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Can Barbra Streisand Confer Governmental Immunities to the Father-of-the-Bride?
and Other Modern Applications of the Doctrine of Governmental Immunities

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Can Barbra Streisand Confer Governmental Immunities to the Father-of-the-Bride?
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The doctrine of "governmental immunity" limits local control over land use regulation by exempting property owned or leased by other governmental entities; the doctrine should be narrowly applied in order to promote orderly planning and maximize the ability of a local government to control the character of its community. The land use projects of other governmental entities generally are exempt from the local government's building and zoning laws – but not always. After a quick survey of the law in this area, this paper addresses three recent examples which tested the limits of "governmental immunities:" (1) the first is the *Streisand Center* case in which a state agency argued that anything it does to raise funds is exempt from local zoning as long as the proceeds are used for a governmental purpose; (2)the second is the *Topsail* case in which the court was asked not to include water "treatment" in a statutory exemption for "the location or construction of facilities for the production, generation, storage, or transmission of water;" and (3) the third is the *Saratoga* case which asks whether a 5000-seat, spectator-oriented, athletic stadium is exempt from local regulation as a "classroom facility."

Legal Background

1. When the Government is Acting Governmentally, It Enjoys Sovereign

Immunity

When the state is conducting a sovereign activity, it is immune from local building and zoning regulations, unless the state consents to such regulation. In *City of Orange v. Valenti,* 37 Cal.App.3d 240, 244 (1994), the court held that the city's parking requirements for "public uses" was inapplicable to the state's unemployment insurance office located in a privately-owned building in which the state leased space. "When the state engages in such sovereign activities as the construction and maintenance of its buildings (and leasing of the building is no different), it is not subject to local regulations unless the Constitution says it is or the Legislature has consented to such regulations. (*Hall* v. *City of Taft, supra*, 47 Cal.2d 177, 183; *County of Los Angeles* v. *City of Los Angeles, supra*, 212 Cal.App.2d 160, 165)." The **University of California** enjoys governmental immunity where it is constructing improvements for educational purposes. *Regents of the University of California v. City of Santa Monica*, 77 Cal.App.3d 130 (1978)[1] (holding that in view of the virtually plenary powers of the regents in the regulation of affairs relating to the university and the use of property owned or leased by it for educational purposes, it was not subject to municipal regulation and that the regents in constructing improvements solely for educational purposes were exempt from local building codes and zoning

[1]Note that Santa Monica is a charter city and the court found that fact irrelevant with respect to the applicability of sovereign immunity.

regulations, and were also specifically exempt from payment of local permit and inspection fees by statute, Gov. Code §§ 6103.6 and 6103.7.) The **Southern California Rapid Transit District** also enjoys sovereign immunity (because it is an entity of the state) and the court has held that local general plans are inapplicable to its projects. *Rapid Transit Advocates v. Southern California Rapid Transit District,* 185 Cal.App.3d 996, 1002 (1986).

2. Notwithstanding the Occasional Clown, the Government Is Not A Three-Ring Circus

The state is immune for its own activities but it cannot automatically transfer its immunity from local ordinances to all who use state-owned land. In *Board of Trustees v. City of Los Angeles*, 49 Cal.App.3d 45 (1975), the question was whether a circus leasing the Devonshire Downs property in Northridge, owned by the California State University, was subject to Los Angeles' zoning regulation. The court found that the circus had no relation to the "governmental function of the university" and held that the university's immunity did not pass to a lessee using the property for private commercial purposes. *Id* at 50. In other words, when the circus rents state-owned property, conducting a circus does not become a "governmental function" insulated from the reach of local zoning and building laws.

In *Regents*, the Supreme Court expressed these canons of statutory

construction with respect to the activities of the University and the purpose of the governmental immunities doctrine:

> ". . . [I]n the absence of express words to the contrary, neither the state nor its subdivisions are included within the general words of a statute. [Citations.] But this rule excludes governmental agencies from the operation of general statutory provisions only if their inclusion would result in an infringement upon sovereign governmental powers. "Where . . . no impairment of sovereign powers would result, the reason underlying this rule of construction ceases to exist and the Legislature may properly be held to have intended that the statute apply to governmental bodies even though it used general statutory language only." (*Hoyt v. Board of Civil Service Commrs.* (1942) 21 Cal.2d 399, 402 . . . .)' (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 276-277.)"

Regents, supra, at 536. *See* Ops. Cal. Atty. Gen. (1992) (concluding that University of California is not bound by the provisions of the Subdivision Map Act when it constructs for-sale on-campus homes as part of a program to provide faculty housing); *Compare with* 72 Ops.Cal.Atty.Gen 119 (1989) (determining that a University-operated pharmacy was subject to the licensing, inspection, and disciplinary provisions of the Pharmacy Law as administered by the California State Board of Pharmacy. The Pharmacy Law was found to specifically apply to state governmental agencies and as a health regulation, "is unquestionably at the core of the State's police power." (*Kelly v. Johnson* (1976) 425 U.S. 238, 247.)

Ten years after the *Regents* case, the Attorney General was asked whether the immunity from local regulation enjoyed by the state in its use of the State Fairgrounds in Sacramento (commonly known as the Cal Expo site) was

transferred to a private developer leasing the land. The Attorney General opined that the State's immunity from local zoning regulations cannot be transferred if the sole government purpose of the lease is to raise revenue for the agency:

> If the use of the property furthered the purposes of the Board of Directors to conduct a state fair (other than merely to raise revenue), the private development would be exempt from local building and zoning regulations. If the private development was solely for the private purposes of the developer, local building and zoning ordinances would apply.

56 Ops. Cal. Atty. Gen. 210, 121 (1985).

3. The State May Consent to Local Regulation – And in Certain Instances Has

Governmental immunity may be waived by statute. *Hall v. City of Taft*, 47 Cal.2d 177, 183 (1956); *Bame v. City of Del Mar,* 86 Cal.App.4th 1346, 1358 (2001). Government Code Sections 53090-53095 provide the broadest statutory consent to local regulations. Section 53091(a) provides that "local agencies"[2] are subject to local zoning and building laws.

> "Government Code Section 53091 evinces a legislative intent to vest in cities and counties control over zoning and building restrictions, thereby strengthening local planning authority."

[2]Government Code Section 53090 reads as follows: As used in this article: (a) ""Local agency"" means an agency of the state for the local performance of governmental or proprietary function within limited boundaries. ""Local agency"" does not include the state, a city, a county, a rapid transit district whose board of directors is appointed by public bodies or officers or elected from election districts within the area comprising the district, or a district organized pursuant to Part 3 (commencing with Section 27000) of Division 16 of the Streets and Highways Code.

City of Lafayette v. East Bay Municipal Utility Dist., 16 Cal.App.4th 1005, 1013 (1993). This statute contains several specific exemptions; however, these statutory exemptions are narrowly interpreted by courts. *Id.* at 1017.

> "These statutes reflect a determination that in general the interests served and benefits gained by local regulation of state agencies outweigh any interference such regulation may have on the functions performed by those agencies."

City of Santa Cruz v. Santa Cruz City School Bd. of Educ., 210 Cal.App.3d 1, 6 (1989) (holding that District could exempt itself from local zoning regulations to replace lights on school's athletic field because the field served an important educational function at the high school).[3] *See also City of Santa Clara v. Santa Clara Unified School District*, 22 Cal.App.3d 152, 158, fn 3 (holding that utility district could not exempt itself from zoning regulations with respect to construction of new service center and concluding that Section 53090 was intended to subject state projects to thorough review and zoning requirements imposed by local government).

Subsections (b) and (c) of Section 53091 create special exceptions for school districts and water/electrical energy utilities, aspects of which are discussed below in the *Topsail* and *Saratoga* examples. First, however, the

[3]In an unpublished decision, one justice of the Sixth District indicated in a concurring opinion that he believed that *Santa Cruz* case was wrongly decided and that the lights were "nonclassroom facilities." *See City of Saratoga v. West Valley-Mission Community College Dist*. Slip Op. Cal.App. 6 Dist.,2002. May 24, 2002, unpublished decision (petition for review pending, Cal. S. Ct. No. S108105).

Streisand Center case raised the issue of whether an agency was a "local agency" and whether governmental immunity extends to lessees of state property, when the state is leasing the property as part of a plan to generate revenue to support the state agency's work.

Streisand Center case – Malibu's Own Graceland

Barbra Streisand's beautiful (former) home is located in the Ramirez Canyon neighborhood in Malibu California. It is a luxurious 22-acre estate. The home is located at the end of a narrow road that winds up the Canyon. Ramirez Creek meanders its way across the property. As is typical of a canyon in Malibu, it is an area plagued by wildfires and floods. There are about 50 homes in the Canyon whose sole access in and out is Ramirez Canyon Road. The entire area has been designated an Environmentally Sensitive Habitat Area. It is zoned Rural Residential and commercial uses are prohibited.

In 1993, Streisand gave the property to the Santa Monica Mountains Conservancy. The Conservancy is a state agency formed by special legislation (Public Resources Code § 33000, et seq.) to acquire and maintain open space resources in the Santa Monica Mountains. The Conservancy accepted the gift and the State made it clear that no money from the State general fund would be used toward the upkeep of the property. So, the Conservancy decided to go into

the hospitality business and turned the estate into a wedding hall (rumor is that was complete with the opportunity for the newlyweds to spend that first night in you-know-who's former bedroom). From the perspective of the local officials, the effort was shameless and from anyone's perspective it was a great financial success. Event after event brought car after car up that hill. Catering trucks and live band equipment became a regular part of a weekend's activity up in Ramirez Canyon. Once a pattern emerged, the problem was diagnosed as unpermitted commercial activity in a residential zone.

The City Attorney exchanged letters with the Attorney General (see attached) in which the State evoked the doctrine of sovereign immunity to justify its money-making venture. The state's position was this: There was no state funding for the Center,[4] so in order to finance the cost of operating the Santa Monica Mountains Conservancy's offices, which had been newly relocated there, and to keep up the vast (and formerly private) estate, it was necessary to lease the site for private events. This was part of the Conservancy's "strategic plan" to raise funds to support the property because the Conservancy's executive director had determined that the property must be "self-supporting." The Conservancy hired its own in-house wedding planner (perhaps the only wedding planner in the

[4]Originally the property was donated to be the "Streisand Center for Conservancy Studies" and it was to be used as a "retreat and research center for advanced academic and applied studies directed toward solution of the most pressing conservation and natural eco system management problems." Soon after acquisition, however, the Conservancy moved its offices into the house and the resident scholar quit. After that, aside from offices, the property was just

State's employ), advertised widely, and started raking in revenue. The City's zoning ordinance allowed 6 such events per year if a temporary use permit were first obtained. So, in the Attorney General's view, if the father-of-the-bride rents a wedding hall run by the state, he is cloaked in governmental immunity and therefore unaccountable to local zoning laws. If he had held the wedding in the house next door, he would be required to obtain a permit from the City, prepare a valet parking plan and satisfy noise restrictions. The Conservancy rejected all efforts to resolve the dispute and claimed sovereign immunity. The Conservancy claimed that its regular (and pricey) tours (which include an elegant tea) provide important public access to recreational opportunities. (See attached *LA Times* article). Malibu had its own little Graceland.

The City sought declaratory relief, injunction and abatement of a nuisance against the Conservancy for illegally operating a commercial venture in a residential zone and for failing to obtain permits for temporary events. The trial court granted the Conservancy's motion for summary judgment, holding that the conservancy is not a "local agency" for the purpose of the state statute consenting to local zoning laws, and exempting the Conservancy from Malibu's zoning ordinance by virtue of its sovereign immunity.

The Second District Court of Appeal both reversed and avoided all the

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used only for weddings, bar mitzvahs and Tea Tours. The "think tank" never did not materialized.

hard issues. The appellate court reiterated an earlier court's characterization of the law regarding which local agencies are subject to which local regulations as "a tangle of prohibitions and exceptions, lacking in a single articulable principle." *City of Malibu v. Santa Monica Mountains Conservancy,* 98Cal.App.4th 1379 (2002) (*citing City of Santa Cruz v. Santa Cruz School Bd. of Educ., supra,* 210 Cal.App.3d at 7). Then the court declared that it need not determine whether the Conservancy was a "local agency" within the meaning of Government Code Section 53090 because the statute creating the Conservancy contained its own consent to local regulation at Public Resources Code Section 33008. There the court reprints *in italics no less* in its opinion the magic words:

> *Nothing in this division shall supersede or limit a local government's exercise of the police power derived from any other provision of existing law or any law hereafter enacted.*

City of Malibu, supra, at 1384. With that, the court systematically rejects all the Conservancy's protests that an interpretation of that statute which preserves local zoning authority will inevitably thwart the mission of the Conservancy.[5] The Conservancy filed what the court termed a "fervid" petition for rehearing (*City of Malibu, supra,* at 1386), which was denied. The California Supreme Court

[5]By which mission I believe the Conservancy meant preserving open space in the Santa Monica Mountains rather than holding weddings at Streisand's former residence. Local zoning authority would thwart the latter (unless the Conservancy were prepared to limit this activity to those permitting under Malibu's temporary use ordinance) but obviously not the former, as the Conservancy is always free to buy land and do less with it than what may be permitted under the local zoning ordinance.

denied the Conservancy's petition for review on August 14, 2002 and the case is now final.[6] The *City of Malibu* case wholeheartedly endorses the importance of the role of local government in planning and demonstrates a meaningful effort to preserve local control in the face of a state agency's eagerness for autonomy. Unfortunately, while the case was intended to address issues of sovereign immunity and application of the statute consenting to local zoning for "local agencies" of the state, the decision ultimately rests on the interpretation of a statute applicable only to the Santa Monica Mountains Conservancy.

The *Topsail* Case – You Can Lead A Horse to Water But You Don't Have To Treat It On the Spot

Soquel Creek Water District (SCWD) purchased a lot in a four-parcel, single-family residential subdivision where it sought to construct a well along with a treatment plant to remove contaminants from the extracted ground water. When the County of Santa Cruz refused to apply its building and zoning ordinances to the proposed project, the homeowners association representing owners of the other three parcels in the subdivision filed suit. SCWD claimed exemption from local building and zoning ordinances under Government Code § 53091. That section reads, in pertinent part:

> ...Building ordinances of a county or city shall not apply to the location or construction of facilities for the production, generation,

[6]The City of Malibu was also represented by Dick Terzian, Bannan, Green, Frank, & Terzian LLP

> storage, or transmission of water, wastewater...
>
> ...Zoning 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....

At the time of this writing, the case is pending before the Supreme Court and briefing is underway as this paper is written. The Court of Appeal decision is reported at *Topsail Court Homeowners Ass'n v. County of Santa Cruz*, 95 Cal. App.4th 835 (2002) and the California Supreme Court's decision is not likely until 2003.

Noting that the Legislature failed to exempt "treatment" facilities in section 53091, the Sixth District Court of Appeal applied standard rules of statutory construction and concluded (correctly, I think) that it was the court's duty court to construe strictly the statutory exceptions. Because only a liberal interpretation of the language would have permitted the court to conclude that the section 53091 exemptions included water treatment facilities, the court rejected the water district's position.

The potential implications of a reversal in this case are enormous. If the Supreme Court accepts the SCWD's position, there would be no mechanism to prevent water districts from placing large facilities wherever they choose. While SCWD relies heavily on the argument that co-location of wells and treatment

facilities is an economic necessity, a blanket exemption would not only afford districts the opportunity to co-locate such facilities, but would also allow for the construction of large facilities in any area, regardless of economic, aesthetic, land-use compatibility and the other considerations which underlie the local planning process.

The attached amicus brief argues: (1) that the statutory construction urged by SCWD would require an expansion of the language beyond what the Legislature logically intended; (2) that the construction of section 53091 urged by SCWD would lead to absurd results and run contrary to established principles of statutory construction; (3) that the Legislature has not indicated that water treatment facilities must be placed in the most cost-efficient location at the expense of the local government's authority to formulate and implement its own land use policies; (4) that SCWD's economic efficiency argument is illusory; and (5) that the legislative history demonstrates the Legislature's intent to reinforce local zoning control through the adoption of section 53091.

Once again the importance of the *Topsail* decision is the reaffirmation of the local government's role in local planning and the reluctance of the courts to read broadly the exceptions to the statute consenting to local regulation for the state's "local agencies."

Saratoga and the Quest for Class Size Reduction

West Valley College ("WVC") is located on a 143-acre parcel owned by West Valley-Mission Community College District. WVC's campus lies entirely within the City of Saratoga. For over thirty years, the District has desired to construct an athletic stadium on the WVC campus and the City has steadfastly opposed such a stadium.

WVC is located in a neighborhood that has been zoned for residential housing since before the establishment of the college. In 1966, the District applied to the City for a conditional use permit to construct and operate a college within the residential neighborhood. The application included plans for an athletic stadium for intercollegiate events. The application led to considerable controversy regarding the compatibility of the college campus, and in particular a stadium, with the surrounding residential neighborhood. Ultimately, the City allowed the college campus; however, it specifically precluded the proposed stadium.

The City recognized the possibility that the District could, under then-existing provisions of Government Code section 53094, exempt itself from local zoning ordinances and thus exempt itself from the City's prohibition of an athletic stadium at WVC. Saratoga residents recognized this possibility as well and a local citizens group (West Valley Taxpayers and Environmental Association of Saratoga) sponsored legislation to prevent permanently the District from building an athletic stadium at WVC, by prohibiting the District from exempting itself from the City's zoning ordinances with respect to the athletic stadium. The City joined Saratoga residents in supporting this legislation to limit school districts' authority to override local zoning ordinances for the construction of nonclassroom facilities, including athletic stadiums. The legislation amended section 53094 to prohibit school districts from exempting any nonclassroom facilities from local zoning regulation.

Thereafter, the District determined that its 5,000-seat stadium was not a "nonclassroom facility" and it adopted a resolution exempting itself from local zoning regulations. The resolution read in part as follows:

> WHEREAS, the District desires to construct at the College an outdoor stadium facility (hereinafter "Facility") in which to conduct intramural or intercollegiate sporting events, other intercollegiate or intramural events, athletic or otherwise, and other

events. The Facility shall be designed to seat no more than 5,000 people (although the final design to be approved by the District may allow for seating of less than 5,000 people) and include, among other amenities, some or all of the following permanent or temporary features: seating, amplified public address and speaker systems, scoreboards, outdoor lighting (including lights, poles and standards), ticket booths, restrooms, concession stands, and other spectator-oriented accessory structures or other such features;

. . . .

NOW, THEREFORE, BE IT RESOLVED, that pursuant to the authority of the provisions of California Government Code § 53094 and any applicable California decisional law, including but not limited to City of Santa Cruz v. Santa Cruz City Schools Board of Education (1989) 210 Cal.App.3d 1, the Board of Trustees of the District has in the past and now hereby reaffirms its intention to render inapplicable to the development and use of any of the facilities of the College (except for "nonclassroom facilities") used for purposes of student instruction and related and incidental uses, including but not limited to its football field, its track and field area, its related sport facilities,

> and any and all improvements to and surrounding its football field, its track and field area and its related sports facilities used for such purposes, to the greatest extent permitted by such authority, and, specifically inapplicable to the development and use of the Facility, with reference to all existing municipal or county zoning ordinances or codes and any permits or petitions arising therefrom made by the City of Saratoga or the County of Santa Clara . . . .

In an unpublished decision, the Sixth District held that the legislative history of former section 53094 unambiguously reflects legislative intent to preclude a school district from exempting an athletic stadium from a zoning ordinance. Under the statute, "nonclassroom facilities" are subject to local zoning regulations without exception. Although *City of Santa Cruz v. Santa Cruz City School Bd. of Education*, 210 Cal.App.3d 1 (1989), held that a school district could exempt itself from zoning regulation for the purpose of replacing fixtures on the athletic field because the field was a "classroom facility," the Sixth District engaged in a detailed review of the legislative history and concluded that the phrase "classroom facilities" was specifically intended to exclude athletic fields.

The three-judge panel produced three concurring opinions. The main opinion concluded that the legislative history of former section 53094 clearly reflects that the 1976 amendment of section 53094 was intended to preclude the District from exempting its proposed “athletic stadium” from Saratoga’s zoning ordinance. In fact, Saratoga sponsored the legislation specifically to accomplish this purpose. Since it is obvious that the Legislature intended its use of the term “nonclassroom” facilities to include athletic stadiums, and there is no support for any contrary construction of the statutory language, the District's proposed athletic stadium is a "nonclassroom facility" within the meaning of former section 53094 and therefore may not be exempted from the City's zoning ordinance. In a concurring opinion, another justice wrote that he found that the West Valley College stadium to be a nonclassroom facility, but concluded that the memorial field at Santa Cruz High (the subject of the *City of Santa Cruz* field lighting case) was a classroom facility used for educational purposes. A third justice flatly stated that he would overrule *City of Santa Cruz* as wrongly decided. This multiplicity of analysis demonstrates the difficulty with the statute. Three judges managed to agree on the application of the statute to the West Valley College stadium but, 12 years after it was decided, could not agree on its application of the statute to the memorial field at Santa Cruz High.

A petition for review in currently pending in the Supreme Court.[7]

Summary and conclusion

These cases raised several examples of state agencies looking to expand their ability to avoid local regulation. Why can't the state use its immunity to raise funds to continue its good works? Streisand gave the house to the state and the state rents it for a wedding event, immune from local zoning, so what? If it is too expensive for the water district to comply with the zoning laws and it could use its property for some water-related uses, why not all? And, come on, everyone knows many lessons are learned in the school football stadium. It's just a big classroom, with a scoreboard and a hot dog concession stand.

In each of these cases the court has concluded that the state had waived governmental immunity with respect to the local agencies. In all three cases, the court engaged in focused statutory construction to reach its conclusion. The courts seem respectful of local zoning and unwilling to run roughshod over local government. However, the state agencies are generally insistent on their positions and persistent in their efforts to avoid local regulation. Stay alert.

[7]The City of Saratoga is represented by Tamara Galanter of Shute, Mihaly & Weinberger, who also assisted in the

Attachments:
Exchange of letters between AG and City Attorney re doctrine of governmental immunity
Sunday July 14, 2002, *LA Times* article
Topsail brief

My thanks to Michael Colantuono who edited this paper.

ADDENDUM TO PAPER ON INTERGOVERNMENTAL IMMUNITIES

Since completion of the main paper, the Legislature enacted and the Governor signed into law SB 1711 (Costa), superseding and, in effect, reversing the decision of the Court of Appeal in the *Topsail* case discussed commencing at page 11 of the paper. The new law amends Government Code Section 53091, in part, by adding the word "treatment" so that subsections (d) and (e) now read as follows:

> (d) Building ordinances of a county or city shall not apply to the location or construction of facilities for the production, generation, storage, **treatment**, or transmission of water, wastewater, or electrical energy by a local agency.
>
> (e) Zoning ordinances of a county or city shall not apply to the location or construction of facilities for the production, generation, storage, **treatment**, or transmission of water, or for the production or generation of electrical energy, facilities that are subject to Section 12808.5 of the Public Utilities Code, or electrical substations in an electrical transmission system that receives electricity at less than 100,000 volts. Zoning ordinances of a county or city shall apply to the location or construction of facilities for the storage or transmission of electrical energy by a local agency, if the zoning ordinances make provision for those facilities.

(Emphasis added).

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editing of this paper.

For all intents and purposes, the legislation moots the statutory construction dispute at issue in *Topsail* and authorizes construction of water treatment facilities without regard to local zoning. Nevertheless, as the paper suggests, the courts are reluctant to read broadly the exceptions to the statute consenting to local regulation for the states "local agencies." The Legislature, on the other hand, apparently is prepared to broaden the exception.
Stay very alert.