many school districts to make. In such cases the Department may approve an amount of acreage less than the recommended site size. Policies related to urban impacted areas are being developed. All other site selection procedures outlined in this book should be followed for these sites.

Careful planning on undersized sites must take place to provide the students at that school an appropriate educational program. Educational specifications must be examined carefully to ensure that all aspects of the program can take place within the bounds of a small site. The school district may consider building multilevel complexes with underground parking to maximize the useable acreage on the site. Off-site issues, such as traffic congestion, should also be addressed in the planning process.

Evaluating Safety Factors

Safety is the first consideration in the selection of school sites. Certain health and safety requirements are governed by state regulations and the policies of the Department. In selecting a school site, the selection team should consider the following factors: (1) proximity to airports; (2) proximity to high-voltage power transmission lines; (3) presence of toxic and hazardous substances; (4) hazardous air emissions and facilities within a quarter mile; (5)

other health hazards; (6) proximity to railroads; (7) proximity to high-pressure natural gas lines, gasoline lines, pressurized sewer lines, or high-pressure water pipelines: (8) proximity to propane tanks; (9) noise; (10) proximity to major roadways; (1 1) results of geological studies and soils analyses; (12) condition of traffic and school bus safety; (13) safe routes to school; and (14) safety issues for joint-use projects.

Proximity to Airports

The responsibilities of the school district, the California Department of Education, and the Department of Transportation (DOT), Aeronautics Program, Office of Airports, concerning the school site's proximity to runways are contained in Education Code Section 17215 (as amended by Assembly Bill (AB) 747, Chapter 837, Statutes of 1999). (See CCR, *Title* 5, Section 14011 (k).)

As a part of the site selection prescreening process, the school district should determine the proximity of the site to runways. Both the Department and DOT have maps identifying airport locations. If the site is within two nautical miles of an existing airport runway or a potential runway included in an airport master plan, as measured by direct air line from the part of the runway that is nearest to the school site, the following procedures must be Followed before the site can be approved:

1. The governing board of the school district, including any district governed by a city board of education, shall give the Department written notice of the proposed acquisition and shall submit any information that is required by the Department. The Department will notify the DOT Aeronautics Program, Office of Airports.
2. The Division of Aeronautics shall investigate the proposed site and, within 30 working days after receipt of the notice, shall submit to the local governing board a written report and its recommendations concerning acquisition of the site. As a part of the investigation, the Aeronautics Program shall give notice to the owner and operator of the airport, who shall be granted the opportunity to comment on the proposed school site.
3. The governing board of the school district shall not acquire title to the property until the report of the DOT Aeronautics Program has been received. If the report favors the acquisition of the property for a school site or an addition to a present school site, the governing board shall hold a public hearing on the matter before acquiring the site.
4. If the report does not favor the acquisition of the property for a school site or an addition to a present school site, the governing board may not acquire title to the property. If the report does not favor acquisition of a proposed site, no state funds or local funds shall be apportioned or expended for the acquisition of that site, construction of any school building on that site, or the expansion of any existing site to include that site.
5. The requirements noted above do not apply to sites acquired before January 1, 1966, or to any additions or extensions to those sites.

Proximity to High-Voltage Power Transmission Lines

Electric power transmission lines maintained by power companies may or may not be hazardous to human health. Research continues on the affects of electromagnetic fields (EMF) on human beings. However, school districts should be cautious about the health and safety aspects relating to overhead transmission lines. School districts should take a conservative approach when reviewing sites situated near easements for power transmissions lines.

In consultation with the State Department of Health Services (DHS) and electric power companies, the Department has established the following limits for locating any part of a school site property line near the edge of easements for high-voltage power transmission lines:

1. 100 feet from the edge of an easement for a 50-I 33kV (kilo volts) line
2. 150 feet from the edge of an easement for a 220-230kV line
3. 350 feet from the edge of an easement for a 500-550kV line

These figures represent kV strengths of transmission lines used by utility companies in January 1993. Utility companies report that strengths for distribution lines are below 50kV.

The Department of Health Services completed a multiyear study of EMFs in schools. Results of the study were published at the end of 2000. The limits noted above for locating school sites near EMF-producing lines may be amended on the basis of the findings of the study.

When evaluating a potential site situated near a power line easement, the site selection team should ask the following questions:

1. Is it necessary for the school district to acquire a site near the easement?
2. Are other options available?
3. Has the school district contacted and discussed with the utility company any plans to (a) increase the voltage of the transmission lines; or (b) build other towers on the easement?
4. Is the line a transmission or distribution line?

Each site will be evaluated according to its own potential hazards by the Department consultant. (See CCR, *Title5*, Section 1401 O(c).)

Presence of Toxic and Hazardous Substances

The presence of potentially toxic or hazardous substances on or in the vicinity of a prospective school site is another concern relating to the safety of students, staff, and the public. Persons responsible for site evaluation should give special consideration to the following hazards:

1. Landfill areas on or adjacent to the site
2. Proximity of the site to current or former dump areas, chemical plants, oil fields, refineries, fuel storage facilities, nuclear generating plants, abandoned farms and dairies, and agricultural areas where pesticides and fertilizer have been heavily used
3. Naturally occurring hazardous materials, such as asbestos, oil, and gas

Education Code sections 17071.13, 17072.13, 17210, 17210.1, 17213.1-3, and 17268 became effective January 1, 2000. Together they established requirements for assessments and approvals regarding toxic and hazardous materials that school districts must follow before receiving final site approval from the Department and funds under the School Facilities Program. (A summary of those requirements is noted below.) The school district may submit materials documenting compliance with the toxic and hazardous substances requirements before submitting the balance of the site approval package documents required by the Department. A local educational agency (LEA) may elect not to pursue a proposed site at any time during the process. Refer to SFPD Advisory 00-01 and SFPD Form 4.01" for further information. (See CCR, *Title 5,* Section 1401 l(j).)

A summary of the requirements is as follows:

- Current and historic uses on and near the proposed school site shall be investigated by a qualified consultant who prepares a Phase I Environmental Site Assessment (paper/database, site review, and interview investigation) conducted according to the American Society of Testing and Materials standards (ASTM E-l 527-2000).
- If the Phase I review concludes that no further investigation is required, two copies of the Phase I assessment and payment for review by the Department of Toxic Substances Control (DTSC) shall be submitted to the Department. The Department will transmit the payment and the Phase I assessment to DTSC for its review and determination. If DTSC concurs with the Phase I assessment, it will issue a determination letter stating that "no action" is required related to hazardous materials.
- If the Phase I review concludes that further investigation is needed or DTSC requires it, the LEA shall enter into an agreement with DTSC and hire a qualified consultant to complete a Preliminary Endangerment Assessment (PEA) under DTSC oversight

and review. The PEA includes the sampling of soils and risk assessment to determine whether a release of hazardous material has occurred, there is a threat of release, or a naturally occurring hazardous material poses a significant health risk. The LEA will then submit the PEA to DTSC. If no hazardous materials are identified, or if they do not pose a significant health risk, DTSC will approve the PEA and issue a determination letter stating that "no further action" is required.

- If required by DTSC because of health risks associated with hazardous materials are identified in the approved PEA, the LEA shall prepare and implement a Response Action (cleanup, removal, or remediation of hazardous materials) under DTSC oversight and approval. DTSC will issue a certification letter when the Response Action is completed. When a Response Action is required for a site, the LEA must obtain a Contingent Site Approval from the Department before the acquisition and implementation of the Response Action to ensure that the site meets all other requirements for Department approval.

Hazardous Air Emissions and Facilities Within A Quarter Mile

(See Education Code Section 17213(b) and *Public* Resources *Code* Section 21151.8(a)(2).)

The LEA shall consult with the administering agency and the local air pollution control district or air quality management district to identify facilities within a quarter mile of the proposed site that might reasonably be anticipated to emit hazardous air emissions or handle hazardous materials, substances, or wastes and shall provide written notification of those findings.

The LEA shall make the finding either that no such facilities were identified or that they do exist but that the health risks do not or will not constitute an actual or potential endangerment of public health at the site or that corrective measures will be taken that will result in emissions mitigation to levels that will not constitute endangerment. In the final instance the LEA should make an additional finding that emissions will have been mitigated before occupancy of the school.

These written findings, as adopted by the LEA governing board, must be submitted to the Department as a part of the site approval package, Often this information is included in the Phase I site assessment and in the adopted California Environmental Quality Act (CEQA) document. (See CCR, *Title* 5, Section 14011 (i).)

Other Health Hazards

(See *Education Code* Section 17213(a) and Public Resources *Code* Section 21151.8(a)(1); see also CCR, *Title* 5, Section 14011 (h).)

The LEA shall include in an environmental impact report or a negative declaration the information needed to determine that the proposed site is not any of the following type:

1. The site of a current or former hazardous waste disposal site or a solid waste disposal site unless, if the site was a former solid waste disposal site, the LEA governing board concludes that the wastes have been removed.
2. A hazardous substance release site identified by the Department of Health Services (now maintained by DTSC)
3. The site of one or more pipelines, situated underground or aboveground, which carry hazardous substances, materials, or wastes, unless the pipeline is used only to supply natural gas to that school or neighborhood

These written determinations, as adopted by the LEA governing board, must be submitted to the Department as a part of the site approval package. Often this information is included in the Phase I site assessment and in the adopted CEQA document.

Other factors to consider are as follows:

- If the proposed land has been designated a border zone property by the Department

of Toxic Substances Control (DTSC), then a school may not be located on the site without a specific variance in writing by DTSC. Contact DTSC, Site Mitigation, (916) 255-3745. See *Health* and *Safety* Code Section 25220.

- From a nuisance standpoint the site selection committee should also consider whether a site is located near or downwind from a stockyard, fertilizer plant, soil-processing operation, auto dismantling facility, sewage treatment plant, or other potentially hazardous facility.

Proximity to Railroads

When evaluating a site near railroad tracks, a study should be conducted to answer the following questions (See *CCR, Title* 5, Section 14010(d)):

1. What is the distance from the track easement to the site?
2. Are the tracks mainline or spur?
3. What kinds of cargo are carried?
4. What is the frequency of rail traffic, and how does the rail traffic schedule relate to the school time schedule?
5. Is the proposed site near a grade, curve, bridge, signal, or other track feature?
6. What is the need for sound and safety barriers?
7. If pedestrians or vehicles must cross the tracks, are there adequate safeguards at the crossing?
8. Are there high-pressure gas lines near the tracks that might rupture in the event of derailment?

While most railroads have detailed instructions for handling hazardous materials, no setback distance between railroad tracks and schools is defined in law. However, the *California Code of Regulations, Title* 5, Section 14010(d), established the following regulations pertaining to proximity to railroads:

> If the proposed site is within 1,500 feet of a railroad track easement, a safety study shall be done by a competent professional trained in assessing cargo manifests, frequency, speed, and schedule of railroad traffic, grade, curves, type and condition of track, need for sound or safety barriers, need for pedestrian and vehicle safeguards at railroad crossing, presence of high pressure gas lines near the tracks that could rupture in the event of a derailment, preparation of an evacuation plan. In addition to the analysis, possible and reasonable mitigation measures must be identified.

The National Transportation Safety Board has called for a uniform standard separation of at least 100 feet between hazardous materials storage and production facilities and mainline railroad tracks, Hazardous materials authorities have evacuated homes within a radius of 1,500 feet to 2,500 feet of railroad accidents when toxic gas and explosives were involved.

Additional information may be obtained from the following organizations:

1. California Public Utilities Commission (CPUC) (Web site www.cpuc.ca.gov) has three regional offices providing railroad information,

   Sacramento (Fresno and counties north)
   Contact: Robert (Buzz) Webb
   (916) 327-3131

   San Francisco (bay and coastal counties)
   Contact: George Elsmore
   (415) 703-2665

   Los Angeles (counties south of Fresno)
   Contact: Tom Hunt
   (213) 576-7089

2. Operation Life Savers, which provides educational materials regarding railroad safety information:

Contact: Eric Jacobsen
(530) 367-3918 (telephone)
(530) 367-3053 (fax)

3. The U.S. Government has statutory authority regarding railroads and works collaboratively with the CPUC.

Federal Railroad Administration
650 Capitol Mall, Room 7007
Sacramento, CA
Contact: Al Settje
(916) 498-6540

4. Refer to Public Utilities Commission General Order No. 161, Rule 4, regarding the ability of local emergency response agencies (fire department or other public agency with responsibility for responding to an emergency) to obtain a list of hazardous materials transported on the rail line in question for the most recent prior twelve-month period. Main line railroads have risk management offices:

Union Pacific (St. Louis)
(800) 892-1283

Burlington Northern Santa Fe (Fort Worth)
(817) 234-2350

Amtrak (Oakland)
(800) 683-4114

Caltrain (San Jose)
(408) 291-5660

Metrolink (Los Angeles)
(909) 593-6973

Emergency Response Plan. There are approximately thirty-three short line railroads, not mainline, around the state. School districts should have information about them (e.g. name of rails, owner, operation, location, and dispatch office). In addition, school districts should identify the mile post crossing nearest the school and keep on file with the school's emergency response plan.

Proximity to Pressurized Gas, Gasoline, or Sewer Pipeline

Education Code Section 17213 prohibits the acquisition of a school site by a school district if the site "contains one or more pipelines, situated underground or aboveground, which carries hazardous substances, acutely hazardous materials, or hazardous wastes, unless the pipeline is a natural gas line which is used only to supply natural gas to that school or neighborhood." ***Public Resources*** Code Section 21151.8 uses the same language with reference to approval of environmental impact reports or negative declarations. (See CC/?, *Title* 5, Section 14010(h).)

Proximity to High-Pressure Water Pipelines, Reservoirs, Water Storage Tanks

Large, buried pipelines are commonly used for delivery of water. The ground surfaces over these buried pipelines are covered with roadways or green belts or remain undeveloped, and the general public is unaware of their existence. Designs of such pipelines include a wide margin of safety for the operating water pressures within the pipe, but a severe earthquake, damage by an adjacent construction activity, or highly corrosive conditions surrounding soils can contribute to leakage or even failure of the pipe. A sudden rupturing of a high-pressure

pipeline can result in the release of a large volume of water at the point of failure and fragments of concrete pipe being hurled throughout the immediate area. Subsequent flooding of the immediate area and along the path of drainage to lower ground levels might occur.

To ensure the protection of students, faculty, and school property if the proposed school site is within 1,500 feet of the easement of an aboveground or underground pipeline that can pose a safety hazard, the school district should obtain the following information from the pipeline owner or operator:

1. The pipeline alignment, size, type of pipe, depth of cover
2. Operating water pressures in pipelines near the proposed school site
3. Estimated volume of water that might be released from the pipeline should a rupture occur on the site
4. Owner's assessment of the structural condition of the pipeline (Periodic reassessment would be appropriate as long as both the pipeline and the school remain operational.)

School districts should determine form topographic maps and in consultation with appropriate local officials the general direction that water released from the pipeline would drain. If site selection must involve such pipelines, districts should seek to (1) avoid or minimize students use of ground surfaces above or in close proximity to the buried pipeline; (2) locate facilities safely or provide safeguards to preclude flooding in the event of a pipeline failure; and (3) prepare and implement emergency response plans for the safety of students and faculty in the event of pipeline failure and flooding.

Proximity to Propane Tanks

A propane tank explosion is known as a boiling liquid evaporative explosion (BLEVE). The school district should address the safety issues of locating a propane tank on or near a school site by answering the following questions:

1. How many tanks are on the site now and how many might there be in the future?
2. How far away would the tanks be stored from the school boundaries?
3. What is the capacity of the tanks?

Once the answers to these questions are established, the district should contact the following state agencies for assistance in evaluating the school's level of safety in the event of explosions and nonexplosive fires:

- State Fire Marshal, (916) 4458200; Hazardous Materials Division, (916) 445-8477
- Public Utilities Commission, Natural Gas Safety Branch, (415) 703-1353
- California Department of Industrial Relations, (510) 622-3052
- Local Fire Marshal

Noise

Noise is unwanted or harmful sound; sound that is too loud is distracting or, worse, injurious,

The loudness of sound is measured in decibels. Each decibel level equates to the amount of acoustical energy necessary to produce that level of sound. The decibel scale is exponential. A person's whisper may be measure at 20 decibels. The sound measured at 30 decibels is ten times as loud as the 20 decibel whisper.

The normal range of conversation is between 34 and 66 decibels. Between 70 and 90 decibels, sound is distracting and presents an obstacle to conversation, thinking, or learning. Above 90 decibels, sound can cause permanent hearing loss. The California Department of Transportation considers sound at 50 decibels in the vicinity of schools to be the point at which it will take corrective action for noise generated by freeways. (See *Streets and*

Highway Code sections 216 and 216.1.)

If the school district is considering a potential school site near a freeway or other source of noise, it should hire an acoustical engineer to determine the level of sound that location is subjected to and to assist in designing the school should that site be chosen. The American Speech-Language-Hearing Association (ASLHA) guidelines recommend that in classrooms sounds dissipate in 0.4 seconds or less (and not reverberate) and that background noise not rise above 30 decibels.

Proximity to Major Roadways

The *California Code of* Regulations, *Title* 5, Section 14010(e), states: "The site shall not be adjacent to a road or freeway that any site-related traffic and sound level studies have determined will have safety problems or sound levels which adversely affect the educational program."

Trucks traveling on public roads - including interstate freeways, state highways, and local roads - often contain the same hazardous materials that railcars on railroads contain, Although the quantities of materials being carried on trucks are smaller for a double trailer or tanker in comparison to a railcar, trucks have a greater incidence of accidents, spills, and explosions than do railcars. Moreover, the protective enclosures of a truck are not as strong as are those of a railcar.

When evaluating a site near a major roadway, a school district needs to ask questions similar to those used in evaluating risk from rail lines:

1. What is the distance from the near edge of the roadway right-of-way to the site?
2. How heavy is the traffic flow?
3. How many trucks carrying freight use the roadway during the time students and staff are present?
4. Is a safety or sound barrier necessary?
5. How will students coming across the highway get to school safety?

The California Highway Patrol (CHP) maintains records of traffic flow, traffic accidents, and roadway accidents involving hazardous materials, The CHP Commercial Vehicles Section (916-445-1865) maintains records on traffic flow and accidents involving hazardous materials. The CHP Safety Net Section (916-375-2838) maintains records on all accidents.

County road departments are also a good source for traffic flow and accident information in the local area. The school district may wish to consult the city or county general plan "Noise Element" to help evacuate school sites near major roadways.

Like railroad setbacks, highway setbacks from schools are not established in law. However, experience and practice indicate that distances of at least 2,500 feet are advisable when explosives are carried and at least 1,500 feet when gasoline, diesel, propane, chlorine, oxygen, pesticides, and other combustible or poisonous gases are transported. In the absence of specific, legally defined setback distances for schools, the Department reviews each case individually.

Results of Geological Studies and Soils Analysis

Education Code sections 17212 and 17212.5 require that a geological study and a soils analyses provide an assessment of the potential for earthquake or other geological hazard damage if the prospective school site is located (1) within the boundaries of any Alquist-Priolo special studies zone; or (2) within an area designated as geologically hazardous in the safety element of the local general plan, as provided in Government Code Section 65302(g). Because California is seismically active and new faults are being discovered, Department policy is that all proposed school sites have geological studies and soils analyses completed.

Any geological study must be conducted according to provisions contained in *Education Code* Section 17212.5, which states that "no school building shall be constructed,

reconstructed, or relocated on the trace of a geological fault along which surface rupture can be reasonably expected to occur within the life of the school building." (See CC/?, Title 5, Section 14011(g)).

Earthquakes, Liquefaction, and Landslides. Alquist-Priolo Earthquake Fault Zone maps delineate active fault lines and earthquake fault zone boundaries (previously known as Special Study Zones). For further information on these maps, contact the California Department of Conservation (CDC), Division of Mines and Geology (DMG), at (916) 323-9672 or see the Web site at www.consrv.ca.gov/cgs. These maps are important because the California Code *of Regulations,* Title 5, Section 14010(f), specifies that new school sites may not contain an active earthquake fault or fault trace.

School districts may also wish to refer to Seismic Hazard Zone maps, also prepared by CDC, which address the hazards of liquefaction and earthquake induced landslides. For further information, contacts DMG at (916) 323-8569 or www.consrv.ca.gov/cgs. These maps are important because the California Code *of Regulations, Title* 5, Section 14010(i), requires that new school sites not be subject to moderate-to-high liquefaction or landslides.

Copies of either of these types of hazard maps for specific communities may be purchased from BPS Reprographic Services, 149 Second Street, San Francisco, CA 94105; (415) 512-*6550.*

The *California Building Code* contains descriptions of areas in the state that are divided into seismic zones III or IV. These zone designations will affect the structural safety design requirements of the Division of the State Architect. Eventually, these zone designations may be affected if a new code is adopted.

Areas Subject to Flooding and Inundation. The *California Coda of Regulations* (CCR), Title 5, Section 14010(g), requires that new school sites are not to be within an area of flood or dam inundation unless the cost of mitigating the impact is reasonable. The overflowing or failure of nearby rivers, streams, dams, levees, detention/retention basins, flood control channels, water supply aqueducts, irrigation canals, and areas subject to flash flooding and surface runoff is cause for concern. Potential damage may be mitigated by elevating the site above flood levels, creating or improving the levees and drainage infrastructure, and establishing emergency notification and evacuation procedures. As a condition of final site approval, the Department consultant may require a hydrologic study or other means of confirmation that the site will not be subject to flooding or a report of proposed mitigation measures, including estimated costs, or both.

The district should consult the local city or county general plan, responsible flood control agencies, and Flood Insurance Rate Maps (FIRM), which are available from the Federal Emergency Management Agency (FEMA). These official maps delineate flood hazard areas, such as the 100-year flood plan. Copies of flood maps are available for a nominal fee, Contact the following agency for a copy of the current flood map for a specific community: Map Service Center (MSC), P.O. Box 1038, Jessup, MD 20794-1038; (800) 358-9616; Web site www.fema.gov/nfip/readmap.htm.

The Governor's Office of Emergency Services (OES) publishes maps that provide the best estimate of where water would flow if dams were to experience failure. Contact OES at www.oes.ca.gov for further information.

See Appendix H for factors to be included in geological hazard reports,

Traffic and School Bus Safety Conditions

The school facility should be situated so that students can enter and depart the buildings and grounds safely. As the number of schools providing child care and extended day classes increases, schools need to ensure the safe flow of buses and other traffic through designated areas of the school grounds. When analyzing potential school sites, the selection team should consider a number of safety factors. The size and shape of the site will affect the traffic flow and the placement of pickup and drop-off points for parents.

When designing pickup and drop-off points, the team should remember that the separation of bus traffic from all other traffic is of paramount importance. Roads servicing the area must be of sufficient paved width when the point at which the bus loads and unloads pupils is off the main thoroughfare. The need for left turn lanes must be determined. Driveway openings must conform to local ordinances or regulations, When analyzing potential school sites for traffic and bus safety, site selection teams should use the evaluation checklist contained in Appendix B. Department consultants can help in evaluating issues of ingress and egress,

Safe Routes to School

The national Walk Our Children to School Day was established in 1997 by the Partnership for a Walkable America, a national alliance of public and private organizations committed to making walking safer, Because the physical environment greatly affects how many residents can and will walk, a Walkability Checklist is provided in Appendix J. It is an excerpt from the National Safety Council's checklist, which can be accessed at www.nsc.org/walkable.htm. A growing number of communities are implementing measures to make their environments safer for walking.

The Department recommends that the site selection committee walk the area surrounding each proposed school site, If there are unsatisfactory walking routes for a proposed site, the school district should consider another site or work with the city or county to have safe walking routes installed before opening the school.

Federal Highway Administration (FHWA) funds may be available to help make school access safer for pedestrians and cyclists. Assembly Bill 1475 (Chapter 663, Statutes of 1999) directs FHWA safety funds to a new program entitled Safe Routes to Schools. This program will sunset January I, 2005.

The California Department of Transportation (DOT) has the responsibility to distribute the Safe Routes to Schools program guidelines. Additional information may be obtained at the following Internet addresses:

DOT Home Page: www.dot.ca.gov
Local Programs: www.dot.ca.gov/hq/LocalPrograms
Traffic Operations: www.dot.ca.gov/hq/traffops

Safety Studies for Joint-Use Sites

Many school districts plan schools for use in conjunction with park districts, library districts, or other governmental entities. Such cooperative planning is encouraged and may result in recreational and educational areas suitable for use by both students and community members. Special care must be taken to ensure that both the students and the community members can use the site without compromising the safety and security of the school. Particular attention should be given to placing public parking areas and toilets away from classrooms and student play areas.

Choosing Appropriate Sites for Joint-Use Facilities

Frequently, school districts agree to cooperate with a local governmental entity, recreation district, or possibly an adjacent school district when planning a new facility, such as a new library, technology center, performing arts center, swimming pool, gymnasium, multipurpose room, or sports complex. Likewise, a commercial or industrial complex may be jointly planned to include a school,

More efforts at saving dollars and acreage will occur as funding and space become scarce resources, The construction and land costs saved may be significant, In some cases, the costs may increase because of joint use, but the benefits to communities may offset the increased expenses, By providing combined and expanded resources and services within a single facility, the school district fosters enhanced community activities.

Agreements must be crafted between the school districts and other appropriate entities regarding site acquisition, mutually acceptable arrangements for space, staffing,

maintenance, materials acquisition, and other matters related to the administration and operation of the joint-use facility. In some cases the shared community facility is also shared between school sites, such as a middle and a high school. In those cases, careful planning must take place about what can and what cannot be shared. In many school districts, more than one facility is used jointly with the community. The fields, theaters, classrooms, and virtually the entire campus become available for joint use. The school is no longer seen as a separate, stand-alone entity.

Examples of Successful Joint-Use or Strategic Alliance Projects in California

Facility	Location
Community Performing Arts Complex	Elk Grove Unified School District, Sacramento City/County Library
Softball Complex	Clovis Unified School District, City of Clovis
Park and Aquatics Center	Roseville Joint Union High School District, City of Roseville
Field Areas	Woodland Joint Unified School District, City of Woodland
Theater and Gymnasiums	Poway Unified School District, Cities of Poway and San Diego
Gymnasium/Fitness Center	Lodi Unified School District, City of Lodi
Technology Center	San Diego County Office of Education
Medical Magnet School/Hospital'	Los Angeles Unified School District and Compton Unified School District, King Drew Medical Magnet High School
High School/Community College Campus	San Diego City Unified School District, San Diego City College
On-site School/Business Entity	Santa Rosa Elementary School District, Hewlett Packard
Senior Center/District Office	Carlsbad Unified School District, Carlsbad Senior Center
Multipurpose Room, Kitchen, Platform	Pauma Elementary School District, Non-profit Foundation, HUD
Library/Media Center, Eastlake High	Sweetwater Union High School District, City of Chula Vista

When planning the acquisition of a site for a joint-use facility, the school district must consider many issues as follows:

- Safety and security
- Access, day and night year-round, including access by public transportation
- Location, as a prominent landmark that encourages community use
- Appropriate size, including adequate space for buildings, grounds, and convenient, plentiful parking

Observing California Environmental Quality Act (CEQA) Requirements

The California Environmental Quality Act (CEQA) is located in the Public Resources Code Section 21000 et seq.; the CEQA guidelines are found in the *California Code of* Regulations, Title 74, Section 15000 et seq. Enacted in 1970, CEQA was primarily intended for use by public agencies in considering the potential environmental implications of their actions when approving projects. The Act establishes a duty for public agencies, including school districts, to analyze, avoid, mitigate, or where feasible, minimize foreseeable environmental damage.

Lead Agency

The lead agency is the single agency responsible for determining the type of environmental analysis CEQA requires and for approving and carrying out the project. The local educational agency (LEA) (i.e., school district or county office of education) is the lead agency under CEQA for school facility construction projects and land acquisition,

One of the requirements for the final site approval by the Department is the LEA's completion of the CEQA process before site acquisition. Although the Department will review adopted CEQA documents as a part of its site approval process, the Department is not responsible for ensuring that the LEA properly followed all CEQA requirements or for challenging LEA decisions under CEQA. In most cases the LEA will be required to produce and adopt a negative declaration or an environmental impact report (EIR) for site acquisitions. This CEQA document will also usually encompass the proposed school construction project.

CEQA Documents Needed for Final Department Approval

As a part of the Department's final site approval process, the LEA must submit a copy of the following documents to the School Facilities Planning Division in its site approval package (see Appendix D, SFPD 4.01"):

- LEA-certified final EIR or adopted negative declaration (including the Initial Study/Environmental Checklist)
- Stamped Notice of Completion (NOC) or comment-period closure letter from the Governor's Office of Planning and Research (OPR), State Clearinghouse (SCH)
- Stamped Notice of Determination (NOD) filed with the County Clerk

The Department recommends that the DTSC review and approval process be completed before completing the CEQA process. However, if a Preliminary Endangerment Assessment is required, the LEA should coordinate with DTSC when completing the CEQA and public participation process.

For further information on CEQA, contact the Governor's Office of Planning and Research, State Clearinghouse, at 1400 Tenth Street, Room 222, Sacramento, CA 95814; mailing address: P.O. Box 3044, Sacramento, CA 95812-3044; telephone: (916) 4450613; Web site: www.opr.ca.gov/. To view or download CEQA or its guidelines, go to http://ceres.ca.gov/ceqa/.

Recognizing Land-Use Issues

Several local, regional, and statewide land-use issues must be considered when evaluating and selecting a school site. Many of these issues are considered a part of the school district's compliance with CEQA.

Cities and counties have the responsibility to adopt local ordinances, policies, plans, and zoning maps regarding allowed and prohibited land uses. General plans may also contain the jurisdiction's preferred approximate location of future school sites. While plan coordination is advisable and notification is required before acquisition, school districts retain the authority to overrule local zoning and general plan land-use designations for schools if specified procedures are followed, (See Government Code sections 53094, 65402(a), and 65403 and Public Resources Code Section 21151.2.)

The California Coastal Commission is a statewide land-use planning agency that a school district may have to consult when selecting school sites. This agency is responsible for planning and regulating development along California's coastal zone, which may extend up to five miles inland. (See *Public* Resources Code Section 30000 et seq. and California Code *of Regulations, Title 14*, sections 13001-I 3666.4.)

State law also encourages public agencies, including school districts, to avoid acquiring land that is designated in the general plan and zoned for agricultural use or sites that fall under

Williamson Act agricultural preserves and contracts. Should agricultural land acquisition be necessary, however, districts will need to follow the procedures described in *Education Code* Section 39006 (repealed in 1996, replaced in 1998) and *Government Code* Section 51290 et seq.).

Obtaining Site Approval

After deciding on a site or sites, the school district site selection team should proceed as follows:

Schedule a site visit with the Department consultant.

If the site is to be purchased with state funds, Department approval is required before state funds can be apportioned. Provide the Department consultant with maps of three approvable sites for review purposed. The consultant will view the sites and provide the district a written evaluation of the site(s) on SFPD Form 4.0, Initial School Site Evaluation (Appendix C). The consultant will indicate which sites are approvable and will rank the sites relative to each other. The consultant will also provide the district three forms required for final approval of the site:

SFPD 4.01, School Site Approval Procedures (Appendix D)

SFPD 4.02, School Site Report (Appendix E)

SFPD 4.03, School Site Certification (Appendix F)

The Department will issue a Final Site Approval Letter (Appendix G) valid for five years.

If the site is to be purchased with funds other than state funds and the school district will not seek state reimbursement at a future date, the district can voluntarily ask the Department to review the site to confirm its suitability as a school site. The district should follow the same procedures outlined above.

Request that the Department arrange an investigation of the site in accordance with *Education Code* Section 17215 (amended in 1999 by Assembly Bill 747) by the Department of Transportation, Aeronautics Program, Office of Airports, if the site is within two nautical miles of an airport runway.

For further information on requirements for purchasing sites with state funds or with funds other than state funds, see *Education Code* sections 17211 and 17251 (a) and (b) and *California Code of Regulations, Title* 5, Section 14012. Refer to the section Presence of Toxic and Hazardous Substances, under Evaluating Safety Factors, for what must be done regarding a Phase I Environmental Site Assessment.

Many statutes and regulations other than those of the Department and the State Allocation Board, Office of Public School Construction, apply to the purchase and use of land for a school. School districts should confer with legal counsel or their county office of education superintendent, or both, before acquiring property.

For additional information regarding any changes in issues relating to school site selection, school districts should contact the School Facilities Planning Division (SFPD) at (916) 322-2470 or refer to the SFPD Web site at www.cde.ca.gov/ls/fa/index.asp.

Appendix

Appendix A
Site Selection Process

When a school district is planning to acquire a site for a school, it must take various factors into consideration. The School Facilities Planning Division has developed three work sheets

o assist the district in assessing potential sites and making preliminary selections. The work sheets, which are included in this appendix, outline a set of 12 primary criteria governing school site selection and consists of three components: Site Selection Criteria, Site Selection fvaluation, and a Comparative Evaluation of Candidate Sites. These components allow for a comprehensive examination of sites to determine strengths and weaknesses (Site Selection Criteria); a ranking of each site (Site Selection Evaluation); and finally, a comparison of sites by the rating factors and total scoring (Comparative Evaluation of Candidate Sites). The criteria are consistent with the California *Education Code, California Code of Regulations, Title* 5, California *Public Resources* Code, and the California Department of Education policies and guidelines.

Although these standards are not the sole criteria to be considered by a school district's site selection committee, the committee may find them useful in evaluating various sites, identifying at least three acceptable sites from which a final choice can be made, and, eventually, explaining the site selection process to interested entities.

Each primary element listed on the Site Selection Criteria work sheet contains secondary measures that provide the committee the opportunity to apply a specific set of guidelines to each potential site and aid in the analysis of a site. The secondary criteria may also be used by the committee to understand better the types of data needed in identifications, selection, and final acquisition of a school site. After considering both primary and secondary standards on the work sheet, the committee should rank the sites in order of acceptability by completing the second and third work sheets.

Part 1. Site Selection Criteria (PDF; 19.5KB; 3pp.)

Part 2. Site Selections Evaluation (PDF; 13.8KB; 1p.)

Part 3. Comparative Evaluation of Candidate Sites (PDF; 1 1.3KB; 1 pp.)

Appendix B
Evaluation Checklist for School Bus Driveways (PDF; 21.6KB; 1 p.)

Appendix C
SFPD 4.0 Initial School Site Evaluation PDF (71KB; 3pp.) | DOC (284KB; 3pp.)

Appendix D
SFPD 4.01 School Site Approval Procedures PDF (39KB; 3pp.) | DOC (224KB; 3pp.)

Appendix E
SFPD 4.02 School Site Report PDF (62KB; 4pp.) | DOC (256KB; 4pp.)

Appendix F
SFPD 4.03 School Site Certification PDF (41KB; 1p.) | DOC (216KB; 1p.)

Appendix G
Factors to Be Included in a Geological and Environmental Hazards Report

I. Site Description
   A, Location of site identified by street name, lot number(s), or other descriptors that are site specific.
   B. Description of site reconnaissance, including the vegetation (describe type), and previous site usage.

II. Geological
   A. Seismic and Fault Hazard
      1. Whether the site is in Alquist-Priolo zone; whether it is situated on or near a pressure ridge, geological fault, or fault trace that may rupture during the life of the school building; and what the student risk factor is.
      2, Locations and potential for ground shaking of nearby faults or fault traces, Discussion of field inspection and reconnaissance.

3. Subsurface conditions determined by exploration and literature review,

B. Liquefaction Subsidence or Expansive Potential
   1. Discussion of subsoil condition relative to ground water and the potential for liquefaction.
   2. Mitigating factors.

C. Dam or Flood Inundation and Street Flooding
   1. Location of the site in relation to flood zones and dam inundation areas,
   2. If the site is in a flood zone, give year, type, and potential hazard.
   3. Potential for sheet flooding, street flooding, and dam or flood inundation.

D. Slope Stability
   1. If located on or near a slope.
   2. Discuss potential for instability and landslides.

E. Mitigations
   1. Discuss mitigations and potential development of the site as it relates to student safety and staff use.

III. Environmental (Where applicable)

A. Health Hazards
   I. Describe the mitigation, if on or near a hazardous or solid' waste disposal, to ensure that the wastes have been removed before acquisition.
   2. Discuss soils sample and underground water sample test results and, if toxics are present, the cleanup procedures.
   3, Address the presence of asbestos if serpentine rock is present.
   4. Identify facilities within one-quarter miie of the site that may emit hazardous air emissions. Provide air emissions test results and an analysis of the potential hazard to students and staff (written findings required).

B. High-Pressure Pipelines and Electric Transmission Lines
   1. Identify proximity to all high-pressure gas lines, fuel transmission lines, pressurized sewer lines, and high-pressure water pipelines within 1,500 feet of the proposed site; and identify supply lines other than gas lines to the site or neighborhood.
   2. Identify all utility easements on or adjacent to the site and the kV capacity of the easement.

Appendix H
References to Codes

Code sections may be found on the Web at www.leginfo.ca.gov/calaw.html. Click on the code you want and enter the section number.

Education Code

Education Code references pertaining to site selection can also be found at the School Facilities Planning Division Web site: www.cde.ca.gov/ls/fa/sf/codes.asp.

Code Section	Subject
17072.12	Assistance in site development and acquisition
17072.13	Evaluation of hazardous materials at a site
17210	Definitions in environmental assessment of school sites

17210.1	Application of state act; hazardous materials; risk assessments; compliance with other laws
17211	Public hearing for evaluation before acquisition in accordance with site selection standards
17212	Investigation of prospective school site; inclusion of geological engineering studies
17212.5	Geological and soils engineering studies
17213	Approval of site acquisition; hazardous air emissions; findings (See also *Public* Resources Code Section 21151.8.)
17213.1	Environmental assessment of proposed school site; preliminary endangerment assessment: costs; liability
17213.2	Hazardous materials present at school site; response action
17213.3	Education Department: monitoring performance of Toxic Substance Control Department; reports on amount of fees and charges
17215	Site near airport; requirements as amended by Assembly Bill 727
17217	/Manner of acquisition; school site on property contiguous to district
17251	Power and duties concerning buildings and sites
35275	New school planning and design

nd plans are set forth in the *California Code of* Regulations, *Title 5.*

Public Resources Code

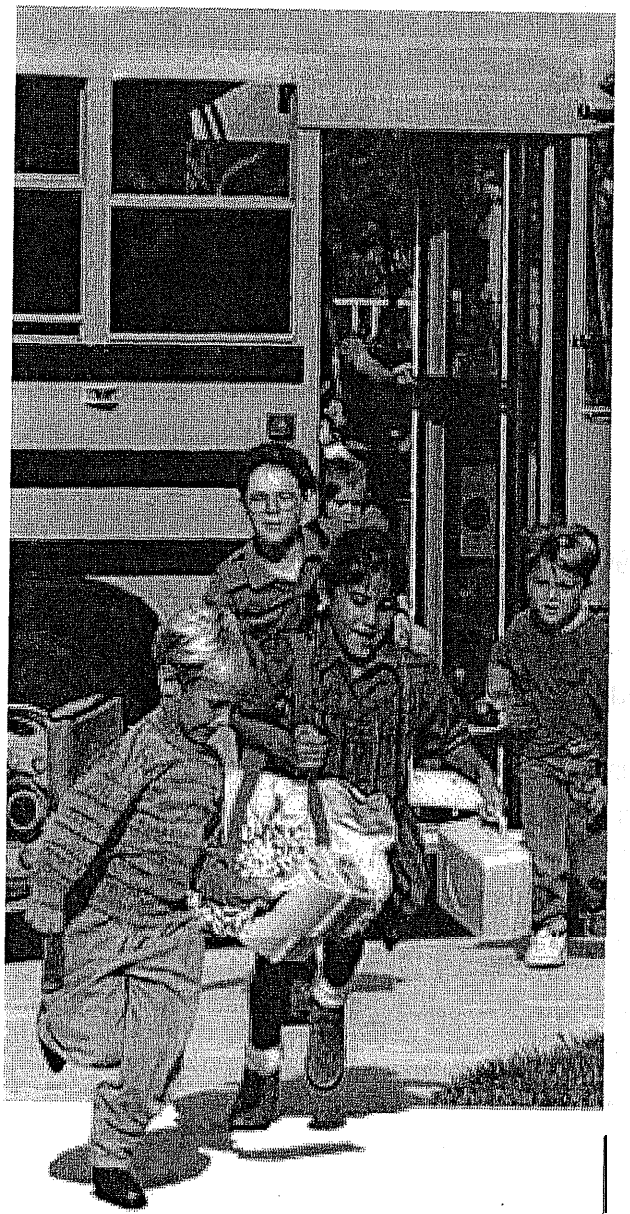
Code Section	Subject
21151.2	School site proposed acquisition or addition; notice to planning commission; investigation: report
21151.4	Construction or alteration of facility within one-quarter mile of school; reasonable anticipation of air emission or handling of hazardous or acutely hazardous material; approval of environmental impact report or negative declaration
21151.8	School site acquisition or construction; approval or environmental impact report or negative declaration; conditions *(Note: Public Resources Code Section 27 157.8 is similar to Education Code Section 77273. School districts must comply with both.)*

Health and Safety Code

Code Section	Subject
25220 - 25240	Land use

Appendix I
Walkability Checklist (PDF; 11.9KB; 2pp.)

Questions: Fred Yeager | fyeager@cde.ca.gov | 916-327-7148



School Facility Program Guidebook

January 2004

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Fred Aguiar, Secretary

Department of Genera! Services
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Contents

Preface

In this preface...

INTRODUCTION

This guidebook was developed by the Office of Public School Construction (OPSC) to assist school districts in applying for and obtaining "grant" funds for the new construction and modernization of schools under the provisions of the Leroy F. Greene School Facilities Act of 1998 (Senate Bill 50). It is intended to be an overview of the program for use by school districts, parents, architects, the Legislature, and other interested parties on how a district or county superintendent of schools becomes eligible and applies for State funding. This guidebook provides direction on accessing the processes leading to project approvals, insight to the various features of the School Facility Program (SIT), and includes suggestions on how to make the funding system as efficient as possible, However) it is not meant to be a step-by-step discussion of every conceivable application process or project type. For complete project specific information be sure to review the SFP Regulations located on the OPSC Web site at www.opsc.dgs.ca.gov and, most importantly, contact your OPSC project manager. The OPSC project managers are assigned by county, and a complete listing of project manager assignments, including telephone numbers and E-mail addresses, are also included on our Web site.

THINGS TO KNOW

This edition of the guidebook contains additional changes from Assembly Sill (AB) 14 that were not fully implemented before the January 2003 edition and were therefore not included, AB 14 also called for amendments to the Critically Overcrowded School Facilities (COS) program regulations and made advance funding available for costs associated with Department of Toxic Substances Control evaluation and response action at existing school sites (Chapter 5). The amendments to the COS program regulations allow for financial hardship districts lo receive advanced funding for the site acquisition and design costs associated with their COS funding application (Chapter 7).

Some program changes in the regulatory process but not yet effective include:

- Modifying the three year SFP new construction eligibility lock-in for small school districts to allow for protection against a loss of eligibility (AB 16).
- Postponing the filing period for the Charter School Facilities Program (CSFP) applications to prepare for the changes in Senate Bill (SB) 15.
- Adjusting thecurrent automatic fire alarm/detection and automatic sprinkler grant allowances to reflect actual costs.
- Allowing districts to file new construction funding applications up until the date of occupancy.

As this edition of the *School Facility Program Guidebook* is being written, the OPSC and the State Allocation Board Implementation Committee are discussing changes to the CSFP and the Joint-Use Program to allow for more flexibility within the existing programs (SB 15). In addition, the implementation of AB 1008, which allows adjustments for hazardous waste removal costs for new construction projects, is being discussed.

WHERE TO BEGIN

Chapter 1, School Facility Program Overview and Chapter 2, The State Allocation Board, the Office of Public School Construction, and Other Involved Agencies will provide general information. After reviewing these chapters, the reader may want to review Chapter 4, Application for Eligibility, because establishing eligibility is the first step in filing an application for either new construction or modernization funding. The remaining chapters can be reviewed as the topics arise.

Chapter 1 School Facility Program Overview

In this chapter...

- Introduction
- Funding for the School Facility Program
- Implementation of the School Facility Program

INTRODUCTION

The School Facility Program (SFP) began in late 1998 and is a significant change over previous State facilities programs. The State funding is provided In the form of per pupil grants, with supplemental grants for site development, site acquisition, and other project specific costs when warranted. This process makes the calculation of the State participation quicker and less complicated. In most cases, the application can be reviewed, the appropriate grants calculated, and SAB approval received in 60–90 days regardless of project size,

In addition to a less complicated application process, the SFP provides greater independence and flexibility to the school district to determine the scope of the new construction or modernization project. There is considerably less project oversight by State agencies than in previous State programs. In return, the program requires the school district to accept more responsibility for the outcome of the project, while allowing the district to receive the rewards of a well managed project. All State grants are considered to be the full and final apportionment by the SAB. Cost overruns, legal disputes, and other unanticipated costs are the responsibility of the district. On the other hand, all savings resulting from the district's efficient management of the project accrue to the district alone. Interest earned on the funds, both State and local, also belongs to the district. Savings and interest may be used by the district for any other capital outlay project in the district. See Chapter 73, Additional SFP Requirements and Features for more information on project savings.

The SFP provides a funding source in the form of grants for school districts to acquire school sites, construct new school facilities, or modernize existing school facilities. The two major funding types available are "new construction" and "modernization".[1] The new construction grant provides funding on a 50/50 State and local match basis. The modernization grant provides funding on a 60/40 basis. Districts that are unable to provide some or all of the local match requirement and are able to meet the financial hardship provisions may be eligible for additional State funding (see Chapter 10, Financial Hardship).

IMPLEMENTATION AND EVOLUTION OF THE SCHOOL FACILITY PROGRAM

Senate Bill 50 (Greene) was chaptered into law on August 27, 1998, establishing the SFP. The legislation required that regulations be approved and in place for accepting and processing applications as soon as Proposition IA was approved by the voters the following November. The SFP continues to evolve through legislative changes. Assembly Bill (AB) 16 and AB 14 provided for significant changes requiring regulations be approved and in place for accepting and processing applications as soon as Proposition 47 was approved by the voters in November 2002. These changes included funding for charter school facilities, critically overcrowded schools, joint-use projects. Some of the changes that impacted new construction funding include the suspension of Priority Points, an additional grant for energy efficiency, and several changes that impact the determination of eligibility. Some of the changes that impacted modernization funding include the change of the funding ratio between the State and the school district from 80 percent State and 20 percent district to 60 percent State and 40 school district, and additional grants for energy efficiency and the modernization of buildings 50 years old or older.

[1] Education Code Sections 17072.10 and 17074.10 establishes the new construction grant and modernization grant respectively.

Information on each category of funding can he found in the following chapters:

SFP Component	Chapter	Page
New Construction	5	19
Modernization	9	49
Financial Hardship	10	57

Helpful Hint:
A listing of school districts who have received SFP funding is available on the OPSC Web site at www.opsc.dgs. ca.gov.

FUNDING FOR THE SCHOOL FACILITY PROGRAM

Funding for projects approved in the SFP comes exclusively from statewide general obligation bonds approved by the voters of California. The first funding for the program was from Proposition 1A, approved in November **1998.** That bond for $ 9.2 billion contained $6.7 billion for K-12 public school facilities. The second funding for the program is from Proposition 47, approved in November 2003. It is a $13.2 billion bond, the largest school bond in the history of the State. It contains $11.4 billion for K--12 public school facilities,

A future bond is currently proposed for March 2004.

Chapter 2 The State Allocation Board, the Office of Public School Construction, and Other Involved Agencies

In this chapter. . .

- State Allocation Board
- Office of Public School Construction
- Other Agencies involved

STATE ALLOCATION BOARD

Created in 1947 by the State Legislature, the State Allocation Board (SAB) is responsible for determining the allocation of State resources including proceeds from General Obligation Bond Issues and other designated State funds used for the new construction and modernization of public school facilities. The SAB is also charged with the responsibility for the administration of the State Relocatable Classroom Program, the Deferred Maintenance Program, and many other facilities related programs. Handbooks on these programs may be found on the OPSC Web site at www.opsc.dgs.ca.gov. Printed copies may be obtained by contacting the OPSC directly.

The SAB meets monthly typically at the State Capitol. At each meeting the SAB reviews and approves applications for eligibility and funding, acts on appeals, and adopts policies and regulations as they pertain to the programs that the SAB administers.

Members

The SAB is comprised of ten members:

- The Director of the Department of Finance or designee (Traditional SAB Chair)
- The Director of the Department of General Services or designee
- The Superintendent of Public Instruction or designee
- One person appointed by the Governor
- Three State Senators; appointed by the Senate Rules Committee (two from the majority party and one from the minority party)
- Three State Assembly Members; appointed by the Speaker of the Assembly (two from the majority party and one from the minority party)

The current SAB members are:

- Donna Arduin, Director, Department of Finance
- Dr. William J. Jefferds, Director, Department of General Services
- Jack O'Connell, Superintendent of Public Instruction
- David Sickler, Governor Appointee
- Dede Alpert, Senator
- Bob Margett, Senator
- Tom Torlakson, Senator
- John Dutra, Assembly Member
- Marco Firebaugh, Assembly Member
- Tony Strickland, Assembly Member

The current SAB officers are:

- Luisa M. Park, Executive Officer
- Bruce B. Hancock, Assistant Executive Officer
- Karen McGagin, Deputy Executive Officer

SAB Implementation Committee

The SAW Implementation Committee is an informal advisory body established by the SAB to assist the SAB and the OPSC with policy and legislat ion implementation. The committee membership is comprised of organizations representing the school facilities community which meets approximately once a month depending upon the workload. The SAB Assistant Executive Officer is the chair of the committee. Committee membership as well as the time and local ion of future meetings can be found on the OPSC Web site at www.opsc.dgs.ca.gov.

OPSC Mission:
"As Staff to the State Allocation Board, the Office of Public School Construction facilitates the processing of school applications and makes funding available to qualifying school districts. These actions enable school districts to build safe and adequate school facilities for their children in an expeditious and cost-effective manner."

OFFICE OF PUBLIC SCHOOL CONSTRUCTION

The OPSC serves the 1,000 plus K--12 public school districts in California. As staff to the SAB, the OPSC is responsible for allocating State funding for eligible new construction and modernization projects to provide safe and adequate facilities for California public school children. The OPSC is also responsible for the management of these funds and the expenditures made with them, It is also incumbent on the OPSC to prepare regulations, policies, and procedures for approval by the SAB that carry out the mandates of the law.

OPSC Responsibilities

The OPSC is charged with the responsibility of verifying that all applicant school districts meet specific criteria based on the type of eligibility or funding which is being requested and to work with school districts to assist them throughout the application process. The OPSC ensures that funds are allocated properly and in accordance with the law and decisions made by the SAB. Since November of 1988, the OPSC has processed over $25.8 billion dollars in State apportionments to the SAW. The programs, funding, and approvals over that period are shown in Appendix 5, Summary of Bond and Deferred Maintenance Allocations.

The OPSC prepares agendas for the SAB meetings. These agendas keep the SAB members, district.., staff, and other interested parties apprised of all actions taken by the SAB. The agenda serves as the underlying source document used by the State Controller's Office for the appropriate release of funds. The agenda Further provides a historical record of all SAB decisions, and is used by school districts, facilities planners, architects, consultants, and others wishing to track the progress of specific projects, the availability of funds, and SAB regulations.

Helpful Hint:
The Directory of Services provides information regarding project manager county assignments, including telephone numbers, and other contact information.

Management of the Office of Public School Construction

The OPSC is directed by an Executive Officer who is appointed by the Governor. The appointee also serves as the Executive Officer to the SAB. A Deputy Executive Officer is selected by the Executive Officer subject to the approval of the Director of General Services. The Deputy oversees the daily operation of the office. An Assistant Ewcutive Officer' is appointed by the SAB. Although not technically a member of the OPSC management, the Assistant Executive Officer works directly with the OPSC management team and acts as liaison between the SAB and the OPSC.

OTHER AGENCIES INVOLVED

School districts planning to construct or modernize existing schools require the assistance of several local, St ate, and federal agencies, It is essential that those dealing with the school construction process have an understanding of the role each agency plays. The three primary State agencies that will be referred to in this guidebook, in addition to the SAW and the OPSC, are the Division of the State Architect (DSA), the California Department of Education (CDE) School Facilities Planning Division (SFPD), and the Department of Toxic Substances Control(DTSC). District representatives may also come into contact with many other agencies. A listing of some of the agencies that might be involved in a school project and their role is provided in Appendix 2, Potential State Agency Involvement.

The agency information provided in this chapter is meant as a tool for school district representatives to become familiar with thr primary State agencies involved in the school construction process The OPSC encourages district representatives to contact each agency to obtain more information about their procedures and processes. To contact the agencies listed below, please see Appendix 1, State Agency Contact Information,

Department of General Services, Division of the State Architect

The primary role of the DSA in the school construction process is to review plans and specifications to ensure that they comply with California's building codes with an emphasis on structural and seismic safety, The review commences when the school district's architect submits working drawings to the DSA. The DSA reviews the working drawings to assure that the proposed structures meet codes and requirements for struct ure (seismic), fire and life safety, and universal design compliance,

California Department of Education, School Facilities Planning Division

The role of the SFPD is to review and approve school district sites and construction plans. The SFPD review begins when a school district plans to acquire a new school construction site. Prior to approving a site for school purposes, the SFPD reviews many factors, including, but not limited to, environmental hazards, proximity to airports, freeways, and power transmission lines. The review of construction plans by the SFPD f&uses mainly on the educational adequacy of the proposed facility and whether the needs of students and faculty will be met. See Chapter 3, Project Development Activities,

Department of Toxic Substances Control

The role of the DTSC in the school construction process begins with the SFPD's site approval process, The DTSC will assist the district with an assessment of any possible contamination, and, if necessary, with the development and implementation of a mitigation plan.

Department of Industrial Relations

The Department of Industrial Relations (DIR) was established to improve working conditions for California's wage earners, and to advance opportunities for profitable employment in California. The role of DIR in the school construction process is to enforce labor laws relating to contractors and employers.

The Labor Code[1] now requires, prior to receiving a SFP fund release, a district to make a certification that a labor compliance program (LCP), that has been approved by the DIR, for the project apportioned under the SFP has been initiated and enforced if both of the following conditions exist:

- Thedistrict has a project which received an apportionment from the funding provided in Proposition 47[2] or from the potential 2004 State bond?; and,
- The construction phase of the project commences on or after April 1, 2003, as signified by the date of the Notice to Proceed.

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[1] Refer to the Labor Code Section 1771.7

[2] Kindergarten-University Public Education Facilities Bond Act of2002

[3] Kindergarten-University Public Education Facilities Bond Act of 2004

The DIR provides a guidebook to assist districts in developing a LCP and has model LCP's available for view on its Web site at: www.dir.ca.gov. The DIR also provides public works contract information regarding:

- LCP's and the Labor Code
- Classification and Scope of Work
- Prevailing Wage Determination and Special Determination for a Specific Project
- Verification of the Status of an Individual Apprentice or an Apprenticeship Program

Questions regarding these matters and LCP approval may be directed to DIR at 415.703.4810.

Chapter 3 Project Development Activities

In this chapter...

INTRODUCTION

The School Facility Program (SFP) provides funding to projects that are essentially through the design phase and are ready to begin construction. With the exception of certain advanced planning and site applications for financial or environmental hardship situations, applications for funding require plans approved by the Division of the State Architect (DSA) and by the California Department of Education (CDE). Applications for new construction funding may also require CDE approval of the project site. In most cases, a great deal of time, money, and effort has already been expended before the project ever reaches the Office of Public School Construction (OPSC). Mast of the tasks involved in this chapter are not a part of the SFP and are not under the jurisdiction of the State Allocation Board (SAB). However, it is important that the district representative is aware of the options and requirements that may affect the district's project.

ESTABLISHING ELIGIBILITY

One of the first steps a district should consider in the school construction process is establishing eligibility for SFP funding on either a district-wide or high school attendance area basis. This will provide the district with the information needed to determine the possibility and scope of State funding assistance, the types of facilities needed, arid the appropriate project site size. See Chapter 4, Application for Eligibility for more information about establishingeligibility.

SELECTING PROFESSIONAL SERVICES

The SFP grants include funding for many professional services related to the development of the school project. Some of the most obvious and commonly used services are provided by architects, civil and structural engineers, and construction managers. Under law, these professional services are different than the services provided by general contractors, painters, site grading subcontractors, and similar construction related work. Unlike construction contracts, professional service contracts are obtained through a qualifications based selection process rather than a competitive bid process.

Because the design professional or other service provider will be engaged long before the application for project funding is submitted to the OPSC, it is critical district representatives are aware that professional services used on projects funded through the SFP must be obtained by a competitive selection process. Failure to do so can jeopardize the project funding.

The Competitive Selection Process

The SFP requires that applicant districts certify that contracts for the services of any architect, structural engineer, or other design professional that were entered into, on or after November 4, 1998 for work on the project were obtained through a competitive process. The term competitive does not mean that the selection has been bid, but rather that a formal qualifications based selection process has occurred that lead to the professional services contract [1].

[1] Chapter 11, commencing with Section 4525 of Division 5 of Title 1 of the Government Code.

Neither the SAB nor the OPSC is qualified to interpret the Government Code requirements pertaining to the selection of professional services. The district is advised to seek legal counsel assistance to ensure that the process used fully complies with this requirement as well as other legal requirements[2] such as Disabled Veterans Business Enterprise requirements, and the Public Contract Codes.

Eventually, the district will be required to certify that professional design services on the project were selected using a competitive process. This certification is made on the *Application for Funding* (Form SAB 50-04).

Compliance

The competitive selection requirement applies to a new construction or modernization project if:

- it is funded under the SFP, and
- professional services of an architect, structural engineer, or other design professional were used to complete the work in the project, and
- contracts for those services were signed on or after November 4, 1998.

Compliance with this requirement is very important. The law specifically mandates that the SAB shall not apportion funds to a district unless the competitive process for professional services has been used. If, during an audit at the project completion, it is determined that the competitive process was not used, the entire project grant could be found to have been made illegally.

Districts who are unfamiliar with the process of hiring an architect should be aware that the American Institute of Architects (MA) California Council has sample contracts available to assist districts. For more information, please contact the AIA at 916.448.9082.

PROJECT RESPONSIBILITIES

During the planning, design, and construction of a school facilities project, many individuals and firms come together to contribute to the project in specific ways. Unless responsibility is assigned by law, the decision about who should perform a given task generally rests with the district as owner, Frequently, however, the district may not be aware of the difference between the types of responsibilities, or even of the need to assign responsibilities and tasks related to the project. This lack of clarify may lead to a situation where a task is assigned to more than one individual or firm, creating a duplication of effort which can be wasteful and counterproductive.

As a result of this situation, a small working group was formed by the Joint Committee on School Facilities to address the issue. The Services Matrix is the result of the group's discussions (see Appendix 4, Services Matrix). District representatives may wish to consult the matrix to determine the responsibilities assigned to a project and to avoid duplication of effort.

Helpful Hint:
The SAB publication on cost reduction is available on the OPSC Web site.

COST REDUCTION

The SAB has developed cost reduction guidelines to assist school districts in reducing project construction costs, In April 2000, the SAB made available the *Cost Reduction Guidelines.* The guidelines are a compilation of hundreds of ideas introduced and discussed at a series of statewide meetings. The input into these guidelines comes from various sources, such as school district representatives, State agencies, architects, building industry representatives, construction managers, and consultants, The guidelines provide districts with ideas and new methods to contain and reduce costs and to maximize the return on expenditures. Along with cost, reduction guidelines, other incentives within the program, such as the retention of savings, exist to promote efficiency in design and construction of school facility projects. (See Chapter 13, Additional SFP Requirements and Features for more information on project savings.)

[2] CEQA and Planning per Public Resources Code Section 21151.2.

JOINT-USE PROJECTS

The language in the law which creates the SFP requires that the applicant school district consider the joint use of core facilities. The SAB's *Cost Reduction Guidelines* contains a number of suggestions as to how a district might investigate such joint use possibilities. Grants received under the new construction program may be used to fund school facilities related joint-use projects. Typical joint-use projects include multi-purpose rooms, libraries, gymnasium, or any other type of facility that can be used by both the district and the community.

Proposition 47 provides funding for joint-use projects, specific criteria to access this funding was included in A1316 (Hertzberg) (see Chapter 8, Joint-Use Projects for more information).

REUSABLE PLANS

The SFP requires the SAB to develop recommendations regarding the use of cost-effective, efficient, and reusable facility plans. Many districts have found that reusing some part or all of a school plan previously constructed in the district or in another district can lead to efficiencies in both the time required to prepare construction plans and the cost of constructing the facility. Such plan reuse is not always feasible, and, even when possible, may require considerable redesign work for the new site; however, in many circumstances the advantages can be significant.

To assist districts with exploring the feasibility of plan reuse for their new construction project, the SAB and the OPSC have developed an Internet-based "catalog" of plans that can be searched and browsed by anyone. The link on the OPSC Web site "Prototype School," contains floor plans, renderings, and vital statistics for a number of projects ranging from complete schools to single classrooms and support buildings. Districts are encouraged to download information on any of the projects on the OPSC Web site without charge. Districts may then contact the architects responsible for the original projects to pursue adaptation of the facilities to their individual needs. Arrangements for use of the plans are made by the district with the design professional. Of course, all plans on the OPSC Web site are copyrighted by the designers or firms that submitted them. The SAB and OPSC do not participate in anyway except as a clearinghouse for plans of school facilities.

PROJECT FINANCING

A district has several different options available to meet its 50 percent funding requirement for new construction and 40 percent funding requirement for modernization projects. Some financing mechanisms the district may consider are:

- General obligation bond funds
- Mello-Roos
- Developer fees
- Proceeds from the sale of surplus property
- Federal grants

Once a district has received a SFP apportionment and is ready for funds to be released on a project, they will need to certify on the *Fund Release Authorization* (Form SAB 50-05) that their contribution to the project has already been expended, is on deposit, or will be expended prior to the notice of completion for the project. (See Chapter 13, Additional SFP Requirements and Features for more information on the fund release process.)

SITE SELECTION

The SFP provides that in addition to the basic grant for a new construction project, the district may also receive up to 50 percent of the cost of site acquisition (see Chapter 5, New Construction Funding or Chapter 10, Financial Hardship). In most cases, the district must have completed the process of identifying the site and must have approval of the site by the CDE prior to applying for site acquisition funding. Some separate site applications for financial or environmental hardships do not need this approval at the time of application, See further discussion under those topics in Chapter 5, New Construction Funding. The identification and approval process falls under the jurisdiction and responsibility of agencies other than the SAB and the OPSC, and is therefore outside the scope of this guidebook, However, because the processes required cm he a major factor in a timely application submittal for project funding, district representatives should be aware of some of the basic requirements for site selection as follows:

identifying a Site

Selecting a site for a new construction project to he funded under the SFP is primarily a local process. The SAB has guidelines and regulations relating only to the funding limits related to site acquisition [3]. The CDE is given the authority in law to develop standards for school site acquisition related to the educational merit and the health and safety issues of the site. The CDE uses these standards to review a site and to determine if the site is an appropriate location for a school facility. The CDE approval is a requirement before the application for funding can be submitted to the OPSC and subsequently to the SAB for funding.

Site Approval

There are many components that make up the review and approval of a proposed school site. The CDE publication, *School Site Selection and Approval Guide*, addresses these components more completely than this guidebook can, Therefore, the district representative considering an application for a site under the SFP should consult the CDE or their publications. Contact, information can be found in Appendix 1, State Agency Contact Information.

[3] SFP Regulations Sections 1859.74 through 1859.76.

Chapter 4 , Application for Eligibility

In this chapter...

INTRODUCTION

The School Facility Program (SFP) provides State funding assistance for two major types of facilities construction projects: new construction and modernization. The process for accessing the State assistance for this funding is divided into two steps; an application for eligibility and an application for funding. Applications for eligibility are approved by the State Allocation Board (SAB) and this approval establishes that a school district or county office of education meets the criteria under law to receive assistance for new construction or modernization. Eligibility applications do not result in State funding. In order to receive the funding for an eligible project, the district representative must file a funding application with the Office of Public School Construction (OPSC) for approval by the SAB. See Chapter 5, New Construction Funding and Chapter 9, Modernization Funding for information on submitting applications for funding.

Helpful Hint:
Applications for eligibility may be filed in advance of applications for funding.

Applications for eligibility may be filed In advance of an application for funding, or the eligibility and funding requests may be filed concurrently at the preference of the district. In either case, an application for eligibility is the first step toward funding assistance through the SFP. The process must be done only once. Thereafter, the district need only update the eligibility information if additional new construction and modernization funding applications are submitted.

After the application for eligibility is reviewed by the OPSC, it is presented to the SAB for approval. The SAB's action establishes that the district has met the criteria set forth in law and regulation to receive State funding assistance for the construction of new facilities or the modernization of existing facilities. Throughout this chapter, references to the district also include a county office of education unless otherwise noted,

The discussions in this chapter are intended to describe the basic processes a district will encounter and use for establishing eligibility. Every possible situation cannot be dealt with in this overview. When preparing an application, the district representative should always contact the OPSC project manager to be sure that the district's approach is correct and will result in the most eligibility possible for Stale assistance. To learn more about the SFP program, visit the OPSC Web site at www.opsc.dgs.ca.gov.

NEW CONSTRUCTION ELIGIBILITY

The underlying concept behind eligibility for new construction is straightforward. A district must demonstrate that existing seating capacity is insufficient to house the pupils existing and anticipated in the district using a five-year projection of enrollment. Once the new construction eligibility is determined, a "baseline" is created that remains in place as the basis of all future applications. The baseline is adjusted for changes in enrollment and for facilities added, and may be adjusted for other factors such as errors and omissions or amendments to the Regulations. For a complete list of adjustments, refer to SFP Regulation Section 1859.51. Except for these updates, the establishment of the eligibility baseline is a one-time process.

Establishing Eligibility on a District-Wide or High School Attendance Area

Districts generally establish eligibility for new construction funding on a district-wide basis. For most districts this is the most beneficial method, and the vast majority of applications are fled in this manner. However, under certain circumstances, the district may have more eligibility if the applications are made on a High School Attendance Area

(HSAA) basis using one or several attendance areas. This circumstance occurs when the building capacity in one HSAA prevents another from receiving maximum eligibility. For example, one attendance area may have surplus classroom capacity while another does not have the needed seats to meet the current and projected student enrollment. Tf the district were to file on a district-wide basis, there might be little or no overall eligibility, even though the students in one attendance are "unhoused" by the definitions established in the SFP. In this case, by filing on a HSAA, the eligibility would increase to allow construct ion of adequate facilities for the unhoused students,

The district may file using one high school attendance area, or at the district's option, it may combine two or more adjacent HSAAs, commonly called a "Super Attendance Area." In either case, the attendance areas must serve an existing, operating high school, and the district must demonstrate that at least one HSAA has negative eligibility at any grade level. Continuation or proposed high schools may not be used for this purpose, Once a district receives funding using a high school attendance area as the basis of its eligibility, it must continue to file future new construction applications on that basis for five years,

Eligibility Process

The SAB has adopted three forms to assist districts in collecting the information needed to establish eligibility. The following outlines the three-step process a district uses to establish new construction eligibility:

Process for Establishing New Construction Eligibility

Step	Documentation	Purpose
1	Enrollment Certification/Projection (Form SAB 50-01)	Used to collect information about the district's current and historical enrollment and to project that data five years into the future.
2	Existing School Building Capacity (Form SAB 50-02)	Used to record all the teaching stations in the district that are adequate to house students.
3	Eligibility Determination (Form SAB 50-03)	Used to compare the information from the first two forms and to determine if the district is eligible for new construction or modernization grants.

The forms referred to in the table can be downloaded from the OPSC Web site at www.opsc.dgs.ca.gov in a format that allows them to be printed as blank forms or completed on the computer and printed for submission to the OPSC. A replica of the forms can be viewed in Appendix 3, SFP Required Forms, An Excel spreadsheet titled *SAB 50-01, 02, 30 Excel Combined Worksheets* is also available on the OPSC Web site that will perform all the required calculations.

Step One — Enrollment Projections

It may take several years to take a new construction project from the initial determination of need to final completion of construction and occupancy, Because of this, the SFP provides a *projection* of enrollment five years into the future to determine eligibility for funding. The *Enrollment Certification/Projection* (Form SAB 50-01) is used to make this projection. This form assists the district with determining future needs, planning, arranging State and local funding, and constructing the project before the children to be served arrive. The method of projecting enrollment into the future involves using current and historical California Basic Educational Data System (CBEDS) enrollment data for the district. The data collected Is then projected into the future for five years using a method known as a Cohort Survival Projection. A district can obtain CBEDS data from the California Department of Education (CDE).

A district may file on a HSAA basis utilizing one or more HSAA. If the district chooses to file an application on this basis the current and three previous years enrollment data in the HSAA or HSAAs (see section on High School Attendance Areas in this chapter) will he needed to he included on the Form SAB 50-01.

Once the district enters the required current and historical enrollment figures, the projection is done automatically on the Excel version of this form. In addition to the five-year projection used in the SFP, the form will also produce it one-year projection for the State Relocatable Classroom Program.

Supplemental Enrollment Figures. A district may supplement the current and historical enrollment figures by the pupils that will occupy dwelling units included in approved subdivision maps or valid tentative subdivision maps for developments to be located in the district or HSAA. The enrollment projection form factors these additional students into the enrollment projection, If the district requests this supplement, the following information must be retained by the district and available for review by the OPSC:

- The approved tentative subdivision maps.
- Approval dates of the maps by the city or county planning commission,
- The number of units to be built in the subdivision,

A yield factor from the various types of housing in the subdivision may be used to supplement the enrollment projection. As an alternative, the district may accept a state-wide average yield factor for calculation purposes. This factor is specified in the instructions on the Form SAB 50-01. Should the district: wish to use its own student yield factors, a copy of the district's study that justifies the student yield factors must he submitted with the Form SAB SO-01 .

A supplement to the enrollment projection for proposed housing units is not available for county superintendent applications.

Small districts with current enrollment of less than 300 should he aware that they have an option for reporting their enrollment differently if it has decreased by more than 50 percent from the **previous** year enrollment. (For more information on using this option please refer to the Form SAB 50-01, Part A.)

Step Two – Existing School Building Capacity

The second part in determining the district's eligibility for new construction assistance is to document the capacity of the school district at the time the first application for eligibility is filed under the SFP. This capacity calculation is done only once. Districts may file capacity information on a district-wide basis or using a HSAA.

The Calculation of Capacity. The *Existing School Building Capacity* (Form SAB 50-02) is used to capture the information needed for the calculations, and the accompanying instructions give a detailed guide of how to complete the form. The Form SAB 50-02 is essentially a record of all the district's facilities, The SFP Regulations provide instructions on what spaces are to be included or excluded in the calculation of the district capacity[1]. It is important to understand that any project funded with local sources must be counted as existing capacity if the contract for construction of the project is signed before the original application for eligibility determination is made. There is an exception provided for projects if the contracts were signed between August 27, 1998 and November 18, 1998, and if the project. did not have eligibility under the Lease-Purchase Program (LPI')).

The process of calculating the districts' existing school building capacity is as follows:

1. The district completes a gross inventory of ail spaces constructed or reconstructed to serve as an area to provide pupil instruction, The grade level of each classroom is also identified.
2. The gross inventory is adjusted by excluding certain spaces that are not considered available teaching stations under law or regulation. The classrooms remaining in the inventory are multiplied by a loading factor of 25 for elementary, 27 for middle and high school, 13 for non-severe, and 9 for for severe classrooms to determine the pupil capacity.
3. A final calculation is done to increase the capacity by a specified amount if the district does not have a substantial number of students enrolled in year round education. High school districts are not subject to this adjustment. The district may request a waiver from this adjustment from the CDE, School Facilities Planning Division.

1 SFP Regulations, Section 1859.30, "Gross Classroom Inventory".

4. A last adjustment occurs for those districts that receive Multi-TrackYear Round Education Operational Grants from the CDE. This increases the district capacity and reduces the final eligibility for the district in a number equivalent to the operational grants the district has most recently received from the CDE.

On-Site Reviews, The district must submit records of the teaching stations existing in the district or HSAA as part of the inventory process. These records generally consist of the following:

- Diagrams of the facilities at each site in the district. These diagrams need not be highly detailed, but must include all permanent and relocatable classrooms at the site. Many districts use simple "fire-drill" maps for this purpose. The diagrams must be submitted with the application.
- Documentation supporting any exclusion claimed from the gross inventory. For instance, if the district claims that a portable is excluded because it has been leased for less than five years, a copy of the lease must be in the district's possession as supporting documentation.

Helpful Hint:
All of the OPSC worksheets are available on the OPSC Web site at www.opsc.dgs.ca.gov.

The district may wish to use an OPSC Site Analysis Worksheet to assist with recording all the classrooms in the gross inventory as well as recording the reasons for exclusions, if any, This document is not mandatory but may make the inventory process easier. It also streamlines the OPSC review of the eligibility application.

Step Three – Determining Eligibility

The last part in the new construction eligibility determination process is done on the *Eligibility Determination* (Form SAB50-03). The existing school building capacity calculated in step two is subtracted from the enrollment projection determined in step one. The number of pupils left, if any, are considered "unhoused" for the purposes of the SW. They represent the district's eligibility for new construction grant entitlement,

Eligibility Application Approval. Once the district has completed steps one through three, they are ready to submit the eligibility application package, The OPSC will conduct a preliminary review of the package to ensure that it is complete prior to adding the application to the workload list, A more detailed review will be completed prior to presentation to the SAB that may include an on-site visit to review the information included in the site diagrams, When the review is complete and the OPSC has validated the eligibility calculations, an item is presented to the SAB for consideration of approval.

In some cases, the OPSC may find that. an application lacks required information. If this is the case, the district is asked to provide the needed information within a specified time. If the district is unable to comply, the application may be returned unprocessed. If this occurs, the district may resubmit the application at any time after the needed information is available,

Districts should review the SFP Application Submittal Requirements worksheet, located on the OPSC Web site, to ensure all required information is included with their application.

MODERNIZATION ELIGIBILITY

Establishing eligibility for modernization in the SFP is more simplified than new const ruction. Applications are submitted on a site by site basis, rather than district-wide or HSAA, as is the case for new construction. To be eligible, a permanent building must be at least 25 years old and a relocatable building must be at least 20 years old. For purposes of determining the age of the building, the 20 year and the 25 year period shall begin 12 months after the plans for the building were approved by the Division of State Architect. In either case, the facility must not have been previously modernized with State funding, The district must also show that there are pupils assigned to the site who will use the facilities to be modernized. If the facility is currently unused, such as a closed school, it may also be eligible for modernization funding if the district intends to reopen it and assign students immediately.

Application Process

The SAB has adopted a single form to calculate modernization eligibility, the Form SAB 50-03. This is the same form used for new construction applications. It may he downloaded from the OPSC Web site in a format that allows it to he printed as a blank form or completed on a computer and printed for submission to the OPSC. A replica of the form can he viewed in Appendix 3, SFP Required Forms.

In order to complete the Form SAB 50-03, the district representative will need a completed site diagram for the applicable school which contains the following information:

- The number of permanent classrooms.
- The number of portable classrooms,
- The ages of all permanent and portable classrooms.
- The grade level of each classroom, i.e., K-6,7-8,9-12, non-severe, or severe.
- The square footage for each enclosed facility on the site may be necessary (see below paragraph and the instructions on the Form SAB 50-03 for more information).

The instructions on the Form SAB TO-03 will guide the district through the process of calculating the eligibility at that site for modernization, If all the buildings are over 25/20 years old for permanent/relocatable buildings respectively and eligible for modernization, the grant eligibility is simply the number of children that are or can he housed at a site, whichever is less, However, for cases where there is a mixture of classrooms that are under and over the modernization age limits, two optional calculation methods are provided. One option is to count those facilities that: are over the age requirement and the children that can he housed in them. The second option is to develop a ratio based on either the square footage or the number of classrooms by comparing the square footage of overage to underage buildings or the number of overage to underage classrooms on the site. The ratio is then applied to the number of children enrolled at the site. 1 f the district selects the option using a ratio of square footage, it will he necessary to provide the square footage information on the site diagrams as well.

Eligibility Application Approval

Helpful Hint:
Did you know that the OPSC provides the current workload list on its Web site?

Once the district has completed part three of the Form SAB 50-03, they are ready to submit the modernization eligibility application package, The OPSC will conduct a preliminary review of the package to ensure that it is complete before adding it to the workload list. A more detailed review will then he completed that may include an on-site visit to review the information included on the site diagrams. When the review is complete and the OPSC has validated the eligibility calculations, an item is presented to the SAB for consideration of approval,

In some cases, the OPSC may find that an application lacks required information. If this is the case, the district is asked to provide the needed information within a specified time, if the district is unable to comply, the application may he returned unprocessed. If this occurs, the district may resubmit the application at any time after the needed information is available. When the application is resubmitted it will he added to the workload list with the new receipt date.

Districts should review the SFP Application Submittal Requirements worksheet, located on the OPSC Web site, to ensure all required information is included with their application,

THE PEOPLE, Plaintiff, v. HARRY-KEN et al., Defendants; TONY ALARCON, Appellant; EL MONTE SCHOOL DISTRICT et al., Respondents

Civ. No. 22496

Court of Appeal of California, Second Appellate District, Division Three

159 Cal. App. 2d 456; 324 P.2d 58; 1958 Cal. App, LEXIS 2020

April 17, 1958

SUBSEQUENT HISTORY: [*1]**

A Petition for a Rehearing was Denied May 7, 1958, and Appellant's Petition for a Hearing by the Supreme Court was Denied June 11, 1958. Carter, J., was of the Opinion that the Petition Should be Granted.

PRIOR HISTORY: APPEAL from an order of the Superior Court of Los Angeles County striking a third amended cross-complaint. Aubrey N. Irwin, Judge.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant citizen challenged the order of the Superior Court of Los Angeles County (California) striking his third amended cross-complaint against respondents, school and county, in the action by plaintiff, the State of California, against the school, the county, and others to abate a public nuisance.

OVERVIEW: The state filed an action against the school, the county, and others to abate a public nuisance alleged to exist on properties located in the county due to dilapidated buildings on the properties. The citizen filed a cross-complaint against the school and the county that sought a judgment declaring that the public interest and necessity required the school to construct a school building and to acquire a site upon which the school building could be erected. The trial court struck the citizen's third amended cross-complaint against the school and the county. The court affirmed on appeal and held that the third amended cross-complaint wholly failed to state a cause of action and was patently frivolous and a sham. The court reasoned that it knew of no law that authorized a private citizen to maintain such an action and that the construction of school buildings was a matter within the sole competency of a school's governing body. The court concluded that the trial court had jurisdiction by its inherent power to prevent frustration, abuse, or disregard of its processes to strike the citizen's cross-complaint.

OUTCOME: The court affirmed the trial court's order striking the citizen's third amended cross-complaint against the school and the county in the state's action against the school and county to abate a public nuisance.

CORE TERMS: cross-complaint, school district, causes of action, public interest, cross-defendant, necessity require, person in charge, frivolous, demurrer, sham, set forth, devote, cause of action, order striking, acquire, public use, dwellings, public nuisance, governing board, school building, real property, certain tract, appropriation, acquisition, delegated, stricken, erected, abate, site, right of eminent domain

LexisNexis(TM) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Counterclaims & Cross-Claims

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Motions to Strike

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

[HN1]While an order striking a pleading is not ordinarily appealable, the rule is otherwise where a cross-complaint is directed against cross-defendants not otherwise parties to an action.

Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Authority

[HN2]Where, when or how, if at all, a school district shall construct school buildings is a matter within the sole competency of its governing board to determine.

Civil Procedure > Eminent Domain Proceedings

Real & Personal Property Law > Eminent Domain Proceedings

[HN3]A private person seeking to exercise the right of eminent domain must not only allege that he proposes to devote the property sought to be acquired to one of the public uses provided in Cal. Civ. Proc. Code § 1238, but it must likewise be made to appear that he is authorized to devote the property to the public use in question, or otherwise stated, that he is a person authorized to administer or have "charge of such use."

Education Law > Departntents of Education > State Departments of Education > Authority

[HN4]Cal. Const. art. IX, §§ 5-6, declare that the legislature shall provide for a system of common schools, or a public school system. By these sections, the constitution makes the school system a matter of state care and supervision. The term "system" itself imports a unity of purpose as well as an entirety of operation, and the direction to the legislature to provide a system of common schools means one system which shall be applicable to all the common schools. This duty to provide for the education of the children of the State of California, so far as the state has, by the adoption of the constitution, undertaken it, cannot be delegated to any agency. It is in a sense exclusively the function of the state that cannot be delegated to any other agency. The education of the children of the state is an obligation which the state took over to itself by the adoption of the constitution. To accomplish the purposes therein expressed the people must keep under their exclusive control, through their representatives, the education of those whom it permits to take part in directing the affairs of the state.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Motions to Strike

[HN5]There is no statutory provision for striking complaints from the files, as there is in respect to sham or frivolous answers. Cal. Civ. Proc. Code §453. However, courts have inherent power, by summary means, to prevent frustration, abuse, or disregard of their processes, A court is not required to tolerate a purported amended complaint which fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration.

HEADNOTES: CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Appeal--Decisions Appealable--Orders on Motion to Strike. --While an order striking a pleading is not ordinarily appealable, the rule is otherwise where a cross-complaint is directed against cross-defendants not otherwise parties to the action.

(2) Pleading--Amendment--On Leave of Court. --An attempted incorporation of counts or causes of action in an amended cross-complaint without leave of court is ineffective and may not be treated as a part of the pleading in the case.

(3) Schools--Buildings and Construction. --A private citizen may not maintain an action for a judgment declaring that the public interest and necessity require the construction by a school district of a school building and "the acquisition and appropriation by said school district of a site upon which said building may be erected within that certain tract of land" described in the pleading; where, when or how, if at all, a school district shall construct school buildings is within the sole competency of its governing board to determine.

(4) Eminent Domain -- Who May Exercise Right -- Individuals: Pleadings. --A private person seeking to exercise the right of eminent domain must not only allege that he proposes to devote the property sought to be acquired to one of the public uses provided in Code Civ. Proc., § 1238, but must also make it appear that he is authorized to devote the property to the public use in question or that he is a person authorized to administer or have "charge of such use."

(5) Pleading -- Subject Matter -- Facts Judicially Noticed. -- An allegation by way of conclusion that the pleader "is a person, competent and qualified to acquire the real property" described in his pleading "as agent of the state and/or person in charge of the uses" therein set forth, should be disregarded, where the appellate court judicially knows it is untrue.

(6) Schools--Legislative Power and Duty. --Const., art. IX, §§ 5, 6, declaring that the Legislature shall provide for "a system of common schools" and "a public school system," make the school system a matter of state care and supervision; the term "system" itself imports a unity of purpose as well as entirety of operation, and the direction to the Legislature to provide "a" system of common schools means one system applicable to all common schools; this duty, so far as the state has by the adoption of the Constitution undertaken it, cannot be delegated to any agency.

(7) Pleading--Motion to Strike--Amended Pleading. --An amended cross-complaint was properly stricken by the trial court where it wholly failed to state a cause of action and was patently frivolous and sham.

(8) Id.--Motion to Strike--Amended Pleading. --Though there is no statutory provision for striking complaints from the files as there is with respect to sham or frivolous answers (Code Civ. Proc., § 453), a court may, by virtue of its inherent power to prevent frustration or abuse of its processes, strike a purported complaint that fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration.

COUNSEL: Alexander Ruiz and Manuel Ruiz, Jr,, for Appellant.

Harold W. Kennedy, County Counsel (Los Angeles), and Edwin P. Martin, Deputy County Counsel, for Respondents.

JUDGES: Patrosso, J. pro tern. * Shinn, P. J., and Wood (Parker), J., concurred.

* Assigned by Chairman of Judicial Council.

OPINIONBY: PATROSSO

OPINION: **[*457]** **[**59]** This is an appeal by cross-complainant Tony Alarcon from an order striking his third amended cross-complaint as against the cross-defendants El Monte School District and county of Los Angeles. **(1)** [HN1]While an order striking a pleading is not ordinarily appealable, the rule is otherwise where, as here, the cross-complaint is directed against cross-defendants not otherwise parties to the action. (*Trask v. Moore* (1944), *24* Cal.2d 365, *373* 1149 P.2d 854].)

The action in which the cross-complaint **[***2]** was filed is one instituted on behalf of the People of the State of California by **[*458]** the district attorney of Los Angeles County against numerous defendants, including cross-defendant, alleged to be the owners or occupants of properties within an area comprising some 24 acres located in the county of Los Angeles and commonly known as "Hick's Camp," to abate a public nuisance alleged to exist upon the properties located therein by reason of the maintenance thereon of dilapidated buildings and unsanitary conditions therein more particularly described.

[60]** A demurrer having been sustained with leave to amend to the original cross-complaint, appellant filed a second amended cross-complaint containing four separate causes of action. Demurrers interposed by the respondents to the latter complaint were sustained without leave to amend as to the first, second and fourth cause of action thereof. Thereafter appellant filed a third amended cross-complaint which was stricken upon motion of the respondents as hereinbefore stated.

The third amended cross-complaint, as is likewise true of its predecessors, is in many respects a remarkable document. It purports to incorporate **[***3]** therein by reference, the first, second and fourth causes of action of the second amended cross-complaint to which, as previously stated, demurrers had been sustained without leave to amend. It then alleges that the action is brought by the appellant "on behalf of apprximately [sic] 35 persons similarly situated, named defendants, in the second amended complaint of nuisance on tile herein, and also as agent for the State of California, and the person in charge of the public uses hereinafter set forth and requested." It then alleges that the El Monte School District and numerous individually named cross-defendants claim an interest in the property described in Exhibit "A," attached to the cross-complaint, which apparently comprises a portion of the property described in plaintiffs complaint, whereon are located the conditions which are sought to be abated as a public nuisance. It further alleges "that the public interest and necessity require that the said property be acquired by cross complainant as agent of the State of California, as provided in section 1001 of the California Civil Code. That cross complainant, Tony Alarcon, is a person, competent and qualified to acquire the **[***4]** real property and improvements thereon, described herein, as agent of the State and/or person in charge of the uses hereinafter set forth. That cross complainant seeks to take and condemn private property, to wit: Real Estate and improvements, for the public uses hereinafter **[*459]** set forth. That the plaintiff and cross defendants, El Monte School District, Ernest Roll, District Attorney for Los Angeles County and the County of Los Angeles, are public bodies within the purview of subsection 21 of the section 1238 of the California Code of Civil Procedure, . . . to wit: To demolish, clear, abate or remove buildings from the area known as 'Hicks Camp' and herein described in exhibit 'A,' for the reason that the same are detrimental to the health, safety and morals of the people, and because of dilapidation, overcrowding, faulty arrangement or design, or lack of ventilation or sanitary facilities of the dwellings predominating in said area. That the public interest and necessity require the construction by the El Monte School District of a school building and also the acquisition and appropriation by said school district of a site upon which said building may be erected within **[***5]** that certain tract of land hereinabove described. In conjunction therewith, said public interest and necessity require, that buildings, dwellings and structures within said tract of land be demolished, cleared, abated and/or removed, in the interest of the health, safety and morals of the people, because of dilapidation, overcrowding, faulty arrangement or design, or lack of ventilation or sanitary facilities of the dwellings therein, in a manner that will be most compatible with the greatest public good and the least private injury. . . . That there is grave danger of the creation of a public nuisance, unless the public uses herein referred to are provided for and the public interest and necessity stated above be adjuticated [sic]."

The cross-complaint closes with a prayer that the cross-defendants be required to set forth the nature, character, extent and value of their several estates or interest 'in the parcels of real property sought to be condemned and the severance damage, if any, accruing thereto; that the value of each separate interest or estate sought to be condemned and the severance damages, if any, be ascertained, and that upon payment to the defendants entitled **[***6]** to compensation **[**61]** of the several amounts so ascertained, the court make and enter a final order of condemnation, "conveying to cross complainant, as agent for the state, the properties for the public use above set forth."

We have ignored the allegations contained in the first, second and fourth causes of action, contained in the second amended cross-complaint, which were attempted to be incorporated **[*460]** by reference in the third amended cross-complaint in view of the fact that the demurrers interposed to these causes of action had, as noted, been sustained without leave to amend. (2) The attempted incorporation of these counts in the third amended cross-complaint without leave of the court is ineffective and they may not be treated as a part of the pleading in the case. (39 Cal.Jur.2d p. 339.) Moreover, without here undertaking to set forth in detail the voluminous allegations of said counts, we are completely satisfied that the trial court properly sustained the demurrers thereto without leave to amend. Each of these three causes of action seemingly undertakes to state a cause of action for monetary and injunctive relief against the respondents upon some undiscernible [***7] theory for damages which the cross-complainant and others similarly situated allegedly will sustain if the plaintiff prevails in its action to abate the nuisances alleged to exist upon the properties owned by them.

(3) From the allegations of appellant's pleadings which we have above summarized in some detail, it would appear that the relief which he seeks thereby as against the respondents is a judgment declaring that the public interest and necessity require the construction by the respondent El Monte School District of a school building and "the acquisition and appropriation by said school district of a site upon which said building may be erected within that certain tract of land" in the cross-complaint described. We know of no law, and none has been called to our attention, which authorizes a private citizen to maintain such an action. [HN2]Where, when or how, if at all, a school district shall construct school buildings is a matter within the sole competency of its governing board to determine? (*Montebello Unified School Dist. v. Keay* (1942), 55 Cal.App.2d 839, 843-844 [131 P.2d 384].)

If, however, the third amended cross-complaint be construed as one whereby appellant **[***8]** as a private citizen seeks to acquire property for the purpose of constructing and operating a public school, it is likewise unauthorized by law. Section 1001 of the Civil Code, upon which appellant assertedly seeks to predicate his action, while authorizing any person, as "an agent of the State" or as "a person in charge of such use" to acquire private property under the power of eminent domain for any of the public uses provided in section 1238 of the Code of Civil Procedure is wholly without application. (4) [HN3]A private person seeking to exercise the right of eminent domain must not only allege that he proposes to devote the **[*461]** property sought to be acquired to one of the public uses provided in section 1238, but it must likewise be made to appear that he is authorized to devote the property to the public use in question, or otherwise stated, that he is a person authorized to administer or have "charge of such use." (*Beveridge v. Lewis* (1902), 137 Cal. 619, 62 1 [67 P. 1040, 70 P. 1083, 92 Am.St.Rep. 188, 58 L.R.A. 581].) (5) While appellant alleges by way of conclusion that he "is a person, competent and qualified to acquire the real property" described in his pleading **[***9]** "as agent of the State and/or person in charge of the uses" therein set forth, the allegation must be disregarded, because we judicially know it is untrue. (*Wilson v. Loew's Inc.* (1956), 142 Cal.App.2d 183, 187-188 [298 P.2d 152].) (6) The constitution declares that the legislature shall provide 'for a system of common schools,' or, as expressed elsewhere in the organic law, 'a public school system.'" (23 Cal.Jur. p. 18; Cal. Const., art. IX, §§ 5-6.) "By these two sections, the constitution makes the school system a **[**62]** matter of state care and supervision. The term 'system' itself imports a unity of purpose as well as an entirety of operation, and the direction to the legislature to provide 'a' system of common schools means one system which shall be applicable to all the common schools. And this duty to provide for the education of the children of the state, so far as the state has, by the adoption of the constitution, undertaken it, cannot be delegated to any agency." (23 Cal.Jur. 21-22.) As said in *Piper v. Big Pine School Dist.*, 193 Cal. 664, 669 [226 P. 926]:

"It is in a sense exclusively the function of the state which cannot be delegated to any **[***10]** other agency. The education of the children of the state is an obligation which the state took over to itself by the adoption of the constitution. To accomplish the purposes therein expressed the people must keep under their exclusive control, through their representatives, the education of those whom it permits to take part in directing the affairs of state."

From the allegations of the cross-complaint, it affirmatively appears that "(i)n this case it is the school district, acting through its governing board, that is the agent of the State in charge of the use for which the land was sought." (*Montebello Unified School Dist. v. Keav, supra.*)

(7) The third amended cross-complaint wholly fails to state a cause of action and is patently frivolous and sham. **[*462]** It was therefore properly stricken by the trial court. (8) As said by this court in *Neal v. Bank of America* (1949), 93 Cal.App.2d 678, 682-683 [209 P.2d 51]:

"It may be conceded that [HN5]there is no statutory provision for striking complaints from the files, as there is in respect to sham or frivolous answers. (Code Civ. Proc., § 453.) However, the courts have inherent power, by sumrnary means, to prevent [***] **1]** frustration, abuse, or disregard of their processes. (41 Am.Jur. §§ 346, 347, p. 527; anno., 13 Am.St.Rep. 640.) . . , In *Santa Barbara County v. Janssens*, 44 Cal.App. 3 18 [186 P. 3721, it was held that an order striking an amended cross-complaint from the files was within the jurisdiction of the trial court, and presumably correct in the absence of error disclosed by the record. The fundamental principle running through the cases is that a court is not required to tolerate a purported amended complaint which fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration, . . . It cannot be doubted that the court had jurisdiction to strike plaintiffs amended complaint on the ground that it was frivolous and a sham and the order clearly was not an abuse of discretion."

The order appealed from is affirmed.

FREEDOM NEWSPAPERS, INC., Plaintiff and Appellant, v. ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM BOARD OF DIRECTORS, Defendant and Respondent.

No. S029178.

SUPREME COURT OF CALIFORNIA

6 Cal. 4th 821; 863 P.2d 218; 25 Cal. Rptr. 2d 148; 1993 Cal. LEXIS 6370; 93 Cal. Daily Op. Service 9589; 93 Daily Journal DAR 16426

December 23, 1993, Decided

PRIOR HISTORY: Superior Court of Orange County, No. 660703, Greer Stroud, Referee.

DISPOSITION: Since the Operations Cornmittee is composed solely of members of the governing body of a local agency numbering less than a quorum of the governing body, the committee's meeting on June 18, 1991, was not subject to the open meeting requirements of the Brown Act. Accordingly, the judgment of the Court of Appeal is reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff newspaper appealed an order of the Court of Appeal (California), which reversed a trial court decision denying the newspaper's petition for a writ of mandate that a meeting conducted by defendant, a county retirement board, was subject to the open meeting requirements of the Ralph M. Brown Act, Cal. Gov't Code § 54950 et seq.

OVERVIEW: The county retirement board had a committee that met to recommend changes to the board's travel policy. The newspaper sought to attend the meeting and when permission was denied, it sought a writ of mandate alleging that the committee was subject to the open meeting requirements of the Ralph M. Brown Act (Act), Cal. Gov't Code § 54950 et seq. The trial court denied the petition and entered judgment for the board. The lower appellate court reversed. The court reversed the lower appellate court's decision, The court found that its examination of the history of the Act, both prior to and after the enactment of Cal. Gov't Code § 54952.3, showed that committees comprised of less than a quorum of the legislative body had generally been considered exempt from the Act's open meeting requirements. Since the enactment of § 54952.3, the attorney general had continuously recognized that advisory committees fell within the express less-than-a-quorum exception. While the attorney general's views did not bind the court, they were entitled to considerable weight. Furthermore, the legislature rejected an alternative bill that would have abolished the implicit less-than-a-quorum exception.

OUTCOME: The judgment was reversed because the operations committee of the county retirement board was composed of members of the governing body of a local agency numbering less than a quorum of the governing body and, as such, was not subject to the open meeting requirements of the law.

CORE TERMS: legislative body, local agency, governing body, quorum, advisory committees, Brown Act, open meeting, less-than-a-quorum, composed, advisory committee, advisory, legislative bodies, exempt, deliberation, regular, notice, recommendations, session, openly, Brown Act's, attend, comprised, Ralph M. Brown Act, chairman, italics, standing committee, advisory commission, public agencies, governing board, formal action

LexisNexis(R) Headnotes

Administrative Law > Governmental Information > Public Meetings

[HN1] The Ralph M. Brown Act, Cal. Gov't Code § 54950 et seq., provides that all meetings of the legislative body of a local agency shall be open and public, except as otherwise provided in the Act. Cal. Gov't Code § 54953.

Administrative Law > Separation & Delegation of Power > Legislative Controls
[HN2] See Cal. Gov't Code § 54952.

Administrative Law > Governmental Information > Public Meetings
[HN3] See Cal, Gov't Code § 54950.

Governments > Legislation > Interpretation
[HN4] When interpreting a statute the court's primary task is to determine the legislature's intent. In doing so the court turns first to the statutory language, since the words the legislature chose are the best indicators of its intent,

Governments > Legislation > Interpretation
[HN5] When a statute is ambiguous, the court typically considers evidence of the legislature's intent beyond the words of the statute and looks both to the legislative history of the statute and to the wider historical circumstances of its enactment.

Administrative Law > Governmental Information > Public Meetings
[HN6] It is more consistent with the legislative intent to construe the less-than-a-quorum exception contained in Cal. Gov't Code § 54952.3 as an exception to the definition of "legislative body," and thus one of several exceptions to the open meeting requirements of the Ralph M. Brown Act, Cal. Gov't Code § 54950, et seq., rather than merely as an exception to the special procedural requirements of § 54952.3. This interpretation is consistent with the act's purpose of ensuring that the actions of public agencies be taken openly and that their deliberations be conducted openly. § 54950. The exception applies only to an advisory committee that consists solely of members of the legislative body that created it but not enough members to constitute a quorum or, thus, to act as the legislative body. Accordingly, before any action can be taken on such a committee's recommendations the entire legislative body must conduct further public deliberations. Cal. Gov't Code § 54952.

SUMMARY: CALIFORNIA OFFICIAL REPORTS SUMMARY

A newspaper publisher sought a writ of mandate to compel a county employees retirement system board of directors to allow the public to attend meetings of the board's operations committee. The committee was advisory in nature and was composed of four members of the nine-member board. The trial court denied the petition and entered judgment in favor of the board. (Superior Court of Orange County, No. 660703, Greer Stroud, Referee.) The Court of Appeal, Fourth Dist., Div. Three, No. GO1 1490, reversed.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that, since the operations committee was an advisory committee composed solely of board members numbering less than a quorum of the board, the committee was not a "legislative body" pursuant to the provisions of Gov. Code, § 54952.3, and was therefore excluded from the open meeting requirements of the Ralph M. Brown Act (Gov. Code, § 54950 et seq.). (Opinion by Panelli, J., with Lucas, C. J., Arabian, Baxter and George, JJ., concurring. Separate concurring and dissenting opinion by Mosk, J. Separate dissenting opinion by Kennard, J.)

HEADNOTES: CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(la) (lb) Counties § l--Open Meeting Requirements--Advisory Committee of County Employees Retirement System Board--Committee Composed of Less Than Quorum of Board: Pensions and Retirement Systems § 3--Administration. --The trial court did not err in denying a petition for a writ of mandate brought by a newspaper publisher that was seeking to compel a county employees retirement system board of directors to allow the public to attend meetings of the board's operations committee. The committee was advisory and was composed of four members of the nine-member board. Gov. Code, § 54952.3, exempts from the definition of "legislative bodies" that are subject to the open meeting requirements of the Ralph M. Brown Act (Gov. Code, § 54950 et seq.) advisory committees composed of less than a quorum of the governing body. Although Gov. Code, § 54952.3, could be read to mean that less-than-quorum committees are merely exempt from the formal requirements of that specific statute, the legislative history of the act, including the Legislature's response to court decisions, demonstrates an intent to exempt less-than-quorum advisory committees from all open meeting requirements. Since the committee was an advisory committee composed solely of board members numbering less than a quorum of the board, the committee was not a "legislative body" and was therefore excluded from the open meeting requirements of the act.

[See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 579.]

(2) State of California § lo--Attorney General--Opinions. --While the opinions of the Attorney General are not binding on the courts, they are entitled to great weight.

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Terry C. Andrus, County Counsel, and Donald H. Rubin, Deputy County Counsel, for Defendant and Respondent.

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JUDGES: Opinion by Panelli, J., with Lucas, C. J., Arabian, Baxter and George, JJ., concurring. Separate concurring and dissenting opinion by Mosk, J. Separate dissenting opinion by Kennard, J.

OPINIONBY: PANELLI, J.

OPINION: [*823] [**219]

[***149] [HN1] The Ralph M. Brown Act (Stats. 1953, ch. 1588, § 1, p. 3269, codified as Gov. Code, § 54950 et seq. [hereafter the Brown Act or the Act]) nl provides that all meetings of "the legislative body of a local agency shall be open and public," except as otherwise provided in the Act. (§ 54953.) At all times relevant to this case the Act contained four separate definitions of "legislative body." n2 We granted review to determine [**220] whether the [***150] Operations Cornmittee of the Retirement Board of Orange County Employees Retirement System (hereafter Board) is a "legislative body" within. the meaning of the Brown Act and, therefore, subject to the Act's [*824] open meeting requirements. Because the Operations Committee is an advisory committee composed solely of Board members numbering less than a quorum of the Board, we hold that the committee is not a "legislative body" pursuant to the provisions of section 54952.3 and is thereby excluded from the open meeting requirements of the Act.

nl All statutory references are to the Government Code unless otherwise noted.

A new law changing the relevant provisions of the Government Code was enacted while this case was pending. (Sen. Bill No. 1140 (1993-1994 Reg. Sess.), Stats. 1993, ch. 1138, eff. Apr. 1, 1994.) The impact of the new law is addressed in footnote 11, *post*. Except in that footnote, all references to the Government Code in this opinion are to the current version, i.e., the law as it will be until Senate Bill No. 1140 takes effect on April 1, 1994.n2 [HN2] Section 54952: "As used in this chapter, 'legislative body' means the governing board, commission, directors or body of a local agency, or any board or commission thereof, and shall include any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency, whether such board, commission, committee or other body is organized and operated by such local agency or by a private corporation."

Section 54952.2: "As used in this chapter, 'legislative body' also means any board, commission, committee, or similar multimember body which exercises any authority of a legislative body of a local agency delegated to it by that legislative body."

Section 54952.3: "As used in this chapter[,] 'legislative body' also includes any advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency. [P] Meetings of such advisory commissions, committees or bodies concerning subjects which do not require an examination of facts and data outside the territory of the local agency shall be held within the territory of the local agency and shall be open and public, and notice thereof must be delivered personally or by mail at least 24 hours before the time of such meeting to each person who has requested, in writing, notice of such meeting. [P] If the advisory commission, committee or body elects to provide for the holding of regular meetings, it shall provide by bylaws, or by whatever other rule is utilized by that advisory

body for the conduct of its business, for the time and place for holding such regular meetings. No other notice of regular meetings is required. [P] 'Legislative body' as defined in this section does not include a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body. [P] The provisions of Sections 54954, 54955, 54955.1, and 54956 shall not apply to meetings under this section."

Section 54952.5: "As used in this chapter[,] 'legislative body' also includes, but is not limited to, planning commissions, library boards, recreation commissions, and other permanent boards or commissions of a local agency."

I. FACTS

The Orange County Employees Retirement System is governed by a nine-member Board. Five members of the Board constitute a quorum. The Board is a "local agency" and a "legislative body" under sections 54951 and 54952 respectively. The Board is therefore subject to the open meeting requirements of the Brown Act. The chairman of the Board has created five advisory n3 committees--operations, benefit, investment, real estate, and liaison--each composed of four members of the Board. Some members serve on more than one committee, The committees' function is to review various matters related to the business of the Board and to make recommendations to the full Board for action. The Board considers the committees' recommendations in public meetings, at which time there is an opportunity for full public discussion and debate, The committees do not have any decisionmaking authority and act only in an "advisory" capacity. n4

n3 The parties do not dispute that these committees are properly 'described as "advisory. "n4 The only evidence concerning the composition and function of the committees is a declaration by the administrator of the retirement system. The declaration states:

"[P] 4. . .,, All of the committees of the Board of Retirement, including the Operations Committee, are comprised solely of members of the Board of Retirement. The Board of Retirement has nine members, and a quorum is five. However, none of the committees of the Board of Retirement are comprised of more than four members, and all committee members are also members of the Board of Retirement. . .,, [P] 5. The function of such committees is to review various matters related to the business of the Board of Retirement, and make recommendations to the full Board for action. The committees have not been delegated any decision-making authority. The committees act in an advisory capacity, and make recommendations to the full Board of Retirement. The full Board considers those recommendations in public meetings, at which time there is an opportunity for full public discussion and debate on those recommendations. [P] 6. The committees are formed by the Chairman of the Board of Retirement. The Chairman determines what committees shall operate, and which members of the Board of Retirement shall serve on such committees. The Chairman has the authority to form new committees, abolish existing committees, or combine existing committees. There is no Board rule or regulation which prescribes the number of Board committees, or the duties of any such committee; it is up to the Chairman of the Board of Retirement to decide what committees shall be formed, and who will serve on them."

On June 18, 199 1, the Operations Committee met to formulate a list of recommended changes to the Board's travel policy. Freedom Newspapers sought to attend the meeting but the committee denied permission on the ground that it was not subject to the open meeting requirements of the [*825] Brown Act. The next day, June 19, the full Board met in a public session at which the chairman of the Operations Committee read and explained the committee's recommendations. The press was in attendance, and there was public discussion among the Board's members about the recommendations. The Board ultimately voted eight to one in public session to accept the recommendations.

[**221] [***151] On the same day, Freedom Newspapers petitioned the trial court for a writ of mandate alleging that the Operations Committee is subject to the open meeting requirements of the Brown Act. The trial court denied the petition and entered judgment in favor of the Board. Freedom Newspapers appealed from that judgment, and the Court of Appeal reversed. We granted the Board's petition for review.

II. DISCUSSION

The Brown Act was adopted to ensure the public's right to attend the meetings of public agencies. (§ 54950.) n5 5 The Act provides that "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." (§ 54953 .) As

already noted, "legislative body" is defined in four sections of the Act, two of which pertain to the case before us. (§ 54952, 54952.3.) Section 54952 provides that any committee or body on which officers of a local agency serve in their official capacity and which is supported by its appointing local agency is a "legislative body." (§ 54952.) n6 6 Section 54952.3 more specifically addresses "advisory" bodies: "As used in this chapter[,] 'legislative body' also includes any advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency. [P] . . . [P] *'Legislative body' as defined in this section does not include a committee composed solely ofmembers of the governing body of* [*826] *a local agency which are less than a quorum of such governing body* ." (§ *54952.3,* n7 7 italics added.)

n5 [HN3] Section 54950 provides: "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [P] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."n6 For the fill text of section 54952, see *ante,* footnote 2.n7 For the full text of section *54952.3, see ante,* footnote 2.

(la) The parties in this case disagree over the meaning of the explicit less-than-a-quorum exception contained in section 54952.3. The Board and its amici curiae, including the Attorney General, argue that an advisory committee that is excluded from the definition of "legislative body" under the exception is completely exempt from the open meeting requirements of the Act. n8

n8 Like the Brown Act, the 1972 Federal Advisory Committee Act generally subjects advisory committees to open meeting requirements. (86 Stat. 770, as amended, 5 U.S.C.S. Appen. § l-15,) However, the same act, as amended, also specifically exempts "any [advisory] committee which is composed wholly of full-time officers or employees of the Federal Government" from the open meeting requirements. (5 U.S.C.S. Appen. § 3(2)(C)(iii).)

In opposition, Freedom Newspapers and its amici curiae contend that the less-than-a-quorum exception in section 54952.3 merely exempts less-than-a-quorum committees from the special, relaxed procedural requirements of section 54952.3. According to Freedom, such committees remain subject to the stricter open meeting requirements that are generally applicable to "legislative bodies" under section 54952.

[HN4] When interpreting a statute our primary task is to determine the Legislature's intent. (*Brown v. Kelly Broadcasting* Co. (1989) 48 Cal.3d 711,724 [257 Cal.Rptr. 708,771 P.2d 406].) In doing so we turn first to the statutory language, since the words the Legislature chose are the best indicators of its intent. *(Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 826 [4 Cal.Rptr.2d 615, **823** P.2d 1216].)

Each party asserts that the language of section 54952.3 supports its view. Freedom [**222] [***152] reasons that,-had the Legislature intended to exempt less-than-a-quorum advisory committees from the Act's open meetingrequirements, it would have used language such as this: " 'legislative bodies' as defined in *this chapter* shall not include a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body." Because the Legislature used the words "in this section," instead of "in this chapter," the effect of the less-than-a-quorum exception, according to Freedom, is simply to exclude less-than-a-quorum committees from the terms of section 54952.3 rather than from other definitions of "legislative body" within the Act.

In contrast, the Board argues that, because section 54952.3 specifically refers to "any . . . advisory committee," that section alone governs advisory [*827] committees for the purposes of the Act. To support its interpretation the Board relies, in part, on the traditional rules of statutory construction that specific statutes govern general statutes *(San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 57 1,577 [7 Cal.Rptr.2d *245, 828* P.2d 147]; *see* also *Yoffie v. Marin Hospital Dist.* (1987) 193 Cal.App.3d 743, 750-753 [238 Cal.Rptr. 502]; *Kennedy v. City of Ukiah* (1977) 69 Cal.App.3d 545, 552 [138 Cal.Rptr. 207]) and that, to the extent a specific statute is inconsistent with a general statute potentially covering the same subject matter, the specific statute must be read as an exception to the more general statute *(Common Cause v. Board of Supervisors*

(1989) 49 Cal.3d 432,443 [261 Cal.Rptr. 574,777 P.2d 610]; *Yoffie v. Marin Hospital Dist., supra*, 193 Cal.App.3d at p. 751). According to the Board, an advisory committee that is excluded from the definition of "legislative body" contained in section 54952.3 is not subject to the Act's open meeting requirements, even if it might otherwise satisfy the more general definition of "legislative body" contained in section 54952.

The Board also argues that Freedom's interpretation of section 54952 would deprive sections 54952.2 and 54952.5, as well as the less-than-a-quorum exception in 54952.3, of meaning. To explain, sections 54952.2 and 54952.5 purport to include only certain bodies within the definition of "legislative body," For the Legislature to have enacted those statutes would have made no sense if the governmental bodies described therein had already been included in the more general definition of "legislative body" contained in section 54952.

To be sure, one could argue that section 54952.3 might still have some meaning under Freedom's interpretation, Because section 54952.3 gives certain advisory bodies the benefit of procedural requirements that are less stringent than the requirements applicable to "legislative bodies" under section 54952, under Freedom's interpretation the exception contained in section 54952.3 for less-than-a-quorum advisory committees would have the effect of subjecting such committees to the stricter, generally applicable procedural requirements.

But Freedom's interpretation of section 54952.3 would also result in absurdity. If we construed section 54952.3 merely as exempting less-than-a-quorum advisory committees from the less rigid procedural requirements in that section, even a temporary, ad hoc advisory committee composed solely of less than a quorum of the governing body would be subject to all of the Brown Act's generally applicable procedural requirements, including the requirement that comtnittees hold "regular" meetings. (§ 54954.) Yet a [*828] temporary, ad hoc committee, by definition, does not hold "regular" meetings. We will not give a statute an absurd interpretation, *(Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208,245 [149 Cal.Rptr. 239, 583 P.2d 1281]; *Gage v. Jordan* (1944) 23 Cal.2d 794, 800 [147 P.2d 387]; *Lynch v. State Bd. of Equalization* (1985) 164 Cal.App.3d 94, 114 [210 Cal.Rptr. 335].)

Freedom attempts to avoid the absurdity by characterizing the Operations Committee as a standing committee. However, neither section 54952 nor section 54952.3 distinguishes between ad hoc advisory committees [**223] [***153] and standing advisory committees, We will not add to a statute a distinction that has been omitted. (Code Civ. Proc., § 1858; see, e.g., *Security Pacific National Bank v. Wozab (1990) 5* 1 Cal.3d 991, 998 [275 Cal.Rptr. 201, 800 P.2d 557].)

[HN5] When a statute is ambiguous, as in this case, we typically consider evidence of the Legislature's intent beyond the words of the statute *(Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 [241 Cal.Rptr. 67, 743 P.2d 1323]) and look both to the legislative history of the statute and to the wider historical circumstances of its enactment *(ibid.). An* examination of the history of the Brown Act, both prior to and after the enactment of section 54952.3, shows that committees comprised of less than a quorum of the legislative body have generally been considered exempt from the Act's open meeting requirements.

In 1958 the Attorney General, interpreting the original version of section 54952, n9 concluded that "meetings of committees of local agencies where such committees consist of less than a quorum of the legislative body are not covered by the act." *(Secret Meeting Law,* 32 Ops.Cal.Atty.Gen. 240,242 (1958).) The Attorney General reasoned that, "[i]n those cases the findings of such a committee have not been deliberated upon by a quorum of the legislative body and the necessity, as well as the opportunity, for full public deliberation by the legislative body still remains." *(Ibid.)*

n9 In 1958 section 54952 provided: "As used in this chapter, 'legislative body' means the governing board, commission, directors or body of a local agency, or any board or commission thereof." (Stats. 1953, ch. 1588, § 1, p. 3270.)

Successive Attorneys General have consistently adhered to the view stated in the 1958 opinion. In 1968 the Attorney General wrote that "[w]e have consistently concluded that committees composed of less than a quorum of the legislative body creating them and not established on a permanent basis for a continuing function are not subject to the open meeting requirements of [*829] that Act, In view of the lack of any pronouncements on the parts of either the courts or the Legislature which would compel a different conclusion, our opinion remains unchanged." (Cal. Atty. Gen., Indexed Letter No. IL 68-106 (Apr. 29, 1968).)

More specifically, since the enactment of section 54952.3 the Attorney General has continuously recognized that advisory committees falling within the express less-than-a-quorum exception in section 54952.3 are not "legislative bodies" within the meaning of the Brown Act. (See, e.g., Cal. Atty. Gen., Indexed Letter No. IL 69-13 1 (June 30, 1969); Secret Meetings Laws

Applicable to Public Agencies (Cal.Atty.Gen., 1972) pp. 6-8; *Closed Meetings,* 63 Ops.Cal.Atty.Gen. 820, 823 (1980); *Open Meeting Requirements, 64* Ops.Cal.Atty.Gen. 856, 857 (1981).) The Attorney General's brief in this case supports the long-standing, view of his office. (2) While the Attorney General's' views do not bind *us (Unger v. Superior Court* (1980) 102 Cal.App.3d 681,688 [162 Cal.Rptr. 61 1]), they are entitled to considerable weight (*Meyer v. Board of Trustees* (1961) 195 Cal.App.2d 420, 43 1 [15 Cal.Rptr. 7173). (lb) This is especially true here since the Attorney General regularly advises many local agencies about the meaning of the Brown Act and publishes a manual designed to assist local governmental agencies in complying with the Act's open meeting requirements. (See, e.g., Open Meeting Laws (Cal.Atty.Gen., 1989).)

In 1961 the Legislature amended the Brown Act, not in response to the Attorney General's recognition of an implicit less-than-a-quorum exception, but in response to a judicial opinion that essentially eviscerated the Act by restrictively defining the terms "meeting" and "legislative body." The court in *Adler v. City Council* (1960) 184 Cal.App.2d 763 [7 Cal.Rptr. *8053 (Adler)* held that a city's planning commission did not violate the Brown Act when all but one of its members attended a dinner given a few days before the host's application to the commission for an amendment to the zoning law. The court held that "the [**224] Brown Act was not [***154] directed at anything less than a formal meeting of a city council or one of the city's subordinate agencies." (*Id.* at p. 770.) Misconstruing the Attorney General's 1958 opinion *(Secret Meeting Law, supra, 32* Ops.Cal.Atty.Gen. 240), which addressed committees composed of less than a quorurn of the governing body, the court also held that the Act did not apply to any committee of an advisory nature, whether or not composed of a quorum of the governing body. *(Adler, supra,* 184 Cal.App.2d at p. 77 1.)

In response to the *Adler* decision, the Legislature broadened the scope of the Brown Act the very next year. (Stats. 1961, ch. 1671, § 1, p. 3637, [*830] amending § 54952 and 54957, and adding § 54952.5, 54952.6, and 54960.) Shortly after the 1961 amendments took effect, the Attorney General construed them as disapproving *Adler* on several points. *(Secret Meeting Law,* 42 Ops.Cal.Atty.Gen. 61 (1963).) Specifically, the Attorney General concluded that the 1961 amendments "disapproved *Adler's* restrictive interpretation of the word 'meeting' by recognizing that criminally prohibited legislative action may be taken at gatherings that fall far short of the ' "formal assemblages of the council sitting as a joint deliberative body" ' " and "repudiated that portion of the *Adler* decision which held that the act was not meant to apply to planning commissions or other bodies of an 'advisory' nature." *(Secret Meeting Law, supra,* 42 Ops.Cal.Atty.Gen., at pp. 64-65.)

In addition to the history set out above, the history of the Brown Act in the Legislature reflects a recognition of the implicit less-than-a-quorum exception and, after the consistent failure of proposals to abolish it, the codification of a limited version of that exception.

A 1963 bill would have abolished the exception by providing that "[a]ll meetings of any committee or subcommittee of a legislative body, *whether or not composed of a quorum of the members of the legislative body,* shall be open and public, and all persons shall be permitted to attend any meeting of such committee or subcommittee, except during consideration of the matters set forth in Section 54957." (Assem. Bill No. 2334 (1963 Reg. Sess.) § 2, italics added.) The bill did not pass.

The legislative history of section 54952.3, the provision at issue in this case, reveals another unsuccessful attempt to abolish the implicit less-than-a-quorum exception. Section 54952.3, enacted in 1968 (Stats. 1968, ch. 1297, § 1, p. 2444), extended the coverage of the Brown Act to certain advisory connnittees that were not previously covered. However, at the same time the Legislature rejected an alternative bill that would have abolished the implicit less-than-a-quorum exception by making all advisory committees subject to the full procedural requirements applicable to governing bodies. (Sen. Bill No. 717 (1968 Reg. Sess.).) n10 The bill that did pass (Assem. Bill No, 202 (1968 Reg. Sess.), codified as § 54952.3) thus appears to be a compromise, incorporating into the open meeting requirements of the Brown [*83 1] Act advisory committees that were not previously included within the Act, but relaxing the procedural requirements applicable to those committees and codifying a limited version of the implicit less-than-a-quorum exception.

n10 Senate Bill No. 717 would have amended section 54952 by adding the italicized words: "As used in this chapter, 'legislative body' means the governing board, commission, directors or body of a local agency, or any board, commission, *committee, advisory committee, or subcommittee* thereof, and shall include any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency, whether such board, commission, committee or other body is organized and operated by such local agency or by a private corporation." (Sen. Bill No. 717 (1968 Reg. Sess,), italics in original.)

To support its view that the committees excluded from the definition of "legislative body" in section 54952.3 were included in another definition of "legislative body," Freedom Newspapers relies on a communication by Assemblyman Hayes to the members of the Assembly discussing his reasons for drafting the less-than-a-quorum [**225] exception, [***155] Assemblyman Hayes claimed that " '[t]he reason [for enacting the less-than-a-quorum exception in section 54952.3] was that such committees of the governing body of a local agency are covered by another section of the Ralph M. Brown Act, Government Code Sec. 54952.' " (4 Assem. J. (1968 Reg. Sess.) p. 7163.) However, these comments offer little assistance in the interpretation of section 54952.3 because they do not necessarily reflect the views of other members of the assembly who voted for section 54952.3. (Cf. ***Delaney v. Superior Court*** (1990) 50 Cal.3d 785, 801, fn. 12 [268 Cal.Rptr. 753, 789 P.2d 934]; ***see*** also ***California Teachers Assn. v. San Diego Community College Dist.*** (1981) 28 Cal.3d 692, 700-701 [170 Cal.Rptr. 817,621 P.2d 856]; ***In re Marriage*** *of* ***Bouquet*** (1976) 16 Cal.3d 583, 589-590 [128 Cal.Rptr. 427, 546 P.2d 13711.)

Indeed, the Legislature's action in two respects since the 1968 enactment of section 54952.3 indicates its continuing understanding that advisory committees comprised solely of less than a quorum of the governing body are exempt from the open meeting requirements of the Act.

First, although legislative acquiescence is a weak indication of legislative intent ***(People v. Escobar*** (1992) 3 Cal.4th 740, 751 [12 Cal.Rptr.2d 586, 837 P.2d 1 100]), we note that the Legislature has allowed the Court of Appeal's opinion in ***Henderson*** *v.* ***Board*** *of* ***Education*** (1978) 78 Cal.App.3d 875 [144 Cal.Rptr. 568] to govern meetings of less-than-a-quorum advisory committees for the past 14 years.

The ***Henderson*** court squarely addressed the issue of whether an advisory committee consisting solely of governing board members, constituting less than a quorum of the board, was exempt from the open meeting requirements of the Act. (78 Cal.App.3d at pp. 880-***883.) In Henderson,*** ad hoc advisory committees had been created for the purpose of advising the board of education about the qualifications of candidates for appointment to a vacant position, Each of the advisory committees was composed solely of members [*832] of the governing body of the school district numbering less than a quorum of the governing body. The court considered whether the advisory committees had violated the Brown Act when they evaluated the candidates' qualifications and interviewed candidates in private sessions. (***Id.*** at p. 877.) Finding that section 54952.3 provided an express exemption from the open meeting requirements of the Brown Act for advisory committees comprised solely of less than a quorum of the governing body, the ***Henderson*** court held that the advisory committees in that case were not subject to the Act. (78 Cal.App.3d at pp. 880-88 1.)

Secondly, and more importantly, the Legislature in 1992 attempted to extend the coverage of the Brown Act by limiting the coverage of the express less-than-a-quorum exception in section 54952.3 to ad hoc advisory committees. This legislation is the strongest indication that the current version of section 54952.3 excludes less-than-a-quorum advisory committees from the Act's open meeting requirements, rather than merely from the less-stringent procedural requirements in section 54952.3. On August 3 1, 1992, the California Legislature passed and sent to the Governor a bill amending the explicit less-than-a-quorum exception as follows: " 'Legislative body' as defined in this section does not include a ***limited duration ad hoc committee*** composed solely of members of the governing body of a local agency which are less than a quorum of the governing body ***but does include any standing committee*** of a governing body irrespective of its composition. For purposes of this section, 'standing committee' means a permanent body created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency and which holds regularly scheduled meetings." (Assem. Bill. No, 3476 (1991-92 Reg. Sess.) § 3, italics added,) The Governor vetoed this bill, reasoning that its economic impact would be too great in view of the state's fiscal outlook. In his veto message the Governor stated: "This [**226] bill would make a number of changes in the Ralph M. Brown [***156] Act relating to open meetings. It would ***expand the number*** *of* ***local agencies subject to the law,*** and expand notice, recordation, and recordkeeping requirements. . . . [P] I cannot approve mandating expensive new requirements while we are unable to afford the ones on the books today." (Governor's veto message to Assem. on Assem. Bill No. 3476 (Sept. 20, 1992) Recess J. No. 24 (1991-1992 Reg. Sess.) p. 10271, italics added.) nll

nl 1 On October 10, 1993, the Governor signed into law Senate Bill No. 1140 (Stats. 1993, ch. 113 8), which changes, as of April 1, 1994, the Brown Act's definition of "legislative body." Among other things, the new law amends section 54952 and repeals sections 54952.2, 54952.3, and 54952.5.

The newly amended section 54952 codifies an exception for less-than-a-quorum advisory

committees in these words: "[A]dvisory committees, composed solely of the members of the legislative body which are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter." (§ 54952, subd. (b), as amended by Sen. Bill No. 1140 (1993-1994 Reg. Sess.), 1993 Stats., ch. 1138, eff. Apr. 1, 1994.)

This case does not present the issue whether the Operations Committee would be a "legislative body" under the new law. Accordingly, we express no opinion on the issue.

The Legislature's adoption of subsequent, amending legislation that is ultimately vetoed may be considered as evidence of the Legislature's understanding of the unamended, existing statute. (See *Eu* v. *Chacon* (1976) 16 [*833] Cal.3d 465,470 [128 Cal.Rptr. 1, 546 P.2d 289]; ***see*** also ***Irvine v. California Emp. Corn.*** (1946) 27 Cal.2d 570, 578 [165 P.2d 908].) The 1992 legislation reflects the Legislature's understanding that the current version of the explicit less-than-a-quorum exception in section 54952.3 excludes advisory committees, whether ad hoc or standing, composed solely of less than a quorum of the members of the governing body from the open meeting requirements of the Act.

The 1992 legislation "would [have] exclude[d] a limited duration ad hoc committee from the definition of legislative body but would [have] include[d] any standing committee, as defined, of a governing body irrespective of its composition." (See Legis. Counsel's Dig., Assem. Bill No. 3476 (1991-1992 Reg. Sess.).) Because the 1992 legislation retained the "in this section" language (§ 54952.3) and made no amendment to the general language in section 54952, the legislation would only make sense if the Legislature gave the words "in this section" the same meaning that the Board attributes to them in the current statute. If the Legislature had intended "in this section" to be interpreted as narrowly as Freedom suggests, the 1992 legislation would have had this bizarre result: Limited duration, ad hoc, advisory committees would have been subject to the full set of procedural requirements applicable to governing bodies, including the requirement of holding "regular meetings," but standing advisory committees would have received the benefit of the relaxed procedural requirements described in section 54952.3, This clearly could not have been the intended effect of the 1992 bill.

In view of these considerations, we find [HN6] it more consistent with the legislative intent to construe the less-than-a-quorum exception contained in section 54952.3 as an exception to the definition of "legislative body," and thus one of several exceptions to the Brown Act's open meeting requirements, n12 rather than merely as an exception to the special procedural requirements of section 54952.3. This interpretation is consistent with the Act's [*834] purpose of ensuring that the "actions [of public agencies] be taken openly and that their deliberations be conducted openly." (§ 54950.) By definition, [**227] the exception applies [***157] only to an advisory committee that consists solely of members of the legislative body that created it but not enough members to constitute a quorum or, thus, to act as the legislative body. Accordingly, before any action can be taken on such a committee's recommendations the entire legislative body, which includes the members of the advisory committee, must conduct further, public deliberations. (§ 54952.) In this way the Act reasonably accommodates the practical needs of governmental organizations while still protecting the public's right to know.

n12 Compare section 54956.9 (legislative body may hold closed sessions to confer with legal counsel regarding pending litigation); section 54957 (legislative body may hold closed sessions to confer with Attorney General, district attorney, sheriff, chief of police, or their respective deputies, on matters posing a threat to the security of public buildings); section 54957.6 (legislative body may hold closed sessions to discuss matters related to employee compensation and collective bargaining).

III. DISPOSITION

Since the Operations Committee is composed solely of members of the governing body of a local agency numbering less than a quorum of the governing body, the committee's meeting on June 18, 1991, was not subject to the open meeting requirements of the Brown Act. Accordingly, the judgment of the Court of Appeal is reversed.

Lucas, C. J., Arabian, J., Baxter, J., and George, J., concurred.

DISSENTBY: MOSK, J.,**KENNARD, J.**

DISSENT:

Concurring and Dissenting.--Although I have no quarrel with the result reached by the majority, I find that virtually all their reasoning has been rendered moot by the enactment of the 1993 legislation quoted in footnote 11 of the majority opinion. (Stats. 1993, ch. 1138.)

That legislation answers the question we took this case to resolve, i.e., whether advisory committees composed solely of members of a legislative body are themselves "legislative bodies" for purposes of the Ralph M. Brown Act. (Gov. Code, § 54950 et seq.) The 1993 legislation plainly declares they are not, unless they qualify as "standing committees" therein defined.

In light of this development the majority opinion has become an anachronism; indeed, the 1993 legislation repeals the very statute discussed by the majority at length. (Gov. Code, § 54952.3.) Because it is not our responsibility to offer advisory opinions on repealed statutes, I would dismiss review in this case as improvidently granted. [*835]

I dissent.

California's Open Meeting Law n1 requires legislative bodies to give notice of the time and place of their meetings and to make such meetings open and accessible to the public. The stated purpose of this law is to assure that Californians can be fully informed about the legislative decisionmaking process of elected and appointed officials. Under the majority opinion, however, a legislative body is entirely free to conduct the public's business in private session, shielding its decisionmaking process from scrutiny by the press or public, simply by dividing itself into various "standing committees" whose membership does not comprise a quorum of the full legislative body. n2 The majority reaches this result by interpreting the Brown Act to exempt such committees from compliance with any of the Act's requirements. The majority's interpretation contorts the statutory language and contravenes the goal of this state's Open Meeting Law.

n1 This law, which is codified in Government Code section 54950 et seq., is also known as the Ralph M. Brown Act, and will hereafter be referred to alternatively as the "Brown Act" or the "Act."

n2 Of course, in the case of a "committee" whose members make up a quorum or more-than-a-quorum of the membership of the full governing body, the committee would not be a "committee" at all; it would be *the* governing body.

I

This case arose out of the June 18, 199 1, meeting of the "Operations Committee" of the Board of Directors of the Orange County Employees Retirement System. The Board administers $1.5 billion, consisting of moneys derived from the county's general fund as well as those contributed by employees. The "Operations Committee" is one of five standing committees that report to the full Board. The membership of the [**228] Operations Committee [*** 158] (and of each of the other standing committees) consists of four of the nine Board members--one person less than a quorum of the Board.

The purpose of the June 18, 1991, meeting was to reevaluate the Board's travel policy--a policy that had engendered substantial controversy after it was reported that some Board members had used public funds to tour Europe, assertedly in connection with Board investments. A reporter for the Orange County Register, a daily newspaper, tried to attend the meeting but was refused entry.

The next day, the newspaper's parent company, Freedom Newspapers, Inc., petitioned the superior court for a writ of mandate, seeking access to future meetings of the Operations Committee. The superior court denied the [*836] petition. The Court of Appeal reversed, however, concluding that the Operations Committee was a "legislative body of a local agency" whose meetings were consequently required by the Brown Act to be "open and public." (Gov. Code, § 54953.) n3

n3 Further undesignated statutory references are to the Government Code.

This court granted the Board's petition for review and now reverses the judgment of the Court of Appeal.

As I shall explain, the Court of Appeal reached the correct result.

II

In the preamble to the Brown Act, the Legislature expressed the intent underlying the Act: "[T]he Legislature finds and declares that the public cornmissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [P] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.

The people insist on remaining informed so that they may retain control over the instruments they have created." (§ 54950.)

Consistent with this stated legislative intent, the Act requires that all meetings of legislative bodies of local agencies "be open and public" and that all persons "be permitted to attend" such meetings. (§ 54953.) The Act does, however, permit legislative bodies to discuss in "closed session" certain sensitive topics, such as pending litigation and personnel matters. n4

n4 The Act permits closed session meetings when an agency discusses a license application by someone with a criminal record (§ 54956.7), or meets with its negotiator regarding the price and terms acceptable to the agency in a real property transaction (§ 54956.8), or discusses pending litigation with legal counsel (§ 54956.9), or participates in a joint agency meeting about insurance pooling, tort liability losses, or workers' compensation liability (§ 54956.95), or discusses employee wages and benefits with its labor negotiator (§ 54957.6), or participates in meetings regarding multijurisdictional drug law enforcement (§ 54957.8).

The Act also requires "legislative bodies" to conduct "regular" meetings (§ 54954) and abide by certain rules pertaining to adjournment or continuance of such meetings (§ 54955, 54955.1). Additional requirements are posting the agenda of each regular meeting, acting only on items listed on the posted agenda (§ 54954.2), and giving written notice one week before [*837] each regular meeting to anyone requesting such notice (§ 54954.1). The Act does allow for special meetings, but only if they are preceded by a 24-hour written notice, (§ *54956.)*

The Act defines "legislative bodies" broadly. The term includes "the governing board, commission, directors or body of a local agency, or any board or commission thereof' as well as "any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency . . .." (§ 54952.) The term also applies to "any board, commission, committee, or similar multimember [**229] body which exercises any [***159] authority of a legislative body of a local agency" (§ 54952.2), as well as to "planning commissions, library boards, recreation commissions, and other permanent boards or commissions of a local agency" (§ 54952.5).

The "Operations Committee" of the Board of Directors of the Orange County Employees Retirement System, as a "committee , , . on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency," qualifies as a "legislative body" within the meaning of section 54952, thus making it subject to the Brown Act's "open meeting" requirements. The issue in this case is whether the Operations Committee is exempted by another, more specific, provision of the Act, section 54952.3, from holding meetings open to the public.

Section 54952.3 provides for less stringent notice requirements for meetings of "any advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency." Under this section, an advisory commission, committee or body is a "legislative body" for purposes of the *open meeting* requirements of the Act. Such a legislative body can, however, elect between giving 24-hour written notice of its meetings or providing by rule or bylaw for its meetings to be held at a regular time; "[n]o other notice of regular meetings is required." (§ 54952.3.)

Section 54952.3 further provides that a "'[l]egislative body' as defined in this section does not include a committee composed solely of members of the governing body of a local'agency which are *less than a quorum* of such governing body." (Italics added.) It is on this italicized phrase that the majority rests its conclusion that advisory committees made up only of members of the full governing body but "less than a quorum" of that body [*838] are exempt from any of the requirements of the Brown Act. Thus, under the majority's interpretation, the Operations Committee was free to conduct its business in private.

I disagree with the majority's interpretation of section 54952.3's "less-than-a-quorum" provision. In my view, this provision by its express terms excludes those advisory committees composed solely of members of the full governing body of the local agency only from the "relaxed" notice requirements of section 54952.3, thereby making such advisory bodies subject to the more rigid requirements that govern legislative bodies generally.

My interpretation of the "less-than-a-quorum" provision is compelled by the plain language of section 54952.3, which must be the starting point for this statutory interpretation, *(Adoption of Kelsey S.* (1992) 1 Cal.4th 8 16, 826 [4 Cal.Rptr.2d 615, 823 P.2d 12163.) After specifying that advisory commissions or committees are "legislative bodies" for purposes of the

Brown Act, section 54952.3 next describes the less stringent procedural requirements for the meetings of such advisory bodies. It then states that " '[l]egislative body' *as defined in this section* does not include a committee composed solely of members of the governing body of the local agency which are less than of quorum of such governing body." By the limiting language, "as defined in this section," the provision carves out an exception from section 54952.3's definition of "legislative body" (and thus from the section's less stringent notice requirements) for an advisory committee composed solely of members of the governing body of the local agency who comprise less than a quorum of the local agency's full membership.

Therefore, in this case the Operations Committee of the Board of Directors of the Orange County Employees Retirement System, as an advisory committee composed solely of members of the full governing body of the local agency (the Board), is not a "legislative body" for purposes of the relaxed notice requirements of section 54952.3. Rather, as I explained earlier, the Operations Committee meets section 54952's definition of "legislative body" as being a "committee . . . on which officers [**230] of a local agency serve in their [*** 160] official capacity as members and which is supported in whole or in part by funds provided by such agency . . .." As such, the Operations Committee is subject to the full force of the Brown Act. Most important, the committee must conduct its business in public.

To require an advisory committee that, as here, is comprised of individuals who are members of the governing body to which the committee reports to conduct public meetings would further the Legislature's stated intent that [*839] "the people's business" be conducted openly, and that both the "actions" and the "deliberations" of government be open to the press and public. Even though the Operations Committee cannot itself bind the full Board by "actions" such as adopting a proposal or enacting a rule (which would require a majority vote of the full Board), it can and does "deliberate." "Deliberation" is defined as "the process , . . of thoughtful and lengthy consideration" or as "formal discussion and debate on all sides of an issue." (American Heritage Dict. of the English Language (1980) p. 349.) Indeed, to best assure that government decisions follow thoughtful and lengthy consideration or debate of all sides of an issue, the Brown Act invites the public to witness that whole process.

A standing committee's reconsideration of a significant policy that affects the public's trust and confidence in its government officials--such as the Board's travel policy here--necessarily involves deliberation. Yet, under the majority's interpretation of section 54952.3, this deliberation can take place in private session outside the scrutiny of the public. And when, as in this case, the makeup of the standing committee recommending a policy change is just one member short of a quorum of the full governing body, and only one additional vote is needed to make the recommended change, there may be little further debate or deliberation on the issue by the full Board. In that event, the public is deprived of its right to witness the deliberative processes of government. Indeed, under the majority's reading of section 54952.3, any local agency wishing to keep its deliberative processes from the public can effectively do so by referring controversial issues to standing committees comprised of one member less than a quorum.

The majority's interpretation of section 54952.3 rests first on its conclusion that construing section 54952.3 to exempt from the less stringent procedural requirements specified by that section *all* less-than-a-quorum advisory committees composed solely of members of the governing body would "result in absurdity" by making even temporary, ad hoc advisory committees subject to the Brown Act's "generally applicable procedural requirements," including that set out in section 54954 of holding "regular" meetings. (Maj. opn., *ante*, at p. 827.) But to require a temporary, ad hoc advisory committee to conduct its meetings at a regular time seems far less absurd than to pert-nit, as the majority does here, a local agency to use standing committees to shield discussion and deliberation on controversial issues from public scrutiny. n5

n5 Fortunately, the majority's opinion, though misguided, will be short-lived. New legislation (Stats. 1993, ch. 1138), which changes the Brown Act's definition of "legislative body" effective April 1, 1994, draws a distinction between "ad hoc" and "standing" advisory committees, and specifies that the latter, to the extent they "have a continuing subject matter jurisdiction," are covered by the Brown Act's "open meeting" requirements. (§ 54942, subd. (b), as amended by Sen. Bill No. 1140 (1993-1994 Reg. Sess.), Stats. 1993, ch. 1138, § 3, eff. Apr. 1, 1994.)

The majority relies also on opinions by the Attorney General (which the majority admits do not bind this court) and on a series of failed legislative [*840] efforts to amend the Brown Act. But we need not turn to unpassed or vetoed legislation to discern the Legislature's intent. The Legislature has made its intent plain in the preamble to the Brown Act, which expressly states that to ensure that Californians can remain informed and

"retain control" over their own government, legislative deliberations must be conducted openly. "Vital" to the functioning of any democratic society is "an [**23 1] informed citizenry." [***161] (*John Doe Agency v. John Doe* Corp. (1989) 493 U.S. 146, 152 [107 L.Ed.2d 462, 110 S.Ct. 471].) Consistent with our Legislature's intent, I would affirm the Court of Appeal's judgment directing that the Board allow members of the press and the public to attend "its regular committee meetings," including those of its Operations Committee.

KEITH L. PRESCOTT, Plaintiff-Respondent, v. UNITED STATES OF AMERICA, Defendant-Petitioner; KEITH L. PRESCOTT, Plaintiff-Respondent-Appellee, v. UNITED STATES OF AMERICA, et al., Defendants, and REYNOLDS ELECTRICAL AND ENGINEERING COMPANY, INC., a Nevada Corporation; Defendant-Petitioner-Appellant

CA Nos. 83-1948, 83-1949

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

731 F.2d 1388; 1984 U.S. App. LEXIS 23179

February 15, 1984, Argued and Submitted
April 25, 1984, Decided

PRIOR HISTORY: [1]**

Appeal from the United States District Court for the District of Nevada. Roger D. Foley, District Judge, Presiding.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant employer sought review of the judgment of the United States District Court for the District of Nevada, which concluded that plaintiff employee could bring a tort action against defendants, employer and United States, on the ground that a reimbursement agreement regarding disability insurance between the state industrial commission and the United States Atomic Energy Commission was void,

OVERVIEW: Defendant United States contracted with defendant employer to test nuclear weapons. The United States Atomic Energy Commission entered an agreement with defendant employer where by defendant United States would pay for insurance that defendant employer would provide under the Nevada Industrial Insurance Act and the Nevada Occupational Disease Act. Next, the atomic energy commission promised to reimburse the Nevada Industrial Commission for disability awards to defendant employer's employees, Defendant employer never paid any premiums for coverage. Plaintiff employee filed a claim in tort against defendant when the United States Department of Energy did not take action on his claim. The district court held that the agreement between the commissions was void, as the industrial commission lacked authority to enter into it. The court affirmed the judgment, holding that plaintiff was entitled to bring an action in tort, as the agreement was void because it did not qualify as a "pledge of assets," under Nev. Rev. Stat. § 616.395(3). The industrial commission did not have authority to enter into the agreement, as the state legislature had not expressly conferred such authority.

OUTCOME: The court affirmed the judgment, holding that the district court had properly determined that the agreement between the state industrial commission and the United States Atomic Energy Commission to provide benefits for defendant employer's employees was void, as the industrial commission did not have authority to make such an agreement. Therefore, plaintiff employee was entitled to bring a tort action against defendant.

CORE **TERMS:** pledge, premium, Nevada Industrial Insurance Act, Nevada Occupational Diseases Act, authority to enter, reimbursement, reimburse, authorize, coverage, disease, void, insurance fund, radiation-related, radiation, cooperative, pledgee, confer, industrial insurance, workers' compensation, insurance coverage, provide coverage, contractor, transfer of property, failed to satisfy, de novo, common-law, conferred, claimant's, disabled, bailment

LexisNexis(TM) Headnotes

Workers' Compensation & SSDI > Coverage

[HN1]See Nev. Rev. Stat. § 616.395(1).

Workers ' Compensation & SSDI > Coverage

[HN2]See Nev. Rev. Stat. § 616.395(3).

Securities Law > Blue Sky Laws > Excluded Transactions

[HN3]A "pledge" is a security interest in a chattel or in an intangible represented by an indispensable instrument, the interest being created by a bailment for the purpose of securing the payment of a debt or the performance of some other duty. The essential elements of a comrnon-law pledge are: 1) the existence of a debt or obligation and 2) the transfer of property to the pledgee, to be held as security and, if necessary, to be used to assure performance of the obligation. The pledgee takes possession of the pledged property and

has a right to retain the property until the debt is satisfied.

Securities Law > Blue Sky Laws > Excluded Transactions

[HN4]A pledge requires a transfer of property and possession by the pledgee. The primary definition of "pledge" is a bailment or delivery of goods or property by way of security for a debt or engagement, or as security for the performance of an act. Under this definition, a transfer is required; a promise to reimburse 'is insufficient.

Workers ' Compensation & SSDI > Administrative Proceedings

[HN5]The Nevada Industrial Commission's powers are limited to those powers enumerated in the Nevada Occupational Diseases Act and the Nevada Industrial Insurance Act. It has only those powers that the legislature has conferred on it expressly or by implication.

Governments > Courts > Judicial Precedents

[HN6]Although Attorney General opinions are not binding, they are entitled to great weight.

Governments > Legislation > Interpretation

Workers ' Compensation & SSDI > Coverage

[HN7]Nevada courts construe the Nevada Industrial Insurance Act and the Nevada Occupational Disease Act broadly and liberally. These acts are to be construed to benefit injured workers and to protect employers from common-law tort actions.

Governments > Legislation > Interpretation

[HN8]A rule of liberal construction does not permit the reading into the act of something new and different than what the legislature saw fit to provide.

COUNSEL: Stewart L. Udall, Esq., Phoenix, Arizona, Larry C. Johns, Esq., Alan R. Johns, Esq., Johns & Johns, Las Vegas, Nevada, for Appellee.

J. Paul McGrath, Asst. Atty. General, Jeffrey Axelrad, Director, Torts Branch, Donald E. Jose, Asst. Director, Torts Branch, Washington, District of Columbia, John Thorndal, Esq., Thorndal, Backus & Maupin, Las Vegas, Nevada, for Appellant.

JUDGES: Duniway, Farris, and Pregerson, Circuit Judges.

OPINIONBY: FARRIS

OPINION: [*1389] FARRIS, Circuit Judge:

The question certified for this interlocutory appeal is whether an agreement between the Atomic Energy Cornmission and the Nevada Industrial Commission is a valid device for providing workers' compensation coverage for radiation-related injuries and diseases for the employees of Reynolds Electrical and Engineering Company. The district court held that the agreement was not a valid device because it failed to meet the requirements of the Nevada Industrial Insurance Act and the Nevada Occupational Diseases Act. We affirm.

FACTS

The United States, through the Atomic Energy Commission **[**2]** and other agencies, has tested nuclear weapons and nuclear devices at the Nevada Test Site since the early 1950's. Reynolds Electrical and Engineering Company is a contractor at the Nevada Test Site. From 196 1 to 1968, Reynolds employed Prescott as an operating engineer. Prescott alleges that he was exposed to radiation when he was regularly sent into highly contaminated test areas immediately after nuclear detonations to retrieve test instruments. In 1969, he was diagnosed as having multiple myeloma, a cancer of the bone marrow. Prescott brought tort actions against Reynolds and the United States, alleging that he contracted the disease as a result of exposure to radiation while employed at the Nevada Test Site.

[*1390] Reynolds and the Atomic Energy Commission had agreed that Reynolds would provide insurance coverage for its employees under the Nevada Industrial Insurance Act and the Nevada Occupational Diseases Act and would pass the insurance costs on to the United States. Although employers typically purchase such insurance by paying premiums to the state insurance fund, Reynolds has not paid any premiums to purchase insurance for employees who suffer radiation-related **[**3]** harm. Instead, in 1956, the Atomic Energy Cornmission and the Nevada Industrial Commission entered into an agreement which was intended to provide coverage for radiation-related diseases and injuries for employees of Reynolds and other contractors and subcontractors at the Nevada Test Site. The agreement provided that when an employee filed a claim, the Nevada Industrial Commission would determine if the claim was compensable under Nevada workers' compensation laws. If compensable, the Nevada Industrial Commission would make payments to the employee for injuries, disabilities or death resulting from work-related radiation exposure. The Atomic Energy Commission promised to reimburse the Nevada Industrial Commission for payments made to employees. This agreement has been extended and modified nine times since 1956, but the substance of the agreement remains unchanged. The Department of

Energy has since assumed the responsibilities of the Atomic Energy Commission.

In 1979, Prescott filed a claim with the Department of Energy. When no action was taken on the claim, Prescott sued Reynolds and the United States in tort. Reynolds and the United States moved to disrniss Prescott's suit, **[**4]** arguing that the Nevada Industrial Insurance Act and the Nevada Occupational Diseases Act provided his exclusive remedy. The district court held that the agreement between the Atomic Energy Commission and the Nevada Industrial Commission failed to satisfy the defendants' obligations to provide coverage under the acts. *Prescott v. United States, 523* F. Supp. 918 (D. Nev. 198 1). The district court held that the agreement was void because the Nevada Industrial Commission lacked authority to enter into the agreement and because the agreement impertnissibly modified the terms of defendants' liabilities created by the Nevada Occupational Diseases Act. The court concluded that since no workers' compensation insurance had been purchased, Prescott could sue Reynolds and the United States in tort, On motion for reconsideration, the district court held that no premiums had been paid to purchase coverage for radiation-related diseases. *Prescott v. United States,* No. 80-143 (D. Nev. Mar. 28, 1983). The court again concluded that since Reynolds had not purchased insurance, Prescott could sue the defendants in tort. Pursuant to 28 U.S.C. § 1292(b), the district court certified for **[**5]** interlocutory appeal the question of the validity of the agreement between the Atomic Energy Commission and the Nevada Industrial Commission.

ANALYSIS

In determining the liability of Reynolds and the United States, the district court interpreted Nevada law. We recently granted rehearing en banc to decide whether a "clearly wrong" or a *de novo* standard applies when reviewing a district court's determination of the law of the state in which it sits, See In *re McLinn, F/V Fjord,* 721 F.2d 666 (9th Cir. rehearing en banc granted Dec. 6, 1983). Under either standard, we affirm.

PLEDGE OF ASSETS

The Nevada Industrial Insurance Act requires that employers pay to the state insurance fund premiums in the form of advance deposits. nl It is undisputed that Reynolds did not contribute to the fund to cover the payment of benefits to employees **[*1391]** for work-related radiation injuries and diseases. Reynolds and the United States argue instead that the agreement between the Atomic Energy Commission and the Nevada Industrial Commission satisfied Reynolds' obligation under the Nevada Industrial Insurance Act. Nev. Rev. Stat. § 616.395(3) permits the state industrial insurance **[**6]** system to accept as a substitute for premiums a "bond or pledge of assets." n2 The district court held that the agreement between the Atomic Energy Commission and the Nevada Industrial Commission is not a pledge of assets within the meaning of Nev. Rev. Stat. § 616.395(3).

---------- Footnotes ----------

nl Nev. Rev. Stat. § 616.395(1) provides: [HN1]

> Except for a self-insured employer, every employer within, and those electing to be governed by, the provisions of this chapter , , , shall pay to the state insurance fund, premiums in the form of an advance deposit as fixed by order of the manager [of the state industrial insurance system].

n2 Nev. Rev. Stat. § 616.395(3) provides: [HN2]

> The system may accept as a substitute for payment of premiums either a bond or pledge of assets. The amount and sufficiency of security required, other than cash, must be determined by the manager [of the state industrial insurance system] but must not be of a value less than the amount of cash required by this section.

---------- End Footnotes- ----------

[7]**

The Nevada Industrial Insurance Act does not define "pledge of assets." Nevada courts have not defined the term. The sparse legislative history provides no guidance. We must therefore look to other sources to determine whether the agreement qualifies as a "pledge of assets."

The Restatement defines [HN3]a "pledge" as "a security interest in a chattel or in an intangible represented by an indispensable instrument, the interest being created by a bailment for the purpose of securing the payment of a debt or the performance of some other duty." RESTATEMENT OF SECURITY § 1 (1941). The essential elements of a common-law pledge are: 1) the existence of a debt or obligation and 2) the transfer of property to the pledgee, to be held as security and, if necessary, to be used to assure performance of the obligation, See, *e.g., Madsen v. Prudential Federal Savings & Loan Ass'n., 558* P.2d 1337, 1339 (Utah 1977). The pledgee takes possession of the pledged property and has a right to retain the

property until the debt is satisfied. *See Ahlswede v. Schoneveld, 87 Nev. 449, 488* P.2d 908, 910 (1971); *Campbell v. Peter*, 108 Utah 565, 162 P.2d 754, 755 (1945).

Reynolds and the government **[**8]** argue that the term "pledge" can signify a promise. However, we reject their argument that the Nevada Legislature intended that a promise to reimburse would satisfy the "pledge of assets" requirement of Nev. Rev. Stat. § 616.395(3);ument conflicts with the well established case law which provides that [HN4]a pledge requires a transfer of property and possession by the pledgee. See e.g., *Lincoln National Bank v. Herber, 604* F.2d 1038, 1040 (7th Cir. 1979); *Madsen v. Prudential Federal Savings & Loan Ass'n, supra.* Additionally, the primary definition of "pledge" is a "bailment or delivery of goods or property by way of security for a debt or engagement, or as security for the performance of an act." BLACK'S LAW DICTIONARY 1038 (5th Ed. 1979). Under this definition, a transfer is required; a promise to reimburse is insufficient. The defendants have not presented any evidence to show that this primary definition of "pledge" was not the intended one. See *Maine v. Thiboutot, 448* U.S. 1, 4, 8, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980). Finally, the Nevada Industrial Insurance Act itself refers to the "amount and sufficiency of *security*" that an employer must provide. **[**9]** Nev. Rev. Stat. § 616.395(3) (emphasis supplied). This reference to "security" indicates that an employer is required to provide something more than a mere promise.

The government's promise to reimburse is at best a conditional promise. Article 4.c. of the agreement provides that "all reimbursements to the NIC by the AEC under this Article shall be subject to the availability of appropriations therefor." Thus, the Atomic Energy Commission expressly promised to reimburse the Nevada Industrial Commission only to the extent that money had been appropriated for that purpose.

Moreover, the procedures outlined in the agreement render such reimbursement contingent on several occurrences. **[*1392]** The agreement provides that the Atomic Energy Commission will reimburse the Nevada Industrial Commission only if the Atomic Energy Commission agrees that a claimant's award was justified. If it disagrees, the Atomic Energy Commission and the Nevada Industrial Commission may submit the dispute to arbitration. If the arbitrator rules that reimbursement is required, the agreement permits the Atomic Energy Commission to seek a de *novo* determination in a court of law. Thus, there are **[**10]** substantial barriers to the Atomic Energy Commission's reimbursement of payments made by the Nevada Industrial Commission. The Nevada Legislature did not intend for this conditional promise to qualify as a "pledge of assets." We agree with the district court's conclusion that the agreement fails to satisfy the requirements of Nev. Rev. Stat. 616.395(3).

AUTHORITY TO ENTER INTO AGREEMENT

Reynolds and the government attempt to justify the failure to meet the statutory requirements by asserting that the Nevada Industrial Commission possessed extraordinary authority to enter into the agreement with the Atomic Energy Commission to provide coverage for employees. They argue that because of the difficulties of devising a manageable premium and rate structure, the agreement was a permissible alternative to the statutorily mandated method of providing coverage.

[HN5]The Nevada Industrial Comrnission's powers are limited to those powers enumerated in the Nevada Occupational Diseases Act and the Nevada Industrial Insurance Act. *See Andrews v. Nevada State Board of Cosmetology*, **86 Nev. 207, 467** P.2d 96 (1970). It has only those powers that the Nevada Legislature has conferred on it **[**11]** expressly or by implication, *Id.* In *Andrews*, the Nevada Supreme Court held that without a specific grant of power by the legislature, the Nevada State Board of Cosmetology could not issue subpoenas to require the attendance of witnesses at hearings. Here, the Nevada Legislature has not expressly conferred on the Nevada Industrial Commission the power to enter into a reimbursement agreement and no such power may be implied.

Reynolds cites *Nevada Industrial Commission v. Reese*, **93 Nev.** 115, 560 P.2d 1352 (1977), for the proposition that the Nevada Industrial Commission has extremely broad authority when administering the Nevada Industrial Insurance Act and the Nevada Occupational Diseases Act. This reliance is misplaced. In Reese, a plurality of the Nevada Supreme Court held that the exercise of quasi-judicial powers by an Appeals Officer of the Nevada Industrial Commission did not violate the separation of powers doctrine. The plurality opinion addressed the question of separation of powers; it did not address the question of express or implied authority.

Reynolds also argue that Nev. Rev. Stat. § 616.223(2), which authorizes the Nevada Industrial Cornmission **[**12]** to enter into cooperative agreements with other public agencies, confers such power on the Commission, This provision is inapplicable. The title of Nev. Rev. Stat. § 616.223 is "Cooperative agreements to provide services to claimants and other

patients." As the title indicates, Nev, Rev. Stat. § 6 16.223(2) authorizes the Nevada Industrial Commission to enter into agreements to provide services and other assistance to disabled employees. It has no bearing on the Commission's authority to enter into an agreement to provide insurance coverage for employees.

The government argues that the agreement is merely a "form of rating system" authorized by Nev. Rev. Stat. § 616.380(1). Even if we were to accept the government's questionable characterization of the agreement, Nev. Rev. Stat. § 616.380(1) does not exempt employers from the statutory requirement of paying premiums or pledging assets under Nev. Rev. Stat. §§ 616.395(1) and (3). Nev. Rev. Stat. § 616.380(1) simply does not authorize the Nevada Industrial Commission to enter into the agreement.

[*1393] In holding that the Nevada Industrial Commission had no authority to enter into the agreement, the district court relied **[**13]** in part on Nevada Attorney General Opinions. In Op. Att'y Gen. No. 64-l 19 (1964), the Nevada Industrial Commission had sought to enter into a cooperative agreement with the Nevada State Board for Vocational Education to provide rehabilitation services for disabled workers. The Nevada Attorney General stated that the Commission had no authority to enter into the agreement because no provision of Chapter 6 16 of the Nevada Industrial Act delegated to the Commission the power to enter into agreements with other agencies for rehabilitation purposes. The Attorney General said, "It is a general rule that commissions and boards have only such powers as are specifically delegated to them by law or which may be reasonably implied therein." Id.

[HN6]Although Attorney General opinions are not binding, they are entitled to great weight. *See Harris County Commissioners Court v. Moore, 420 U.S. 77, 87* n. 10, 43 L. Ed. 2d 32, 95 S. Ct. 870 (1975); *Moore v. Panish*, 32 Cal. 3d 535, 544, 186 Cal. Rptr. 475, 480, 652 P.2d 32, 37 (1982). The present case is similar to the situation in Op. Att'y Gen. No. 64-l 19. Although the Nevada Industrial Insurance Act and the Nevada Occupational Diseases **[**14]** Act confer broad power on the Nevada Industrial Commission, they do not authorize the Commission to enter into a reimbursement agreement as a substitute for the payment of premiums or the pledge of assets. The defendants have cited no authority which confers such power upon the Cornmission. Because it lacked authority, the Nevada Industrial Commission's agreement with the Atomic Energy Commission is void. *See Washington v. Penwell, 700* F.2d 570, 573 (9th Cir. 1983).

Reynolds and the government rely heavily on Op. Att'y Gen. No. 64-165 (1964). There, the Attorney General said that although no premiums to the state insurance fund had been paid for three years, the Nevada Industrial Commission could not refuse insurance coverage to members of the Eldorado Valley Advisory Group. The Nevada Legislature had required that the members be covered, determined how premiums would be paid, initially authorized appropriations for the payment of premiums, but later failed to appropriate funds for the continued payment of premiums. Faced with this unique situation, the Attorney General concluded that there was a "legislative mandate" for Board members to have continuous coverage notwithstanding **[**15]** the three year lapse in the payment of premiums. In the present case, no such legislative mandate may be inferred, The Nevada Legislature never authorized this type of agreement to serve as a permissible method of providing insurance coverage under the Nevada Industrial Insurance Act or Nevada Occupational Diseases Act.

The defendants' fmal argument is that the policies underlying the Nevada Industrial Insurance Act and the Nevada Occupational Diseases Act require us to find that the agreement is a permissible method of providing insurance coverage to employees. We recognize that [HN7]Nevada courts construe these acts broadly and liberally. *See Antonini v. Hanna Industries, 94 Nev.* 12, 573 P.2d 1184, 1186 (1978); *Nevada Industrial Commission v. Bibb, 78 Nev. 377,* 374 P.2d 53 1 (1962). These acts are to be construed to benefit injured workers, *Nevada Industrial Commission v. Peck, 69 Nev.* 1, 239 P.2d 244, 248 (1952), and to protect employers from common-law tort actions. *Antonini v. Hanna Industries.* Even under a broad and liberal reading, neither the Nevada Industrial Insurance Act nor the Nevada Occupational Diseases Act authorizes the Nevada Industrial Cornmission **[**16]** to enter into the agreement with the Atomic Energy Commission: [HN8]

> [A] rule of liberal construction . . . does not permit the reading into the act of something new and different than what the Legislature saw fit to provide. We feel that the powers given the Industrial **[*1394]** Insurance Board as set forth in the statutes are exclusive.
> Op. Att'y Gen. No. 64-119(1964).

Prescott argues, and the district court held, that the agreement was void pursuant to Nev. Rev. Stat. § 6 17.190 as a device waiving the terms of liability of the Atomic Energy Commission and its contractors under the Nevada Occupational Diseases Act. Since we conclude that the agreement failed to satisfy the "pledge of assets" requirement and that the agreement

is void because the Nevada Industrial Commission lacked the authority to enter into the agreement, we need not reach this issue.

In holding that the agreement fails to meet the requirements of the Nevada Industrial Insurance Act and the Nevada Occupational Diseases Act, we express no opinion on the other issues addressed by the district court. **[**17]**

OF THE STATE OF CALIFORNIA

OFFICE: OFFICE OF THE ATTORNEY GENERAL

No. 88-308

1988'Cal. AG LEXIS 37; 71 Op. Atty Gen. Cal. 332'

DECEMBER 7, 1988

CORE TERMS: ordinance, lease-purchase, school district, financed, grading, construction of school facilities, lease, site, constructed, drainage, financing, school facilities, exempt, governing board, regulating, onsite, local agencies, finance, local school, local regulation, involvement, school construction, indebtedness, school site, reconstruction, acquisition, regulation, consented, offsite, zoning

REQUESTBY: **[*1]**

JOHN K. VAN DE KAMP, Attorney General (RONALD M. WEISKOPF, Deputy Attorney General)

OPINION: THE HONORABLE MARIAN BERGESON, MEMBER OF THE CALIFORNIA SENATE, has requested an opinion on the following questions:

1. Are school facilities financed pursuant to the Leroy F. Greene State School Building Lease-Purchase Law of 1976 (Ed. Code, § 17700 et seq.) exempt from compliance with section 53097 of the Government Code?

2. If school facilities financed pursuant to the Leroy F. Greene State School Building Lease-Purchase Law of 1976 are not exempt from compliance with section 53097 of the Government Code, is the cost of that compliance to be included in calculating the total cost of a project for the purpose of apportioning funds to finance it under the Law?

CONCLUSIONS

1. School facilities financed under the Leroy F. Greene State School Building Lease-Purchase Law of 1976 are not exempt from compliance with section 53097 of the Government Code, i.e., construction of such facilities is subject to city or county ordinances regulating drainage or road improvements and conditions, and to city or county ordinances requiring the review and approval of grading plans as such relate to the design **[*2]** and construction of onsite facilities and improvements. In addition, 'when such facilities are constructed, consideration must be given to specific requirements and conditions of city or county ordinances relating to the design and construction of offsite improvements.

2. The cost of compliance with the ordinances mentioned in section 53097 of the Government Code is properly included in determining the total cost of a project when calculating the apportionment of funds to finance it under the Leroy F. Greene State School Building Lease-Purchase Law of 1976.

ANALYSIS

As a general rule neither the state nor its agencies is subject to local building or zoning regulations unless the Legislature has consented to such regulation, This Opinion answers whether the construction of school facilities under the Leroy F. Greene State School Building Lease-Purchase Law of 1976 is subject to certain local ordinances that Government Code section 53097 says governing boards of school districts must comply with.

Examining the essentials of the Lease-Purchase Law and the Government Code section, we will conclude that the construction under the Law is subject to those ordinances. But first, by **[*3]** way of background, we explain the setting of the Law and the section and how their juxtaposition gives rise to the instant request.

A. The Lease-Purchase Law. "The usual method of funding new school construction in California has been for school districts to obtain voter approval for the issuance of general obligation bonds. (See Ed. Code, §§ 15100, 15124.)" (62 Ops.Cal.Atty.Gen. 209, 210.) The Leroy F. Green State School Building Lease-Purchase Law of 1976 (Stats. 1976, ch. 1010, § 2, p. 2850; Ed. Code, tit. 1, div. 1, pt. 10, ch. 22, § 17700 et seq.) provides an alternative way in which local school districts are able to obtain needed school facilities. n1 Basically its mechanism sees the "construction" of such facilities with state money, their ownership by the state, and their lease to local school districts. n2

n1 Except as context may otherwise indicate, unidentified section references in this opinion will refer to those sections of the Education Code that comprise the Leroy F. Greene State School Building Lease-Purchase Laws of 1976.

n2 In this opinion, as in the Leroy F. Greene State School Building Lease-Purchase Law, the term "construction" also includes the reconstruction, remodeling, and replacement of facilities. (§ 17702.1; cf., Ed. Code, § 39142.)

[*4]

One of the reasons why such leasing arrangements have proven "an effective alternate to general obligation bonds" (48 Ops.Cal.Atty.Gen. 110, 113 fn. 3 quoting Report, Assem. Int. Comm. on Municipal and County Government, 1 Assem. Jour. (1963)), is that without their method of financing, many projects would never be realized because of the constitutional proscription against school districts incurring an excess annual indebtedness over revenue without an appropriate vote of their electors. (Cal. Const, art, XVI, § 18 113; see 56 Ops.Cal.Atty.Gen. 571, 575-577 (1973); 48 Ops.Cal.Atty.Gen. 110, supra.) There are also statutory limitations on the amount of immediate bonded indebtedness a school district can incur. (See e.g., Ed. Code, §§ 15102-15109.) However, with a bona fide "lease purchase" arrangement that "is entered into in good faith and creates no imrnediate indebtedness for the aggregate installments . . . but . . . confines liability to each installment as it falls due and each year's payment is for the consideration actually furnished in that year, no violence is done to the constitutional provision. [Citations.]" (City of Los Angeles v. Offner (1942) 19 Cal.2d [*5] 483, 486 [option to purchase at the end of the lease]; accord, Dean v. Kuchel (1950) 35 Cal.2d 444, 447-448 [vesting of title at the end of the lease].) This is because the obligation incurred by the district is not classified as a liability "exceeding in any year the income and revenue provided for such year." (See Dean v. Kuchel, supra: City of Los Angeles v. Offner, supra; 56 Ops.Cal.Atty.Gen. 572, 575-577, supra; 48 Ops.Cal.Atty.Gen. 110, 110-l 13, supra.) Accordingly, a succession of cases and Opinions of this Office have upheld the propriety of such lease-purchase arrangements. (See authorities collected at 56 Ops.Cal.Atty.Gen. 572, 577, supra.)

> n3 Section 18 of article XVI of the California Constitution currently provides:
>
> "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenues provided for such year, without the assent of two-thirds of the qualified electors thereof . . ., except that with respect to any such public entity which is authorized to incur indebtedness for public school purposes, any proposition for the incurrence of indebtedness in the form of general obligation bonds for the purpose of repairing, reconstructing or replacing public school buildings determined . , . to be structurally unsafe for school use, shall be adopted upon the approval of a majority of the qualified electors of the public entity voting on the proposition at such election. . , ."
>
> The purpose for the provision was to prevent the "snowballing" of accumulated debt carried into succeeding years, (McBean v. City of Fresno (1896) 112 Cal. 159, 164; 48 Ops.Cal.Atty.Gen. 110, 110, supra.)

[*6]

In the specifics of Leroy F. Greene State School Building Lease-Purchase Law financing, "[e]ach school district which desires to lease a [facility from the state] for a grade level maintained by it, . . . submit[s] through its governing board an application therefor [to the State Allocation Board]." (§ 11717; cf., § 11720.) On receiving an application to enter in to such a leasing arrangement, the State Allocation Board is authorized to undertake construction of the facility for the applicant district (§§ 17702(d), 17705(d), 17710, 17712) with funds from the State School Building Lease-Purchase Fund (§ 17708; cf., § 17711). "The Board may construct any project, and may acquire all property necessary therefor, on such terms and conditions as it may deem advisable" (§ 17710) and it "has full charge of the acquisition, construction, completion, and control of all projects authorized by them." (§ 17712.)

Upon completion of a project, the Board leases it to the district for a period of up to forty years (§§ 17705(e), 17730.2). During the term of the lease, title to all property acquired, constructed, or improved by the board remains with the state (§§ 17713, 17730) after which it "reverts" **[*7]** to the particular school district for which the project was undertaken (§ 17730.2). (See generally, 68 Ops.Cal.Atty.Gen. 329 (1985).)

B. Government Code Section 53097. As mentioned at the very outset, it is accepted as a general matter that neither the state nor its agencies is subject to local building or zoning regulations unless the Legislature consents to such regulation. (Cf. Hall v. Citv of Taft (1956) 47 Cal.2d 177, 183: City of Orange v. Valenti (1974) 37 Cal.App.3d 240. 244; Town of Atherton v. Superior Court (1958) 159 Cal.App.2d 417, 427; 68 Ops.Cal.Atty.Gen. 114, 118, 119 (1985); 56 Ops.Cal.Atty.Gen. 210, 211-212 (1973).) In a specially enacted article of the Government Code -- viz, article 5 (§§ 53090-53097) of chapter 1 of part 1 to title 5 in division 2; Stats. 1959, ch. 2110, p. 4907, § 1 [hereinafter, "article 5"] -- the Legislature has consented to a limited form of such regulation; (City of Orange v. Valenti, supra, 37 Cal.App.3d at 245.) It has provided that local agencies of the state for the local performance of governmental or proprietary functions

within limited boundaries, "shall comply with all applicable building **[*8]** ordinances and zoning ordinances of the county or city in which the territory of the local agency is situated." (Gov. Code, § 53091; cf. id., § 53090, subd. (a).)

School districts are such local agencies; they are agencies of the state for the local operation of the State school system. (City of Santa Clara v. Santa Clara Unified Sch. Dist. (1971) 22 Cal.App.3d 153, 158 & 158 fn. 3: Town of Atherton v. Superior Court, supra, 159 Cal.App.2d at 421: Hall v. City of Taft, supra, 47 Cal.2d at 181 .) But the Legislature has traditionally treated them differently from other local agencies with respect to certain aspects of the operation of article 5, in part "because it was well aware that school construction was [already] subject to almost complete control by the state." (City of Santa Clara v. Santa Clara Unified Sch. Dist., supra.) Thus for example, while all local agencies are required to comply with city or county zoning ordinances (Gov. Code, § 5309 1, supra), under section 53094, the governing board of a school district could previously, by two-thirds vote, exempt itself from the purview of all such ordinances and render them inapplicable **[*9]** to a proposed use of property by the district, unless the use was for nonclassroom facilities. (Gov. Code, § 53094; cf., City of Santa Clara v. Santa Clara Unified Sch. Dist., supra at 158: see also id., § 53091 [school district need not comply with local building ordinances when acting under the State Contract Act, nor with local zoning ordinances unless they make provision for the location of public schools and unless the city or county planning commission has adopted a master plan].)

In 1984 however, the Legislature amended section 53094 and added a section 53097 to article 5, to specifically require that school districts comply with city or county ordinances regulating drainage, road improvement, and the approval of grading plans relating to the design and construction of onsite facilities. (Stats. 1984, ch. 657, §§ 1, 2, p. 2420.) With that amendment and addition, the Legislature removed a school district's option to exempt itself from the types of ordinances specified in newly enacted section 53097. That section, the subject of this opinion, provides as follows:

". . . the governing board of a school district shall comply with any city or county ordinance **[*10]** (1) regulating drainage improvements and conditions, (2) regulating road improvements and conditions, or (3) requiring the review and approval of grading plans as such ordinance provisions relate to the design and construction of onsite facilities and improvements." (Gov. Code, § 53097.)

The section also provides that school districts "shall give consideration to the specific requirements and conditions of city or county ordinances relating to the design and construction of offsite improvements." (Ibid.) n4 The use of the word "shall" indicates that a mandatory obligation is imposed upon a district. (Gov. Code, § 14.)

> n4 Section 53097 provides in full as follows:
>
> "Notwithstanding any other provisions of this article [e.g., § 530941, the governing board of a school district shall comply with any city or county ordinance (1) regulating drainage improvements and conditions, (2) regulating road improvements and conditions, or (3) requiring the review and approval of grading plans as such ordinance provisions relate to the design and construction of onsite facilities and improvements, and shall give consideration to the specific requirements and conditions of city or county ordinances relating to the design and construction of offsite improvements. If a school district elects not to comply with the requirements of city or country ordinances relating to the design and construction of offsite improvements, the city or county shall not be liable for any injuries or for any damage to property caused by the failure of the school district to comply with those ordinances.
>
> "This section shall remain in effect only until January 1, 199 1, and as of such date is repealed, unless a later enacted statute, which is chaptered before January 1, 1991, deletes or extends such date."

[*11]

The scope of "projects" involving school facilities financed under the Leroy F. Greene State School Building Lease-Purchase Law of 1976 is likely to involve the types of local ordinances with which the Legislature has specified in section 53097. The term "project" is defined in the Lease-Purchase Law to mean:

". . . the facility being constructed or acquired by the state for rental to the applicant school district and may include the reconstruction or modernization of existing buildings, construction of new buildings, the grading and development of sites, acquisition of sites therefor and any easements or rights-of-way pertinent thereto or necessary for its full use including the development of streets and utilities." (§ 17702, subd (d).)

However, because of the particular state involvement when school facilities are constructed under the Lease-Purchase Law, question arises whether section 53097 applies to the construction of such facilities. We are specifically asked whether that construction is exempt from the mandate of the section, i.e., whether it must comply with city and county ordinances relating to drainage and road improvements and conditions, or which require review [*12] and approval of grading plans for the design and construction of onsite facilities and improvements, We will conclude that such construction is not exempt from section 53097's mandate and must comply with the local ordinances mentioned therein. That being the case, we were also asked whether the cost of complying with those ordinances may properly be included in calculating the total cost of a project, as defined in subdivisions (b), (d), and (f) of section 17702, for the purpose of apportioning funds to finance it under the Lease-Purchase Law. We will conclude that the cost of compliance is properly included in that calculation.

1. Does The Mandate of Section 53097 Apply To School Facilities Financed Under The Leroy F. Greene State School Building Lease-Purchase Law of 1976?

As mentioned, section 53097 is a recent addition to article 5. (Stats. 1984, ch. 657, § 2,) In enacting it the Legislature made it clear that although school districts might generally exempt themselves from local zoning ordinances under section 53094, it wanted them nevertheless to comply with certain types of local ordinances mentioned in section 53097. (See e.g., Legis. Counsel's Dig., Sen. Bill [*13] No. 1681, 4 Stats. 1984 (Reg. Sess.) Summary Dig., p. 224.) Under the new section, a school district would now have to comply with city or county ordinances regulating drainage and road improvements, and the approval of grading plans relating to the design and construction of onsite facilities, Such ordinances are likely to be involved in the construction of school facilities financed under the Leroy F. Green State School Building Lease-Purchase Law, just as they would be in the case of the construction of school facilities that is otherwise financed.

In applying section 53097 to Lease-Purchase Law projects, we must determine whether the Legislature intended such application. (Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 256; Great Lakes Properties, Inc. v. City of El Segundo (1977) 19 Cal.3d 152, 163; Select Base Materials v. Board of Equal. (1959) 5 1 Cal.2d 640, 645,) There, as we have seen, question arises as to whether the Legislature intended to subject the construction of school facilities financed under the Leroy F. Green State School Building Lease-Purchase Law to the mandate of section 53097 and the local ordinances of which [*14] it speaks. That is because the section is specifically directed to an undertaking of "the governing board of a school district," whereas when a project is financed under the Lease-Purchase Law, a state agency, the State Allocations Board "has full charge of the acquisition, construction, completion and control" of the project (§ 17712), title to the property is in the state (§ 17713) and the school district acts as "agent of the state" on the project (§ 17729). Accordingly, it has been suggested that these factors combine to make school construction projects under the Lease-Purchase Law projects of the state rather than those of the governing boards of local school districts, thus rendering Government Code section 53097 inapplicable to them.

As we now proceed to explain, we do not believe that the particular nature of the state's involvement in the construction of school facilities under the Leroy F. Green State School Building Lease-Purchase Law is such as to warrant a conclusion that the Legislature either intended to exempt such construction from the requirements of section 53097 or, more generally, to clothe the overall undertaking with the State's immunity from the type of [*15] local regulation found in the ordinances spoken of therein.

It is true that when school facilities are constructed under the Leroy F. Green State School Building Lease-Purchase Law, the State is involved in its sovereign capacity, acting through a state agency, the State Allocation Board. (§ 17704.) The process involves the Department of Education and the Department of General Services as well (§§ 17723, 17724, 17725) and interestingly, the role of those Departments in the construction of school facilities under the Lease-Purchase Law is the same as they play in the construction of school facilities that are financed otherwise. (§ 17723.) n5 For example, in both situations, the Department of Education advises the governing boards of school districts on the acquisition of school sites, establishes standards for school buildings, and reviews and approves all plans and specifications for buildings (Ed. Code, § 3910 1; cf., id., § 39158) and the Department of General Services supervises the design and construction of school buildings and ensures that they are constructed according to approved plans (id., §§ 39140, 39143, 39144). (See generally, 56 Cal.Jur.3d, Schools, §§ [*16] 266-273.) The state is thus directly involved with the construction of school facilities financed outside of the Leroy F. Green State School Building Lease-Purchase Law but no suggestion is made that such construction is not subject to section 53097 because of that state involvement.

n5 Section 17723 provides:

> "Nothing contained in this chapter [i.e., The Leroy F. Green State School Building Lease-Purchase Law] shall be construed as changing the powers and duties of the Department of Education or the Department of General Services in respect to school sites and the construction of school buildings as contained in Chapter 1 (commencing with Section 39000) and Chapter 2 (commencing with Section 39 100) of Part 23 of Division 2 of Title 2 [of the Education Code]."

The predicate for state immunity from local regulation is founded, inter alia, on the notion that the state should be able to carry out its sovereign operations free of local interference unless it has otherwise consented. (See e.g., Hall v. City of Taft, supra, 47 Cal.2d 177, 184; 68 Ops.Cal.Atty.Gen. 114, 118-119, supra; 56 Ops.Cal.Atty.Gen. 2 10, 2 1 l-2 12, supra.) With the enactment of article 5 **[* 17]** in 1959 the Legislature consented to a limited form of local regulation over local agencies which perform state functions (City of Orange v. Valenti, supra, 37 Cal.App.3d 240, 245) and with the enactment of Government Code section 53097 in 1984, it specifically required that school districts, which are local agencies of the state for the operation of the state school system, comply with those city or county ordinances mentioned therein. The requirement of the section is not contingent on the method of financing school construction and we do not see the real nature of the state's involvement in school construction under the Leroy F. Green State School Building Lease-Purchase Law as creating such contingency.

Every school district in this state must be under the control of a governing board, i.e., a "board of trustees or a board of education" (Ed. Code, 8 35010) and when school districts act, "by statutory provision [they] act through [their governing] boards." (Gonzales v. State of California (1972) 29 Cal.App.3d 585, 590.) With the conventional construction of school facilities, the question of "where, when or how, if at all, a school' district shall construct **[*18]** [a] school building[ ] is a matter within the sole competency of its governing board to determine." (People v. Oken (1958) 159 Cal.App.2d 456, 460.) The same is essentially true with the construction of a school facility under the Leroy F. Greene State School Building Lease-Purchase Law.

Under the Lease-Purchase Law, the State Allocation Board does not generate its own business; it responds instead to the needs, and acts at the behest of local school districts as expressed in applications submitted through their governing boards, for the lease of a particular facility. (§§ 17708.5, 17717, 17717.5, 17720; cf. 68 Ops.Cal.Atty.Gen. 329, 330, supra.) As with the construction of school facilities generally, when they are constructed under the Leroy F. Green State School Building Lease-Purchase Law, it is the local district acting though its governing board which decides upon a facility, chooses its site, secures appraisals, and enters into contracts for its construction. (Compare §§ 17717, 17720 and 17729 with Ed. Code, §§ 35270, 39170, 81060.) Indeed, such role is mandated by the Lease-Purchase Law, section 17729 thereof providing:

"The [State Allocation Board] shall authorize **[*19]** the applicant school district to act as its agent in the performance of acts specifically approved by the board and all acts required pursuant to Article 3 (commencing with Section 3 9 140) of Chapter 1 of Part 23 of Division 3. Such authorizations shall include, but are not limited to, the selection of school sites, the securing of appraisals, the contracting for architectural services, the advertisement of construction bids and the entering into of contracts therefor and the purchase of furniture and equipment."

Under the Lease-Purchase Law then, the governing board of a school district is the instigator of a project that will be constructed. It makes the decision regarding the facility to be built and it lets the contracts for the construction, albeit as an "agent" of the state. While actual title to a facility temporarily rests in the state for the term of a lease (§§ 17713, 11730.2), the reason for that is so the lease-purchase method of financing can be used. The state cannot lease a facility to a school district under the mechanism of the Law's lease-purchase financing, if it does not own the property. And from that we see why the district is designated as the state's **[*20]** "agent" in constructing a project; it is so designated because it is dealing with property title to which is temporarily in the state. n6

n6 The wording of section 17730.2 is worthy to note. It provides that

> "Notwithstanding any other provision to the contrary, all lease agreements shall terminate 40 years from the date of execution and title to the property covered therein shall revert to the district as though full payment had been made." (Emphasis added.)

Under the Lease-Purchase Law a school district thus has a present vested reversionary interest in the property which it leases.

Except for these features of title and agency, which are inherent in a lease-purchase arrangement to make its financing possible, Lease-Purchase Law projects are much like district financed construction, and in both cases the governing boards of the respective school districts take all of the actions necessary for the construction of their facilities. The reality then of the construction of school facilities under the Leroy F. Greene State School Building Lease-Purchase Law, is one of school districts building needed facilities but using state funds and availing themselves of the lease-purchase **[*21]** mechanism to do so. There is nothing in the wording of section 53097 to suggest that it was not intended to apply to that activity of governing boards of local school districts, even though they act as "agent" of the state and title to the facilities constructed rests temporarily in the state, than to their constructing school facilities with traditional bond issue financing.

Under the Lease-Purchase Law the added essence of the state's involvement in the construction of school facilities, beyond that which it has with conventionally financed construction of those facilities, is basic&y financial. There is no reason why the method of financing school construction should affect the legislative intention regarding the application of the local ordinances spoken of in section 53097 to that construction,

For similar reasons, the realities of Lease-Purchase Law construction undercut the justification to clothe the activity with the state's immunity from local regulation. As we have seen, one of the reasons for according an activity of the state immunity from the type of local regulation as appears in the ordinances mentioned in section 53097, is the notion that the state should be **[*22]** able to carry out its sovereign operations free of local interference. Inasmuch as the construction of a school facility under the Lease-Purchase Law is essentially the undertaking of a local school district and not the state, the justification to accord it immunity from local regulation is not present. Then too, to the extent that the state is involved, its involvement is not such as would see its sovereign operations impaired if construction complies with the local ordinances spoken of in section 53097. In this vein we note that the Legislature has itself provided in section 1773 1 that when projects are undertaken under the Lease-Purchase Law, "[an] applicant district, acting as agent for the state, shall comply with all laws pertaining to the construction, reconstruction, or alteration of, . . school buildings." (§ 1773 1; emphasis added.) The ordinances spoken of in section 53097 would be such laws, and it thus appears that the Legislature has consented to their being applied to Lease-Purchase Law projects.

An examination of the circumstances prompting the enactment of section 53097 supports the view that the Legislature intended that construction of school facilities **[*23]** under the Leroy F. Green State School Building Lease-Purchase Law should comply with the local ordinances mentioned in the section.

The legislative history of section 53097 indicates that it was enacted in response to a situation which saw storm water runoff from a school site cause damage to surrounding properties. The runoff allegedly occurred because of faulty design and lack of adequate grading of the site, and it was contended that the incident would not have happened had the school district complied with local ordinances relating to design and grading. (See e.g., Assembly Local Government Committee, Comments on Sen. Bill No, 168 1 (June 27, 1984), at p. 2; Senate Democratic Caucus, Summary of Legislation [SB 1681] (April 10, 1984), at p. 1; Senate Republican Caucus, Digest of SB 168 1 (March 28, 1984), at p. 2.) Accordingly, section 53097 was enacted to ensure that school districts would comply with such local ordinances.

In analyzing the command of section 53097 our primary task of course has been to ascertain the intent of the Legislature so as to effectuate the purpose of the law. (Friends of Mammoth v. Board of Supervisors, supra, 8 Cal.3d 247, **[*24]** 256: Great Lakes Properties, Inc. v. City of El Segundo, sum-a, 19 Cal.3d 152, 163: Select Base Materials v. Board of Equal., supra, 51 Cal.2d 640, 645.) While that was done initially by examining the words of the statute themselves (People v. Overstreet (1986) 42 Cal.3d 891, 895: People v. Craft (1986) 41 Cal.3d 554, 560; People v. Belleci (1979) 24 Cal.3d 879, 884: People v. Knowles (1950) 35 Cal.2d 175, 182) the words must be construed with the nature and purpose of the statute in mind, and toward that end "both the legislative history of the statute and the wider historical circumstances of its enactment are legitimate and valuable aids in divining the statutory purpose." (California Mfrs. Assn. v. Public Utilities Corn. (1979) 24 Cal.3d 836, 844, citing Steilberg v. Lackner (1977) 69 Cal.App.3d 780. 785 and Alford v. Pierno (1972) 27 Cal.App.3d 682, 688; see also, Sand v. Superior Court (1983) 34 Cal.3d 567, 570.)

Examining the circumstances surrounding the enactment of section 53097 we have just seen how it was designed to ensure that school districts would comply with local drainage and **[*25]** grading ordinances to prevent a reoccurrence of the type of damage that had occurred from water runoff from a school site when a district had not complied with such local ordinances in constructing a facility. Where, as here, a statute is intended to address and ameliorate a

particular undesirable situation, that object must be considered and the words of the statute liberally construed to give it effect. (West Pico Furniture Co. v. Pacific Finance Loans (1970) 2 Cal.3d 594, 608; People v. Ventura Refining Co. (1928) 204 Cal. 286, 291; Rich v. State Board of Optometry (1965) 235 Cal.App.2d 591, 604; County of San Diego v. Milotz (1953) 119 Cal.App.2d Supp. 871, 881.)

So doing, we can see that it matters not to the runoff of rain water, whether the grading and drainage of a school site was accomplished with state or district funds. And the runoff of waters from a school site is not dependent on the niceties of title, or whether a school district acted as agent of the state in constructing it. The purpose of the statute, avoiding a recurrence of damage from water runoff from an improperly graded or drained school site, would require heed to local [*26] drainage and grading ordinances during construction in either case.

The construction of school facilities under the Leroy F. Green School Building Lease-Purchase Law is initiated by, and takes place at the direction of, the governing boards of local school districts. They are the real parties in interest in that construction. While the Legislature has treated school districts differently from other local agencies of the state with respect to their having to heed the strictures of local building and zoning ordinances, it has made it clear in section 53097 that when their governing boards act, they nonetheless have to comply with local ordinances regulating drainage or road improvements and conditions, and local ordinances requiring the review and approval of grading plans relating to the design and construction of onsite facilities and improvements. Such ordinances are likely to be involved when school facilities are constructed with Lease-Purchase Law financing.

Accordingly, we conclude that school facilities financed under the Leroy F. Greene School Building Lease-Purchase Law are not exempt from the requirement of section 53097 and complying with the types of local ordinances [*27] mentioned therein.

2. Is The Cost Of Compliance With The Types Of Ordinances Mentioned In Section 53097 To Be Included In The Total Project Costs Of A School Facility Financed Under The Leroy F. Greene State School Building Lease-Purchase Law?

In the event that we concluded that school facilities financed under the Leroy F. Greene State School Building Lease-Purchase Law had to comply with the city or county ordinances spoken of in section 53097 of the Government Code, we were asked whether the cost of compliance with such ordinances was properly included in the total cost of the project, as defined in subdivisions (b), (d) and (f) of section 17702, when apportioning funds for it. We conclude that the cost of compliance is properly included in that calculation,

Under the Lease-Purchase Law, the State Allocation Board "apportions" funds from the State School Building Lease-Purchase Fund (§ 17708) or other sources (§ 17711) to finance the cost of a project approved by it for lease to an applicant school district. Subdivision (f) of section 17702 defines "apportionment" as

"... a reservation of funds necessary to finance the cost of any project approved by the board [*28] for lease to an applicant school district." (Emphasis added.)

For the purposes of the Law, the term "cost of project" is defined as including:

"... the cost of all real estate property rights, and easements acquired, and the cost of developing the site and streets and utilities imrnediately adjacent thereto, the cost of construction, reconstruction, or remodeling of buildings, and the furnishing and equipping of them, the cost of plans, specifications, surveys, estimate of costs or such other expenses that are necessary or incidental to the financing of the project." (§ 17702, subd. (b); emphases added.)

And again, we have seen how the term "project" is defined for the purposes of the Leroy F. Greene State School Building Lease-Purchase Law as including, inter alia,

"... the reconstruction or modernization of existing buildings, construction of new buildings, the grading and development of sites, acquisition of sites therefor and any easements or rights-of-way pertinent thereto or necessary for its full use including the development of streets and utilities." (§ 17702, subd (d); emphases added.)

The construction of facilities and the grading and developing [*29] of sites and adjacent streets is thus an integral part of a project financed under the Lease-Purchase Law (§ 17702, subd. (d)), and the cost of such is specifically included within the "cost of a project" (id., subd. (b)) for which an apportionment of funds may be made by the board to finance it (id., subd. (f)).

In answer to the first question we concluded that the construction of school facilities financed under the Leroy F. Greene State School Building Lease-Purchase Law had to comply with local ordinances regulating

drainage or road improvements and conditions, and local ordinances requiring the review and approval of grading plans as such relate to the design and construction of onsite facilities and improvements. In addition, when such facilities are constructed, consideration must be given to specific requirements and conditions of city or county ordinances relating to the design and construction of offsite improvements, The cost of complying with such ordinances is thus a necessary incident to a project undertaken pursuant to the Lease-Purchase Law. Such cost would legitimately fall within "the cost of developing the site and streets . . . immediately adjacent [*30] thereto" or "the cost of construction", and as such would be part of the total "cost of the project" (§ 17702, subd. (b)) for which appropriation under the Lease-Purchase Law can be made (id., subd. (f)) to finance it (ibid.).

We therefore conclude that the cost of having a project comply with the types of ordinances mentioned in section 53097 of the Government Code is properly included in the total cost of the project financed under the Leroy F. Greene State School Building Lease-Purchase Law of 1976.

TOWN OF ATHERTON (a Corporation), Petitioner, v. SUPERIOR COURT OF SAN MATE0 COUNTY, Respondent; MENLO PARK SCHOOL DISTRICT, Real Party in Interest

Civ. No. 18064

Court of Appeal of California, First Appellate District, Division One

159 Cal. App. 2d 417; 324 P.2d 328; 1958 Cal, App. LEXIS 2015

April 17, 1958

SUBSEQUENT HISTORY: [*1]**

A Petition for a Rehearing was Denied May 16, 1958.

PRIOR HISTORY: PROCEEDING in prohibition to restrain the Superior Court of San Mateo County from proceeding in an eminent domain action.

DISPOSITION: Writ denied.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner town, citing Cal. Gov't Code §§ 65800, 65806, brought a proceeding in prohibition to restrain respondent Superior Court of San Mateo County (California) from proceeding in an eminent domain action to acquire lands on behalf of real party in interest school district,

OVERVIEW: The town had adopted an interim zoning ordinance, pursuant to Cal. Gov't Code § 65806, and contended that adoption of the ordinance permitted it to prohibit any other than specific uses. The court denied the writ. The court noted that school districts were agencies of the state for the local operation of the state school system. The court determined that the state had occupied the field of school site location. The court stated that the comprehensive system of school control and operation by the school districts as shown in the statutes governing education was completely inconsistent with any power of a municipality to control the location of school sites. The court determined that under the statutory scheme, the state had in nowise ceded to the municipalities its sovereign right to locate school sites, but on the contrary had expressly granted the power of location to its agencies, the school districts.

OUTCOME: The court discharged the alternative writ and denied the town's petition for a peremptory writ prohibiting the superior court from proceeding with the eminent domain action on behalf of the school district.

CORE TERMS: municipality, site, ordinance, planning commission, zoning, school district, school site, regulation, zone, public schools, occupied, municipal, zoning ordinance, locate, school board, acquisition, governing board, public school, acquiring, acquire, acres, general plan, recommendation, legislative body, hereinbefore, elementary, temporary, resident, interim, zoned

LexisNexis(TM) Headnotes

Real & Personal Property Law > Zoning & Land Use > Land Use Planning

[HN1] Cal. Gov't Code § 65806 provides that if the planning commission in good faith is conducting studies or holding hearings for the purpose of the adoption of any zoning ordinance or amendment thereto, the legislative body may adopt a temporary interim zoning ordinance prohibiting any purposes which might conflict with such ordinance.

Education Law > Departments of Education > State Departments of Education > Authority

[HN2]The public schools of California are a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the constitution and the state legislature is given comprehensive powers in relation thereto. School districts are agencies of the state for the local operation of the state school system. The beneficial ownership of property of the public schools is in the state.

Governments > State & Territorial Governments > Relations With Governments

[HN3]The public school system is of statewide supervision and concern and legislative enactments thereon control over attempted regulation by local government units.

Education Law > Departments of Education > State Departments of Education > Authority

[HN4]The state has occupied the field of school site location.

Education Law > Departments of Education > State Departments of Education > Authority

[I-INS] Cal. Educ. Code § 18402 provides: The State Department of Education shall establish standards for school sites.

Education Law > Departments of Education > State Departments of Education > Authority

[HN6] Cal. Educ. Code § 18403 provides that the governing board of a school district before acquiring property for a new school site or addition to a present school site shall give the planning commission having jurisdiction notice in writing of the proposed acquisition. The planning commission in 30 days is required to submit to the school board a written report of the investigation and its recommendations concerning acquisition of the site. The governing board shall not acquire title to the property until the report of the planning commission has been received. If the report does not favor the acquisition of the property for a school site, or for an addition to a present school site, the governing board of the school district shall not acquire title to the property until 30 days after the cornmission's report is received.

Governments > State & Territorial Governments > Relations With Governments

[HN7] Cal. Educ. Code § 18404 provides that a school district board and a city school board, if the latter desires to locate a school within two miles of an airport, must notify the State Department of Education of the proposed acquisition of a school site, and if the state department does not report favorably, the school board must wait 30 days before acquiring title to the property. This power of recommendation in the state department is inconsistent with the right of a local planning commission to designate by zoning the area where a public school may be located.

Governments > State & Territorial Governments > Relations With Governments

[HN8] Cal. Gov't Code § 65090 et seq. deal with the appointment and powers of a city planning commission. In ch. 3, art. 9, dealing with "Administration of Master or General Plan" appears Cal. Gov't Code § 6555 1, which provides that after the legislative body has adopted a master or general plan for the city no public ground or open space shall be acquired and no public building or structure shall be constructed or authorized in the area until its location, purpose and extent have been submitted to and reported upon by the planning commission. Cal. Gov't Code § 65552 provides that if the power to acquire such public ground or open space or public building or structure is vested in some governmental body, cornmission, or board other than the city council, then such body, commission or board shall submit to the planning commission its location, purpose and extent. Cal. Gov't Code § 65553 provides that the planning commission shall report its findings as to whether the proposed public improvement conforms to the adopted master or general plan. Cal. Gov't Code § 65554 provides: If the planning commission disapproves the proposed public improvement, its disapproval may be overruled by such other governmental body, board, or agency. Such a power in the other government body is completely incompatible with a power in the municipality of zoning public schools.

Governments > Local Governments > Police Power

[HN9]Cal. Const. art. XI, § 11, the police power section, provides: Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws. A zoning ordinance falls within the classification of police measures.

Real & Personal Property Law > Zoning & Land Use > Zoning Generally

[HN10] Cal. Gov't Code § 65800 provides in part: Pursuant to the provisions of this chapter, the legislative body of any county or city by ordinance may: (a) Regulate the use of buildings, structures, and land as between agriculture, industry, business, residence and other purposes; (d) Create civic districts around civic centers, public parks, and public buildings and grounds for the purpose of enabling a planning commission to review all plans for buildings or structures within the district prior to the issuance of a building permit in order to assure an orderly development in the vicinity of such public sites and buildings. Cal. Gov't Code § 65801 provides: For such purposes the legislative body may divide a city, a county, or portions thereof into zones of the number, shape, and area it deems best suited to carry out the purpose of this chapter. Cal. Gov't Code § 65806 gives the city council authority to adopt as an emergency measure a temporary interim zoning ordinance to protect the public safety, health and welfare, which ordinance may prohibit such and any other uses which may be in conflict with such zoning ordinance.

Real & Personal Property Law > Zoning & Land Use > Land Use Planning

[HN11] Cal. Gov't Code § 65462 provides of what the master or general plan shall consist, including (a) A land use element which designates the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, recreation, education, public buildings and grounds, and other categories of public and private uses of land. Cal. Gov't Code § 65470 provides: A master or general plan may include a public buildings element of the plan, showing locations and arrangements of civic and community centers, public schools, libraries, police and fire stations, and all other public buildings, including their architecture and the landscape treatment of their grounds.

Governments > State & Territorial Governments > Relations With Governments

[HN12]A city may not enact ordinances which conflict with general laws on statewide matters.

Governments > State & Territorial Governments > Relations With Governments

[HN13]The comprehensive system of school control and operation by the school districts as shown in the statutes is completely inconsistent with any power of a municipality to control the location of school sites,

Governments > State & Territorial Governments > Relations With Governments

[HN14]When it engages in such sovereign activities as the construction and maintenance of its buildings, as differentiated from enacting laws for the conduct of the public at large, the state is not subject to local regulations unless the constitution says it is or the legislature has consented to such regulation, Cal. Const. art. XI, § 11 should not be considered as conferring such powers on local government agencies. Nor should Cal. Gov't Code §§ 3860 1, 38660, which confer on a city the power to regulate the construction of buildings within its limits, be so considered.

Education Law > Departments of Education > State Departments of Education > Authority

Governments > State & Territorial Governments > Relations With Governments

[HN15]Cal. Const, art. IX, § 5, art. IV, § 25(27), vest the legislature with the absolute power to establish the state school system. It is well settled that the school system of the state is a matter of general concern and not a municipal affair.

HEADNOTES: CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Schools--Legislative Control. --The public schools are a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the Constitution, and the Legislature is given comprehensive powers in relation thereto.

(2) Id.--School Districts. --School districts are agencies of the state for the local operation of the state school system.

(3) Id.--School Property. --The beneficial ownership of property of the public schools is in the state.

(4) Id.--Legislative Control. --The public school system is of statewide supervision and concern and legislative enactments thereon control over attempted regulation by local government units.

(5) Id.--School Property--Location of School Site. --School site location by school districts is not subject to zoning ordinances of a municipal corporation in which the site is located, because the state has occupied the field by general laws (Ed. Code, §§ 18402-l 8404; Gov. Code, § 6555 1 et seq.) and such ordinances conflict with such laws.

(6) Id.--School Property--Location of School Site. --The Government Code provisions relating to the power of municipalities to regulate the use of buildings and land, to create civic districts around public buildings and grounds (§ 65800), to zone (§ 65801), and to adopt interim zoning ordinances (§ 65806), and relating to what the master plan shall include (§§ 65462, 65470) do not conflict with the statutes (Ed. Code, §§ 18402-18404; Gov. Code, § 65551 et seq.) that evidence occupation by the state of the field of determining the location of school sites within a municipality.

(7) Id. -- School Property -- Location of School Site. --The comprehensive system of school control and operation by the school districts, as shown by the provisions of the Education Code, is completely inconsistent with any power of a municipality to control the location of school sites.

(8) Id.--School Property--Location of School Site, --Since the location and acquisition of a school site is a sovereign activity of the state which has not been ceded to the municipalities, a municipality has no power to control the location of a school site within its borders by means of an interim zoning regulation,

COUNSEL: Winston Churchill Black for Petitioner.

No appearance for Respondent.

Keith C. Sorenson, District Attorney, and Howard E. Gawthrop, Deputy District Attorney, for Real Party in Interest.

Edmund G. Brown, Attorney General, and Richard H. Perry, Deputy Attorney General, as Amici Curiae on behalf of Real Party in Interest.

JUDGES: Bray, J. Peters, P. J., and Wood (Fred B.), J., concurred.

OPINIONBY: BRAY

OPINION: [*418] [329]** Petitioner seeks writ of prohibition to restrain the Superior Court of San Mateo County from proceeding in an action in eminent domain now pending in that court, numbered 76501, brought by Menlo Park School District * against certain parties, in which said respondent seeks to

condemn certain lands in said town of Atherton for school purposes. +

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* Hereinafter referred to as respondent.

+ Argued and submitted with this proceeding is No. 1 Civil 18025, *Samuel Landi and Rose Landi* v. *Superior Court.* See *post,* p. 839 [324 P.2d 326] this day decided.

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[***2]

Questions Presented

Do the zoning ordinances of a municipality control the right of a school district in which the municipality is included, to designate the location of its schools? Corollary to this are the questions (a) Is a school district a state agency? (b) If so, has the state occupied the field of location of schools?

Facts

There is no conflict as to the facts. Included in Menlo Park School District are the incorporated cities of Atherton and Menlo Park as well as unincorporated territory. The district desires to acquire land in Atherton for public school purposes. Petitioner is a municipal corporation of the sixth class, June 24, 1957, the city council adopted ordinance Number 225, entitled "An Interim Zoning Ordinance Relating to Public Buildings and the Location Thereof Declaring its Urgency and Providing that it Shall Take Effect Immediately." In [*419] substance it prevents any property in the town of Atherton which is zoned for residential purposes from being used for any other purposes, specifically providing that no lands presently zoned residential may be used for the purpose of public buildings, including but not limited to schools. The ordinance was [***3] adopted pursuant to [HN1] section 65806, Government Code, which provides that if the planning commission in good faith is conducting studies or holding hearings for the purpose of the adoption of any zoning ordinance or amendment thereto, the, legislative body may adopt a temporary interim zoning ordinance prohibiting any purposes which might conflict with such ordinance.

The same day the city council adopted a resolution proposing amendments to the town's zoning ordinance Number 146 as amended for the zoning of public buildings, including schools, and directing the planning commission to hold public hearings on the proposed amendments to determine whether or not zoning districts should be established in which public buildings, including schools, may be located. The planning commission has employed a planning consultant for expert advice on land uses in the town, is now making pertinent studies, and has held public hearings. If valid, the ordinances would prohibit the school district from locating its school as proposed.

July 3, 1957, respondent commenced its eminent domain action, in which it seeks [**330] to condemn approximately nine acres within petitioner's corporate limits for [***4] school purposes, which property is zoned for residential uses only under petitioner's comprehensive zoning plan (ordinance Number 146 as amended). The condemnation is in direct violation of ordinance Number 225. The superior court in said action refused to grant petitioner's request for an order staying proceedings in said action. The petition alleges that the planning commission is proceeding "in good faith" as required by section 65806, Government Code; that Atherton was incorporated in 1923 for the express purpose of assuring a continuance of its area as, and its area still is, a low density, estate type, residential community consisting of 3,035 acres. It has no industrial or manufacturing plants or districts and no business district or business enterprises excepting two real estate offices and one gasoline service station existing as nonconforming uses. Atherton is primarily dependent for revenue to operate the municipality on real property taxes. Three different elementary school districts including respondent extend into the [*420] boundaries of Atherton and the portion of each in Atherton is much smaller than the outside portions. Approximately 7,000 persons live [***5] in Atherton. Registered as in attendance in schools within the town limits are 6,046 persons of whom 2,696 are in elementary grades. Only 1,640 of these persons reside in Atherton; 1,206 of these are in the elementary grades. Approximately 33 elementary students resident in Atherton cannot attend any public school in the town and are attending one in unincorporated territory. Seventy-four and sixty-one one-hundredths per cent of the land in Atherton is used for one family residences, 15 per cent for streets, 5.86 per cent for schools, 3.61 per cent for public utilities, fire protection and city hall, police and other municipal uses; .92 per cent for other uses. The major portion of respondent district lies in the city of Menlo Park. Menlo Park uses for school purposes only 1.5 per cent of its land as compared to the 5.86 per cent used in Atherton. A study by the American Institute for Planners, published jointly with the Federal Reserve Bank of Boston, for a city of the same size, type and kind as Atherton, shows that reasonable and proper zoning would require for school purposes only 1.3 1 per

cent of the total town area, or 39.76 acres as compared to Atherton's present 5.86 **[***6]** per cent or 177.77 acres. In addition to the nine acres sought to be condemned, petitioner is informed that respondent intends to acquire additional acreage in Atherton. Listing the present public and private schools, petitioner contends that Atherton has more schools per capita and more students in proportion to residents, than any other city in the United States. In the past five years there have been attempts to build four additional schools in Atherton. One elementary district whose boundary does not include any of the territory of Atherton, attempted to acquire property in Atherton for a school which no Atherton resident would have been permitted to attend. Attending school in Atherton with its population of only 7,000 are approximately 6,000 students while no community on either side of Atherton has students therein exceeding one for every five residents. Because of needed traffic control, public safety and police protection every school in Atherton has to receive the special attention of a police officer and because of the unreasonable number of schools there is an unreasonable burden on the police department and an unreasonable expenditure for the benefit of a majority **[***7]** of students who contribute nothing thereto.

In its answer in the eminent domain action, petitioner has set forth that plaintiff has not acquired the conditional use **[*421]** permit required by ordinance Number 146. The superior court denied petitioner's motion for a judgment on the pleadings based upon the ground that respondent's complaint was barred by the provisions of said two ordinances.

Does Petitioner's Zoning Ordinance Control?

Petitioner contends that the issue in this case is whether a municipality under section **[**331]** 65806, Government Code, has the power by an interim ordinance to prohibit any other than specific uses pending studies by the planning commission, It attempted to do this in ordinance Number 225. We are only concerned with the power of the municipality by such an ordinance to prohibit a school district from acquiring public school sites, and not to the application of the ordinance in general.

Petitioner concedes that the power of erninent domain is inherent in the State of California and may be exercised by the state, or any of its agencies to which the power is delegated, but contends that the delegation of the power to schools is limited by **[***8]** the powers which it contends the municipalities have by virtue of section 11, article XI, Constitution, and section 65800, Government Code.

In order to determine these questions we must consider the question of whether a municipality has the power to zone school sites, whether by an interim ordinance or otherwise. Therefore, we must determine if a school district is a state agency, and if so, whether the state has occupied the field in the matter of location of school sites.

(a) *Is a School District a State Agency?*

(1) This question has been flatly answered in the affirmative in *Hall v. City of Taft*, 4'7 Cal.2d 177 1302 P.2d 574]: [HN2]"The public schools of this state are a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the Constitution and the state Legislature is given comprehensive powers in relation thereto. . , , (2) School districts are agencies of the state for the local operation of the state school system. [Citations.] (3) The beneficial ownership of property of the public schools is in the state." (Pp. 179, 18 1.)

(b) *State has Occupied the Field.*

(4) [HN3]"The public school system is of statewise **[***9]** supervision and concern and legislative enactments thereon control over attempted regulation by local government units, [Citations.]" (*Hall v. City of Taft, supra*, at p. 18 1.)

[*422] (5) Has the state occupied the field of school site location or has it expressly granted the power of school zoning to the municipalities? The answer is that [HN4]the state has occupied the field. Evidence of this is the following statutes:

[HN5] Section 18402, Education Code: "The State Department of Education shall establish standards for school sites." How can this be accomplished if a municipality may by zoning determine the location of such sites?

[HN6] Section 18403, Education Code, provides that the governing board of a school district before acquiring property for a new school site or addition to a present school site shall "give the planning commission having jurisdiction notice in writing of the proposed acquisition." The planning commission in 30 days is required to submit to the school board "a written report of the investigation and its recommendations concerning acquisition of the site." "The governing board shall not acquire title to the property until the report of the planning commission **[***10]** has been received. *If the report does not favor the acquisition of the property for a school site, or for an addition to a present school site, the governing board of the school district shall not acquire title to the property until 30 days after the commission's report is received."* (Emphasis added.)

This shows that while the local planning commission may recommend concerning the location of a school site the ultimate determination of the site is in the school board.

[HN7]Section 18404 provides that a school district board and a city school board, if the latter desires to locate a school within two miles of an airport, must notify the State Department of Education of the proposed acquisition of a school site, and if the state department does not report favorably, the school board must wait 30 days before acquiring title to the property. This power of recommendation in the state department is inconsistent with the right of a local **[**332]** planning commission to designate by zoning the area where a public school may be located.

[HN8] Section 65090 et seq., Government Code, deal with the appointment and powers of a city planning commission. In chapter 3, article 9, dealing with "Administration **[***11]** of Master or General Plan" appears section 6555 1, which provides that after the legislative body has adopted a master or general plan for the city no "public ground or open space" shall be acquired and "no public building or structure shall be constructed or authorized in the area" until its location, purpose and extent have been submitted to and reported upon by **[*423]** the planning commission. Section 65552 provides that if the power to acquire such "public ground or open space" or public building or structure is vested in "some governmental body, commission,'or board" other than the city council, then such body, commission or board shall submit to the planning commission its location, purpose and extent.

Section 65553 provides that the planning commission shall report its findings as to whether the proposed public improvement conforms to the adopted master or general plan.

Section 65554 provides: "If the planning commission disapproves the proposed public improvement, *its disapproval may be overruled by such other governmental body, board, or agency.*" (Emphasis added.) Such a power in the other government body is completely incompatible with a power in the municipality **[***12]** of zoning public schools.

Petitioner points out that a planning commission has no legislative function, but may only study, administer and recommend, whereas the city council has the sole power to zone. Therefore, says petitioner, section 65554 deals only with the planning commission and is not binding on the city council. This contention overlooks the fact that the section is dealing with a master plan which has already been adopted by the city council and in which the council has zoned an area for a public ground or building. While the council may zone it, these sections provide that if the power to acquire such ground or building is in some other governmental body that body after reporting to the planning commission may entirely disregard the disapproval of the commission. There is no requirement that it then must go to the city council before it may acquire the property. "[Public] ground or open space," and "public building or structure," necessarily include public school grounds and buildings. Assuming that the city council under the statutes relied upon by petitioner, and hereafter discussed, in the first instance has the power to zone schools, it is clear that such **[***13]** zoning is merely advisory or recommendatory and that under section 65554 such zoning is not binding on the school district.

(6) Petitioner contends that Atherton's power to zone comes from [HN9]section 11, article XI, Constitution (the police power section): "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." "A zoning ordinance falls within the classification **[*424]** of police measures." (*Hurst v. Citv of Burlingame, 207* Cal. 134, 138 [227 P. 308].) Petitioner concedes that under the qualification in the section, the Legislature has the power to grant to the school districts if they are state agencies the exclusive power of zoning school sites. Petitioner contends that the Legislature has not done so but on the other hand has done just the contrary and designated the municipalities as the body having the power to effect such zoning. Supporting its contention it cites the hereafter mentioned statutes which it contends control those above mentioned. [HN10] Section 65800, Government Code: "Pursuant to the provisions of this chapter, the legislative body of any **[***14]** county or city by ordinance may: (a) Regulate the use of buildings, structures, and land as between agriculture, industry, business, residence *and other purposes. . . .* (d) Create civic districts around civic centers, public parks, and public buildings and **[**333]** grounds for the purpose of enabling a planning commission to review all plans for buildings or structures within the district prior to the issuance of a building permit in order to assure an orderly development in the vicinity of such public sites and buildings." (Emphasis added.) Section 65 80 1: "For such purposes the legislative body may divide a city, a county, or portions thereof into zones of the number, shape, and area it deems best suited to carry out the purpose of this chapter." Section 65806 gives the city council authority to adopt as an emergency measure a temporary interim zoning ordinance to protect the public safety, health and welfare, which ordinance may prohibit "Such *and any other* uses which may be in conflict with such zoning ordinance." (Emphasis

added.) [HN1 1]Section 65462 provides of what the master or general plan shall consist, including "(a) A *land* use element which designates the proposed [***15] general distribution and general location and extent *of the* uses of the land for housing, business, industry, recreation, *education,* public buildings and grounds, and other categories of public and private uses of land." (Emphasis added.) Section 65470: "A master or general plan may include a public buildings element of the plan, showing *locations* and arrangements of civic and community centers, *public schools,* libraries, police and fire stations, and all other public buildings, including their architecture and the landscape treatment of their grounds." (Emphasis added.)

We see nothing in any of the above statutes which in any way conflicts with the statutes hereinbefore mentioned which we hold evidence the occupancy of the field by the state. The [*425] sections referred to by petitioner necessarily include broad general language in order to cover all the situations, purposes and property with which zoning must be concerned. The word "education" in section 65462 does not conflict with the power of a school district to locate its schools. It must be construed with statutes dealing with zoning and the rights of the state. It must be remembered that in all municipalities [***16] there are private schools, the location of which is purely a municipal matter. Hence the reason for the words "education" and the words "other uses" and "other purposes" appearing in the above statutes. As to the words "public schools" in section 65470, no master plan would be complete without showing on it the location of public schools already in existence. It may also show areas which the city recommends for future schools. The quoted words in nowise show that the Legislature intended by the use of these words to repeal the evident power given school districts expressly as state agencies to locate their schools. The statutes relied upon by petitioner include "public buildings." Petitioner concedes that the inclusion of those words in the statutes does not in any manner interfere with the right of the state to locate a state building, or of a county to locate a county building, in any portion of a municipality it desires, regardless of any attempt of the municipality to zone the location of such buildings. Yet if its contention is correct that by the inclusion of the words "education" and "public schools" in the above statutes the Legislature was relinquishing the field of [***17] school site location to the municipalities, it necessarily would be equally true that by the inclusion of "public buildings" the Legislature was also relinquishing the field of state and county building site locations.

Zahn v. Board of *Public Works. 195* Cal. 497 1234 P. 3881, deals with the power of the city of Los Angeles to zone to exclude stores from certain areas. Petitioner contends that the language (pp. 502-503) to the effect that a municipal zoning ordinance which regulates, restricts and segregates the location of "industries, the several classes of business . . . and the several classes of public and semi-public buildings" is a valid exercise of the police power, is a holding that Atherton has the power it claims here. Obviously, the court did not have in mind nor was it passing [**334] upon the question involved in our case. It was dealing solely with the power to zone business areas,

In *Hall* v. *City* of *Taft, supra,* 47 Cal.2d 177, the question was "whether a municipal corporation's building regulations [*426] are applicable to the construction of a public school building by a school district in the municipality." (P. 179.) Taft, like Atherton, [***18] is a city of the sixth class. Taft, as does petitioner here, relied on article XI, section 11 of the Constitution and contended that under the police power therein granted, it was given the power to adopt building regulations which would apply to school buildings within its boundaries, as the state had not occupied the field. After holding, as we have hereinbefore shown, that a school district is a state agency, the court went on to hold that the state had completely occupied the field and that the city's regulations concerning "the activity involved" (p. 184) conflicted with general laws. [HN12]"A city may not enact ordinances which conflict with general laws on statewide matters [citations]."

The Education Code sets out a complete system for providing necessary and adequate schools. In addition to the statutes hereinbefore discussed there are the following: Section 502 1: "The Legislature hereby declares that it is in the interest of the State and of the people thereof for the State to aid school districts of the State in providing necessary and adequate school buildings for the pupils of the Public School System, such system being a matter of general concern inasmuch as the education [***19] of the children of the State is an obligation and function of the State." This language obviously includes the location of schools. Section 5041: "The Legislature hereby declares that it is in the interest of the State and of the people thereof for the State to aid school districts of the State in providing necessary and adequate school sites and buildings for the pupils of the Public School System, such system being a matter of general concern inasmuch as the education of the children of the State is an obligation and function of the State. . , ." Section 5022 appropriates a sum of $ 30,000,000 to be apportioned to school districts for "(1) The purchase and improvement of school building sites." Section

18 102, subdivision (a), requires the board of education to "Advise with the governing board of each school district on the acquisition of new school sites, and after a review of available plots give the governing board of the district in writing a list of the approved locations in the order of their merit considering especially the matters of educational merit, reduction of traffic hazards, and conformity to the organized regional plans as presented in the master plan of the planning **[***20]** commission having jurisdiction." While the department of education is thereby required to consider the master plan of a city, **[*427]** in approving a school site, the school district is not required to conform to the department's recommendations. Section 18404 hereinbefore discussed gives the local school board the power to disregard the department's recommendations as it only requires the board to delay for 30 days the acquiring of title to the property the board desires, if the department's recommendation is unfavorable. These sections, as was said in *Hall* v. *City of Taft, supra*, 47 Cal.2d 177, 188, concerning the building construction sections, "tend more to indicate that the school districts could follow such regulations [of the municipalities] as well as those of the state but are not bound to do so."

"The governing board of any school district may, and when directed by a vote of the district shall, build and maintain a schoolhouse." (Ed. Code, § 1815 1.) Section 18153 gives the school board the power to establish additional schools in the district. Section 18152 gives the school board, where any school is overcrowded, the power to locate the school in temporary **[***21]** quarters, without restriction as to its location,

(7) [HN13]The comprehensive system of school control and operation by the school districts **[**335]** as shown in the statutes herein discussed is completely inconsistent with any power of a municipality to control the location of school sites.

Hall v. *City of Taft, supra,* 47 Cal.2d 177, placed its decision that the construction of school buildings by school districts is not subject to building regulations of a municipality upon another ground than that the state has completely occupied the field by general laws and that such regulations interfere with those laws. * "'. , . [HN14]When it engages in such sovereign activities as the construction and maintenance of its buildings, as differentiated from enacting laws for the conduct of the public at large, it is not subject to local regulations unless the Constitution says it is or the Legislature has consented to such regulation. Section 11 of article XI of the state Constitution, *supra,* should not be considered as conferring such powers on local government agencies. Nor should the Government Code sections which confer on a city the power to regulate the construction of buildings within **[***22]** its limits (see Gov. Code, §§ 38601, 38660) be so considered. . . .'" (P. 183.) As stated in the Hall case (p. 181): "The beneficial ownership of property of the public schools is in the state."

---------- Footnotes ----------

* The brief of the attorney general on behalf of Honorable Roy E. Simpson, Superintendent of Public Instruction and ex-officio Director of Education, as amicus curiae, stresses this ground.

---------- End Footnotes- ----------

[*428] (8) If, as the Hall case holds, the construction and maintenance of a school building is a sovereign activity of the state, it is obvious that the location and acquisition of a school site is necessarily and equally such an activity. Obviously, too, neither the Constitution nor the Legislature has consented to a municipal regulation of school sites. As said in *Kentucky Institution for Education of Blind v. City of Louisville,* 123 Ky. 767 [97 S.W. 402, 8 L.R.A.N.S. 5531, as quoted in the Hall case (p. 183): ""'The principle is that the state when creating municipal governments does not cede to them any control of **[***23]** the state's property situated within them, nor over any property which the state has authorized another body or power to control. . . . How can the city ever have a superior authority to the state over the latter's own property, or in its control and management? From the nature of things it cannot have.""'

As said in *C. J. Kubach Co. v. McGuire,* 199 Cal. 2 15, 217 [248 P. 6761: "In the interpretation of a legislative enactment it is the general rule that the state and its agencies are not bound by general words limiting the rights and interests of its citizens unless such public authorities be included within the limitation expressly or by necessary implication."

Under the statutes, the state has in nowise ceded to the' municipalities its sovereign right to locate school sites.: On the contrary, the state has expressly granted the power of location to its agencies, the school districts.

[HN15]Article IX, section 5, and article IV, section 25, subdivision 27, of the Constitution vest the Legislature with the absolute power to establish the state school system. "It is well settled that the school system of the state is a matter of general concern and not a municipal affair. **[***24]** . . ." (*Becker v. Council of the City of Albany,* 47 Cal.App.2d 702, 705 [118 P.2d 924].)

The fact that ordinance Number 225 is an interim ordinance intended to hold property in status quo under the period of study necessary to an ultimate determination of the city's master plan, does not give the city the power to prevent the district from exercising its right of eminent domain in acquiring a school site. As we have shown, the city has no right to zone against the district's right of location whether such zoning be intended to be temporary or permanent.

[336]** Petitioner contends that the action of the school board in bringing the eminent domain action and particularly in choosing the school site thereby sought to be acquired is arbitrary **[*429]** and constitutes an abuse of the discretion vested in the board. This question cannot be determined in prohibition. It is possibly a matter of defense to be determined in the condemnation action.

The alternative writ is discharged and the petition for a peremptory writ is denied.

CITY OF SANTA CLARA, Plaintiff and Respondent, v. SANTA CLARA UNIFIED SCHOOL DISTRICT et al., Defendants and Appellants

Civ. No. 28819

Court of Appeal of California, First Appellate District, Division Two

22 Cal. App. 3d 152; 99 Cal. Rptr. 212; 1971 Cal. App. LEXIS 1678

December 20, 1971

SUBSEQUENT HISTORY: [*1]**

A petition for a rehearing was denied January 19, 1972, and respondent's petition for a hearing by the Supreme Court was denied February 16, 1972.

PRIOR HISTORY: Superior Court of Santa Clara County, No. 216587, George H. Barnett, Judge.

DISPOSITION: Since the record contains no evidence, as noted above, for the finding that the defendant school district acted arbitrarily and capriciously when it adopted Resolution No. 69-6, the judgment is reversed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellants, school district and associated individuals, challenged the judgment of the Superior Court of Santa Clara County (California) which held that appellants had acted arbitrarily and capriciously in adopting a resolution to construct a continuation high school on property located within appellee city, voided appellants' resolution, and enjoined further construction until there was full compliance with appellee's zoning ordinance.

OVERVIEW: Appellee city filed suit against appellants, school district and associated individuals, to enjoin the construction of a continuation high school that was authorized by appellants after they passed a resolution pursuant to Cal. Gov't Code 453094. The trial court held that appellants had acted arbitrarily and capriciously in passing the resolution, declared the resolution void and enjoined further construction of the school absent compliance with the local ordinance. Appellants challenged the trial court's decision, The court reversed the decision of the trial court and stated that the record sufficiently demonstrated that appellants had considered alternative sites for the school and had attempted to cooperate with appellee and the local ordinances to no avail. Accordingly, the court found that appellants had not acted arbitrarily or capriciously and that pursuant to Cal. Gov't Code §53094, they had the right to pass the resolution, The court found no merit to appellants' argument that Cal. Gov't Code §5039 1 authorized arbitrary denial of a use permit or denied public schools their due process rights.

OUTCOME: The court reversed the trial court's judgment and stated that there was no evidence that appellants, school and associated individuals, had acted arbitrarily and capriciously in adopting a resolution to construct a continuation high school. The court found that appellants properly exercised their right to exemption from local ordinances and that appellee city had the opportunity to inquire into appellants' criteria in selecting the site.

CORE **TERMS:** school district, site, use permit, zoning ordinance, high school, continuation, ordinance, public schools, exempt, arbitrary and capricious, governing board, zoning, constructed, zone, bid, acted arbitrarily, school site, capriciously, planning commission, voted, local agencies, evaluated, local agency, superintendent, local zoning, municipal, selecting, accorded, school construction, elementary school

LexisNexis(TM) Headnotes

Administrative Law > Separation & Delegation of Power > Constitutional Controls

Administrative Law > Separation & Delegation of Power > Jurisdiction

[HN1] Cal. Gov't Code §53090 provides that a local agency means any agency of the state for the local performance of governmental or proprietary function within limited boundaries; that it does not include the state, a city or a county.

Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Authority

Governments > Local Governments > Ordinances & Regulations

[HN2] Cal. Gov't Code §53091 provides in part that each local agency shall comply with all applicable building ordinances and zoning ordinances of the county or city in which the territory of the local agency is situated. Notwithstanding the preceding provisions of §53091, $53091 does not require a school district to comply with the zoning ordinances of a county or city unless such zoning ordinance makes provision for the

location of public schools and unless the city or county planning commission has adopted a master plan.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Governments > Local Governments > Ordinances & Regulations

Administrative Law > Judicial Review > Standards of Review

[HN3] Cal. Gov't Code §53093 provides that a local agency aggrieved. by the application of any zoning ordinance of a county or city or by the decision of an officer, department, board or bureau of the county or city made in connection with such ordinance may appeal to the local planning advisory committee and may thereafter obtain a review of the committee's decision in a court of competent jurisdiction. The section further provides that in lieu of an appeal to the local planning advisory committee, the aggrieved local agency may commence a superior court action seeking review of the act or determination of the county or city.

Administrative Law > Judicial Review

Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Authority

Governments > Local Governments > Ordinances & Regulations

[HN4] Cal. Gov't Code §53094 provides that notwithstanding any other provisions of this article, the governing board of a school district, by vote of two-thirds of its members, may render a city or county zoning ordinance inapplicable to a proposed use of property by such school district. If such governing board has taken such action the city or county may commence an action in the superior court seeking a review of such action of the governing board of the school district to determine whether it was arbitrary and capricious. If the court determines that such action was arbitrary and capricious, it shall declare it to be of no force and effect, and the zoning ordinance in question shall be applicable to the use of the property by such school district.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Authority

Governments > Local Governments > Ordinances & Regulations

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review

[HN5] All local agencies are required to comply with city or county zoning ordinances (Cal. Gov't Code §53091), but that school districts are specifically authorized to exempt themselves from the purview of such ordinances by a two-thirds vote of their governing boards (Cal. Gov't Code 1653094). The only reasonable interpretation of these sections is that a school district must abide by local zoning ordinances unless it chooses to exercise its right of exemption. The decision to render itself exempt is apparently one which the district may make at any time. Cal. Gov't Code §53094 contains no time limitation of any kind. Neither does §53094 limit a school district's discretion in any way except to provide that if the district's determination to exempt itself is arbitrary and capricious, it is subject to attack in the superior court.

Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Authority

Governments > Local Governments > Ordinances & Regulations

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review

[HN6] Although the selection of a school site by a school district involves an exercise of legislative and discretionary action and may not be challenged as to its wisdom, expediency or reasonableness, a school district must refrain from making such selection in an arbitrary and capricious manner.

SUMMARY: CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court entered judgment declaring null and void a school district's resolution declaring a city zoning ordinance inapplicable, as permitted by Gov. Code, § 53094, to its proposed construction of a continuation high school on a particular site. Construction of the school was permanently enjoined unless and until there should be full compliance with the city's zoning ordinance. The court found that Gov. Code, § 53094, was constitutional but that the school district had acted arbitrarily and capriciously in adopting its resolution pursuant thereto. (Superior Court of Santa Clara County, No. 216587, George H. Barnett, Judge.)

The Court of Appeal reversed the judgment, holding that the evidence did not support the trial court's finding of arbitrary and capricious action. In that connection, the court summarized evidence indicating the district board's extensive efforts to cooperate with the city prior to its passage of the resolution. It also noted that the city's denial of a use permit for the

construction was apparently based solely on a blanket disapproval of the concept of a continuation high school. No merit was found in the district's contention that it was not subject to the city zoning ordinance to begin with. (Opinion by Rouse, J., with Taylor, P. J., and Kane, J., concurring.)

HEADNOTES: CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to McKinney's Digest

(1) Schools § 57--Buildings and Construction--Location of School Site. --In an action by a city to enjoin a school district from constructing a continuation high school in an area zoned for residential use, the evidence did not support the trial court's finding that the district acted arbitrarily and capriciously in adopting a resolution rendering the city's zoning ordinance inapplicable to the proposed use of the property as permitted by Gov. Code, § 53094, where the district had selected the challenged site for the school only after it had evaluated several alternative sites, and only after it had evaluated the location of the property, the traffic conditions around the property, the proximity to an elementary school, available financing, recreational facilities, and planning considerations, where, following the city's denial of a use permit (apparently based solely on a blanket disapproval of the concept of a continuation high school), the district board met twice before adopting the resolution, the second meeting being for the specific purpose of hearing from those opposed to construction on the site chosen, and where the president of the board testified that the board thereafter adopted the resolution because it still believed that the property selected was the best available site for the school.

(2) Schools § 57--Buildings and Construction--Location of School Site. --It could not be said that a school district was exempted from compliance with a city's zoning ordinance under Gov. Code, § 5309 1, providing, in effect, that school districts need not comply with a city or county zoning ordinance unless it makes provision for the location of public schools, where, though the city ordinances required the obtaining of a use permit, it, in fact, permitted public schools to be constructed in R-l zones as well as in less restrictive zones, and it contained a general welfare standard furnishing the criteria for determining whether to issue a use permit. Such an ordinance meets the requirements of due process and does not authorize the unbridled or arbitrary denial of a use permit.

COUNSEL: William M. Siegel, County Counsel, and Robert T. Owens, Deputy County Counsel, for Defendants and Appellants.

Edwin J. Moore, City Attorney, and M. Van Smith, Assistant City Attorney, for Plaintiff and Respondent.

JUDGES: Opinion by Rouse, J., with Taylor, P. J., and Kane, J., concurring.

OPINIONBY: ROUSE

OPINION: [*154] [213]** This is an appeal by the Santa Clara Unified School District, the individual members of the board of trustees of said district and the superintendent of schools of said district from a judgment enjoining **[**214]** the construction of a continuation high school on certain property located within the City of Santa Clara.

The facts are without conflict and may be summarized as follows: The City of Santa Clara has at all **[***2]** times since July 1960 had a master plan which provides for the location of public schools within its boundaries. Ordinance No. 9 18, which was enacted by the city in February 1960, provides for the issuance of use permits authorizing the location of public schools within residential zones. The ordinance declares it to be unlawful and a public nuisance to locate a school within a residential zone without having first obtained a use permit.

The Santa Clara Unified School District, which was created in 1966, owns certain real property located within the City of Santa Clara. The property in question had originally been acquired by the Santa Clara Elementary school District in 1952, and the Scott Lane Elementary School had been constructed on a portion of the property in 1953. Ordinance No. 9 18 had not been enacted at that time, and there was no requirement that a use permit be obtained. The property was zoned for residential use at the time, and it continued to be zoned for residential use following the construction of the elementary school.

In April 1967, the Santa Clara Unified School District decided to construct a continuation high school on the unused portion of the district owned **[***3]** property on which the Scott Lane Elementary School had been constructed. The district reached this decision after considering and evaluating various alternative sites.

Preliminary plans and specifications were prepared, and they were approved by the State Division of Architecture in April 1968. Construction bids were advertised for, and in September 1968, it was determined that the low bid exceeded the estimated cost of construction. The district rejected this bid due to the lack of adequate funding. The plans and specifications were then reviewed and new bids were

called for. The new bids were to be opened on November 19, 1968.

After calling for the new bids, the district filed an application for a use permit with the City of Santa Clara. The district's initial application had no plans attached to it, and it was not accepted for filing. The district then filed a second application, in proper form, and on November 13, 1968, [*155] the city planning commission ruled that it would recommend approval of the use permit subject to certain conditions having to do with landscaping, construction and parking.

On November 19, the city council filed an appeal from the planning [***4] commission's decision,

On November 2 1, the time having arrived for the opening of the construction bids, the governing board of the school district held a special meeting and voted to award the construction contract to the Near Cal Corporation. The board was aware that the district's application for a use permit was to be reviewed by the city council. However, the board members felt that since the recommendation of the planning commission had been favorable, the city council would in all probability grant the use permit. The construction contract was signed on November 25, and construction commenced shortly thereafter.

On December 26, the governing board of the school district held another meeting. Lawrence Curtis, the superintendent of the school district, advised the board that the Near Cal Corporation felt that there was opposition to the construction of the proposed school and feared that litigation might be in the offing. The board was advised by the county counsel that it had the authority, under Government Code, section 53094, to render the city zoning ordinance inapplicable to the proposed school construction. However, the board decided that it wished to continue to [***5] cooperate fully with the city.

The district's use permit application had in the meantime been referred to the city's architectural control committee. Following [**215] the December 26 meeting, representatives of the school district met with this committee, and it was agreed that subject to certain modifications acceptable to both sides, the district would comply with the conditions imposed by the planning commission.

On December 30, the city council voted to deny the district's application for a use permit.

On January 2, 1969, a meeting of the governing board of the school district was held. The board members were informed of the city council's action. They were also provided by the county counsel with a resolution exercising their rights under Government Code, section 53094. county counsel advised the board that if it wished to build the continuation high school on the site it had previously selected, he recommended that the board adopt the resolution. The board decided to take no action until it had held an open meeting on January 7, and had heard from those individuals [*156] who were opposed to the construction of the school on the site selected by the district. [***6]

At the January 7 meeting, the board explained to those attending the meeting the various factors which had been considered in selecting the site for the continuation high school. After hearing from those in opposition, the board voted to adopt Resolution No. 69-6 rendering the city zoning ordinance inapplicable under Government Code, section 53094. The president of the board testified that after listening to all of the views discussed at the meeting, she still believed that the board had selected the best available site for the continuation high school. Had she felt otherwise, she would have voted against the resolution.

Following the school district's adoption of Resolution No. 69-6, the City of Santa Clara commenced the instant action against the school district, the individual members of its governing board, the district's superintendent of schools and Near Cal Corporation. The city sought injunctive relief and judicial review of the school district's action, and it alleged that the proposed school construction was in violation of the city's zoning ordinance; that Government Code, section 53094, was unconstitutional; and that the school district had acted arbitrarily and capriciously [***7] in adopting Resolution No. 69-6.

The trial court held that Government Code, section 53094, was constitutional, but that the school district had acted arbitrarily and capriciously in adopting Resolution No. 69-6. Judgment was entered declaring Resolution No. 69-6 to be null and void and permanently enjoining construction of the continuation high school on the site selected by the school district unless and until there was full compliance with the city's zoning ordinance. The instant appeal followed.

The issues raised, on this appeal turn upon the proper interpretation to be accorded to sections 53090 through 53095 of the Government Code. Prior to the enactment of these sections in 1959, our Supreme Court had held that public schools were a matter of statewide concern and that school districts, being local agencies of the state, were not subject to municipal construction regulations when engaged in such sovereign activities as the construction of school buildings. (***Hall v.*** *City of Taft* (1956) 47 Cal.2d 177 [302 P.2d 574].) It was subsequently held that school districts were likewise exempt from municipal zoning ordinances and that the state had occupied the field of school [***8] site

selection by general laws contained in the Education and Government Codes. (*Town of Atherton v. Superior Court* (1958) 159 Cal.App.2d 417 [324 P.2d 328].) The *court* in the *Atherton* case stated: "If, as the *Hall* case holds, the construction and maintenance of a school building is a sovereign activity of the state, it is obvious that **[*157]** the location and acquisition of a school site is necessarily and equally such an activity. Obviously, too, neither the Constitution nor the Legislature has consented to a municipal regulation of school sites. As said in *Kentucky Institution for Education of Blind v. City of Louisville, 123* Ky. *767* [97 S.W. 402, 8 L.R.A.N.S. 5531, as quoted in **[**216]** the Hall case (p. 183): ""The principle is that the state when creating municipal governments does not cede to them any control of the state's property situated within them, nor over any property which the state has authorized another body or power to control. , . . How can the city ever have a superior authority to the state over the latter's own property, or in its control or management? From the nature of things it cannot have."'" (P. 428.)

In 1959, **[***9]** the Legislature responded to these decisions by enacting Government Code, sections 53090 through 53095.

[HN1]Section 53090 provides in pertinent part that "[local] agency" means any agency of the state for the local performance of governmental or proprietary function within limited boundaries; that it does not include the state, a city or a county.

[HN2]Section 53091 provides in part that "Each local agency shall comply with all applicable building ordinances and zoning ordinances of the county or city in which the territory of the local agency is situated. , . Notwithstanding the preceding provisions of this section, this section does not require a school district to comply with the zoning ordinances of a county or city unless such zoning ordinance makes provision for the location of public schools and unless the city or county planning commission has adopted a master plan."

[HN3] Section 53093 provides that a local agency aggrieved by the application of any zoning ordinance of a county or city or by the decision of an officer, department, board or bureau of the county or city made in connection with such ordinance may appeal to the local planning advisory committee and may thereafter obtain **[***10]** a review of the committee's decision in a court of competent jurisdiction. The section further provides that in lieu of an appeal to the local planning advisory committee, the aggrieved local agency may commence a superior court action seeking review of the act or determination of the county or city. nl

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nl This section was repealed by the Legislature in 1970 (Stats. 1970, ch. 172, § *23).*

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[HN4]Section 53094 provides that "Notwithstanding any other provisions of this article, the governing board of a school district, by vote of two-thirds of its members, may render a city or county zoning ordinance inapplicable to a proposed use of property by such school district. . . . If such governing **[*158]** board has taken such action the city or county may commence an action in the superior court . . , seeking a review of such action of the governing board of the school district to determine whether it was arbitrary and capricious. . , , If the court determines that such action was arbitrary and capricious, it shall **[***11]** declare it to be of no force and effect, and the zoning ordinance in question shall be applicable to the use of the property by such school district." n2

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n2 No attempt has been made to summarize in detail the provisions of sections 53092 or 53095, since they do not bear directly upon the issues raised on this appeal. Section 53092 authorizes the delegation of certain powers of the State Division of Architecture to the county or city. Section 53095 provides that sections 53090 through 53095 shall prevail over certain specified sections of the Education and Government Codes.

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When these sections are read as a whole, it is apparent that [HN5]all local agencies are required to comply with city or county zoning ordinances (Gov. Code, § 53091), but that school districts are specifically authorized to exempt themselves from the purview of such ordinances by a two-thirds vote of their governing boards (Gov. Code, § 53094). The only reasonable interpretation of these sections is that a school district must abide by local **[***12]** zoning ordinances unless it chooses to exercise its right of exemption. The decision to render itself exempt is apparently one which the district may make at any time. Section 53094 contains no time limitation of any kind. Neither

does that section limit a school district's discretion in any way except to provide that if the district's determination [**217] to exempt itself is arbitrary and capricious, it is subject to attack in the superior court. n3

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n3 This construction of Government Code, sections 53090 through 53095, is entirely consistent with the Assembly Committee Report preceding their enactment. Thus, it appears that the Legislature deliberately accorded different treatment to school districts than to other local agencies because it was well aware that school construction was subject to almost complete control by the state. Sections 53090 through 53095 were primarily designed to insure that *other* local agencies which were not subject to such thorough control by the state could not claim exemption from city and county zoning requirements by virtue of the language contained in *Hall v. City of Taft, supra.* The Legislature accordingly provided in section 53094 that school districts, as opposed to other local agencies, should retain the right to exempt themselves from local zoning ordinances. (See Problems of Local Government Resulting from the *Hall v, City of Taft* Case Decision, 6 Assem. Interim Corn. Report No. 8, Municipal and County Government (1959) p. 7, 1 Assem. J. Appendix (1959).)

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[***13]

It is apparent that a school district desiring to construct a new classroom facility within the limits of a particular city which has a master plan and a zoning ordinance providing for the location of public schools is faced from the very outset with several alternative courses of action. The school district might decide to exempt itself immediately and to make no attempt whatever to comply with local zoning ordinances. A second alternative is that the school district could elect total compliance with all zoning requirements, [*159] and, if it were denied the right to build on a particular site or were subjected to other requirements which it considered unreasonable, the district could avail itself of its right of appeal to the local planning advisory committee or could seek relief in the superior court, A third possibility is that the school district might choose to comply with all city zoning requirements which were acceptable to it and might reserve its right to exempt itself when it was directed to comply with a condition which it deemed unreasonable.

(1) In the instant case, the only reasonable inference which can be drawn from the evidence is that defendant school district [***14] elected to cooperate with the city and to comply with all zoning requirements which it deemed reasonable. Representatives of the district met with the city's architectural control committee and reached an amicable compromise with regard to the conditions imposed by the planning commission. When the city council then denied the use permit and thereby flatly prohibited construction on the desired site, the district exempted itself from the city's zoning ordinance under Government Code, section 53094. It unquestionably possessed this right unless its decision can be deemed arbitrary and capricious.

In the instant case, the district's decision to exempt itself from the city zoning ordinance was made at a time when the city council had flatly prohibited construction of a continuation high school on the site previously selected by the school district. The situation was not one where the district was merely faced with a decision as to whether it was willing to comply with certain conditions imposed by the city. In fact, the district's decision whether to exempt itself from the zoning ordinance turned upon one question -- whether the district had selected an appropriate site for the [***15] continuation high school.

In his announcement of intended decision, the learned trial judge concludes that "the situation which has created the present dilernma arises from the fact that *a contract to construct the school was let and actual construction commenced prior to either the obtaining of a use permit or the determination not to be bound by the local ordinance,"* (Italics in original.)

It appears to this' court that such conclusion is an oversimplification of the entire problem and does disservice to the overall efforts of the school district. The evidence shows that the school district originally selected the site for the continuation high school only after it had evaluated several [**218] alternative sites. Its decision was a reasoned and considered one, and it selected the Scott Lane Elementary School site only after it had evaluated [*160] the location of the property, the traffic conditions around the property, the proximity to an elementary school, available financing, recreational facilities and planning considerations.

The evidence bearing upon the city council's reasons for denying the district's application for a use permit suggests a far different approach [***16] to the

problem. The minutes of the meeting of December 30 when the council voted to deny the use permit, show that Mayor pro tern. Kiely relinquished the gavel in order to second the motion to deny the use permit. He then addressed the council, stating that he had previously taught in a continuation high school and knew that the students consisted of "dope peddlers, molesters, screwballs, thieves, knifers, et cetera," He believed that individuals of this type were a potential threat to the neighborhood and should not "be taken care of at the expense of other kids." He urged that the council not only overrule the planning commission and deny the use permit but that it take whatever legal action was necessary to prevent the continuation high school from being constructed at the site selected by the district.

There is no evidence that the city council gave any consideration to alternative sites or that its opposition to the district's choice of site was based upon anything other than a blanket disapproval of the concept of a continuation high school.

Following the denial of the use permit, the governing board of the school district met on January 2 and again on January 7. There is [***17] no evidence remotely suggesting that the district acted in a precipitous manner, The January 7 meeting was held for the specific purpose of hearing from those opposed to the construction of the continuation high school on the site chosen by the district. In addition to listening to their views, the district's governing board also took the opportunity to explain the various factors which had led to the selection of the Scott Lane Elementary School site. When the governing board then voted to render the city's zoning ordinance inapplicable, it obviously did so because it still believed that the Scott Lane Elementary School property was the best available site for the continuation high school. The president of the board so testified, and the record contains no evidence to the contrary.

It is obvious that the evidence above summarized furnishes no support for a finding that the adoption of Resolution No. 69-6 was either arbitrary or capricious,

Plaintiff city asserts that if it did fail to produce evidence of arbitrary and capricious conduct on the part of the school district, such failure was the fault of counsel for the school district, The city asserts, more specifically, that [***18] when its counsel sought to question the superintendent of the [*161] school district concerning the factors considered in selecting the site for the continuation high school, counsel for the school district objected and asserted that the only issue before the court was the propriety of the district's conduct in adopting Resolution No. 69-6. The city contends that under such circumstances, the school district is bound by the doctrine of invited error and cannot object to the sufficiency of the evidence to support a finding of arbitrary and capricious conduct because such lack was the result of the improper exclusion of evidence at the district's instance. (*Watenpaugh* ***v. State Teachers' Retirement (1959) 5 I*** Cal.2d 675, 680 [336 P.2d 1651; *Gray* v. *Southern Pacific* ***Co.*** (1944) ***23*** Cal.2d 632, 644 [145 P.2d 561].)

The record does show that counsel for the school district objected when the city's counsel sought to ask the superintendent of the district whether the board had taken ethnic factors into consideration when selecting the site for the continuation high school. However, the record also shows [**219] that the trial court overruled the objection when [***19] the city's counsel argued that the board's ultimate act of passing Resolution No. 69-6 would itself be arbitrary and capricious if the school site had been originally selected in an arbitrary and capricious manner. At subsequent stages in the trial, it is rather unclear which counsel took what position, Counsel for the city objected on three occasions when the school district's counsel inquired into the school site selection, but the court overruled the objections and stated that a substantial number of factors had to be considered in evaluating the district's decision to adopt Resolution No. 69-6. Both counsel ultimately asked a number of questions pertaining to the school site selection,

The record does reflect some confusion as to the relevance of evidence bearing upon the district's reasons for selecting the site for the continuation high school. However, it cannot be said that counsel for the school district prevented the city's counsel from inquiring into the subject. Both counsel were permitted to ask questions as to the various factors considered by the school district in choosing the site, and none of the evidence elicited was in the least suggestive of arbitrary or [***20] capricious conduct on the part of the school district. n4

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n4 For purposes of retrial, it may be pointed out that the evidence in question was clearly relevant to the issues before the court. Although it is true that the city brought this action for the sole purpose of invalidating Resolution No. 69-6, it is apparent that the school district's conduct in adopting this resolution could not be evaluated without taking prior events into consideration. The district adopted the resolution because it believed that it had selected the best available site for the continuation high school and should

proceed with construction despite the city's opposition, [HN6]Although the selection of a school site by a school district involves an exercise of legislative and discretionary action and may not be challenged as to its wisdom, expediency or reasonableness, a school district must refrain from making such selection in an arbitrary and capricious manner. (***Arthur*** v. ***Oceanside-Carlsbad Junior College*** *Dist.* (1963) 216 Cal.App.2d 656, 658 [31 Cal.Rptr. 177].) It is obvious that evidence showing that the school district acted arbitrarily and capriciously when it originally selected the site for the continuation high school would be highly relevant to the question of whether it likewise acted arbitrarily and capriciously when it made the determination to adhere to such selection and to exempt itself from local zoning requirements.

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[*21]**

[*162] Another point urged by respondent City of Santa Clara appears worthy of comment. In referring to the provisions of section 53093 of the Government Code (since repealed by the Legislature), respondent suggests that appellant school district did not avail itself of the right of review provided for therein. While it is clear that school districts clearly qualified as "a local agency aggrieved" within the provisions of that section, yet it is significant to note that the method prescribed by section 53094 (and the one resorted to by appellant herein) is available only to school districts. Thus it seems reasonable to conclude that the Legislature, consistent with the philosophy set forth in ***Hall*** v. *City of Taft, supra*, 47 Cal.2d 177, and ***Town of Atherton v. Superior Court,*** *supra*, 159 Cal.App.2d 417, contemplated that school districts might prefer to deal with the problem under the authority of this section, rather than section 53093.

(2) One further point requires discussion for purposes of retrial. In addition to contending, quite correctly, that there was no evidentiary support for the finding that the adoption of Resolution No. 69-6 was arbitrary and **[***22]** capricious, defendant school district has also argued that the adoption of the resolution was an entirely unnecessary act on its part because it was never subject to the city's zoning ordinance to begin with. The school district bases this argument upon the language of Government Code, section 53091, to the effect that school districts need not comply with **[**220]** a city or county zoning ordinance unless it "makes provision for the location of public schools . . , ." The district contends that the city's zoning ordinance does not provide for the location of public schools because it imposes the requirement that a use permit must first be obtained and does not designate any particular zone in which public schools may be constructed without a use permit. The school district also argues that the city has discriminated against public schools in favor of private schools because the zoning ordinance does provide that private schools may be constructed in R-4 zones without a use permit.

The district's position is not meritorious. The question before us is not whether public or private schools are accorded identical treatment under the city's zoning ordinance but whether the ordinance **[***23]** provides for the location of public schools. The city correctly points out that public schools may **[*163]** be constructed in R-l zones as well as in less restrictive zones whereas private schools may not. It is thus arguable that public schools are accorded more favorable treatment than private schools. Clearly, the ordinance does provide for the location of public schools, and the requirement that a use permit be obtained does not, as contended by the school district, give the city unlimited discretion to exclude public schools. The city's zoning ordinance contains a general welfare standard which furnishes the criteria for determining whether to issue a use permit. Such an ordinance meets the requirements of due process and does not authorize the unbridled or arbitrary denial of a use permit. (***Stoddard v.*** *Edelman* (1970) 4 Cal.App.3d 544, 548-549 [84 Cal.Rptr. ***443***]; *Tustin* ***Heights Assn.*** v. ***Bd.*** *of Supervisors* (1959) 170 Cal.App.2d 619, 635 [339 P.2d 914].)

Since the record contains no evidence, as noted above, for the finding that the defendant school district acted arbitrarily and capriciously when it adopted Resolution No. 69-6, the **[***24]** judgment is reversed.

12 Cal.Rptr.3d 343
32 Cal.4th 1029, 88 P.3d 71, 12 Cal.Rptr.3d 343, 4 Cal. Daily Op. Serv. 3571, 2004 Daily Journal D.A.R. 4984
(Cite as: 32 Cal.4th 1029, 88 P.3d 71, 12 Cal.Rptr.3d 343)

H

Briefs and Other Related Documents

Supreme Court of California

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY et al., Plaintiffs and Appellants,
v.
John GARAMENDI, as Insurance Commissioner, etc., et al., Defendants and Respondents;
Southern Christian Leadership Conference of Greater Los Angeles, Inc., et al., Interveners and Respondents.

No. 5102251.

April 26, 2004.
As Modified June 9, 2004.

Background: Insurer brought action against the Insurance Commissioner for a declaratory judgment that the regulation making insurers' community service statements available for public inspection was invalid. Civil rights and consumer groups intervened, The Superior Court, City and County of San Francisco, No. 308274, Ronald Evans Quidachay, J., entered summary judgment in favor of Commissioner and the groups, Insurer appealed. The Court of Appeal affirmed. Review was granted, superseding opinion of Court of Appeal.

Holdings: The Supreme Court, Brown, J., held that:
(1) the regulation was valid, and
(2) the information was subject to disclosure, even if the statements contained trade secrets.

Judgment of **Court** of Appeal affirmed.

Opinion, I 12 Cal.Rptr.2d 574, superseded,

West Headnotes

[1] Records ⚿30
326k30 Most Cited Cases

Statute mandating public disclosure of insurance rates also encompassed other factors that might impermissibly affect availability of insurance, and thus Insurance Commissioner had statutory authority to promulgate regulation malting insurers' community service statements available for public inspection, and such regulation was valid. West's Ann.Cal.Ins.Code §§ 1861.02, 1861.03, 1861.05, 186 1.07; IO CCR § 2646.6(c).

[2] Insurance ⚿1070
217k1070 Most Cited Cases

In reviewing the validity of an insurance regulation, Supreme Court's function was to inquire into the legality of the regulation, and not its wisdom,

[3] Insurance ⚿1034
217k1034 Most Cited Cases

[3] Insurance ⚿1058
217k1058 Most Cited Cases

The Insurance Commissioner has broad discretion to adopt rules and regulations as necessary to promote the publ ic wel fare.

[4] Insurance ⚿1070
217k1070 Most Cited Cases

In reviewing whether Insurance Commissioner had statutory authority to promulgate regulation, Supreme Court would conduct an independent examination, and determine whether, in enacting the specific rule, the Commissioner reasonably interpreted the legislative mandate.

[5] Insurance ⚿1541
2 17k154 1 Most Cited Cases

[5] Records ⚿30

326k30 Most Cited Cases

Statute mandating public disclosure of insurance rates and other factors that might impermissibly affect availability of insurance established absolute rule in favor of public disclosure, and other statutory exemptions from disclosure did not apply, and thus information contained in insurers' community service statements was subject to public disclosure, even if the statements contained trade secrets, as disclosure furthered statutory purpose of fostering consumer participation in rate-setting process. West's Ann.Cal.Evid.Code § 1060; West's Ann.Cal.Gov.Code § 6254; West's Ann.Cal.Ins.Code § 1861.07; 10 CCR § 2646.6(c).

See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1114 et seq.; Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2004) *¶14:46.10 (CAINSL Ch. 14-B).*

[6] Statutes 181(1)
36 1 k 18 1(1) Most Cited Cases

[6] Statutes 184
36 1 k 184 Most Cited Cases

When construing a statute, court must ascertain the intent of the Legislature so as to effectuate the purpose of the law.

[7] Statutes 188
361k 188 Most Cited Cases

[7] Statutes 206
361k206 Most Cited Cases

In determining legislative intent so as to construe statute to effectuate its purpose, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase, and sentence in pursuance of the legislative pm-pose.

[8] Statutes 184
36 1 k 184 Most Cited Cases

[8] Statutes 206
361k206 Most Cited Cases

[8] Statutes 208
361 k208 Most Cited Cases

In construing a statute, a court does not consider the statutory language in isolation, but instead examines the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts.

[9] Statutes -223.1
361k223.1 Most Cited Cases

Courts read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.

[10] statutes -325
36 I k325 Most Cited Cases

The rules of statutory construction apply equally in construing statu tes enacted through the initiative process,

[11] Statutes 195
361k195 Most Cited Cases

Under the rule of statutory construction, expressio unius est exclusio alterius, where exceptions to a general rulc arc specified by statute, other exceptions are not to be presumed unless a contrary legislative intent can be discerned.

***345 **72 *1034 I-Icller Ehrman White & McAuliffe, Paul Alexander, Vanessa Wells and Victoria Collman·Brown, Menlo Park, for Plaintiffs and Appellants.

LeBoeuf, Lamb, Greene & MacRae, Sonnenschein Nath & Rosenthal, Thomas E. McDonald and Sanford Kingsley, San Francisco, for Allstate Insurance Company, A l lstate Indemnity Company, Deerbrook Insurance Company, United Services Automobile Association and USAA Casualty Insurance Company as Amici Curiae on behalf of Plaintiffs and Appellants.

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NY, Paul W. Cane, Jr., San Francisco; National Chamber Litigation Center and Robin S. Conrad, Washington, DC, for California Chamber of Commerce, Chamber of Commerce of the United States, the California Business Roundtable, California Healthcare Institute and the Pharmaceutical Research and Manufacturers of America as Amici Curiae on behalf of Plaintiffs and Appellants.

Horvitz & Levy, David S. Ettinger, Mitchell C. Tilner, Daniel J. Gonzalez, Encino; Barger & Wolen, Steven H. Weinstein and Robyn E. King for Fanners Insurance Exchange, Fire Insurance Exchange, Truck Insurance Exchange, The Association of California Insurance Companies, The Personal Insurance Federation of California and The National Association of Independent Insurers as Amici Curiae on behalf of Plaintiffs and Appellants,

Fred J. Hiestand, Sacramento, for the Civil Justice Association as Amicus Curiae on behalf of Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Randall P. Borcherding and Kristian D. Whitten, Deputy Attorneys General, for Defendants and Responcients.

Public Advocates, Mark Savage, San Francisco, and Thorn Ndaizee Meweh for Interveners and Respondents Southern Christian Leadership Conference of Greater Los Angeles, Inc., and Consumers Union of U.S., Inc.

Gail Hillebrand, San Francisco, for Intervener and Respondent Consumers Union of U.S., Inc.

**73 Kevin Stein, New York, NY, for California Reinvestment Committee as Amicus Curiae on behalf of Interveners and Respondents.

John A. Russo, City Attorney (Oakland), Barbara J. Parker, Chief Assistant City Attorney, and Daniel Rossi, Deputy City Attorney for City of Oakland as Amicus Curiae on behalf or Interveners and Respondents.

*1035 Dennis J. Herrera, City Attorney (San Francisco), Owen J. Clements, Chief of Special Litigation, and Ellen M. Forman, Deputy City Attorney, for City and **County** of San Francisco as Amicus Curiae on behalf of Interveners and Respondents.

Harvey Rosenfield and Pamela Pressley for The Proposition 103 Enforcement Project as Amicus Curiae on behalf of Interveners and Respondents,

BROWN, J.

In 1988, voters passed Proposition 103, which made "numerous fundamental changes in the regulation of automobile and other types of insurance." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 812, 258 Cal.Rptr. 161, 771 P.2d 1247 (*Calfarm*).) "Formerly, the so-called 'open competition' system of regulation had obtained, under which 'rates [were] set by insurers without prior or subsequent approval by the Insurance Commissioner . . ..'" ***346(*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 240, 32 Cal.Rptr.2d 807, 878 P.2d 566 (*20th Century*).) Proposition 103 altered this system by adding to the Insurance Code article 10--"entitled 'Reduction and Control of Insurance Rates.' ([Ins.Code,] §§ 1861.01-1861.14.)" (*California Auto. Assigned Risk Plan v. Garamendi* (1991) 232 Cal.App.3d 904, 907, 283 Cal.Rptr. 562 (*CAARP*).) This new article required, among other things, approval by the Insurance Commissioner of the State of California (hereafter Commissioner) [FN1] for all insurance rate increases (see *id.* at pp. 909-910, 283 Cal.Rptr. 562), and "provide[d] for consumer participation in the administrative ratesetting process" (*Walker v. Allstate Indemnity Co. (2000)* 77 Cal.App.4th 750, 753, 92 Cal.Rptr.2d 132).

FN1. For convenience, we use "Commissioner" to refer to the Insurance Commissioner and/or the California Department of Insurance.

Pursuant, in part, to statutes enacted as part of Proposition 103, the Commissioner promulgated section 2646.6 of title 10 of California Code of Regulations (hereafter Regulation 2646.6). [FN2] Under Regulation 2646.6, subdivision (a), "[e]ach

insurer writing in excess of ten million dollars in" certain "lines of insurance . . . [o]n or before March 1 of every year . . . shall file a Community Service Statement ... with the Department of Insurance's Statistical Analysis Bureau in Los Angeles," The statement must contain specified statistical information concerning the insurer's business in the State of California, organized by ZIP code, including information described as *1036 "Record A data." [FN3] Record **74 A data consists of "the total earned exposures ***347 and total earned premiums, and the total number of exposures new, exposures canceled, and exposures non-renewed, stated separately" for each line of *1037 insurance and ZIP code. (Reg.2646.6, subd. (b)(l).) The statement, including the record A data, is subject to Insurance Code section 186 1.07, pursuant to Regulation 2646.6, subdivision (c). And Insurance Code section 186 1.07 provides that "[a]ll information provided to the commissioner pursuant to this article shall be available for public inspection, and the provisions of Section 6254(d) of the Government Code and Section 1857.9 of the Insurance Code shall not apply thereto."

FN2. This opinion addresses the pre-March 15, 2003, version of the regulation. Effective March 15, 2003, the Commissioner amended Regulation 2646.6. These amendments do not affect our construction of subdivision (c) of Regulation 2646.6--which did not materially change--and the related Insurance Code provisions.

FN3. "The insurer's Community Service Statement shall set forth, for the reporting period which shall consist of the calendar year ending on the immediately preceding December 31, for each Zone Identification Program ('ZIP') code in every county in California in which it sells insurance or maintains agents: [¶] (1) the total earned exposures and total earned premiums, and the total number of exposures new, exposures canceled and exposures non-renewed, stated separately for the following coverages: [¶] (A) private passenger automobile liability (excluding policies issued through the California Automobile Assigned Risk Plan); [¶] (B) private passenger automobile physical damage; [¶] (C) homeowners multiple peril (excluding policies issued through the California FAIR plan); [¶] (D) commercial multiple peril, by ZIP code for the location of individual risks (excluding policies for which the annual premium is more than $7,500); [¶] (E) commercial automobile liability (excluding policies issued through the California Automobile Assigned Risk Plan and excluding policies for which the annual premium is more than $7,500); [¶] (F) commercial automobile physical damage (excluding policies for which the annual premium is more than $7,500); [¶] (G) fire (excluding policies issued through the California FAIR Plan) (as specified in the Department of Insurance Statistical Plan, dated June 2, 199.5); [¶] (I-I) liability other than automobile (excluding professional liability coverages and excluding all commercial policies for which the annual premium is more than $7,500). [¶] (2) by service performed at each office, the number of offices maintained in the ZIP code during the reporting period; (For purposes of this section, 'service' means claims service, marketing or sales service.) Where more than one service is performed at an office, the insurer shall categorize the office based upon the service provided at that office. [¶] (3) the number of independent, employed or captive agents or agencies and the number of employed or independent claims adjusters maintaining offices (including home offices)' in the ZIP code during the reporting period; [¶] To be counted for purposes of this section, an office must be open to the general public no fewer than 37.5 hours per week at least 50 weeks per year. A new office opened at any time during the reporting period shall be counted if it has been open at least 60 consecutive business days during the reporting period. An office closed at any time during the reporting period shall be counted unless it has been closed for more than 60 consecutive business days during

the reporting period, [¶] (4) For an insurer distributing through direct solicitation, the number of direct mail or telephone solicitations for new insurance business made during the reporting period to addresses in the ZIP code; [¶] (5) the number of agents and claims adjusters maintaining offices in the ZIP code during the reporting period who identified themselves as conversant in a language other than English, listed by language as specified in the Department of Insurance's Statistical Plan, dated June 2, 1995.[¶] (6) The race or national origin, and gender, of each applicant who is a natural person, as provided by the applicant on a separate, detachable form that refers to the application. The form shall state that this information is requested by the State of California in order to monitor the insurer's compliance with the law, that the applicant is not required to provide this information but is encouraged to do so, and that the insurer may not use this information for underwriting or rating purposes. A sample of this form shall be included in the Department of Insurance's Statistical Plan, dated June 2, 1995. No such information shall be used for purposes of underwriting or rating any applicant. [¶] For purposes of this section, race or national origin means one of the following: [¶] (A) American Indian or Alaskan Native [¶] (B) Asian or Pacific Islander [¶] (C) African-American [¶] (D) Latino [¶] (IS) White [¶] (F) Other [¶] (G) Information not provided by applicant or policyholder. [¶] (7) The number of applications received for each line of insurance as listed in (b)(1) above. [¶] (8) The number of applications for which the insurer declined to provide each of the coveragcs listed in (b)(1) above." (Reg.2646.6, subd.(b).)

In this case, we consider the validity of the public inspection provision found in Regulation 2646.6, subdivision (c) and the scope of the public disclosure mandate of Insurance Code section 1861.07, We conclude that (1) the public inspection provision of Regulation 2646.6, subdivision (c) is valid; and (2) Insurance Code section 1861.07 does not incorporate the exemption from disclosure found in Government Code section 6254, subdivision (k), and does not therefore exempt information protected by the trade secret privilege from disclosure.

I.

As required by Regulation 2646.6, State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Company and State Farm General Insurance Company (collectively State Farm) filed a community service statement with the Commissioner in 1998. In a letter accompanying its statement, State Farm wrote: "STATE FARM INSURANCE COMPANIES CONSIDER[ ] THE INFORMATION CONTAINED IN RECORD A, B, AND C HEREIN AS PRIVILEGED AND CONFIDENTIAL. IT IS PROPRIETARY IN NATURE, CONSTITUTES TRADE SECRET MATERIAL, AND IS NOT TO BE DISSEMINATED BEYOND THE DESIGNATED RECIPIENTS WITHOUT THE EXPRESS WRITTEN CONSENT OF THE STATE FARM INSURANCE COMPANIES."

Despite State Farm's invocation of the trade secret privilege, the Commissioner, without notifying State Farm beforehand, ***348 provided its community service statement to David "Birny" Birnbaum upon his request pursuant to Regulation 2646.6 and Insurance Code section 1861.03. After learning about this, State Farm sent a letter to the Commissioner, protesting the release of its trade **75 secrets to Birnbaum and asking the Commissioner to take all reasonable steps to retrieve this information. The Commissioner then sent a letter to Birnbaum stating that it had "inadvertently released" the information and asking him to return it. Birnbaum, however, refused to do so.

State Farm then filed this action against Birnbaum and the Commissioner, seeking declaratory and injunctive relief. In its complaint, State Farm alleged that "the information contained in the Community Service Statement is *1038 confidential and constitutes trade secrets belonging to State Farm" and is not subject to public inspection under Insurance Code section 1861.07. It sought, among

other things, the return of its trade secret information and an injunction barring Birnbaum from using or disclosing that information.

Soon thereafter, the Southern Christian Leadership Conference of Greater Los Angeles, Inc., and the Consumers Union of U.S., Inc. (collectively interveners), successfully intervened in the action, In their complaint, the interveners sought a declaration "that the Community Service Statement and data insurers file with the [Commissioner] ... are public records subject to public inspection and not exempt from public disclosure."

State Farm then amended its complaint, The amended complaint included the interveners and clarified that only the record A data was a trade secret, State Farm also added two declaratory relief claims. First, it sought "a declaration that IO C.C.R. § 2646.6(c) is invalid to the extent that it purports to make Insurance Code § 186 1.07 applicable to data submitted by State Farm pursuant to 10 C.C.R. § 2646.6, and purports to make data submitted in confidence by State Farm pursuant to 10 C.C.R. § 2646.6 publicly available." Second, it sought a "declaration that Insurance Code § 186 1.07 does not abrogate trade secret rights; that trade secret protections apply to information submitted under Insurance Code § 1861.07; that State Farm's data submitted in Record A ... constitutes a trade secret; and that, if Insurance Code § 186 1.07 applies to data submitted pursuant to 10 C.C.R. § 2646.6, State Farm's data submitted in Record A to each of its Community Service Statements must be held as confidential by the [Commissioner] and cannot be produced pursuant to a Public Records Act request,"

After the trial court dismissed Birnbaum from the action, [FN4] both the Commissioner and the interveners moved for summary judgment, The court granted both motions. In granting the Commissioner's motion, the court held that the Commissioner "did not exceed [his] powers in enacting and implementing 10 CCR § 2646.6(c), and State Farm has not shown that there **is an** exception to the requirements of IO CCR § 2646,6(c) and Insurance Code § 186 1.07 for information which would otherwise be considered a trade secret." In granting the interveners' **motion,** the court held that (1) "there is no triable issue as to any material fact; there is no showing by [State Farm] of economic value of the Record A data in the **Community Service** Statements, Cal. Regs.Code tit, 10, § 2646.6; and the Community Service ***349 Statements and Record A data are not a trade secret"; (2) "the California Department of Insurance did not exceed its powers in promulgating *1039Section 2646.6 of Title 10 of the California Code of Regulations to ensure that insurers do not unfairly discriminate against poor and ethnic communities"; and (3) "the Community Service Statements and data insurers file with the California Department of Insurance pursuant to Cal. Regs.Code **tit.** 10, § 2646.6 are public records subject to public inspection under Regulation § 2646,6(c) and Cal. Ins.Code § 1861.07 and are not exempt from public disclosure."

FN4. Birnbaum filed a motion to strike pursuant to Code of Civil Procedure section 425.16. The trial court granted the motion and entered judgment for Birnbaum. State Farm filed a notice of appeal, but later abandoned the appeal.

The Court of Appeal affirmed. [FN5] First, the court concluded that State Farm had standing to bring an **action** to prevent the Commissioner **76 from disclosing its record A data. Second, the court held that the Commissioner did not exceed his statutory authority by making community service statements subject to the public disclosure mandate of Insurance Code section 1861.07. Third, the court found no trade secret exception to the public disclosure mandate of Insurance Code section 1861.07. **According** to the court, Insurance Code **section 1861.07** declared a general rule requiring disclosure "*without* exceptions" and did not incorporate the exemption from disclosure for statutory privileges found in Government Code section 6254, subdivision (k). Thus, State Farm could not shield its record A data from public inspection by asserting the trade secret privilege codified in Evidence Code section 1060. Finally, the court held that, even if the trade secret privilege applied, it "still would not protect State Farm's record A data." Relying *on Uribe v. Howie (1971)* 19 Cal.App.3d 194, 96 Cal.Rptr. 493, the court held that Evidence Code section 1060, even if

applicable, could not shield this data from disclosure because "the public interest is better served by disclosure ... than by nondisclosure." As a result, the court declined to consider State Farm's contention that there was a triable issue of fact as to whether its record A data is a trade secret.

FN5. Pending consideration of the appeal, the Court of Appeal "temporarily enjoined the Commissioner, the Department, and Interveners from disclosing data, information, or potential trade secrets that State Farm provided under [Regulation] 2646.6, the record A data."

We granted review.

II.

[I] Before the Court of Appeal, State Farm contended the Commissioner exceeded his "statutory authority by making community service statements subject to the public disclosure mandate of Insurance Code section 1861.07 and that California Code of Regulations, title 10, section 2646.6, subdivision (c) [was] invalid to the extent that it purport[ed] to do so." According to State Farm, only information submitted pursuant to article 10 of chapter 9 of part 2 of division 1 of the Insurance Code (hereafter article 10) must be * 1040 disclosed under Insurance Code section 186 1.07, and community service statements do not contain such information, The court rejected this contention. Citing Insurance Code section 186 I .03, [FN6] it concluded that "arTICLE IO is not only about rates and ***350 rate regulation; it also concerns other factors that may impermissibly affect the availability of insurance." **Thus,** "[i]t was well within the authority of the Commissioner to conclude that requiring insurers to submit the information contained in those statements would facilitate his obligations to implement and en force article 10." In a convoluted argument, State Farm now challenges this holding. We, however, find the public inspection provision of Regulation 2646.6, subdivision (c) to be valid.

FN6. As relevant here, Insurance Code section 186 1.03, subdivision (a) provides that "[t]he business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act (Sections 51 to 53, inclusive, of the Civil Coclc), and the antitrust and unfair business practices lows (Parts 2 (commencing with Section 16600) and 3 (commencing with Section 17500) of Division 7 of the Business and Professions Code),"

[2][3][4] In reviewing the validity of a regulation, "[o]ur function is to inquire into the legality of the regulations, not their wisdom." (*Morris v. Williams* (1967) 67 Cal.2d 733, 737, 63 Cal.Rptr. 689, 433 P.2d 697,) The Commissioner "has broad discretion to adopt rules and regulations as necessary to promote the public welfare." (*Calfarm, supra,* 48 Cal.3d at p. 824, 258 Cal.Rptr. 161, 77 1 P.2d 1247.) Thus, our task "is limited to determining whether the regulation (1) is 'within the scope of the authority conferred' (Gov.Code, § 1 1373) and (2) is 'reasonably necessary to effectuate the purpose of the statute' (Gov.Code, § I1374)." (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 411, 128 Cal.Rptr. 183, 546 P.2d 687.) In this case, State Farm only challenges the authority of the Commissioner to enact the public inspection provision of Regulation 2646.6, subdivision (c). We must therefore conduct an independent examination (see *20th Century, supra,* 8 Cal.4th at pp. 271-272, 32 Cal.Rptr.2d 807, 878 P.2d 566) and cletermine "whether in enacting the specific rule" the Commissioner "reasonably interpreted the legislative mandate" **77(*Fox v. San Francisco Residential Rent etc. Bd.* (1985) 169 Cal.App.3d 65 I, 656, 2 15 Cal.Rptr. 565).

The challenged portion of Regulation 2646.6, subdivision (c) provides that community service statements arc subject to Insurance Code section 1861.07. As relevant here, Insurance Code section 186 1.07 states that "all in formation" submitted to the Commissioner "pursuant to" article 10 "shall be available for public inspection...." Because all information provided pursuant to article 10--which encompasses I nsura nce Code sections 1861 .01 to 186 1. 16--is subject to public disclosure under

Insurance Code section 1861.07, the validity of the regulation depends on whether the statutes in article 10 authorize the Commissioner to require community service statements,

*1041 In answering this question, we first find that Office of Administrative Law (OAL) opinions approving Regulation 2646.6 are irrelevant. "The approval of a regulation ... by the [OAL] ... *shall not be considered by* a court in any action for declaratory relief brought with respect to a regulation." (Gov.Code, § 11350, subd. (c), italics added; see also *Jimenez v. Honig* (1987) 188 Cal.App.3d 1034, 1040, fn. 4, 233 Cal.Rptr. 817 ["The courts are precluded from considering . . . the opinion of the [Office of Administrative Law (OAL)] . . . in reviewing the validity of the regulation"],) Thus, we t-eject State Farm's claim that we are constrained by holdings, of the OAL. As such, we may consider all the article 10 statutes cited as authority for the promulgation of , Regulation 2646.6, subdivision (c)--i.e., Insurance Code sections 186 1.02, 1 86 1.03 and 1 86 1 .05--in determining the regulation's validity, (See Note, foll. Regulation 2646.6.)

Nor, contrary to State Farm's contention, did the Court of Appeal consider whether Insurance Code section 186 1.03 actually incorporates provisions of the Unruh Act and other business laws. Rather, the court correctly observed that Insurance Code section 1861.03 made "the business of insurance subject to the state's ***351 antitrust and unfair business practice laws and to the Unruh Civil Rights Act." (See also *Farmers Ins. Exchange v. Superior* Court (1992) 2 Cal.4th 377, 394, 6 Cal.Rptr.2d *487, 826* P.2d 730 [Ins.Code, § 186 1.03 "merely modifies preexisting law, to provide, in essence, that insurers are subject to the unfair business practices laws *in addition to* preexisting regulations under the McBride Act, as amended"].) Based on the breadth of these business laws, the court then concluded that article 10 "encompasses more than rate matters and addresses other factors that may impermissibly affect the availability of insurance."

In doing so, the Court of Appeal correctly found that the Commissioner did not exceed his authority by promulgating the public inspection provision of Regulation 2646.6, subdivision (c). As part of Proposition 103, article 10' s stated purpose was " 'to protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace, to provide for an accountable Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all Californians.' " (I-I istorical and Statutory Notes, 42A West's Ann. Ins.Code (1993 ed.) foll. § 186 1.01 , p. 649.) To this end, article 10 gives the Commissioner broad authority over insurance rates (*CAARP, supra,* 232 Cal.App.3d at pp. 9 13-914, 283 Cal.Rptr. 562), and expressly precludes him from approving rates that are "excessive, inadequate, unfairly discriminatory or otherwise in violation of' chapter 9 of the Insurance Code (Ins.Code, § 1861.05, subd. (a)). Through Insurance Code section 1861.03, subdivision (a), the article also subjects the business of insurance to laws prohibiting discriminatory and unfair business practices. Thus, article 10 is not limited in scope to rate regulation. It *1042 also addresses the underlying factors that may impermissibly affect rates charged by insurers and lead to insurance that is unfair, unavailable, and unaffordable.

As such, the Commissioner undoubtedly has the authority under article 10 to gather any information necessary for determining whether these factors are impermissi bly a ffec t ing the fairness, availability, and affordability of insurance. This information necessarily includes statistical data relevant to the Commissioner's determination that a California community is underserved by the insurance **78 industry. (See Reg. *2646.6,* subd. (c) [using information from community service statements, the Commissioner shall "issue the Commissioner's Report on Underserved Communities which will report those communities within California, designated by ZIP code, that the Commissioner finds to be underserved by the insurance industry"].) Therefore, the Commissioner reasonably concluded that community service statements fall within his legislative mandate under article 10. Accordingly, we conclude that the Commissioner did not exceed his statutory authority b y promulgating Regulation 2646.6, subdivision (c), and subjecting these statements to the public disclosure mandate of Insurance Code section 186 1.07,

III.

[5] Although the public inspection provision of Regulation 2646.6, subdivision (c) is a valid regulation, the scope of disclosure required by the regulation depends on the scope of disclosure required by Insurance Code section 186 1.07. According to State Farm, Insurance Code section 1861.07, by expressly barring the application of the exemption from public disclosure codified in Government Code section 6254, subdivision (cl), establishes that the rest of Government Code section 6254 applies. Specifically, State Farm contends ***352** Government Code section 6254, subdivision (k)--which exempts from disclosure "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege"--controls. Thus, trade secret information privileged under Evidence Code section 1060 should be exempt from public disclosure under Insurance Coclc section 1861.07. (See *CBS, Inc. v. Block (1986) 42* Cal.3d 646, 656, 230 Cal.Rptr. 362, 725 P.2d 470 [Gov.Code, § 6254, subd. (k) "merely incorporates other prohibitions established by law"].)

The interveners contend Insurance Code section 1861.07 establishes an absolute rule in favor of public disclosure, and its language barring the application of Government Code section 6254, subdivision (d) merely buttresses this rule. Thus, according to *1043 the interveners, neither Government Code section 6254, subdivision (k) nor Evidence Code section 1060 applies to a records request. As explained below, we agree with the interveners.

[6][7][8][9][10] "When construing a statute, we must 'ascertain the intent of the Legislature so as lo effectuate the purpose of the law.' " (*Wilcox v. Birtwhistle* (1999) 2 I Cal.4th 973, 977, 90 Cal.Rptr.2d 260, 987 P.2d 727, quoting *DuBois v. Workers Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387, 20 Cal.Rptr.2d 523, 853 P.2d 978.) "In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387, 241 Cal.Rptr. 67, 743 P.2d 1323.) At the same time, "we do not consider . . . statutory language in isolation." (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 578, 110 Cal.Rptr.2d 809, 28 P.3d 860.) Instead, we "examine the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts." (*Alford v. Superior Court (2003) 29* Cal.4th 1033, 1040, 130 Cal.Rptr.2d 672, 63 P.3d 228.) Moreover, we " 'read every statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness," ' " (*Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1065, 77 Cal.Rptr.2d 202, 959 P.2d 360, quoting *People v. Pie/cm* (I 991) 52 Cal.3d 894, 899, 276 Cal.Rptr. 91 S, 802 P.2d 420.) "These rules apply equally in construing statutes enacted through the initiative process." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272, 105 Cal.Rptr.2d 457, 19 P.3d I 196.)

We now apply these rules. Insurance Code section 1861.07 states: "A ll in formation provided to the commissioner pursuant to [article 10] shall be available for public inspection, and the provisions of Section 6254(d) of the Government Code and **79Section 1857.9 of the Insurance Code shall not apply." The first clause broadly requires public disclosure of "[*a*] *ll* information provided to the commissioner pursuant to" article IO--which, by definition, includes record A data. (Ins.Code, § 186 1.07, italics addecl.) Thus, Insurance Code section 186 1.07, on its face, subjects State Farm's record A data to public inspection.

*1044 The second clause of Insurance Code section 186 1.07--which states that two specific statutory exemptions from disclosure do not appl y--does not a l ter th is conclusion. The statutes listed in the second clause-Government Code section 6254, ***353 subdivision (d) [FN7] and Insurance Code section 1857.9 [FN8] --SPECIFically exempt from disclosure records relating t o regulatory information provided by insurers to state agencies. Because the application o f these exemptionswould nullify the broad disclosure mandate of Insurance Code section 186 1.07, the drafters of Proposition 103 presumably added the second clause to make clear that these exemptions do not apply. As **such,** this clause does not establish that the other statutory exemptions

from disclosure found in Government Code section 6254--such as section 6254, subdivision (k)--do apply. Indeed, the drafters' use of the inclusive term "all" to describe the information subject to public disclosure bolsters this construction of Insurance Code section 1861.07. (See *California Assn. of Dispensing Opticians v. Pearle Vision Center* (1983) 143 Cal.App.3d 419, 429, 191 Cal.Rptr. 762 [use of "inclusive terms such as 'in any form directly or indirectly' and 'or otherwise' " indicated that the listed items were not intencied to be exclusive], disapproved on another ground in *Leach v. City of San Marcos* (1989) 213 Cal.App.3d 648, 66 1, 20 1 Cal.Rptr. 805; *Worthington v. Unemployment Ins. Appeals Bd.* (1976) 64 Cal.App.3d 384, 388, 134 Cal.Rptr. 507 ["The general expression ['any and all'] we deem not to be limited by the description of two common positions of persons engaged * 1045 by others"].) Thus, when viewed in context, the exemptions listed in Insurance Code section 1 86 1.07 "are meant to be examples rather than an exhaustive listing of all those" statutory exemptions that are inapplicable. (*California Assn. of Dispensing Opticians*, at p. 429, 191 Cal.Rptr. 762.)

FN7. Government Code section 6254, subdivision (d) provides that: "Except as provided in Section 6254.7 and 6254.13, nothing in this chapter shall bc construed to require disclosure of records that are any of the following: [¶] ... (d) Contained in or related to any of the following: [¶] (1) Applications filed with any state agency responsible for tile regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies. [¶] (2) Examination, operating, or condition reports prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1). [¶] (3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1). [¶] (4) Information receiveci in confidence by any state agency referred to in paragraph (1)."

FN8. Insurance Code section 1857.9 states in relevant part that "(a) An insurer doing business in this state, except as provided by subdivision (f), shall report the information specified by the commissioner that is collected by a licensed advisory organization on an annual basis for each class of insurance designated in the prior calendar year by the commissioner pursuant to subdivision (b) for policies issued or issued for delivery in California. The commissioner shall waive the requirements of this subdivision for any information that has been provided to the Insurance Services Office by the insurer, if the Insurance Services Office provides the information to the commissioner on or before the date on which the insurer is required to file the statement .... [¶] ... [¶] (i) The information provided pursuant to subdivision (a) shall be confidential and not revealed by the department, except that the commissioner may publish an analysis of the data in aggregate form or in a manner which does not disclose confidential information about identified insurers or insureds."

Such a construction comports with the purpose behind Proposition 103. Proposition 103 was enacted to " 'ensure that insurance is fair, available, and affordable for all Californians. " (*Wolfe v. State Farm Fire & Casualty Ins. Co. (1996) 46* Cal.App.4th 553, 564, 53 Cal.Rptr.2d 878.) To achieve this goal, the drafters established a public hearing process for reviewing insurance rate changes. (See Ins.Code, §§ 1861.05, 1861.055, 1861.08.) In doing so, the drafters sought to "enable ***354 consumers to permanently unite to fight against insurance abuse...." (Ballot Pamp., Gen. Elec. (Nov. 8, I 988) arguments in favor of Pi-op. 103, p. G88.) By giving the public **SO access to all in format ion provided to the Commissioner pursuant lo article lo--which was enacted by Proposition 103--our construction of Insurance Code section 1861.07 is wholly consistent with Proposition 103's goal of fostering consumer participation in the rate-setting process.

Nonetheless, State Farm contends our rules of

statutory construction compel a contrary conclusion. According to State Farm, Insurance Code section 1861.07, by specifying that the exemption from disclosure found in Government Code section 62.54, subdivision (d) does not apply, establishes that the rest of Government Code section 6254--including its other exemptions from disclosure, such as the exemption codified in subdivision (k)-- does apply. Otherwise, the clause would be mere surplusage and serve no purpose, in direct contravention of our rules of statutory construction. (See, e.g., *Williams v. Superior Court (1993) 5* Cal.4th 337, 357, 19 Cal.Rptr.2d 882, 852 P.2d 377 ["An interpretation that renders statutory language a nullity is obviously to be avoided"].)

[1 1] State Farm also claims that the rule of statutory construction, *expressio unius est exclusio alterius,* establishes that the other exemptions from disclosure codified in Government Code section 6254 should apply, Under this rule, "where exceptions to a general rule are specified by statute, other exceptions are not to be presumed unless a contrary legislative intent can bc discerned." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 1 16, 6.5 Cal.Rptr.2d 580, 939 P.2d 1280.) According to State Farm, the second clause of Insurance Code section 180 1 .07 creates an exception to the general rule--that records identified in Government Code section 6254 may be exempt from disclosure--for those records identified in subdivision (cl). Thus, it contends no exception should be presumed for those records identified in any other part of Government Code section 6254, including subdivision (k). (See *Mountain Lion Foundation,* at p. 116, 65 Cal.Rptr.2d 580, 939 P.2d 1280.)

1046 These rules of statutory construction do not, however, apply here. As explained above, the language of Insurance Code section I 86I .07, when viewed in context, is not ambiguous and, by its terms, requires public disclosure of the record A data. (See *ante, 12* Cal.Rptr.3d at pp. 352-354, 88 P.3d at pp. 79-80.) The rules cited by State Farm therefore "cannot perform [their] proper role of resolving an ambiguity in statutory language or uncertainty in legislative intent because here we encounter neither ambiguity nor uncertainty." (*Williams v. Los Angeles Metropolitan Transit Authority* (1968) 68 Cal.2d 599, 603, 68 Cal.Rptr. 297, 440 P.2d 497.) "In these circumstances there is no room for the proposed rule[s] of construction," (*Ibid.*) Indeed, we have long recognized that these rules do not **control** where, as here, the statutory language "may fairly comprehend many different objects, some of which are mentioned merely by way of example, without excluding others of similar nature." (*Estate of Banerjee* (1978) 2 1 Cal.3d 527, 539, fn. 10, 147 Cal.Rptr. 157, 580 P.2d 657.)

Finally, the fact that insurers may invoke the trade secret privilege in the public hearing process established by Proposit ion 103, pursuant to Insurance Code section 1861.08, does not dictate a different***355 result. [FN9] There is nothing anomalous about precluding insurers from invoking the trade sccrct privilege after they have already submitted trade sccrct i nformation to the Commissioner pursuant to a regulation validly enacted under article 10 (see *ante,* 12 Cal.Rptr.3d at pp. 349-351, 88 P.3d at pp. 76-78), while permitting them to invoke the privilege in response to a request for in formation in a public rate hearing, Insurance Code section 186 1.07 merely requires public disclosure of "information provided to the commissioner pursuant t o " article 10. By definition, this information is **81 relevant to the Commissioner's mandate under article 10 to " 'ensure that insurance i s fair, available, and affordable for all Californians.' " (Historical and Statutory Notes, 4 2A West's Ann. Ins.Code, *supra,* foll. § I SO 1 .01, at p. 649.) Given that article 10 seeks to encourage publ ic participation in the rate-setting process (see *ante,* at p. 16), precluding insurers from withholding trade secret information already provided to the Commissioner because of its relevance under article 10 *(see ante,* at pp. 349-35 1, 88 P.3d at pp. 76-78) is certainly reasonable. [FN 10] **1047** A nd such a conclusion does not render meaningless the insurers' power to invoke the trade sccrct privilege at the public rate hearing, because insurers may still prevent disclosure of trade sccrct information not already provided to the Commissioner pursuant to article 10.

FN9. Under Insurance Code section I SO 1 .08, rate hea ings are "conducted pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of

Title 2 of the Government Code.,.." Because Government Code section 1 15 13, subdivision (c) provides that "[t]he rules of privilege shall be in effect to the extent they are otherwise required by statute to bc recognized at the hearing," the trade secret privilege codified in Evidence Code section 1060 applies in these hearings.

FN 10. In reaching this conclusion, we decide only that information already provided to the Commissioner pursuant to a validly enacted regulation under article 10 is not protected by the trade secret privilege.

Accordingly, we conclude that Insurance Code section 1861.07 does not incorporate the exemption to disclosure found in Government Code section 6254, subdivision (k), and that trade secret information is therefore not exempt from disclosure. Because we find that State Farm may not invoke the trade secret privilege to prevent disclosure of its record A data under Insurance Code section 186 I .07 , we decline to address the other issues raised by State Farm. [FN11]

FN1 1. Specifically, we do not determine whether (1) a trade secret owner has standing to assert the trade secret privilege and prevent the Commissioner from disclosing its trade secret information pursuant to a records request under Insurance Code section 1861.07; (2) a trade secret owner has waived the trade secret privilege by submitting its trade secrets in its community service statements; and (3) the "injustice" exception to the trade secret privilege permits disclosure despite the privilege under the facts of this case.

DISPOSITION

We affirm the judgment of the Court of Appeal.

WE CONCUR: GEORGE, C.J., KENNARD, BAXTER, WERDECAR, CHIN, and MORENO, JJ.

32 Cal.4th 1029, 88 P.3d 71, 12 Cal.Rptr.3d 343, 4 Cal, Daily Op. Serv. 3571, 2004 Daily Journal D.A.R. 4984

Briefs and Other Related Documents (Back to top)

- 2004 WL 524838 (Appellate Brief) State Farm's Supplemental Brief (Cal. Rule of Court 29.1(d)) (Jan. 30, 2004)Original Image of this Document (PDF)
- 2002 WL 1926034 (Appellate Brief) STATE FARM'S REPLY BRIEF ON THE MERITS TO INTERVENORS SOUTI I ERN CHRISTIAN LEADERSHIP CONFERENCE AND CONSUMERS UNION OF U.S. (May. 22, 2002)
- 2002 WL 1926054 (Appellate Brief) STATE FARM'S REPLY TO RESPONDENTS CALIFORNIA INSURANCE COMMISSIONER AND CALIFORNIA DEPARTMENT OF INSURANCE (May. 2 1, 2002)
- 2002 WL 1926 I I8 (Appellate Brief) BRIEF OF RESPONDENTS SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND CONSUMERS UNION (May. 02, 2002)
- 2002 WL 1926 I 19 (Appellate Brief) BRIEF OF RESPONDENT:; CALIFORNIA INSURANCE COMMISSIONER AND CALIFORNIA DEPARTMENT OF INSURANCE (May. 01, 2002)
- 2002 WL 9850 17 (Appellate Brief) PETITIONERS' OPENING BRIEF ON THE MERITS (Apr. "3, 2002)

END OF DOCUMENT

Commission on State Mandates

Original List Date: 9/3/1 998
Last Updated: 6/7/2004
List Print Date: 07/20/2004
Claim Number: 98-TC-04
Issue: Acquisition of Argicultural Land for a School Site

Mailing Information: Draft Staff Analysis

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