August 25, 1988

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL
APPLICABILITY OF LAND USE REGULATIONS TO CITY, AND OTHER PUBLIC AGENCIES

At the Transportation and Land Use Committee meeting on August 8, 1988, the committee discussed a proposed sign at San Diego Jack Murphy Stadium. The proposed sign was described as approximately 2250 square feet in size and it was noted that the City's sign ordinance would only allow a sign of 250 square feet. It was also noted, however, that the stadium is considered "exempt from the requirements of the ordinance."

After some discussion, the matter was moved to the City Council without recommendation and this office was requested to report on the issue of why the stadium is exempt from the sign ordinance and also if and why city facilities, county facilities and the facilities of state and federal agencies are likewise exempt from the City's land use regulations.

City Facilities

This office has rendered several opinions on the subject of why the City is not subject to its own land use regulations in connection with the construction and operation of City facilities. Attached as Attachment 1 is a representative opinion dated March 14, 1950, which explains why a fire department facility was not subject to the City's zoning regulations. The key case of Kubach Co. v. McGuire, 199 Cal. 215, is cited in the 1950 opinion. A review of subsequent case law indicates that the ruling in the Kubach case continues to be the law in California.

The Kubach case held that even though the Los Angles City Charter prohibited buildings in excess of 150 feet in a portion of the city, such fact did not restrict or prohibit the city from erecting a 400-foot-high city hall within the restricted area.

The court stated:

> 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.

Therefore, in the specific case of the San Diego Jack Murphy

Stadium, it appears clear that, since the facility is leased and operated as a public facility by the City, the sign ordinance limiting signs to 250 square feet is not applicable to signs at the stadium unless the City ordinance establishing the limitation expressly, or by necessary implication, indicates that it was intended to include City facilities.

The City's sign regulations are contained in section 95.0100 et seq. and section 101.1100 et seq. of the City's Municipal Code. A review of those regulations indicates that there is no provision specifying that the City shall be subject to the regulations with regard to municipally owned or operated facilities.

Other Public Agencies

With regard to public agencies other than the City, prior to 1956 it was generally felt that cities did have some ability to control all development within a city's limits including development by other public agencies. However, in 1956 the California Supreme Court in Hall v. City of Taft, 47 Cal.2d 177, 302 P.2d 574, determined that a city's building construction regulations were not applicable to school construction since school districts are agencies of the state and that the activity of school construction had been preempted by the provisions of the State Education Code. In 1958, in the case of Town of Atherton v. Superior Court, 159 Cal.App.2d 417, the California Appellate Court went even further and held that municipal zoning regulations were not applicable to public schools on the basis that the state legislature had precluded the ability to zone against any public building or structure. The court cited Government Code section 65402 which provides only advisory status to a city's planning commission with regard to proposed public improvements by other public agencies.

As a result of the above two court decisions the state legislature, in 1959, enacted section 53090 et seq. of the Government Code entitled "Regulation of Local Agencies by Counties and Cities." Section 53091 provides the basic rule 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." "Local agency" is defined in section 53090 to include locally operating agencies of the state. Specifically excluded, however, are the state and cities and counties. In addition, the subsequent sections of the statute provide exceptions, as discussed below, by which school districts may avoid the requirement of complying with local regulations by a two-thirds vote of a school district board of directors and other local agencies may avoid such regulations by

four-fifths votes of their members.

County Facilities

As stated above, the general rule requiring compliance with land use regulations is not applicable to the county of San Diego in its construction of county public facilities within the San Diego city limits. See Atkins v. Sonoma County, 60 Cal.Rptr. 499, 430 P.2d 57, 67 Cal.2d 185 (1967), and also Los Angeles County v. City of Los Angeles, 28 Cal.Rptr. 32, 212 Cal.App.2d 160 (1963). The county is, on the other hand, subject to the provisions of section 65402(b) of the State Government Code. That section provides in part that:

> A county shall not acquire real property for public purposes . . ., nor dispose of any real property, nor construct or authorize a public building or structure . . . within the corporate limits of a city, if such city . . . has adopted a general plan . . . and such general plan . . . is applicable thereto . . . until the location, purpose and extent of such acquisition, disposition, or such public building or structure have been submitted to and reported upon by the city planning commission, as to conformity with said adopted general plan . . ..

Therefore, while the City building and zoning ordinances are not applicable to county facilities, such county facilities are subject to review and comment by the City's Planning Commission with regard to conformity to the City's General Plan. However, the county is not bound by any determination or recommendation by the City's Planning Commission.

School Facilities

With regard to public school facilities, section 53091 states:

> 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.

Also with regard to school facilities, section 53094 specifies in part that "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 classroom use of

property by such school district," but that section precludes such action by a school district in connection with the proposed construction of nonclassroom facilities. The only remedy given to the city for such a determination that a zoning ordinance is "inapplicable" is to obtain a court determination that such action "was arbitrary and capricious."

In interpreting section 53090 et seq. the courts have held that the exemptions applicable to school facilities did not automatically exempt a school district from a city-required use permit in order to construct a school in a residential zone, but that the school district did not act arbitrarily and capriciously in rendering the use permit requirement inapplicable after having evaluated alternative school sites. City of Santa Clara v. Santa Clara Unified School District, 99 Cal.Rptr. 212, 22 Cal.App.3d 152 (1971).

In addition, section 53097 provides that, for the period ending January 1, 1991, with regard to the construction of school classroom facilities, a school district must comply with city ordinances relating to drainage improvements, road improvements and grading.

Water or Electrical Facilities

Other exemptions to the general provisions of section 53091 include a provision that "building ordinances of a county or city shall not apply to the location or construction of facilities for the production, generation, storage, or transmission of water or electrical energy by a local agency."

Redevelopment Agency Facilities

With regard to redevelopment agencies, an initiative ordinance inconsistent with a prior established redevelopment plan was held to be controlled by the redevelopment plan in cases of direct conflict. In other words, a redevelopment plan takes precedence over conflicting provisions of later initiative ordinances. Redevelopment Agency of the City of Berkeley v. City of Berkeley, 143 Cal.Rptr. 633, 80 Cal.App.3d 158 (1978). Also see Kehoe v. City of Berkeley, 135 Cal.Rptr. 700, 67 Cal.App.3d 666 (1977), which held that a redevelopment plan took precedence over a later enacted neighborhood preservation ordinance.

The cases relating to redevelopment agencies have indicated that such agencies are subject to municipal building and zoning regulations but that regulations relating to nonissuance of demolition permits, local building codes or zoning ordinances which conflict with state statutes governing community redevelopment agencies are not "applicable" ordinances for the purposes of section 53091.

Statewide Agency Facilities

In Regents of University of California v. City of Santa Monica, 143 Cal.Rptr. 276, 77 Cal.App.3d 130 (1978), the court held that a statewide agency such as the University of California is not a "local agency" and is, therefore, exempt from municipal building ordinances.

Housing Authority Facilities

As to housing authorities, there are no cases indicating that housing authorities are not subject to the provisions of section 53091 requiring local agencies to comply with all applicable city building and zoning ordinances. In addition, section 34326 of the State Health and Safety Code, specifically relating to housing authorities, states that housing authorities are "subject to the planning, zoning, sanitary, and building laws, ordinances, and regulations applicable to the locality in which the housing project is situated."

SEDC and CCDC

At the Transportation and Land Use Committee meeting questions were also raised by committee members as to whether local organizations such as Southeast Economic Development Corporation and Centre City Development Corporation are subject to the City's zoning and building regulations. Since both SEDC and CCDC are California nonprofit corporations, there is no

specific provision in the law which exempts SEDC, CCDC or other locally operated nonprofit corporations from compliance with applicable land use regulations except as they may recommend land uses as an agent of the Redevelopment Agency.

Other Local Agency Facilities

In addition to the specific exemptions and exceptions described above, section 53096 of the Government Code specifies in part:

> Notwithstanding any other provisions of this article, the governing board of a local agency, by vote of four-fifths of its members, may render a city or county zoning ordinance inapplicable to a proposed use of property if the local agency at a noticed public hearing determines by resolution that there is no feasible alternative to its proposal, . . .
>
> If such governing board has taken such action the city or county may commence an action in the superior court of the county whose zoning ordinance is involved or in which is situated the city whose zoning ordinance is involved, seeking a review of such action of the governing board to determine whether it

> was supported by substantial evidence. . . . If the court determines that such action was not supported by substantial evidence, 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 local agency.
>
> "Feasible" as used in this section means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.

Therefore, in addition to the other exceptions to the general rule that locally operating agencies of the state are subject to municipal land use regulations, it appears that such regulations may generally be avoided where they would render a proposed project infeasible.

Federal Agency Facilities

The matter of whether federal governmental agency facilities are subject to local zoning regulations is not completely clear. The courts have held that the constitutional exercise of federal power is not subject to control by state and local zoning regulations but "where no federal efforts are impeded or strained," federal authorities should seek so far as possible to comply with zoning regulations and restrictions. Agua Caliente Bank of Mission Indians' Tribal Council v. Palm Springs, 347 F.Supp. 42. In that case, the court held that Indian lands held in trust are subject to municipal zoning ordinances. In the case of Dupuis v. Submarine Credit Union, 170 Conn. 344, 365 App.2d 1093, the court held that federally owned property is subject to the jurisdiction of the state and its subdivisions, including building code and zoning ordinances, which are not inconsistent with federal purposes or contrary to federal laws.

In cases of national emergency, the courts have always upheld federal projects as being exempt from local zoning regulations. San Diego v. Van Winkle, 69 Cal.App.2d 237, 158 P.2d 774.

Therefore, the general rule with regard to federal projects appears to be that federal agencies must comply with local zoning regulations so long as such regulations do not unreasonably or substantially interfere with the viability of the federal project or contradict any federal purpose. An exhaustive discussion of potential state and municipal controls with regard to federal projects is contained in an article entitled "Regulating and Servicing Governmentally-owned and/or Used Lands," authored by Frank Gillio, then City Attorney of the City of Sunnyvale, for

the 1967 annual conference of the League of California Cities. See League of California Cities Conference Papers, May-Oct. 1967.

Summary

In summary, cities have been determined by the courts to not be subject to their own land use regulations. Counties have been held by the courts not to be subject to the land use regulations of cities, at least insofar as the counties are constructing and operating governmental, as opposed to proprietary, projects.

The courts have held that state agencies are not, in the absence of a state statutory mandate, subject to local building and zoning ordinances. The state legislature has, however, through the enactment of section 53090 et seq. of the State Government Code declared that certain state agencies are, in fact, subject to local building and zoning ordinances. Housing authorities are specifically subject to local ordinances.

Redevelopment agencies are subject to most local building and zoning ordinances to the extent such ordinances are not in direct conflict with prior approved redevelopment plans.

Public school districts are subject to local building and zoning ordinances if the local zoning ordinance makes provision for the location of public schools and if a city has adopted a master plan including provisions for schools. However, a school district may, by a two-thirds vote of its members, render a city zoning ordinance inapplicable to proposed classroom construction unless such action would be both "arbitrary and capricious." Nonclassroom school facilities and drainage, road and grading improvements for classroom facilities, are subject to city building and zoning ordinances if the city has a master plan and the city's zoning ordinances make provision for the location of public schools.

Building ordinances (as opposed to zoning ordinances) of a city are provided by statute not to apply to the location of construction of facilities for the production, generation, storage or transmission of water or electrical energy by any state agency.

In addition, in those cases where no state statutory provision specifies mandatory compliance by specific agencies, local agencies may avoid municipal building and zoning ordinances by four-fifths votes supported by substantial evidence that compliance with such regulations would render a project infeasible.

As to federal projects, the general rule is that federal agencies should comply with state and local zoning regulations except to the extent such regulations would significantly impede or restrain a federal project or contradict any federal purpose.

Respectfully submitted,
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Attachment
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