

DETAILED SUMMARIES OF THIS MONTH'S CASES

ACTS OR OMISSIONS OF PUBLIC EMPLOYEES

- **Because mediation tolled the deadline for trial, court erred in dismissing case under the five-year statute.**

In 1998, plaintiff sued the county for injuries sustained in an auto accident with a county sheriff's deputy. Absent tolling, the five-year statute required the case to be tried by May 2003. In February 2003, the court ordered the case into mediation, with a completion date of April 2003. In April 2003, the case was unsuccessfully mediated, and the mediator filed a notice of non-agreement. In May 2003, the county moved to dismiss the case under the five-year statute; and in July 2003 the trial court did so, ruling that the mediation tolled the deadline two months so that the deadline expired in July 2003.

Reversed. The trial court misinterpreted the five-year statute. Under Code of Civil Procedure section 1775.7, since the case was ordered into mediation four years and six months after filing, the mediation order tolled the five-year deadline; and April 2003 became the new four-year-and-six-month date. The deadline to try the case was therefore six months later: October 2003.

Gonzalez v. County of Los Angeles (2nd Dist., Div. 1, September 30, 2004) __Cal.App.4th__, 2004 Daily Journal DAR __, 2004 WL _____.

- **Disqualification of entire city attorney's office was not required when attorney for homeowners in action against city accepted a job at city attorney's office.**

Plaintiffs sued the city, alleging that its failure to properly maintain and repair a sewer line resulted in damage to their home. The plaintiff's principal attorney began work on the case. She then accepted a job at the city attorney's office. The plaintiffs moved to disqualify the city attorney's office based on the attorney's conflict of interest. The trial court concluded that disqualification of the entire office was required by the vicarious disqualification rule.

The appellate court reversed. An attorney who switches sides during litigation is disqualified from representing his or her former adversary. The disqualification extends to the attorney's entire law firm. A city attorney's office is not a "law firm" within the meaning of the vicarious disqualification rule. Disqualification of a non-supervisory deputy city attorney should not result in the vicarious disqualification of the entire office. Here, the creation of an "ethical wall" to prevent access to information is sufficient to protect both the confidentiality of attorney-client communications, and the integrity of the judicial process. Therefore, disqualification of the entire office was not required.

City of Santa Barbara v. Superior Court (Stenson) (2nd Dist., Div. 6. September 7, 2004) __Cal.App.4th__, 2004 Daily Journal DAR 11240, 2004 WL 1977582.

IMMUNITIES

- **Investigator and prosecutor who allegedly pressured witness to lie in a murder trial are not entitled to absolute immunity.**

Genzler was arrested for homicide. His defense was imperfect self-defense. His first trial resulted in a conviction that was reversed on instructional error. At his second trial a witness testified that she was pressured by the deputy district attorney and investigator in the first trial not to disclose the victim's history of street-fighting. After Genzler was convicted of involuntary manslaughter he sued, alleging constitutional violations by the prosecution. The defendants moved for summary judgment based on immunity. The district court denied immunity for the investigator, the prosecutor, and the prosecutor's supervisors.

The Ninth Circuit affirmed denial of immunity for the investigator and the prosecutor, but allowed immunity for the supervisors. Absolute immunity applies only to an official's advocacy function, intimately associated with the judicial phase of the criminal process. Here, the detective and prosecutor were engaged in an investigative function and not in quasi-judicial advocacy when they interviewed the witness before the first trial. Therefore, their alleged actions are unprotected by absolute immunity. But the alleged misconduct by their supervisors was closely related to prosecutorial decisions once the trial began. Therefore, the supervisors' actions involve advocacy and are entitled to absolute immunity.

Genzler v. Longanbach (9th Cir. September 27, 2004) __F.3d__, 2004 Daily Journal DAR 12027, 2004 WL 2169395.

- **Prosecutors are entitled to absolute immunity from liability for overbroad search warrants.**

The district attorney's office initiated an investigation of alleged environmental contamination relating to a defunct gasoline station being converted into a parking lot. After an initial search was conducted, the person responsible for removal of an underground gasoline tank was indicted on twenty-one criminal counts. Two more searches were conducted before the case was transferred to the California Attorney General's office for prosecution. All charges were eventually dropped. The plaintiff alleges that the district attorney violated his civil rights because the second search warrant was unsubstantiated. The district court denied the district attorney's claim of absolute immunity.

The Ninth Circuit reversed. Prosecutors are absolutely immune from liability for gathering additional evidence after probable cause is established. Here, the second search warrant sought evidence to prosecute the indictment. Probable cause had already been established by the indictment via a grand jury. Therefore, the district attorney's review of the warrant prior to submission was intimately associated with the judicial process and entitled to absolute immunity.

KRL v. Moore (9th Cir. September 27, 2004) __F.3d__, 2004 Daily Journal DAR 12021,

2004 WL 2169414.

- **Appellant need not assert a serious and unsettled question of law for the court to hear an interlocutory appeal from a denial of Eleventh Amendment Immunity.**

A state inmate filed an action alleging that the state's failure to accommodate his osteoarthritis and osteoporosis violated the Americans with Disabilities Act. The district court denied the state's motion for judgment on the pleadings on Eleventh Amendment grounds, and the state filed an interlocutory appeal. The appellate court affirmed denial of the motion. The United States Supreme Court vacated and remanded for reconsideration in light of *Tennessee v. Lane* (2004) 539 U.S. 941, 124 S.Ct. 1978.

The Ninth Circuit affirmed. The denial of a state's motion for judgment on the pleadings on the grounds of Eleventh Amendment immunity is an interlocutory appeal and need not await final judgment. The state contends that the appellate court must also determine if the appeal involves a "serious and unsettled question of law." However, the court has never required such a showing for an interlocutory appeal of Eleventh Amendment immunity. This conclusion is consistent with the findings in *Lane* and therefore the court's initial findings are affirmed.

Phiffer v. Columbia River Correctional Institute (9th Cir. September 21, 2004) __Cal.4th__, 2004 Daily Journal 11787, 2004 WL 20093450.

EMPLOYMENT - CIVIL RIGHTS

- **State agency has an affirmative duty to solicit information from an asthmatic employee before medically demoting her.**

The plaintiff suffers from asthma and worked for a state prison teaching art classes. The prison's art studio is located within a building containing a dry cleaning facility. The plaintiff alleged that the fumes from a solvent spilled at the facility triggered an asthma attack. After the attack her doctor released her to return to work, on the condition that she not work near the dry cleaning facility. The prison then initiated a medical demotion process. The plaintiff filed a request for reasonable work accommodations. Her request was denied and she was demoted. She successfully appealed to the State Personnel Board. The trial court affirmed the Board's decision revoking the plaintiff's demotion and holding that the prison had a duty to engage in an interactive process before demoting her.

The appellate court affirmed. The Government Code allows a state agency to demote or transfer an employee after considering the conclusions of the medical examination and other pertinent information. The Board construed the requirement to consider other pertinent information as requiring an interactive process with the employee to obtain the necessary information. This interpretation is reasonable. Therefore, the Board did not err in holding that the employer was responsible for actively soliciting the employee's views.

California Dept. of Corrections v. State Personnel Board (Henning) (3rd Dist. September 3, 2004) __Cal.App.4th__, 2004 Daily Journal DAR 11043, 2004 WL 1950058.

EMPLOYMENT - DISCRIMINATION AND HARASSMENT

- **Time barred claims of sexual harassment may serve as the basis for an employee's current allegations of retaliation.**

A female correctional officer alleged that she declined inappropriate sexual advances by her immediate supervisor and another employee who was also the union president. Discrimination and retaliation against the officer ensued over the next five years in the form of abusive behavior, denied work transfers, and denied requests for vacation and holidays. The officer sued the department of corrections. The district court held that allegations based on a hostile work environment were barred by a statute of limitations. It also held that the time bar precluded the plaintiff from demonstrating a causal link between claims of sexual harassment and recent allegations of retaliation.

The Ninth Circuit affirmed that claims of sexual harassment were time barred but reversed summary judgment of retaliation claims. The officer is not precluded from attempting to show a causal link between earlier harassment and more recent alleged acts of retaliation. In retaliation claims, causation is an element of the plaintiff's prima facie case, not temporal proximity. Here, the absence of immediacy between the declined sexual advances and the alleged effects does not disprove causation. Therefore, the plaintiff raised genuine issues of material fact to support her claims of retaliation.

Porter v. California Dept. of Corrections (9th Cir. September 10, 2004) __F.3d__, 2004 Daily Journal DAR 11308, 2004 WL 2029923.

EMPLOYMENT - SCHOOL LIABILITY

- **Probationary teacher disciplined for objecting to random weapons searches in her classroom is not entitled to reinstatement after employment contract expired.**

The plaintiff worked as an art teacher for two school years under two consecutive provisional contracts. She refused to allow school officials to conduct a random weapons searches in her classroom, believing that the practice violated the Fourth Amendment. As a result, she was issued a disciplinary notice which precluded her from receiving another employment contract under district practices. She sued the district alleging several claims. Regarding allegations of wrongful termination, the trial court granted summary judgment for the district. Regarding claims that her termination violated free speech under the California Constitution, the trial court granted the district's motion for judgment notwithstanding the verdict.

The appellate court affirmed. Under the terms of the teacher's employment contract and the Education Code she was classified as a probationary employee and thus not eligible for automatic

renewal of her contract. Therefore, her employment was not terminated, it simply was not renewed. Furthermore, the trial court properly applied the factors set forth in *Degrassi v. Cook* (2002) 29 Cal.4th 333 to reach the conclusion that money damages were not an appropriate remedy for the alleged violation of free speech. For example, the teacher had meaningful alternatives such as seeking injunctive relief but instead opted to obstruct the school's random search policy.

Motevalli v. Los Angeles Unified School District (2nd Dist., Div. 3, September 9, 2004)
__Cal.App.4th__, 2004 Daily Journal DAR 11283, 2004 WL 2007047.

- **A teacher who is not eligible for permanent employment is not automatically rehired for another year if the school district does not send timely notice of reelection.**

The defendant district employed plaintiff as a teacher for one year under an emergency permit; and for a second year as a probationary employee under a clear credential. It then sent him a notice of non-re-election of employment for the upcoming school year. Plaintiff contended that under Education Code section 44929(b) he was entitled to a non-re-election notice earlier. He sued for a writ of mandate compelling the district to employ him for another year. The trial court denied the writ petition.

The appellate court affirmed. The three paragraphs of section 44929(b) must be read together to provide that the statute's non-re-election notice provisions only apply to teachers eligible for permanent employment. Plaintiff was undisputedly ineligible for permanent employment when he received the notice. The district therefore did not have to serve the notice by subdivision (b)'s deadline.

Culbertson v. San Gabriel Unified School Dist. (2nd Dist., Div. 3, August 31, 2004)
__Cal.App.4th __, 2004 Daily Journal DAR 10843, 2004 WL 1926036.

EMPLOYMENT - WHISTLEBLOWER LIABILITY

- **IRS employee's allegations that former IRS attorney improperly received favorable treatment for his clients are protected under Whistleblower Protection Act.**

A Division Chief of the IRS complained of inappropriate conduct of a former IRS Regional Counsel. The Chief was then accused of using his computer to view non-work related web sites and demoted to the position of Program Analyst. Prior to his demotion, he took sick leave and requested special accommodations upon his return to work. His request was ignored. He sued alleging Whistleblower Protection Act (WPA) violations, discrimination based on disability, discrimination based on age, and retaliation. The district court dismissed the age discrimination claim and granted summary judgment for the IRS on the remaining claims.

The Ninth circuit reversed summary judgment of the WPA claim. To prove a whistleblower claim the plaintiff must demonstrate that the he or she made a disclosure protected under the WPA. Here, the employee's disclosures that several taxpayers received favorable treatment as a result of representation by a former IRS attorney are protected under the WPA. The trial court erred in holding that such disclosures were not protected because they did not involve government misconduct. The

plaintiff alleged that current IRS employees acted in concert with the former IRS attorney to deliver favorable treatment. Therefore, summary judgment was not appropriate and the case is remanded to determine if the plaintiff's disclosures caused his subsequent demotion.

Coons v. Secretary of the U.S. Dept. of the Treasury (9th Cir. September 1, 2004) ___F.3d___, 2004 Daily Journal DAR 10901, 2004 WL 1936015.

POLICE - CIVIL RIGHTS LIABILITY

- **Officers who conducted a warrantless search of a parolee who was in custody are not entitled to qualified immunity.**

Officers conducted a search of what they believed was a parolee's residence. They did not verify with a parole officer or their records that the parolee was in custody at the time of the search. When they arrived at the residence they falsely asserted that they had a search warrant. The plaintiff alleges that in order to gain entry the officers threatened to arrest her and take custody of her five week old son. Once inside, an officer pointed a loaded weapon towards her baby while conducting the search. She sued, alleging that the search was unlawful and that officers used excessive force against her son. The district court granted the defendants summary judgment based on qualified immunity.

The Ninth Circuit reversed. The warrantless search violated the plaintiff's Fourth Amendment rights; and the officers used excessive force. The officers used duress to gain access, and conducted a warrantless search in an unreasonable manner. Use of a weapon against someone who is helpless constitutes excessive force. Furthermore, the parolee had been in custody for six weeks; the officers therefore lacked reasonable grounds to believe that he was present at the plaintiff's home. Less stringent Fourth Amendment requirements for parole searches are not applicable.

Motley v. Parks (9th Cir. September 21, 2004) ___F.3d___, 2004 Daily Journal DAR 11805, 2004 WL 2093442.

- **City's procedure for determining probable cause after a warrantless arrest did not violate plaintiff's civil rights.**

The plaintiff was arrested without a warrant for grand theft and fraudulent use of a credit card. The police then filled out a pre-printed application for probable cause and submitted it to the superior court. Within forty-eight hours a magistrate reviewed the application and made a probable cause determination. After further investigation, charges were dropped due to insufficient grounds. The plaintiff sued, alleging that the procedure used to determine probable cause was unconstitutional. The district court ruled in favor of the city.

The appellate court affirmed. Under the Fourth Amendment, a post-arrest probable cause determination is sufficient so long as it is prompt, fair, and reliable. The city's procedure complies with these requirements. Although the procedure does not provide for a personal appearance before a magistrate, the constitution does not require a personal appearance. The use of a pre-printed probable cause application is sufficient, because it is accompanied by a sworn complaint that incorporates by

reference factual materials that establish probable cause.

Jones v. City of Santa Monica (9th Cir. September 10, 2004) __F.3d__, 2004 Daily Journal DAR 11304, 2004 WL ____.

POLICE - RELEASE OF POLICE RECORDS

- **Press entitled to access to identity of police officer appealing disciplinary action and redacted records of appellate disciplinary proceeding.**

A media company learned that a disciplinary appeal by a peace officer was scheduled for hearing before the civil service commission. The company appeared before the commission seeking access to the hearing. However, under the commission's rules the hearing was closed to the public and the identity of the officer concealed. The company sued, alleging that the rules violated the California Public Records Act. The trial court held in favor of the defendant county.

The appellate court reversed. The Act permits non-disclosure of records under specific statutory exemptions. Here, the trial court incorrectly relied on a Penal Code provision that declares a peace officer's personnel records confidential to deny access to records for the entire appellate proceeding. The exemption only covers records maintained by the employing agency; but the appellate record included information derived from other sources. Therefore, the plaintiff is entitled to records of the appellate proceeding, redacted to exclude information obtained from the officer's personnel records. Disclosure of the officer's name is also appropriate, because the defendant failed to explain why it should remain confidential.

Copley Press Inc. v. Superior Court (County of San Diego) (4th Dist., Div. 1, September 16, 2004) __Cal.App.4th__, 2004 Daily Journal DAR 11687, 2004 WL 2066578.

CIVIL RIGHTS - DUE PROCESS AND EQUAL PROTECTION

- **Nonresident Workers Act that grants preferences to resident workers does not violate the Fourteenth Amendment.**

The Commonwealth of the Northern Mariana Islands is under authority of the United States but exempt from immigration and employment laws. It enacted the Nonresident Workers Act, which sets conditions on and procedures for the hiring of nonresident workers. The plaintiff, a citizen of the Philippines, challenged the NWA, alleging that it violates the Fourteenth Amendment by restricting his right to freely market his labor. The district court dismissed his claims.

The Ninth Circuit affirmed. It is uncontested that the NWA is a discriminatory statute: It treats nonresidents differently from residents and citizens. But that discriminatory impact is allowed because it is closely related to important governmental goals: boosting the Commonwealth's economy; giving

preference to its resident workers; and providing a system of accounting for its nonresident workforce. The statute thus meets the intermediate level of review under the Equal Protection clause. Furthermore, plaintiff's Substantive Due Process claim fails because the Court has never held that the right to pursue work is a fundamental right. Therefore, the NWA survives the constitutional challenge.

Sagana v. Tenorio (9th Cir. September 7, 2004) __F.3d__ 2004 Daily Journal DAR 11079, 2004 WL 1965048.

CIVIL RIGHTS - CALIFORNIA CONSTITUTION

- **Municipal utility district failed to demonstrate that its race-based discrimination, which favored minority-owned businesses, is necessary to maintain federal funding.**

A municipal utility district implemented an affirmative action program that set race-based goals for utilization of minority businesses. A business that was not minority-owned, but did submit bids on district contracts, challenged the plan in court. The business alleged that the program violated the state constitution because it gave preferential treatment to contractors based on race. As a defense, the district asserted that the program was required to maintain eligibility for receipt of federal funds, and was thus allowed under an exemption clause in the constitution. The trial court granted the business summary judgment.

The appellate court affirmed. The constitution's exemption to prohibitions on racial discrimination applies to governmental action necessary to maintain eligibility for federal funds. But to qualify for the exemption, the governmental agency must have substantial evidence that it will lose federal funding unless it enacts race-based measures; and it must demonstrate that the race-based measures are narrowly tailored to minimize racial discrimination. Here, the district's studies confirmed past racial discrimination, but failed to identify federal laws requiring race-based programs to avoid loss of funding. The district also failed to demonstrate that race-neutral measures would not suffice to remediate past discrimination.

C&C Construction Inc. v. Sacramento Municipal Utility District (3rd Dist. September 14, 2004) __Cal.App.4th__, 2004 Daily Journal DAR 11480, 2004 WL 2039130.

CIVIL RIGHTS - PRISONER'S RIGHTS

- **Prison inmate must exhaust administrative remedies before seeking judicial relief.**

A prison inmate alleges that the State improperly denied him timely medical care and required prescriptions. He filed a government tort claim asserting numerous tort claims and it was denied. He also sought administrative remedies, but had not yet received a final administrative decision at the time he filed suit in state court. The trial court granted the State's demurrers.

The appellate court affirmed. The plaintiff's claim that he need only substantially comply with the requirement to exhaust administrative remedies is without merit. Under both state and federal law, a

prisoner must exhaust available administrative remedies before seeking judicial relief. Here, the plaintiff concedes that he has not completed the administrative process provided by the department of corrections. Although money damages are unavailable in the administrative process, he must still exhaust administrative remedies. The administrative process furthers important government interests in prison autonomy, mitigating damages, application of Department expertise, and maintaining order in the court system.

Wright v. State of California (3rd Dist. September 21, 2004) __Cal.App.4th__, 2004 Daily Journal DAR 11868, 2004 WL 2095114

CIVIL RIGHTS - PREEMPTION

- **FERC's policy of allowing electricity prices to be set by market forces is not abdication of interstate rate setting authority.**

A utility that provides electricity to consumers in Washington state sued various generators and traders of wholesale electricity for violations of California state antitrust and consumer protection laws. They allege that the defendants manipulated the market and restricted electricity supplies to cause artificially high prices. The district court held that the claims were preempted by federal law, which authorizes the Federal Energy Regulatory Commission to set wholesale electricity rates.

The Ninth Circuit affirmed. Plaintiffs contend that the FERC's policy of setting rates in accordance with market forces amounts to abdication of rate making. Although energy sellers are no longer required to seek tariff approval of energy rates, the FERC continues to oversee wholesale electricity rates through several reporting requirements. These requirements allow the FERC to monitor the reasonableness of charges. Therefore, the FERC continues to exercise its exclusive jurisdiction over interstate sales of wholesale electricity; and the plaintiff's suit was properly dismissed for lack of jurisdiction.

Public Utility District No. 1 of Snohomish County v. Dynegy Power Marketing Inc. (9th Cir. September 10, 2004) __F.3d__, 2004 Daily Journal DAR 11306, 2004 WL ____.

CIVIL RIGHTS - FIRST AMENDMENT - FREE SPEECH

- **County ordinance prohibiting "specific sexual activity" at adult entertainment businesses violates the First Amendment.**

A county approved a comprehensive scheme for the licensing and regulation of adult entertainment businesses. The scheme requires that all dancers disclose to the county their names, addresses, and telephone numbers. It forbids specific sexual activity. The plaintiffs operate a live adult dancing establishment. They challenged the ordinance as unconstitutional. The district court struck a requirement that nude or seminude dancers wear identification cards, but otherwise affirmed the ordinance.

The Ninth Circuit reversed. Nude dancing is expressive conduct protected by the First Amendment. The requirement that dancers disclose personal information to the county is unconstitutional, because under Arizona law such information would be presumptively available to the public. Therefore, prospective dancers would be discouraged from engaging in expressive conduct because disclosure of personal information would expose them to unwelcome harassment from aggressive patrons or overzealous opponents of adult businesses. The prohibition on specific sexual activity is also unconstitutional because it constitutes a total ban on nude or semi-nude dancing. It is not a time, place and manner restriction. Instead, it is overly broad and violates the First Amendment.

Dream Palace v. County of Maricopa (9th Cir. September 27, 2004) __F.3d__, 2004 Daily Journal DAR 12034, 2004 WL 2169437.

- **Grand jury admonition preventing witnesses from discussing testimony is not a prior restraint in violation of First Amendment.**

After testifying before a grand jury a witness is usually admonished not to reveal to any person the questions asked, responses given or any other matter concerning the grand jury's investigation. The witness is also warned that violation of the admonition is punishable as contempt of court. A newspaper challenged the practice as a violation of its First Amendment rights. The trial court held the grand jury's practice constitutional.

The appellate court affirmed. The grand jury did not directly prevent the newspaper from publishing anything. The admonition only prevents the newspaper's access to information that a witness might have been willing to impart. Therefore, the admonition cannot be deemed a restraint upon the newspaper's free speech rights. Furthermore, it has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. Here, there is no First Amendment right to access grand jury proceedings.

San Jose Mercury News Inc. v. Criminal Grand Jury of Santa Clara County (6th Dist. September 15, 2004) __Cal.App.4th__, 2004 Daily Journal DAR 11574, 2004 WL 2050157.

CIVIL RIGHTS - TAXES

- **Parking-tax requirements that exempt certain groups do not violate equal protection clause.**

Defendants operate a commercial parking operation. The city brought an enforcement action to collect over \$800,000 in parking taxes. At trial the defendants successfully challenged the twenty-five percent tax as unconstitutional. They alleged that there was no rational basis for subjecting them to the tax while exempting certain other groups.

The appellate court reversed. The parking tax exempts revenues derived from parking by registered hotel guests or apartment residents and long-term parking by members of the military services. The city presented a plausible policy reason for each classification. Exemptions for hotel guests may serve to encourage tourism and avoid double taxation since guests are already subject to a separate tax

on transient occupancy of hotel rooms. Exemptions for apartment residents may serve to encourage landlords to provide on-site parking to tenants, and thus alleviate street parking congestion. The city is entitled to give preference to military personnel in light of their service to the country. Therefore, the parking tax survives rational-basis scrutiny and does not violate the equal protection clause.

City and County of San Francisco v. Flying Dutchman Park Inc. (1st Dist., Div. 2, September 9, 2004) __Cal.App.4th__, 2004 Daily Journal DAR 11208, 2004 WL 2005917.

CIVIL RIGHTS - STANDING AND PROCEDURE

- **Although *Younger* abstention applies to federal actions for damages, those actions should be stayed while the state proceedings are pending, rather than dismissed.**

Plaintiff's Oregon surveyor license was revoked by the State Board of Examiners for Engineering and Land Surveying. He appealed the decision. While the appeal was pending, plaintiff filed a federal action seeking money damages. He alleged that the Board was retaliating against him, and violating his First and Fourteenth Amendment rights in denying the license. The district court dismissed the action under *Younger v. Harris* (1971) 401 U.S. 37. The Ninth Circuit reversed.

The Ninth Circuit, sitting en banc, held that *Younger* abstention principles apply. *Younger* abstention principles apply to actions at law as well as for injunctive or declaratory relief, because a determination that the federal plaintiff's constitutional rights have been violated would have the same practical effect as a declaration or injunction on the pending state proceedings. Nevertheless, damages actions are different from actions that seek only declaratory or injunctive relief, because the relief sought is not discretionary and may not be available in state proceedings. Therefore, when damages are at issue, the action should be stayed instead of dismissed.

Gilbertson v. Albright (9th Cir. September 3, 2004) __F.3d__, 2004 Daily Journal DAR 10998, 2004 WL 1949425.

LAND USE - ZONING AND REGULATORY TAKINGS

- **Even after county approves vesting tentative map, newly-incorporated city can reject final subdivision map for a development project.**

Sandpiper acquired property in a county area just before the area became part of a proposed city. Sandpiper submitted its vesting tentative map for a subdivision after the first signatures on the incorporation petition. The county planning commission approved the vesting tentative map. The city then incorporated. The city assumed review of the development plan; and ultimately denied approval of the map. The trial court granted Sandpiper a writ of mandate revising the decision, ruling that under the Subdivision Map Act (Government Code sections 66410 et seq.) the city had no discretion to deny

approval.

The appellate issued a writ reversing the trial court. Ordinarily, under the Act a public entity must approve a final subdivision map after it approves a vesting tentative map. But Government Code section 66413.5 gives newly-incorporated cities discretion to deny approval if the vesting tentative map was submitted to the county after the first signature on the incorporation petition. The trial court erred in ruling the city had to issue legislation expressly adopting section 66413.5. Further, the city's mere processing of the subdivision application did not estop it from ultimately denying approval.

City of Goleta v. Superior Court (Oly Chadmar Sandpiper General Partnership) (2nd Dist., Div. 6, September 30, 2004) __Cal.App.4th__, 2004 Daily Journal DAR __, 2004 WL _____.

- **County's decision to merge contiguous parcels of land into one is upheld despite the fact that the county failed to provide notice.**

The county decided that four contiguous parcels of land owned by the plaintiffs merged into one. The plaintiffs allege that there was no merger because the county did not comply with its own ordinances. The plaintiffs unsuccessfully appealed the county's decision to the county planning commission, the board of supervisors and the trial court.

The appellate court affirmed. The Subdivision Map Act allows for involuntary merger of property provided that the owner of the affected parcels has been notified of the merger proposal and is afforded the opportunity for a hearing. However, the Act also allows merger despite lack of notice under certain conditions. Here, the plaintiffs concede that their parcels satisfy exemption conditions. A county ordinance also has a notice requirement before a merger can take effect. The requirement does not apply to this case because the ordinance granting merger of the plaintiff's property took effect before the notice requirement was adopted. Therefore, the merger determination was proper under state and local law.

Moore v. Board of Supervisors of Mendocino County (1st Dist., Div. 4, September 24, 2004) __Cal.App.4th__, 2004 Daily Journal DAR 12003, 2004 WL 2137284.

LAND USE - EMINENT DOMAIN

- **Property owner is entitled to monetary damages in eminent domain action because the city violated a preliminary injunction.**

The owner of an office building used the land he owned between his building and another to park his car. The city expressed its intent to block access from the street to the owner's parking space. After the city refused to compensate the owner for his right to use the parking space, the owner sought and obtained a preliminary injunction ordering the city not to interfere with his parking access. The city violated the injunction by building a permanent curb and installing bolted benches across the sidewalk to block access to the parking space. The city then filed a cross complaint in eminent domain to the

owner's initial suit. The trial court held that the owner was entitled to compensation in the amount of \$150,000.00.

The appellate court affirmed. The city erroneously claimed that the owner was required to file an administrative mandate action before any compensation could be awarded. The purpose of an administrative mandate is to give the government entity one last chance to revise or reverse its course so that the taxpayers do not incur unnecessary liability. Here, the action to obtain a permanent injunction was, in substance, an administrative action. Therefore, compensation was appropriate.

Hurwitz v. City of Orange (4th Dist., Div. 3, September 24, 2004) __Cal.App.4th__, 2004 Daily Journal DAR 11969, 2004 WL 2129731.

REVIEW OF ADMINISTRATIVE DECISIONS

- **County must undertake Environmental Impact Report before demolishing historic but dilapidated jail.**

Monterey County's Old Jail in Salinas was built in 1931 in the Gothic Revival style. In 1970, Cesar Chavez was imprisoned there, drawing national attention. The County intended to demolish the jail as dilapidated. After hearings, it determined CEQA did not require the County to pursue an Environmental Impact Report before destroying the jail. Instead, the County decided to adopt a Mitigated Negative Declaration (a lesser report than an EIR) setting forth plans to document the jail with photos, an historic monography, archived blueprints, and reuse of architectural elements. It concluded that with these mitigations, adverse environmental effects on cultural resources from the demolition would be less than significant. The trial court declined to issue a writ directing the city to prepare an EIR.

The appellate court reversed. Administrative hearing testimony from a certified historian and a certified architect, as well as the County's own studies, established substantial evidence supporting a fair argument that the jail was an historic resource. The demolition would obviously cause a significant impact to that resource. Substantial evidence also supports a fair argument that the proposed mitigation measures are inadequate: They fail to reduce the environmental detriment to insignificance. The demolition therefore meets the low threshold for requiring a full EIR.

Architectural Heritage Assoc. v. County of Monterey (6th Dist. September 30, 2004) __Cal.App.4th__, 2004 Daily Journal DAR __, 2004 WL _____.

- **Administrative body denied doctor a fair hearing by disqualifying all of his experts, and trial court erred by failing to remand the case for rehearing.**

The Medical Board accused the petitioner doctor of improper experimental treatments on his patients. During the administrative hearing, the state's and petitioner's medical experts presented

divergent opinions on whether petitioner's treatments were within the standard of care. The Board ultimately ruled that all of petitioner's experts were unqualified, because they did not sufficiently address the specific facts concerning the patients at issue. It then disciplined petitioner. On an administrative mandamus petition, the trial court ruled that the Board had improperly disqualified the experts. Instead of remanding the matter, the trial court independently weighed the evidence (including the evidence the Board improperly refused to consider) and concluded the Board's decision was supported by substantial evidence.

The appellate court issued a writ directing the trial court to remand the matter to the Board. The Board denied petitioner a fair hearing by disqualifying all of his experts. The experts indisputably had the credentials and knowledge to qualify as experts. The degree to which they addressed individual facts went to the weight of their testimony, not its admissibility. Since the Board had discretion over discipline, the trial court erred in reweighing the evidence itself. The court should remand the matter to the agency to consider the evidence and exercise its discretion after a full and fair hearing on the merits -- especially where, as here, the agency has unique technical expertise. The trial court's statutory ability to take evidence improperly excluded in the administrative hearing is no substitute for informed and fair agency decisionmaking.

Sinaiko v. Superior Court (Medical Board of California) (3rd Dist. September 30, 2004)
__Cal.App.4th__, 2004 Daily Journal DAR __, 2004 WL _____.

- **School district may deny a charter school's request for facilities when the request lacks documentation in support of student projections.**

A charter school requested that a school district make school facilities available to its students. The school's request included projections of the number of students that would be served. The district requested specific information about the students such as their names, dates of birth, home addresses and grade levels. The school refused to provide such data due to confidentiality concerns and its request was denied. The charter school sued to compel the district to provide facilities. The trial court granted the school's petition.

The appellate court reversed. Under the Code of Regulations, a request for facilities requires "if relevant, documentation of the number of in-district students". The charter school interprets this clause as applicable only to new charter schools and not to existing schools. However, the plain language of the statute indicates that the clause is applicable to all charter schools. Furthermore, charter schools are required to make a showing of enrollment projections with relevant documents. Therefore, the district acted within its discretion by denying the facilities request.

Environmental Charter High School v. Centinela Valley High School (2nd Dist., Div. 2, September 10, 2004) __Cal.App.4th__, 2004 Daily Journal DAR 11378, 2004 WL 1843391.

- **County's approval of development plan that would have a detrimental impact on seasonal wetlands did not violate California Environmental Quality Act.**

A county department approved a proposal to allow development of land that would result in loss of seasonal wetlands. Based on an environmental impact report (EIR), the department found that the benefits of the project would outweigh the significant and detrimental impact on wetlands. The Sierra Club's appeal of the department's decision to the county board of supervisors was denied. The Sierra Club's petition to the superior court alleging that the development violates the CEQA was also denied.

The appellate court affirmed. The Sierra Club argues that the EIR was inadequate because it did not analyze the economic feasibility of the identified alternatives. However, the CEQA does not require that EIRs include an analysis of economic feasibility. The public agency bears the responsibility for making its decisions based on substantial evidence in the entire record. Here, the record did provide sufficient information for the department to consider and reject possible alternatives to the proposed development plan. Therefore, the plaintiff's claims were properly dismissed.

Sierra Club v. County of Napa (Beringer Wine Estates) (1st Dist., Div. 1, September 1, 2004) __Cal.App.4th__, 2004 Daily Journal DAR 10939, 2004 WL 1759301.

PUBLIC ENTITY VENUE

- **A party contracting with a county cannot voluntarily waive its statutory right to have venue over disputes transferred to a neutral county.**

A construction contract between the petitioner builders (which had its place of business in Marin County) and Contra Costa County provided that any action arising out of the contract would be brought in Contra Costa County. It expressly waived the builder's right under Code of Civil Procedure section 394 to remove the action to a neutral county. The County sued the builders in a Contra Costa court for breach of contract. The builders timely petitioned to move the action to a neutral county. The trial court ruled the builders had waived their right to do so, and denied the petition.

The appellate court issued a writ directing the trial court to grant the petition. Section 394 permits a party sued by a county to remove the case to a neutral county. A contract's venue-selection clause cannot contravene that right. Although a party can involuntarily waive removal by delay, parties cannot voluntarily waive it by contract.

Arntz Builders v. Superior Court (County of Contra Costa) (1st Dist., Div. 3, September 30, 2004) __Cal.App.4th__, 2004 Daily Journal DAR __, 2004 WL ____.

CASES PENDING BEFORE THE CALIFORNIA SUPREME COURT

- **The California Supreme Court will decide if a criminal defendant may request police personnel records by filing a declaration under seal.**

Garcia v. Superior Court (City of Santa Ana) (4th Dist., Div. 3, July 27, 2004) 2004 Daily Journal DAR 9147, review granted September 22, 2004 by 2004 Daily Journal DAR 11935.

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