meeting

10/11/62

Memorandum No. 63(1962)

Study No. 52(L) - Sovereign Immunity (Dangerous Conditions of Public Property)

Article 1. General. We have created a new Article 1 which is comprised of the sections which will relate to both public entities and their employees. Article 2, under this scheme, will relate only to the liability of public entities, and Article 3 will relate only to the liability of public officers and employees. This was done, in part, because of the possibility that an immunity section would be included in this portion of the statute. As the immunity will apply to entities and their employees both, it seemed appropriate to place it in the first part of the statute where there are other sections relating to entities and officers both. Then, too, this shortens the article on the liability of public entities and removes from that article all materials that do not deal exclusively with the liability of public entities.

The new article begins with Section 830. This section was formerly Section 830.2. Article 2 now begins with Section 835 and Article 3 begins with Section 840. Law enforcement also begins with Section 840; but that chapter will be moved back so that it begins with Section 845. The chapter formerly beginning with Section 845, the chapter on mob and riot damage, has been deleted so the remainder of the statute will be unaffected so far as numbering is concerned.

Former Section 830, which provided that this chapter exclusively governs the liability of public entities and public employees for injury caused by conditions of public property, has been deleted. At the

September meeting the Commission directed the staff to cross-refer in Section 830 to all the statutes which would also pertain to the liability of public entities for dangerous conditions of property. In going over the various sections, the only section which appeared to be inapplicable was the one relating to the discretionary immunity of public entities. Therefore, it seemed appropriate to cross-refer to that section in the portion of this chapter that deals with the liability of public entities in order to make clear that this chapter defines the scope of the discretionary immunity. The deletion of Section 830 makes necessary the addition of a similar section, though, in the article dealing with the liability of public officers and employees. The existing Government Code Section 1953, which relates to the liability of public officers and employees at the present time, is also the exclusive basis for the liability of public officers and employees for injuries caused by conditions of public property. Although Article 2 does not prescribe the exclusive standards for the liability of public entities, Article 3 does prescribe the exclusive standards for the liability of public employees. The liability of a public entity for a dangerous condition of property may be grounded upon Article 2 or upon any other statute that may be found which seems to be applicable. If a public employee is to be held liable for a condition of property, the conditions spelled out in Article 3 must be met.

Section 830. This section reflects the decisions made by the Commission at its September meeting. The wording of subdivision (c) is that approved by the Commission. The Commission should note the sweep of subdivision (c). It appears to be somewhat too broad. The note

underneath the section points out the problem that subdivision (c) is apparently aimed at, but its language goes far beyond that problem. From its language a dangerous condition of a carload of wheat or a tank of milk or some similar condition would not be a "dangerous condition" of public property within the meaning of this statute. Thus, liability for such a condition would not be based upon the terms of this chapter but would be based upon the provisions of the chapter relating to the liability of public entities generally. In practical effect, this would mean that the basis of liability for the dangerous condition of this type of property would be the basis upon which public employees are liable. The staff suggests that the removal of former Section 830 makes the reference to foodstuffs, etc., in this subdivision unnecessary. The removal of the refernce would mean that the liability of a public entity for a dangerous condition of this type of property could be grounded upon this chapter, upon the chapter relating to liability generally, or upon contract, or upon any other basis upon which public entities may be held liable.

Subdivision (c) may be entirely unnecessary. The reference to real and personal property merely declares the existing law, and there is nothing in this statute which would tend to indicate that "property" is to be more limited than under existing law. The reference to easements, encroachments and other similar property merely states that property that does not belong to the public entity is not the property of the public entity. This is a truism which it doesn't seem necessary to embody in a statute.

Subdivision (a) of Section 830 defines "dangerous condition" in terms of "public property". This is somewhat artificial. The reference to "public property" is unnecessary for in the substantive portions

of the statute it is made clear that public entities are only liable for dangerous conditions of their own property. A definition that would be more accurate technically would be:

> (a) "Dangerous condition" means a condition of property that creates a substantial risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.

Section 830.2. If the definition of dangerous condition is modified as suggested above, the trivial defect rule stated in this section should be modified accordingly. In any event, there should be a reference to "adjacent property" in this section as well as in 830 in order to conform them to Section 835.4, relating to inspection.

The City Attorney of Fresno suggests setting the rule at a specific measurement. (See Exhibit III.)

Section 830.4. At the September meeting the Commission requested the staff to solicit from various public entities suggestions as to specific immunities that might be included in the dangerous conditions portion of the statute. The Commission was then considering whether a list of specific immunities or a general discretionary immunity, or both, should be included in the dangerous conditions statute. The Commission also wanted the staff to report on the extent to which the discretionary immunity of public employees and the Federal Government under the Federal Tort Claims Act has been applied in dangerous conditions cases. The Exhibits attached to this memorandum are the letters we received in response to our solicitation of comments on specific immunities.

You will note from the letters that there is a great deal of duplication in the suggestions made by the various entities. It is apparent that they are concerned about the same matters. The suggested immunities are:

1. Architectual, engineering or landscape design. (Department of Finance, Los Angeles County Counsel, City of Inglewood, Los Angeles City Attorney, Department of Public Works.)

You will note that the Los Angeles County Counsel would condition this immunity upon a finding that the property was properly designed upon some reasonable basis originally. The City Attorney of Los Angeles makes a similar suggestion. On page 2 of Exhibit VI he suggests that there be no immunity where "the design is so faulty as to evidence arbitrary action." The City Attorney first suggests that this be a matter for the jury to decide but at the last suggests that this be a matter for the court to decide as a matter of law.

Discretion in these matters has been limited similarly by the Court of Appeals of New York. The leading New York case upon the subject is Weiss v. Fote, 7 N.Y.2nd 579 (1962). The opinion in the Weiss case discusses the New York authorities at considerable length. The court said, "[W]e have long and consistently held that the courts would not go behind the ordinary performance of planning functions by the officials to whom those functions were entrusted." (Page 584.) The court also said:

> It is proper and necessary to hold municipalities and the State liable for injuries arising out of the day-by-day operations of government--for instance, the garden variety of injury resulting from the negligent maintenance of a highway--but to submit to a jury the reasonableness of the lawfully authorized deliberations of executive bodies presents a different question. . . . To accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts. Acceptance of this conclusion . . . serves only to give expression to the important and continuing need to preserve the pattern of distribution of governmental functions prescribed by constitution and statute.

* * *

> . . . In the area of highway safety, at least, it has long been the settled view, and an eminently justifiable one, that courts should not be permitted to review determinations of governmental planning bodies under the guise of allowing them to be challenged in negligence suits; something more than a mere choice between conflicting opinions of experts is required before the State or one of its subdivisions may be charged with a failure to discharge its duty to plan highways for the safety of the travelling public . . . .[Pages 585-588]

> To state the matter briefly, absent some indication that due care was not exercised in the preparation of the design or that no reasonable official could have adopted it--and there is no indication of either here--we perceive no basis for preferring the jury verdict. . . to that of the legally authorized body which made the determination in the first instance. [Page 586.]

2. The existence or nonexistence of structures, appurtenances or improvements. (See the comment of the Department of Finance on page 2 of Exhibit I, pink pages.)

3. The presence or absence of regulatory devices or personnel. (See the comments of the Department of Finance, City of Fresno, City of Inglewood, and the Department of Public Works.)

In the Padelford case cited by the Fresno City Attorney, the District Court of Appeal held that the City of Pomona was negligent and liable under the Public Liability Act when it removed a traffic signal so that the wiring could be repaired. An intersection collision subsequently occurred at the unprotected intersection. In the Raposa case, also cited by the Fresno City Attorney, the City of Stockton turned the power off to a traffic light because water had shorted the circuit and the light was changing improperly. The intersection was nonetheless controlled by signs, a factor which was missing in the Padelford case. In the Raposa case the City of Stockton was held not liable when a car passed a truck upon the right hand side--the truck having stopped for a pedestrian in a crosswalk--

and struck the pedestrian. The District Court of Appeal reversed a jury verdict for the plaintiff against the city and also held that the city was not liable for failing to direct traffic at the intersection. In the Dudum case, the City of San Mateo lost at the appellate level a motion for a summary judgment where it was sought to be held liable for an intersection accident when the accident was allegedly due to the fact that a stop sign was obscured by an overhanging tree. From these cases the City Attorney seems to have properly concluded that it is necessary to have stop signs at signal-controlled intersections which will control the traffic when the signals are not in operation, despite the opinion of the city traffic engineer and the views of other traffic engineers throughout the State.

4. Natural conditions or phenomena. (Department of Finance.) Somewhat similar is the suggestion of the Attorney General (at page 2 of Exhibit V) that the State be immune from liability for the condition of its undeveloped and unoccupied lands. A suggested definition is included in the Attorney General's letter. Somewhat similar, too, is the Department of Public Work's suggestion that public entities be immune from liability for conditions of highway facilities caused by weather conditions.

5. The Attorney General suggests immunity for dangerous conditions in "correctional institutions" and "mental hospitals and institutions." (See Exhibit V.)

6. The Los Angeles County Counsel letter designated Exhibit VIII suggests an immunity from all liability for dangerous conditions of property inasmuch as the arguments in favor of this liability "are strictly of a socialist nature based upon the proposition that a person injured on public property should be indemnified by his fellow citizens."

7. The letter of the County Counsel designated Exhibit VIII suggests an immunity for remote roads and trails and property used only incidentally for recreational purposes.

8. The Santa Clara County Counsel suggests an immunity if injury results while property is being used for other than the designed or intended purpose. The problem he indicates seems to have been met by the insertion of "with due care" in the definition of dangerous condition. The remainder of his letter is concerned with the general standards of liability for dangerous conditions of property.

Discretionary immunity. The New York rule on discretionary immunity insofar as dangerous conditions of property are concerned is discussed above in connection with the suggested specific immunity for architectural, engineering or landscape design. Apparently there is such an immunity in New York but it is limited. There is no discretion to do what no reasonable man would do. It would appear from the Court of Appeals' opinion that the matter may be a question of law for the court to decide. The court states that where there is a conflict in the evidence, i.e., a conflict in the testimony of the plaintiff"s and defendant's experts, and there is some evidence from which it might be concluded that the State's action was reasonable, the jury may not decide that it was unreasonable.

In California, there seems to have been some discretionary immunity; but the nature and the extent of the immunity is fairly uncertain. In George v. City of Los Angeles, 11 Cal.2nd 303 (1938), the Supreme Court recognized the rule that is applied in several other states that there is no liability for the design of public improvements unless the design is arbitrary or palpably unreasonable; but the court said that this immunity did not exist in California under the Public Liability Act. Illustrative is Hawk v. City of Newport Beach, 46 Cal.2nd 213 (1956), where the court said that "in the instant case reasonable men could differ on the question of what action might be reasonably necessary to protect the public" and, therefore, the issue should be submitted to the jury.

In Coffey v. City of Berkeley, 170 Cal. 258 (1915), a case decided

under a statute similar to the 1923 Public Liability Act, the court held there was no liability for failure to build a bridge across a creek or for failure to place signals,lights or other warnings at the end of a street where it intersected with a creek when there was no allegation that the city had not taken other action to guard against accidents. The city was held immune because the question whether to build a bridge and the question of the nature of the safeguards to be placed were questions of discretion which would not be reviewed by the court. In Perry v. City of Santa Monica, 130 Cal. App.2nd 370 (1955), the city was held not liable for failure to control an intersection with stop signs. In Goodman v. Raposa, 151 Cal. App.2nd 830, the city was held not liable for failing to direct traffic when a stop sign was turned off for repairs. In Mercado v. Pasadena, 176 Cal. App.2d 28 (1959), the court said that the location of a stop sign is a governmental act for which the city cannot be held liable. The allegation in that case was that the stop sign was placed too far south of the intersection to provide adequate protection. In Waldorf v. City of Alhambra, 6 Cal. App.2d 522 (1959), the city was held not liable where the street on one side of an intersection was narrower than the street on the other side of the intersection and no warning was provided of the narrowing of the street. In Seybert v. Imperial County, 162 Cal. App.2d 209 (1958), the county was held not liable for failure to provide regulations for the use of a lake. In Stang v. City of Mill Valley, 38 Cal.2d 486 (1952), the city was held not liable for injuries resulting from a fire which the city was unable to extinguish because the water lines and fire hydrants had become clogged with debris. The court said "[I]t clearly appears that the gravamen of plaintiff's complaint is the

failure of a governmental function. Such failure involves the denial of a benefit owing to the community as a whole, but it does not constitute a wrong or injury to a member thereof so as to give rise to a right of individual redress. . . ."(At page 489.) In Shipley v. City of Arroyo Grande, 92 Cal. App.2d 748 (1949) the city was held not liable for failure to provide curbs more than two inches high, as a result of which a car went over the curb and struck the plaintiff. In Belcher v. City and County of San Francisco, 69 Cal. App.2d 457 (1945), the city was held not liable for failure to provide a handrail on a very steep street.

In contrast with the foregoing line of cases, the George case cited above held the city could be liable for dangerous design of streets. In Reisman v. L. A. School District, 123 Cal. App.2d 493 (1954), it was held that the school district could be held liable for putting black top underneath a tetherball pole. In Pritchard v. Sully Miller Contracting Company, 178 Cal. App.2d 247 (1960), the city was held liable for setting a traffic signal. In Jones v. City of L. A. , 104 Cal. App.2d 212 (1951) the question of whether a light pole was placed too close to the curb was held a question of fact for the jury. In Reel v. City of South Gate, 172 Cal. App.2d 49 (1959), the city engineer ordered unlighted barricades to be left over a newly painted area in a street so that motorists would learn of the existence of the painted island; and the city was held liable for the resulting accident. In Irvin v. Padelford, 127 Cal. App.2d 135 (1947), the City of Pomona was held liable in an intersection collision because it had removed a stop light from the intersection in order to repair it. In Dudum v. City of San Mateo, 167 Cal. App.2d 593 (1959), the city of San Mateo was held liable for an intersection collision where the stop sign was obscured by a tree.

From the foregoing, it appears that the California courts have rejected any overall discretionary immunity for dangerous conditions of property; but, nonetheless, they do apply such a doctrine from time to time in those cases where they believe that governmental decisions should not be reviewed. How they distinguish these groups of cases from each other is difficult to determine.

Similar difficulties are found in the U. S. cases where there is a statutory discretionary immunity given the government. In American Exchange Bank of Madison, Wisconsin v. U. S., 257 Federal 2d. 938 (7th Circuit 1958) the government was held liable for failure to provide a hand rail on the post office steps. (Compare the Belcher case above.) In Somerset Seafood Company v. U. S., 193 Federal 2d. 631 (4th Circuit 1951) the government was held liable for negligently marking a wrecked vessel even though the commander of the fifth coast guard district made the decision that the particular buoy should not be moved closer to the submerged wreck which constituted a hazard to navigation. In Indian Towing Company v. United States, 350 U. S. 61, the government was held liable for the negligent maintenance of a navigation light by the coast guard. The Supreme Court's opinion in the case is not too helpful. Among the plaintiff's allegations were allegations that the coast guard negligently inspected the light. The plaintiff also alleged that the coast guard was negligent in not inspecting the light in the three week interval between the previous inspection and the time of the wreck. This latter allegation gets into the question of the extent of inspection service to be provided. The Supreme Court does not discuss these matters, it merely states that the complaint stated a cause of action and sent the case back for trial. In Dalehite v. United States, 346 U. S. 15, the government's fertilizer was obviously in a dangerous condition, for it

exploded and virtually blew up the entire city of Texas City. The trial court found the Government was negligent in adopting the fertilizer export program as a whole, was negligent in various phases of manufacture, and was negligent in failing to police the loading of the fertilizer on the ship. The Supreme Court held the disaster nonactionable because of the discretionary immunity. The Court said that "the decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the government's fertilizer program." Thus, the Court seemed to be drawing a distinction between planning and operation; but as the other cases cited have indicated, the distinction between planning and operation is very hazy. Possibly the difficulty the federal cases have with the discretionary immunity stems from the absolute nature of the immunity. If the court finds that the particular act alleged to be negligent was discretionary, under the Federal Tort Claims Act the court must hold there is no liability. Thus, there seems to be a tendency to hold acts nondiscretionary where it is perfectly clear that there has been a mistake made in the exercise of discretion. On the other hand, there seems to be a tendency to hold acts discretionary where there is some reasonable basis for the actions taken.

Section 835. This section has been revised in accordance with the actions of the Commission at the September meeting. The "notwithstanding" phrase at the beginning, though, has been added in lieu of making cross-reference to all of the applicable sections in a section at the beginning of Article 1.

Section 835.2. There has been some misunderstanding concerning the meaning of subdivision (e). It has been made a separate subdivision here

(it was formerly contained in subdivision (d)) in order that it might be considered by itself. Some argument is made--and the argument prevailed with the Commission in regard to Section 835--that a condition is not dangerous if the public entity has taken adequate measures to protect against the risk created by the condition and, therefore, subdivision (e) is unnecessary in the light of subdivision (a), which requires the plaintiff to show that the property was in a dangerous condition at the time of the injury. The trouble with deleting the subdivision is that the plaintiff would have to show only a dangerous condition of which the entity had notice in order to make out a prima facie case. He would not be required to show anything else, such as that an unreasonable time had elapsed within which repairs might have been made or other precautions taken. This is a substantial change in the existing law. As was pointed out during the argument at the last meeting, the way negligence law seems to operate generally is that the plaintiff must show that the defendant did not conform to some standard of conduct that one would ordinarily think a reasonable man would conform to. Then the defendant may show that under all the circumstances applicable to him--such as emergency, etc.--the defendant did not act unreasonably. Perhaps subdivision (e) should be revised to require the plaintiff to show that sufficient time had elapsed from time of notice within which one would normally expect an entity, acting reasonably, to have protected against the condition.

Section 835.4. The word "proves" at the end of the preliminary language of the section should probably read "establishes" to conform with other changes the Commission has made in similar sections. So far as the policy of this section is concerned, and so far as the basic

policies of the remainder of the chapter are concerned, reference should be made to Memorandum No. 46 and the various supplements thereto.

Section 835.6. Subdivision (a) has been added to this section because the Commission wanted a defense similar to that in subdivision (b) to be applicable to the created condition liability. Subdivision (b) did not fit since it had been drafted in regard to the discovered condition type of liability. Therefore, it was necessary to draft a subdivision (a) to comply with the Commission's directive.

Section 840. In view of the deletion of the section at the beginning of Article 1 making this entire chapter exclusive, it seemed desirable to place a similar section at the beginning of this article insofar as public employees are concerned. This appears to state the existing law as it has developed under Government Code Section 1953.

Section 840.2. The Commission may wish to delete the last clause of subdivision (d) to conform this section to the similar one relating to public entities. The justification for keeping the subdivision as it is, is that stated in the note underneath the section.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

Memo.63(1962)

EXHIBIT I

STATE OF CALIFORNIA

Sacramento 14

Interdepartmental Communication

To: California Law Revision Commission
School of Law
Stanford University, California

Date: September 28, 1962

Attention: Mr. John H. DeMoully
Executive Secretary

From: Department of Finance--Executive Offices

Subject: Dangerous Conditions of Public Property

At the September meeting of the Commission, interested agencies were invited to submit suggested conditions of public property which should not be the basis for tort liability because they involve the exercise of official discretion.

The position of the Department of Finance with regard to the liability of the State for alleged dangerous conditions of its property was expressed in a letter to the Commission dated June 7, 1962, a copy of which is attached. The Department of Finance is opposed to broad tort liability for conditions of all State property and particularly to imposing liability on the State on the basis of all "foreseeable" use.

To any statutory definition of liability for dangerous conditions of public property, whether the basis be "foreseeable" use or "intended" use, the Department of Finance urges that it be clearly expressed that there should be no liability arising from conditions of public property including, but not limited to, conditions resulting from:

1. Architectural, engineering or landscape design.

2. The existence or non-existence of structures, appurtenances or improvements.

3. The presence or absence of regulatory devices or personnel.

4. Natural conditions or phenomena.

Our reasons for urging that there be no liability for these conditions include the following:

1. Design. The State should have complete freedom to design facilities. Therefore such things as the location, size, shape, capacity, appearance, materials used, and finishes applied, should not constitute dangerous conditions.

2. Structures, Appurtenances and Improvements. The existence or non-existence of particular structures, appurtenances or improvements could be considered part of the design of a facility, but it is listed separately for emphasis. The State should be free to provide or not provide such things as elevators, ramps, roads, sidewalks, stairways, tunnels, bridges and entry ways. Therefore the presence or absence of structures, appurtenances or improvements should not constitute dangerous conditions.

3. Regulatory Devices or Personnel. The State should be free to determine in what manner and to what extent it will regulate the use of State facilities by devices or personnel including such things as pedestrian and vehicular regulatory devices, lifeguards, guides and traffic officers. Therefor the installation or non-installation of regulatory devices and the employment or non-employment of regulatory personnel should not constitute dangerous conditions of public property.

4. Natural Conditions and Phenomena. Topography, geology, weather, flora, fauna, water and fire are examples of natural conditions and phenomena for which the State should not be responsible. Therefore natural conditions of public property or conditions of public property resulting from natural phenomena should not constitute dangerous conditions.

We are forwarding these suggestions at this time to comply with the Commission Staff's request. However the importance and complexity of the subject justifies further study which may result in some modifications of our suggestions in the future.

I appreciate this opportunity to present the views of the Department of Finance on this subject to the Law Revision Commission and hope that they will be of some assistance.

S/
Hale Champion
Director of Finance

HC:wek
78449
Attach.

EXHIBIT II

THE COUNTY COUNSEL

of Los Angeles County

September 28, 1962

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Re: Discretionary immunity under the Public Liability Act

Gentlemen:

At the last meeting of your Commission held in Beverly Hills, it was requested that we give you our thoughts on possible areas of immunity for discretionary acts of public officers which may result in a dangerous or defective condition of public property.

We have two thoughts in this matter which we would like to present for your consideration together with illustrative examples:

1. Immunity for discretion exercised in designing a public project.

   An example of this situation would be the design of a flood control system where such a system was constructed in accordance with reasonable engineering principles but a storm of unprecedented magnitude resulted in a runoff so great that the system was unable to handle it, resulting in the flooding of property.

   We believe that so long as the system was properly designed upon some reasonable basis with reference to past rainfall data that there should be no liability.

2. Where a public project is properly designed and constructed according to the prevailing standards at the time of its construction but where the passage of time and advances in technology render the project obsolete.

   A classic example of this is the San Francisco Oakland Bay Bridge which was built in 1936.

   The width of the lanes on this bridge was established according to the prevailing practice at that time. Since that time however by reason of the use of larger and faster

vehicles, the standard width of highway lanes has been substantially increased.

While it might be possible in the case of an ordinary highway to widen the road, this is of course not possible in the case of the Bay Bridge.

If we think of any other cases for discretionary immunity in the area of the dangerous or defective condition of public property, we will communicate them to you prior to the next meeting of the Commission.

Very truly yours,

HAROLD W. KENNEDY
County Counsel

by S/
Robert C. Lynch
Deputy County Counsel

RCL:hv

EXHIBIT III

CITY OF FRESNO
California

CITY HALL
2326 Fresno Street
AMherst 6-8031

October 2, 1962

California Law Revision Commission
School of Law
Stanford University, California

Attention: John H. DeMoully
Executive Secretary

Subject: Specific Immunities in Dangerous Conditions Legislation

Gentlemen:

The Fresno City Traffic Engineer has indicated that in his opinion it would be desirable that no boulevard stopsign be erected at a signal controlled intersection. The multiplicity of signs at such intersections creates some confusion and, in the opinion of the Traffic Engineer, may do more harm than would the absence of such signs in case the signals were turned off for any reason. He would like to have the normal rules of the road apply at a signal controlled intersection, in the event the signals were not in operation for any reason.

Due to certain decisions of the District Court of Appeal, including Irvin v. Padelford, 127 CA 2d 135, Goodman v. Raposa, 151 CA 2d 830, Dudum v. City of San Mateo, 167 CA 2d 596, we have been reluctant to carry out the Traffic Engineer's recommendation, although his recommendation conforms to the views of the State Department of Public Works and traffic engineers throughout the State.

For the foregoing reasons, we believe it would be helpful if the public agencies were specifically immune from liability in those instances where the legislative body has determined that a specific type of traffic regulation or control is or is not necessary. In other words, if the legislative body determines that a busy street should not be protected by boulevard stopsigns, there should be no liability.

We have had no other specific situation called to our attention in which immunity appears desirable, except in connection with trivial defects. Leaving to the judge what is a trivial defect has not proved satisfactory, and decisions in this State now vary from 1/2 inch to 1-1/2 inch. Some states specifically spell out that a sidewalk defect of a certain depth is not actionable so that judges are not tempted to use their ingenuity to impose liability. Such a provision would be helpful in California where the trend has been to ever increasing liability.

Very truly yours,
S/ John H. Lauten
John H. Lauten
City Attorney

Memo 63(1962)

EXHIBIT IV

CITY OF INGLEWOOD

CALIFORNIA

Office of
Mark C. Allen, Jr.
City Attorney

October 4, 1962

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University, California

Dear Mr. DeMoully:

Your letter dated October 1, 1962, arrived in this office on October 2, 1962, inviting my comments for specific immunities which should be included in liability for dangerous conditions of public property, with a notation that such comments to be considered, must be received before October 8, 1962.

Let me first state that I would agree that all public agencies should be exempt from liability from failure to install regulatory traffic devices and that no liability should exist based on highway design standards.

It would further appear to me that if such an exemption is to be included in the statute, the exemption should also clearly state that (at least as to such traffic control devices as were lawfully installed), no liability attaches for the installation of a traffic control device regardless of a jury decision after the fact that the accident might not have occurred but for the traffic control device.

It further appears to me that there should be some express provision concerning dangerous or defective conditions of public property that will permit a public agency to take precautions considered by them best to avoid injury and damages without exposing themselves to additional liability. For example--if it is necessary to drain storm waters through a culvert, the City should not be faced with the Hobsons Choice of installing a grill to keep children from being injured and have to consider that if the grill were plugged up and the storm waters backed up, that liability would be imposed, and on the other hand, if they do not install the grill and some child crawls into the culvert, liability would exist. I greatly fear that the liability question may come to influence legislative bodies not to take the best precautions designed to avoid death, injury and severe property damages.

The foregoing list is not complete but in order to meet your time limit, it is not possible for me to make a more comprehensive evaluation of the problem.

Yours respectfully,

S/

Mark C. Allen, Jr.
CITY ATTORNEY

MCA: R

CC: Mr. Robert Cockins
City Attorney of Santa Monica

Memo 63(1962)

EXHIBIT V

State of California
Office of the Attorney General

DEPARTMENT OF JUSTICE
Library and Courts Building, Sacramento 14

October 5, 1962

California Law Revision Commission
Stanford
California

Attention: John H. DeMoully

Dear Sirs:

This will acknowledge receipt of your letter of October 1, 1962, in which you indicated the Law Revision Commission would appreciate receiving any suggestions our office might have as to specific immunities we believe should be included in the statute relating to liability for dangerous conditions of public property.

In this regard, we believe the Commission should seriously consider whether certain properties belonging to the State should be excluded from all liability for dangerous condition.

The first area is that of "correctional institutions." In this regard it should be remembered that maintenance and repair work and janitorial services are performed by inmates under supervision of employees but the inadequate number of employees supervising such work makes it less certain that the institutions will be maintained in as safe a condition as private institutions and the State should not be subjected to liability because of this factor. The increased cost necessary to render these places of confinement completely safe in light of the large number of persons incarcerated in relatively close confines makes it impractical for the State to consider other methods than the present economic means of maintaining such properties. Medical care is available to inmates who might be injured during confinement. Therefore it is recommended that the Commission provide that no liability should be imposed upon the State for injuries occurring to patients as a result of dangerous and defective conditions of any correctional institution.

The second area the Commission should consider excluding from liability is "Mental hospitals and Institutes." In most instances housekeeping and janitorial services are performed by the patients of these institutions. Part of the reason for having this work done by the patients is the

therapeutic value it has in keeping these persons busy and having them perform functional and useful services. Though this work is done under the general supervision of State employees, there is less certainty that completely safe premises will be maintained. If any of these patients are injured because of a dangerous and defective condition of the property, it is to be remembered that medical care at the institution is immediately furnished them and at no cost. The maintenance of these large mental hospitals and institutions is a very expensive item in the State's budget and the curtailing of further services would possibly be occasioned if the added burden of paying any court judgments were added to the present cost of maintaining these facilities. Therefore it is recommended that the Commission provide that no liability should be imposed upon the State for injuries to patients of "Mental hospitals and Institutes" for dangerous and defective conditions of such facilities.

A third area where the Commission could well consider granting complete immunity to the State is the vast amount of State lands which are actually undeveloped and unoccupied lands, where there is no practical possibility of the State's exercising any control or inspection of such lands. Therefore it is recommended that the Commission exclude from the possibility of liability the dangerous and defective condition of: "all ungranted tidelands and submerged lands owned by the State, and of the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, and straits, including tidelands and submerged lands" (§ 6301, Pub. Res. Code) and "The unsold portions of the sixteenth and thirty-sixth sections of school lands, the unsold portions of the 500,000 acres granted to the State for school purposes, and the unsold portions of the listed lands selected of the United States in lieu of the sixteenth and thirty-sixth sections . . ." (§ 7301, Pub. Res. Code).

In some instances the State Lands Commission grants leases to persons to erect wharfs and other buildings on such lands and in those cases the injured party can look to that person for recovery for any injuries which may be occasioned by the dangerous and defective condition of the property so leased.

Our office welcomes the opportunity to submit these thoughts for the Commission's consideration and also appreciates the opportunity to attend the Commission's deliberations at its various meetings.

At present we are attempting to compile the type of lawsuits which were filed against State employees in their individual capacities in the last ten years and the number and amounts of judgments which were obtained against them. We are also attempting to find out the experience of New York State and the Federal Government and the amount of claims and judgments awarded because of liability imposed because of the dangerous and defective conditions of recreational areas.

We will forward such information as we receive to the Commission as soon as possible.

Very truly yours,
STANLEY MOSK, ATTORNEY GENERAL

By S/
CHARLES A. BARRETT, Assistant Attorney General

Memo 63(1962)

EXHIBIT VI

CITY ATTORNEY

City Hall

Los Angeles 12, California

October 4, 1962

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Palo Alto, California

Dear Mr. DeMoully:

With regard to your letter of October 1, 1962, inviting suggestions relative to specific immunities which should be included in the dangerous conditions legislation, I think there should be an immunity of both public officers and employees and the public entities where the claimed dangerous condition arises out of faulty design as distinguished from neglect and maintenance.

With regard to the liability of public officers and employees, I assume proposed Section 901.10 is intended to cover negligence for maintenance only whereas Section 901.09 includes negligence in construction or design. As above stated, I think negligence of public officers and employees should be limited to maintenance only. If we get into the matter of design responsibility, as a practical matter, gets too difficult to pinpoint; for instance, a too abrupt curve in a street may go all the way back in its origin to the action taken by the City Council in acquiring the right of way many years before and the same situation would hold true in the design of public buildings where, for instance, the stairway might be improperly designed. There are just too many public officials actually involved in constructing a public building to pinpoint, in fairness, a defect in design.

I think the Commission will find that the decisions imposing liability on officers for the dangerous condition of a highway has been for neglect in maintenance as distinguished from faulty design, and this common law liability was recognized in California and resulted in the 1917 Act being construed as limiting such liability, as explained in Shannon v. Fleishhacker (1931) 116 Cal. App. 258, at page 263. See also, Ham. v. County of Los Angeles (1920) 46 Cal. App. 148, commencing at page 161. This matter of liability for

design brings up what I think is a ridiculous situation. The Commission will find generally that the Courts in various jurisdictions hold that a jury, while entitled to find negligence in failure to keep the street in repair, as in the opinion of the jury it should have been kept, is not permitted to find liability for negligence due to faulty design, unless the jury is able to find that the design is so faulty as to evidence arbitrary action. This point was raised in George v. City of Los Angeles (1938) 11 Cal.2d 303, 307. There the court recognized that the rule was followed in other jurisdictions but held it was not the law in California. It is bad enough if the jury is to be permitted to substitute its judgment in matters of design in cases against the public entity, but it is intolerable that the jury should be permitted to do so in cases against public officials. I think there should be an immunity of public officials in this field of liability as well as the public entity itself, or at the most, the requirements should be that in order to predicate liability on faulty design the court, as a matter of law, should be required to find that the design was so palpably faulty as to evidence arbitrary action.

* * *

Very truly yours,

S/

BOURKE JONES
Assistant City Attorney

BJ:ls

Memo.63(1962) EXHIBIT VII

THE COUNTY COUNSEL

of Santa Clara County

October 8, 1962

California Law Revision Commission
School of Law
Stanford University, California

Attention: Mr. John G. DeMoully
Executive Secretary

Gentlemen:

Thank you for your letter of October 1, 1962 inviting my suggestions as to areas where specific immunities should be granted in the treatment of liability for dangerous and defective conditions of public property. I regret that time does not permit my giving this comprehensive subject a more detailed response.

There are several areas, however, which I believe warrant your consideration, some of which have undoubtedly been suggested by others.

Most important perhaps is an immunity if injury results while the property is being used for other than the designed or intended purpose. This becomes particularly important in recreational uses and will possibly be considered by your commission under that heading. Some examples are: swimming in areas specifically set aside for fishing or boating and in which swimming is prohibited. In an absence of a statutory immunity, litigation and possible liability could result regardless of the injured party's disregard of the prohibitions against the use which resulted in the injury. Other examples include: the use of a golf course for a touch-football game, the use of a bridle path for motorcycle or vehicular traffic, the use of a wilderness area or game preserve for unauthorized camping. Immunity in these areas would seem to be logical and equitable.

Another area which might be contemplated by your letter of October 1 concerns the element of notice or knowledge. I believe that in order to show actual (rather than constructive) notice or knowledge, the person who has the knowledge of the defect should be one with the responsibility and authority to take action. Knowledge of a defective road condition by a member of the road department might constitute knowledge of the

county, while knowledge of a county social worker should not satisfy this requirement, the latter having no duty or responsibility to report or remedy the condition. Although the status of the case law in this area is probably adequate protection at the moment, any statutory modification of these rules or any statutory definition of notice or knowledge should include the above-suggested qualification.

A third area which concerns this office involves the failure of a public agency to comply with some administrative safety regulation as evidence of negligence. Unless care is taken in the treatment of this subject, such non-compliance may eventually result in the imposition of absolute liability. There may be many extenuating circumstances behind a failure to comply with an administrative safety regulation as well as questions as to the reasonableness of the regulation itself. As an example, the State Department of Corrections may establish standards for the construction of drunk tanks and fix a limitation on the number of persons that may occupy such a facility. In a normal situation, the county may very reasonably be expected to comply with such a regulation, but a sudden exceptional number of drunk arrests such as may have occurred in San Francisco the night the Giants won the pennant, may force a police agency to crowd a drunk tank, or to house drunks in facilities not meeting the standards of the State Department of Corrections. This violation of a state safety regulation should not become evidence of negligence under such circumstances.

It is difficult for the originators of such regulation at the state level to fully appreciate the varying fiscal and personnel difficulties and sudden emergencies at play in the local agencies. Rules reasonable for Los Angeles County could be ridiculous if applied to Trinity County. This concept invades the field of discretionary immunity and should be approached with a caution. This problem has been touched upon by the tentative recommendations of the Law Revision Commission of July 1, 1962 relating to governmental liability for hospital, medical, and public health activities, specifically commencing at page 7 thereof. With all due respect to the regulation-making bodies of the administrative arm of our state government, serious consequences could flow if it became the accepted rule of law that their judgment supersedes the discretionary judgment of public officials at the local level as to what is reasonable and appropriate.

I hope these general observations will be of assistance. If you would like more detailed comments on these or any other points, please do not hesitate to contact us.

Very truly yours,

SPENCER M. WILLIAMS
County Counsel

SMW:meb

MEMO. 63(1962) EXHIBIT VIII

EDMUND G. BROWN
GOVERNOR OF CALIFORNIA

ROBERT E. REED
CHIEF OF DIVISION

ROBERT B. BRADFORD
DIRECTOR

STATE OF CALIFORNIA
Department of Public Works
DIVISION OF CONTRACTS AND RIGHTS OF WAY
(LEGAL)

PUBLIC WORKS BUILDING
1120 N STREET
(P. O. BOX 1499)
SACRAMENTO 7, CALIFORNIA

PLEASE REFER TO
FILE No.

October 2, 1962

Law Revision Commission
School of Law
Stanford University
Stanford, California

Attention Mr. John H. DeMoully

Gentlemen:

Re: Liability of Public Entities for Dangerous Conditions of Public Property

At the last meeting of the Commission and in your letter of October 1, 1962, the Department of Public Works was requested to provide the staff with suggested provisions pertaining to immunity from liability for dangerous conditions of public property based upon specific discretionary acts of the public entity.

We agree with the tentative recommendation of the Commission that "public entities should be immune from liability for acts done by their employees which are committed to their discretion". The suggested comprehensive liability statute, in Section 815.4, provides that a public entity is not liable for injury resulting from an act or omission of an employee where the act or omission was the result of an exercise of discretion. However, the discretionary immunity rule has not been incorporated into the provisions relating to liability for dangerous conditions of public property since proposed Section 830 provides that it is the exclusive basis for liability. Thus, it is necessary to draft specific provisions where the entity is not liable for certain discretionary acts pertaining to the operation of its public property.

It is the suggestion of the Department of Public Works that, in connection with liability for dangerous conditions, public entities should not be liable for:

(1) the failure to provide traffic control devices;

(2) the adoption or failure to adopt highway design standards;

(3) the effects on the use of highway facilities of weather conditions.

The consultant to the Commission has researched this subject and had this to say on page 609 of the study:

> "Perry v. City of Santa Monica, discussed above, for example, surveys the applicable provisions of the California Vehicle Code and emphasizes the breadth of discretion vested in the state and local authorities with respect to boulevard stop signs and other traffic control devices. Manifestly, these matters should properly, in most cases, be left to the informed judgment of responsible public officials; for their resolution ordinarily will require an evaluation of a large variety of technical data and policy criteria, including traffic volume frequency and peak load factors, physical layout and terrain, visibility hazards and obstructions, prevailing weather conditions, nature of vehicular use, normal traffic speed in the area, volume of pedestrian traffic, alignment and curvature information, need for similar precautionary measures at other like places, alternative methods of control, and availability of currently budgeted funds to do the job. Decisions not to adopt control devices, when based on premises of this order do not appear to be readily susceptible to intelligent and rational reexamination by untrained juries or judges sitting as triers of fact."

On pages 610 and 611 of the study the consultant further states:

> "To permit reexamination in tort litigation of such inaction, involving as it does a vast congeries of policy determinations at the legislative and planning levels, would appear to create too great a danger of impolitic interference with freedom of decision-making by those public officials in whom the function of making such decisions has been vested. It is thus suggested that liability in such cases be denied in California." (Emphasis added.)

Very recently the same principle was applied in the case of Thon v. City of Los Angeles, 203 A.C.A. 199. At page 202 the court stated:

"Failure to provide a public street, fire apparatus, traffic signals, a traffic stop sign, or other public convenience or necessity gives no rise to a cause of action, ..."

In fact, the Legislature has already recognized the application of this same principle to downward speed zoning. Vehicle Code Section 22358.5 provides:

"It is the intent of the Legislature that physical conditions such as width, curvature, grade and surface conditions, or any other condition readily apparent to a driver, in the absence of other factors, would not require special downward speed zoning, as the basic rule of Section 22350 is sufficient regulation as to such conditions." (Emphasis added.)

On page 513 of the study the consultant recommends that a public entity should not be liable for snow and ice conditions since these are natural conditions beyond the control of governmental agencies. This same principle has been adopted in other states but should be broadened to include all types of weather conditions which affect the use of highway facilities.

It is suggested that Section 831.1 be added to the proposed dangerous condition statute to read as follows:

"A public entity is not liable under Section 830.6 or Section 830.8 for:

(1) the failure to provide regulatory traffic devices or signals, such as, but not necessarily limited to, traffic signals, stop or yield signs, roadway markings or speed zoning signs;

(2) the adoption or failure to adopt highway design standards, such as, but not necessarily limited to, capacity, width, horizontal or vertical curvature or grade, resulting in conditions which are apparent to the highway user under normal circumstances;

(3) the effect on the use of highway facilities of weather conditions, in and of themselves, such as, but not necessarily limited to, fog, wind, flood, rain, ice or snow."

In drafting subparagraph (3) it was the intent of the Department of Public Works to exclude liability only in situations where the weather condition in and of itself caused the accident and not to exclude situations where the weather condition may have created a dangerous condition of the highway, such as a flood washing out a portion of the roadway or wind having blown a tree across the traveled way. In this type of situation liability should be based upon the dangerous condition of public property and duty to remedy or warn after notice of the condition.

We have discussed the above suggestions with the Department of Finance and the Attorney General's office and do not see any apparent conflict with their suggestions and believe that they can be easily integrated with the suggestions of these agencies.

The Department is concerned with the definition of an "employee" in the proposed statute. We believe that the definition should be drafted so as to expressly exclude from its meaning independent contractors. This is particularly important in relation to the subject matter of this letter for we feel that a public entity should not be liable for the discretionary acts of its independent contractors, particularly in the methods of construction which are left to their control. We believe this can be best accomplished by modifying the definition of "employee" rather than adding another subsection to our suggested statute pertaining to the discretionary acts of independent contractors.

The above suggestions are submitted with the understanding that if at any future time we believe others are necessary, they can be drafted and submitted to the staff.

Very truly yours,

Robert E. Reed

ROBERT E. REED
Chief of Division