1-1-1975

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In February, 1971, Dwight Lopez, a student at Central High School in Columbus, Ohio, was suspended by the principal as a result of a cafeteria fracas at his school. At least 75 other students were similarly suspended the same day.\(^1\) Lopez later testified that he had been present during the disturbance, but was merely an innocent bystander.\(^2\) He was not given a hearing (the record is silent as to whether he asked for one); there was no evidence that he was involved in destructive conduct; and—evidently because he misunderstood the terms of his suspension—he remained away from school for roughly 20 days. Consequently, he was transferred to a continuation school.\(^3\)

Similar student demonstrations occurred in other Columbus, Ohio, public schools over about a two-month period, and a number of students were suspended\(^4\) pursuant to an Ohio statute which authorized a principal to suspend or expel a student for misconduct.\(^5\) The statute required only that the principal notify the parents, stating a reason for his action, within 24 hours. While an expelled student was expressly accorded the right to a hearing before the local Board of Education, a suspended student was provided no such opportunity.

Dwight Lopez challenged the constitutionality of this policy, joining in a class action suit with eight other students, each of whom had been suspended for up to 10 days without a hearing.\(^6\) A three-judge federal court invalidated the Ohio statute,

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2. *Id.*
3. *Id.*
holding that the due process clause of the fourteenth amendment protects a student's right to education against state infringement. School administrators appealed; the Supreme Court accepted jurisdiction of the case as *Goss v. Lopez*.\footnote{7. Id. at 1302.}

*Goss v. Lopez* raised an issue which had troubled the lower courts.\footnote{8. 419 U.S. 565 (1975).} Since the landmark case of *Dixon v. Alabama State Board of Education*,\footnote{9. Note, Procedural Due Process and Short Suspensions from the Public Schools: Prologue to Goss v. Lopez, 50 Notre Dame Law. 364 (1974).} which involved expulsion of a state university student, due process rights of notice and hearing had been extended to students facing expulsion or long-term suspensions from school.\footnote{10. 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961). This was the first major decision which recognized that students facing expulsion from school are entitled to due process.} However, the courts could not agree whether due process rights applied to short-term suspensions.


Law and order in the classroom should be the responsibility of our respective educational systems. The courts should not usurp this function and turn disciplinary problems, involving suspension, into criminal adversary proceedings—which they definitely are not.\footnote{14. 386 F.2d 778 (2d Cir. 1967).}

In a five to four decision, the *Goss* Court affirmed the lower

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7. Id. at 1302.
10. 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961). This was the first major decision which recognized that students facing expulsion from school are entitled to due process.
12. See, e.g., Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040 (9th Cir. 1973); Farrell v. Joel, 437 F.2d 160 (2d Cir. 1971); Madera v. Bd. of Educ., 386 F.2d 778 (2d Cir. 1967).
14. 386 F.2d 778 (2d Cir. 1967).
15. Id. at 788-89.
court decision, holding that a student’s right to education is a constitutionally protected interest\textsuperscript{16} encompassing both a liberty and a property right.\textsuperscript{17} A student facing suspension\textsuperscript{18} is therefore entitled, as a minimum, to oral or written notice of the charges, an opportunity for a hearing appropriate to the nature of the case, an explanation of the evidence, and an opportunity to present his side of the story.\textsuperscript{19}

The Court reasoned that if a state mandates education for children between specified ages, as Ohio does,\textsuperscript{20} students have a “legitimate claim of entitlement”\textsuperscript{21} amounting to a property interest in public education.\textsuperscript{22}

Protected interests in property are normally “not created by the Constitution. Rather, they are created and their dimensions are defined” by an independent source such as state statutes or rules entitling the citizen to certain benefits.\textsuperscript{23}

Similarly, recognizing that suspension might label a student as a trouble-maker, thus injuring his reputation and standing with peers and teachers, the Court held that students have a liberty interest in their reputations.\textsuperscript{24}

The Court rejected appellant’s assertion that a suspension of ten days or less is not a serious deprivation and thus not worthy of due process protection. The Court again stressed, as it had earlier in Board of Regents v. Roth,\textsuperscript{25} that

\begin{quote}
in determining “whether due process requirements apply in the first place, we must look not to the ‘weight’ but to
\end{quote}

\begin{itemize}
\item[-] 16. 419 U.S. at 565.
\item[-] 17. Id. at 574-75.
\item[-] 18. Id. at 582. The Court addressed itself solely to the issue of short-term suspensions. Though Goss did not precisely define “suspension,” the term was used in its general educational sense, that is, a temporary compulsory exclusion from school and educational exposure, as a penalty for objectionable behavior. It does not encompass reassignments not involving exclusion from school attendance.
\item[-] 19. Id. at 581; see the Court’s reaffirmation and general recognition of the principle of enforceable students’ rights in Wood v. Strickland, 420 U.S. 308, ___ (1975).
\item[-] 21. 419 U.S. at 573; see Bd. of Regents v. Roth, 408 U.S. 564 (1972).
\item[-] 22. 419 U.S. at 574.
\item[-] 23. Id. at 572-73. It is interesting to note that as early as 1874, the California Supreme Court, in the context of an equal protection segregation case, stated that attendance at a public school is a legal right just as a vested interest in property is a legal right. Ward v. Flood, 48 Cal. 36 (1874) (upholding separate but equal school system).
\item[-] 25. 408 U.S. 564, 570-71 (1972).
\end{itemize}
the nature of the interest at stake.’ . . . [A]s long as a
property deprivation is not de minimus, its gravity is irrele-
vant to the question whether account must be taken of
the Due Process Clause.\textsuperscript{24}

A balancing test—weighing the interest of the student in unin-
terrupted education against the interest of the school system
in maintaining an environment conducive to learning—is rele-
vant only to the kind of procedure due process requires, and not
to whether the right applies.\textsuperscript{27} Thus, writing for the majority, Justice White concluded:

Neither the property interest in educational benefits tem-
porarily denied nor the liberty interest in reputation,
which is also implicated, is so insubstantial that suspen-
sions may constitutionally be imposed by any procedure
the school chooses, no matter how arbitrary.\textsuperscript{28}

Justice Powell in his dissent agreed with the majority view
that a constitutionally protected interest may be created by an
independent source such as statutory law,\textsuperscript{29} but he maintained
that a student’s right to education must be demarcated by the
entire statutory package.\textsuperscript{30} Therefore, since the same Ohio law
which provided for free public education\textsuperscript{31} also authorized
school principals to suspend students for up to 10 days,\textsuperscript{32} Lopez
was not denied due process.

The \textit{Goss} decision is the latest major development in a line
of Supreme Court cases establishing a continuum of protected
interests identified as “legitimate claims of entitlement.”\textsuperscript{33} Not
all claims and not all entitlements trigger the protections of the
due process clause. “[A] mere subjective ‘expectancy’ is
[not] protected by procedural due process.”\textsuperscript{34} However, as the

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\textsuperscript{26} 419 U.S. at 575-76.
\textsuperscript{27} Id. at 476-79.
\textsuperscript{28} Id. at 576.
\textsuperscript{29} Id. at 586-87.
\textsuperscript{30} Id.
\textsuperscript{31} OHIO REV. CODE ANN. § 3313.64 (1972).
\textsuperscript{32} Id. § 3313.66.
\textsuperscript{33} See, e.g., Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sinderman, 408 U.S. 593 (1972) (college teacher who lacked contractual and tenure “right” to reemployment raised “genuine issue as to his interest in continued employment”); Morrissey v. Brewer, 408 U.S. 471 (1972) (parolee and society have interest in rehabilita-
tion and “in treating the parolee with basic fairness”); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare recipient has sufficient “entitlement” to benefits to require proce-
dural due process).
\textsuperscript{34} Perry v. Sinderman, 408 U.S. 593, 603 (1972).
Court reaffirmed in *Goss,* a claim of entitlement may be engendered by "existing rules or understandings."

A person’s interest in a benefit is a “property” interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at the hearing.

The Supreme Court’s holding that students have a claim of entitlement to education will have a substantial impact on the nation’s public school systems, since many state codes authorize suspensions without any provisions for a hearing. The California Education Code, for example, authorizes suspension by teachers for the day of class and the day following, suspension by principals for up to five school days, and suspension or expulsion by the governing board, but until recently did not provide for either a hearing or notice before suspension. Section 10607 provides only that on or before the third day of the suspension period the parent or guardian may attend a meeting with school officials to discuss the reasons for the disciplinary action. If the parent does not meet with school authorities, he or she is notified by mail that the suspension has been imposed.

This section was construed in *Charles S. v. Board of*
as requiring something less than a full due process hearing. The California Court of Appeal noted that a "hearing" was specified only in section 10608, which pertains to expulsions; section 10607 uses the words "meeting" and "conference." The court reasoned that "such a radical change in the wording of adjacent code sections 'cannot be deemed meaningless and without design.'" The court concluded that due process requirements were met by the post-suspension notice to the parents and by the post-suspension conference; a suspended student could present informal proof substantiating his version of a disputed fact situation at the conference.

Other pre-Goss short suspension cases similarly have upheld the constitutionality of section 10607. In Baker v. Downey City Board of Education, which concerned two students who were suspended for 10 days and permanently removed from their respective student-body and class offices for publishing what was deemed a profane and vulgar off-campus newspaper, a federal district court held that compliance with section 10607 satisfied the plaintiffs' administrative procedural rights. In duration, the school policy involved, and other matters pertinent to the suspension, shall be discussed. If the parent or guardian fails to join in such a conference, the school officials shall send him by mail a letter stating the fact that suspension has been implemented and setting forth all other data pertinent to the action.

For recent changes in the expulsion procedure, see id. §§ 967, 10608, 10609-09.4 (Deering's Adv. Legis. Service No. 8, 1975).


45. Id. at 95, 97 Cal. Rptr. at 430. Quoting People v. Pennington, 66 Cal. 2d 508, 521, 58 Cal. Rptr. 374, 383, 426 P.2d 942, 951 (1967), the court defended a hearing as a "'proceeding where evidence is taken to the end of determining an issue of fact and a decision made on the basis of that evidence.'"

46. 20 Cal. App. 3d at 94-96, 97 Cal. Rptr. at 429-30. CAL. EDUC. CODE § 10608 (West 1975) provided in pertinent part:

If a pupil is expelled from school, the parent or guardian of the pupil may appeal to the county board of education which shall hold a hearing thereon and render its decision.

This section was repealed and replaced by a new section 10608 which requires greatly expanded procedural process. Id. (Deering's Adv. Legis. Service No. 8, 1975).


49. Id. at 94, 97 Cal. Rptr. at 429.


51. Id. at 523. The court observed:

[If the temporary suspension of a high school student could not be accomplished without first preparing specification of charges, giving no-
Noonan v. Green, the court of appeal impliedly also found section 10607 to provide adequate procedural safeguards in a short-suspension situation.

However, the permissive post-suspension notice and conference between parents and school officials will not comply with the Goss minimum requirements. The student in California who must wait for the post-suspension conference before he or she may tender an explanation for the alleged misconduct is deprived of three days’ school attendance; the Goss Court held that any such deprivation, irrespective of the length, warrants due process protection. Absent an emergency, both notice and a hearing must precede the suspension.

Three major problems remained unsolved by Goss to plague school administrators. First, as Justice Powell’s dissent asked, to which other educational decisions might the Goss procedural requisites extend? Second, are school board trustees and administrators liable in damages if they fail to provide adequate procedures? Third, what constitutes a procedurally acceptable hearing?

Justice Powell suggested that, by the logic of the majority

tice of a hearing, and holding a hearing, or any combination of these procedures, the discipline and ordered conduct of the educational program and the moral atmosphere required by good educational standards, would be difficult to maintain.

Id. at 522-23.


53. The Noonan court held that the trial court had no jurisdiction in the case because of the failure of the parties to pursue the remedies provided by sections 10607 and 10608. The court confused the issue by referring to the meeting specified in section 10607 as a “hearing.” Id. at 30-31, 80 Cal. Rptr. at 517.

54. 419 U.S. at 582.

55. Id. at 597. Justice Powell suggested that Goss logically would apply to many educational decisions:

Teachers and other school authorities are required to make many decisions that have serious consequences for the pupil. They must decide, for example, how to grade the student’s work, whether a student passes or fails a course, whether he is to be promoted, whether he is required to take certain subjects, whether he may be excluded from interscholastic athletics or other extracurricular activities, whether he may be removed from one school and sent to another, whether he may be bused long distances when available schools are nearby, and whether he should be placed in a “general,” “vocational,” or “college-preparatory” track.

In these and many similar situations claims of impairment of one’s educational entitlement identical in principle to those before the Court today can be asserted with equal or greater justification. Likewise, in many of these situations, the pupil can advance the same types of speculative and subjective injuries given critical weight in this case.

Id.
opinion, such basic educational decisions as giving a student a failing grade might affect the "broad range of interests" accorded constitutional protection as property rights. For some indication of the probable scope of the Goss holding it is helpful to look to the Roth line of cases which preceded Goss. In Board of Regents v. Roth, the Supreme Court indicated the parameters of the expanding concept of property rights. Such rights are not infinite.

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Thus, the college instructor in Roth did not have a claim of entitlement because the terms of his contract specified that he was hired for only one year, while the instructor in Perry v. Sinderman did have a claim of entitlement based on his reliance on an alleged informal understanding at his college.

These cases also help define the parameters of the liberty interest, the meaning of which "must be broad indeed." The instructor in Roth did not establish deprivation of a liberty interest because he failed to show that his professional reputation was harmed when he was not rehired.

If a student's entitlement to an education, established by Goss, is injured by action taken by school administrators, or if the student can show harm to his reputation, Powell's fears

57. See note 54 supra.
58. 408 U.S. 564 (1972).
59. Id. at 577.
60. Id. at 578.
61. 408 U.S. 593, 602-03 (1972).
63. Id. at 573-74.
may be realized. Decisions which traditionally have been left to the discretion of educators may now be subject to review in the courts.

The answer to the second unresolved problem was given by the Supreme Court in \textit{Wood v. Strickland},\textsuperscript{64} a case subsequent to \textit{Goss} which involved the suspension of two girls for spiking the home economics class punch with malt liquor at a meeting attended by parents and students. The Court held that a school board trustee or administrator "must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges."\textsuperscript{65} This holding overturned the traditional common-law extension to school officials of qualified good-faith immunity.\textsuperscript{66} In the context of school discipline, the \textit{Strickland} Court held, a school official who takes an action which violates the constitutional rights of a student is liable for damages under section 1983 of the Civil Rights Act.\textsuperscript{67}

A major defect in the \textit{Goss} decision is that the majority failed to explicate precisely the components of a fair pre-suspension hearing. Who should conduct the hearing? Should parents be afforded the opportunity to be present? Does the student have a right to contest the charge against him? Do any evidentiary rules apply?

The \textit{Goss} Court seemed to indicate that very informal procedures are constitutionally adequate.

There need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred.\textsuperscript{68}

A student need not be represented by counsel nor must he be allowed to cross-examine witnesses.\textsuperscript{69} Furthermore, if the "informal discussion" the Court describes may be held "minutes" after the offense occurred, and simultaneously with notice, parents obviously will be unable to be present at the hearing.

\textsuperscript{65} \textit{Id.} at 1001.
\textsuperscript{66} \textit{See} Sweeney v. Young, 82 N.H. 159, 131 A. 155 (1925); Douglas v. Campbell, 89 Ark. 254, 116 S.W. 211 (1909).
\textsuperscript{68} 419 U.S. at 582.
\textsuperscript{69} \textit{Id.} at 583.
Again, it is useful to turn to the line of cases preceding Goss for guidelines. In Goldberg v. Kelly, the Supreme Court ruled that basic procedural due process requires a hearing held "at a meaningful time and in a meaningful manner," though the exact procedural requirements may vary with the basic circumstances:

"[C]onsideration of which procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." 72

The Supreme Court has found in Goldberg v. Kelly and subsequent decisions in the Roth line that for persons facing deprivation of liberty or property, "meaningful manner" includes the right to an impartial decisionmaker, to a decision based on rules and evidence, and to a record which states the decisionmaker's reasons for his determinations and indicates the evidence he relied upon. The nature of the interest at stake in school disciplinary situations suggests that these requirements may well apply to a pre-suspension hearing.

Ordinarily, a teacher or principal probably must be presumed to be impartial, but whether a teacher or principal who has just witnessed misconduct may function as an impartial trier of fact is a question which some future court must resolve.

It is noteworthy, however, that in a pre-Goss case, Sullivan v. Houston Independent School District, the Fifth Circuit Court of Appeals ruled that someone other than the principal should conduct the short-term suspension hearing if the principal's

70. Justice Powell, however, argued that "the relationship between a student and teacher is manifestly different" from that involved in many of the noneducational settings found in other Roth-line cases. 419 U.S. at 594 n.13.
74. See cases cited note 73 supra.
77. 475 F.2d 1071, 1077 (5th Cir. 1973); see Hawkins v. Coleman, 376 F. Supp. 1330 (N.D. Tex. 1974).
involvement was such that he could not be an impartial trier of fact.

An additional source of guidelines for pre-suspension hearings may be found in recent California legislation enacting standards for pre-expulsion hearings. 78 The legislature recognized the importance of an impartial decisionmaker by providing that "the governing board may appoint an impartial administrative panel of three or more certificated employees of the district, none of whom shall be on the staff of the school in which the pupil is enrolled." 79 The decision to expel a student must be based upon substantial evidence. Although the technical rules of evidence need not be observed, only evidence upon which reasonable persons are accustomed to rely may be admitted. 80 A reasonably accurate record must be made of the proceedings. 81

Although Goss may not require standards as stringent or formal as those established by the California Legislature for expulsion hearings, the liability which attends failure to develop adequate procedural safeguards for short-term suspension proceedings makes caution the wiser course.

Patricia Paulson White

79. Id. § 10608 (d).
80. Id. (f).
81. Id. (e).

On December 23, 1972, Los Angeles Deputy Sheriff Garcia received an anonymous tip advising him that by calling a certain telephone number bets could be placed throughout the country. The tip led to a three-month investigation which resulted in the arrest of defendant William Parker and other persons involved in a bookmaking ring.¹

During the course of the investigation Garcia and his deputies maintained surveillance of three residential apartments in El Monte, California: 12132 Sitka, Apartment 18; 9918 Rio Hondo Parkway, Apartment 15; and 5023 Rosemead Boulevard, Apartment 3. Numerous activities at these first two addresses reinforced the officers’ suspicions that a bookmaking ring was in operation.² The deputies also learned that defendant William Parker,³ known to the officers from previous bookmaking arrests, was the lessee of the Rosemead apartment.⁴

1. People v. Parker, 44 Cal. App. 3d 222, 118 Cal. Rptr. 523 (1975). Deputy Garcia estimated that the bookmaking ring consisted of 18 agents and 75 to 100 bettors. Id. at 228, 118 Cal. Rptr. at 527.

2. Id. at 224-27, 118 Cal. Rptr. at 525-27. The investigation began after Garcia traced the telephone number to the Rio Hondo apartment. Garcia maintained surveillance of that apartment from December 27, 1972, through March 7, 1973, and noticed that Alvin Lingo followed a consistent pattern in using the apartment when the local tracks were open. The pattern consisted of Lingo leaving his home at 9:00 a.m., driving to a liquor store and purchasing a National Daily Reporter, and then proceeding to the apartment where he would remain until 6:30 p.m.

Garcia also observed Jacob and Pat Jackson at the Rio Hondo apartment and learned that the Jacksons were leasing an apartment on Sitka in El Monte. The deputy further learned from the telephone company that between January 4, 1973, and February 2, 1973, hundreds of calls were made from the Sitka apartment telephone to the Turfmaster Wire Service, which informs subscribers of the latest horse racing results. On February 5, 1973, Garcia observed Mr. Jackson in a bar collecting bets and making payoffs to various patrons. During the course of the surveillance at the Sitka address, Garcia noticed James Registar, a bookmaker who had a previous arrest record, used the Sitka apartment in a manner similar to Alvin Lingo’s use of the Rio Hondo Parkway apartment. Id.

3. On February 7, 1973, Parker was seen in a meat market, a bar, and a bowling alley talking about horse racing with people who would point to a copy of the National Daily Reporter, after which Parker would write something down. At the conclusion of each conversation either Parker or his female companion would place a call on a pay phone. Id. at 226-27, 118 Cal. Rptr. at 527.

4. Id. at 226, 118 Cal. Rptr. at 526-27. The affidavit from which the court summa-
On February 21, 1973, at 6:30 p.m., Garcia observed Lingo and Registar, both of whom were thought to be part of the ring, leave the Sitka apartment. Registar was carrying a green plastic bag which he placed in a large refuse receptacle at the side of the apartment complex. The bin was used by about 60 people in the 19-unit apartment building. Garcia proceeded to the trash bin without a warrant and retrieved the green trash bag. Inside he found incriminating evidence from which he concluded that the Sitka and Rio Hondo apartments were being used to conduct bookmaking activities. Garcia discovered Parker's name, address, and telephone number in the records recovered from the trash, and materials connecting him with 12 bets.

Several weeks later, on the basis of the information gathered during the three-month investigation, Deputy Garcia secured a warrant which authorized the search of defendant's residence. The search uncovered additional incriminating evidence in Parker's apartment. Parker was arrested and charged with conspiracy and bookmaking activities.

At the preliminary hearing, defendant's motion to quash the warrant was denied on the grounds that the warrantless search of the trash can did not violate the fourth amendment's prohibition against unreasonable searches and seizures. The

5. Garcia found 10 daily tally sheets, 80 slips of paper showing payoffs on winning horses, 10 National Daily Reporters—all marked, 49 slips of paper showing weekly owes to bettors, 12 slips of paper showing daily owes and pays to agents, 106 pieces of paper showing monies bet on each race at Santa Anita, and a telephone bill for a special toll-free number installed at 9918 Rio Hondo Parkway. Id. at 227-28, 118 Cal. Rptr. at 527.

6. Garcia formed his opinion on the basis of his expertise as a bookmaking vice officer. Id. at 228, 118 Cal. Rptr. at 527-28.

7. Id. at 228, 118 Cal. Rptr. at 528.

8. CAL. PEN. CODE § 337a (West 1970) provides in part:

   Every person . . . [w]ho lays, makes, offers or accepts any bet or bets . . . is punishable by imprisonment in the county jail for a period of not more than one year or in the state prison for a period not exceeding two years.

9. CAL. PEN. CODE § 182 (West 1970) provides in part:

   If two or more persons conspire:

   1. To commit any crime . . . they shall be punishable by imprisonment in the county jail for not more than one year or in the state prison for not more than three years, or by a fine not exceeding five thousand dollars ($5,000) or both.

10. Id. at 226 n.6, 118 Cal. Rptr. at 526 n.6.
magistrate further found that even if the search of the trash can was improper, there existed sufficient evidence from other sources to justify the issuance of the warrant. The defendant appealed to the superior court on a 995 motion to have the information set aside. The superior court granted the motion, holding that the People had presented no evidence that a warrant to search the receptacle could not have been obtained.

The People did not raise the issue of whether the affidavit contained independent information to support the warrant if the trash can material were excised.

On appeal from the superior court decision, the California Court of Appeal ruled that the magistrate had been given enough information apart from the trash can material to justify issuing the warrant. The opinion cited the officer's expertise and the detailed eighteen page affidavit as furnishing the necessary probable cause.

Although the ruling on the affidavit was sufficient to decide the case, the Parker court felt compelled to address itself to the issue of the search of the trash can with probable cause but without a warrant. The history of the trash can cases began in 1969 when the California Supreme Court in People v.

11. 44 Cal. App. 3d at 229, 118 Cal. Rptr. at 528.
12. CAL. PEN. CODE § 995 (West 1970) provides in part:
   The indictment or information must be set aside by the court
   If it be an information:
   1. That before filing thereof the defendant had not been legally
      committed by a magistrate.
13. 44 Cal. App. 3d at 229, 118 Cal. Rptr. at 528-29.
14. Since the People did not raise before the superior court the issue of the search
    warrant's validity minus the information obtained from the trash can, the defendants
    claimed that the question could not be raised on appeal. However, the court of appeal
    cited People v. Maltz, 14 Cal. App. 3d 381, 92 Cal. Rptr. 216 (1971), for the proposition
    that the People could raise any issue before the court of appeal that was presented to
    and decided by the magistrate at the preliminary hearing, even though the superior
    court, on appeal, was not asked to decide that issue. 44 Cal. App. 3d at 229, 118 Cal.
    Rptr. at 529.
15. Id. at 229, 118 Cal. Rptr. at 528.
16. Id.; see People v. Benjamin, 71 Cal. 2d 296, 455 P.2d 438, 78 Cal. Rptr. 510
    (1969), where the California Supreme Court upheld an affidavit in a fact situation
    similar to Parker.
17. The magistrate at the preliminary hearing, the trial court, and the court of
    appeal indicated that there was probable cause for the search of the trash can. 44 Cal.
    App. 3d at 229 n.8, 118 Cal. Rptr. at 529 n.8.
18. U.S. CONST. amend. IV provides:
   The right of the people to be secure in their persons, houses, papers,
   and effects against unreasonable searches and seizures shall not be viol-
   ated, and no warrant shall issue but upon probable cause supported by
Edwards\textsuperscript{18} invalidated the warrantless search of a residential homeowner's trash can which was within a few feet of his back door. The Edwards court cited Katz v. United States\textsuperscript{20} for the proposition that the fourth amendment protects people, not places, and that wherever an individual may harbor a reasonable expectation of privacy, he is entitled to be free from governmental intrusion.\textsuperscript{21} The Edwards court concluded that the defendant had exhibited an expectation of privacy and that the expectation was reasonable under the circumstances of the case.\textsuperscript{22} The court further stated:

We can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other tell-tale refuse and trash to be examined by neighbors or others, at least not until the trash had lost its identity and meaning by becoming part of a conglomeration of trash elsewhere. Half truths leading to rumor and gossip may readily flow from an attempt to "read" the contents of another's trash.\textsuperscript{23}

Two years later, the same court in People v. Krivda\textsuperscript{24} extended the Edwards rationale and declared illegal the warrantless search of a trash can which a homeowner had placed on the sidewalk for collection. The people had argued removing trash

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\textsuperscript{19} Id. at 1104, 458 P.2d at 718, 80 Cal. Rptr. at 638.


\textsuperscript{21} Id. at 1104, 458 P.2d at 718, 80 Cal. Rptr. at 638.

to the sidewalk for collection was an abandonment of one's trash to the police or the general public.\textsuperscript{25} The \textit{Krivda} court noted, however, that many municipalities have enacted ordinances which restrict the right to haul away trash to licensed collectors and prohibit unauthorized persons from tampering with trash containers.\textsuperscript{26} The \textit{Krivda} court indicated that it was reluctant to encourage the police to search citizens' trash without a warrant.\textsuperscript{27}

Nevertheless, in a 1973 decision, \textit{People v. Dumas},\textsuperscript{28} the California Supreme Court distinguished \textit{Krivda} and upheld the warrantless search of a car parked in front of the defendant's home. The \textit{Dumas} court accepted the analogy between a trash can and an automobile,\textsuperscript{29} but indicated that the \textit{Krivda} decision did not preclude a valid warrantless search of a trash can upon a proper showing of probable cause.\textsuperscript{30} The \textit{Dumas} court further pointed out that trash cans, like cars and parcels consigned to common carriers,\textsuperscript{31} may be searched without a warrant if the requirements of \textit{United States v. Carroll}\textsuperscript{32} are

\textsuperscript{25} 5 Cal. 3d at 365, 486 P.2d at 1268, 96 Cal. Rptr. at 68.
\textsuperscript{26} Id. at 366, 486 P.2d at 1268, 96 Cal. Rptr. at 68.
\textsuperscript{27} Id. at 367, 486 P.2d at 1269, 96 Cal. Rptr. at 69.
\textsuperscript{28} 9 Cal. 3d 871, 512 P.2d 1208, 109 Cal. Rptr. 304 (1973).
\textsuperscript{29} Id. at 884, 512 P.2d at 1217, 109 Cal. Rptr. at 313. The \textit{Dumas} decision established a three-level hierarchy of fourth amendment protection, depending upon the nature of the place to be searched. Homes and offices are to be accorded all but absolute protection from warrantless searches. Cars and trash cans, because of an individual's lesser expectation of privacy, may be searched upon probable cause if it can be shown that it was impractical for the police to secure a warrant. Other places may be searched without a warrant if the defendant had not exhibited a reasonable expectation of privacy. \textit{Id.} at 882-83, 512 P.2d at 1216-17, 109 Cal. Rptr. at 312-13.
\textsuperscript{30} The \textit{Dumas} court concluded that the affidavit in the \textit{Krivda} case did not meet the test set out in \textit{Aguilar v. Texas}, 378 U.S. 108 (1964). 9 Cal. 3d at 884, 512 P.2d at 1217, 109 Cal. Rptr. at 313.
\textsuperscript{31} \textit{People v. McKinnon}, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972). The \textit{McKinnon} decision upheld the warrantless search of cartons which were in the hands of an airline on the grounds of exigent circumstances. The \textit{McKinnon} case can be distinguished from \textit{Parker} in three respects: first, in \textit{McKinnon} the defendants were ready to board an airplane which was preparing to fly out of the jurisdiction; second, the cartons in \textit{McKinnon} were not resting on private property but had been consigned to a common carrier for transportation to a remote destination; finally, the cartons were being used for an illegal purpose in that they contained contraband, not mere evidence. \textit{Id.} at 911, 500 P.2d at 1105, 103 Cal. Rptr. at 905. In \textit{Parker} the trash was still on private property and not yet in the trash truck; the defendants were not in the process of fleeing the area; and the trash on the night in question was not being used for an illegal purpose: it was evidence and not contraband. \textit{See} 44 Cal. App. 3d at 223-29, 118 Cal. Rptr. at 525-28.
\textsuperscript{32} 267 U.S. 132 (1925). The \textit{Carroll} Court summed up the doctrine this way:

\textit{[T]he guaranty of freedom from unreasonable searches and seizures by}
met: existence of probable cause and exigent circumstances which render the obtaining of a warrant impractical.\textsuperscript{33}

Against this background, the \textit{Parker} court upheld the warrantless search of the trash can.\textsuperscript{34} It is interesting to note that the \textit{Parker} court never stated that apartment dwellers who place their trash in a common receptacle do not enjoy the protection of the fourth amendment with respect to that trash. While \textit{Edwards} and \textit{Krivda} invalidated warrantless searches of private homeowners' trash bins, the California Supreme Court has never decided whether an apartment dweller who shares a common receptacle has the same reasonable expectation of privacy.\textsuperscript{35} Had the \textit{Parker} court concluded that an apartment resident has no reasonable expectation of privacy, it would have been unnecessary to determine what exigent circumstances are sufficient to support a warrantless search, since there would have been no fourth amendment rights to protect. Therefore, by implication, the court assumed the existence of a protectable right and addressed itself to the task of evaluating the exigent circumstances of the search.

The court listed the characteristics of a trash can which ordinarily would render the securing of a warrant impractical: first, the materials in a trash can are placed there for removal and thus are highly portable; second, trespassory incursions into exterior trash receptacles by human and animal foragers are not totally unexpected; finally, people are not particularly careful in making sure that the contents of the trash can will

\begin{quote}
the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motorboat, wagon or automobile, for contraband goods, where it is not practical to secure a warrant because the vehicle can be quickly moved out of the locality.
\end{quote}

\textit{Id.} at 153.


34. \textit{See note 17 supra.}

35. In both \textit{Edwards} and \textit{Krivda} the trash cans belonged to residential homeowners. In People v. Stewart, 34 Cal. App. 3d 695, 110 Cal. Rptr. 227 (1973), the court indicated that an apartment dweller might have a lesser expectation of privacy with respect to his trash bin than a homeowner. However, the \textit{Stewart} court never resolved this issue and decided the case on other grounds. \textit{Id.} at 700, 110 Cal. Rptr. at 230. Since the \textit{Parker} decision, the California Court of Appeal has concluded that communal trash receptacles are protected by the fourth amendment. People v. Smith, \textit{\textsuperscript{____} Cal. App. 3d \textsuperscript{____} n.5}, 125 Cal. Rptr. 192, 197 n.5 (1975).
not be damaged by the weather. The court stated that since most trash cans share these common characteristics, the People would need to show only minimal additional facts to justify a warrantless search of a trash receptacle.

While the Dumas decision indicated in dictum that trash placed on a sidewalk for collection may be searched without a warrant upon probable cause, at least when officers have reason to fear the imminent arrival of garbage collection trucks, the Parker court concluded that Deputy Garcia faced no such emergency. Consequently, the court had to find other exigent circumstances which rendered the securing of a warrant impractical. It found three: the sudden unexpected nature of the discovery; the communal character of the trash receptacle, which increased chances of tampering or weather damage; and the fact that procuring and serving a warrant in the midst of an ongoing investigation involving numerous suspects might prevent successful completion of the operation.

The court first noted that the officers came upon the trash unexpectedly. Thus, the police were not in a situation where they knew ahead of time the location and the nature of the area to be searched but for some reason failed to get judicial approval. However, the mere fact that the officers discovered the evidence inadvertently does not automatically mean that it was impractical to obtain a warrant. The People must still demonstrate that the overall circumstances are such that the evidence may be destroyed or removed from the reach of the

36. 44 Cal. App. 3d at 230, 118 Cal. Rptr. at 529.
37. The court declined to attach any significance to the fact that the trash bin was located next to the exterior premises. Id. The court stated that an analogy with automobile search cases was appropriate, and noted that searches of vehicles have been upheld where the car was parked at the curb or adjacent to the defendant's apartment, id. at 231, 118 Cal. Rptr. at 530, apparently on the theory that the very nature of a trash can, like the inherent mobility of an automobile, tends to make securing a warrant impractical. See Chambers v. Maroney, 399 U.S. 48 (1970); cf. Coolidge v. New Hampshire, 403 U.S. 443 (1971).
38. See note 30 supra.
40. 44 Cal. App. 3d at 230, 118 Cal. Rptr. at 529.
41. Id.
42. Id.
officers if a search is not carried out immediately. 44

The Parker court also indicated concern that the contents of the trash can would be tampered with or damaged by the weather, and noted that these chances were increased since many people regularly used the receptacle. 45 Yet there was no showing of inclement weather, nor that the apartment complex was located in an area where tampering with trash was likely to be more than a remote possibility. Since the material the officers were interested in was in a plastic bag, the chances that the evidence would be damaged by rain, blown away by the wind, or damaged by other garbage in the bin were small. At the time the trash was placed in the receptacle, there was only one green plastic bag. 46 Consequently, it would have been easy for the officers to identify the bag had they decided to secure a warrant.

Finally, the court noted that any effort to obtain a warrant could have resulted in the premature disclosure of the ongoing investigation to the potential defendants, thereby preventing its successful completion. 47 The opinion gives no explanation as to how this might happen and as a result of the omission, we must speculate. One possible interpretation is that even though the deputies did not have to serve a warrant on anybody in order to search the trash bin, 48 they probably would have been required to give a receipt to Registar for the property taken, 49 since it was his trash that was seized. Had Registar received such a receipt, it is reasonable to assume that he would have called defendant Parker and other persons in the ring, alerting them to possible police action and warning them to destroy any incriminating evidence in their possession.

45. 44 Cal. App. 3d at 230, 118 Cal. Rptr. at 529.
46. Id. at 227, 118 Cal. Rptr. at 527.
47. Id. at 230, 118 Cal. Rptr. at 529.
48. See CAL. PEN. CODE § 1528 (West 1970) which provides in part:
   If the magistrate is thereupon satisfied . . . that there is probable cause . . . he must issue a warrant . . . to a peace officer in his county commanding him forthwith to search the person or place named for the property or things specified . . .
49. CAL. PEN. CODE § 1535 (West 1970) provides:
   When the officer takes property under the warrant, he must give a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property.
However, in *People v. Phillips*,\(^5\) the California Court of Appeal held that the receipt requirement imposed by the Penal Code was ministerial in nature, and the fact that officers did not issue one did not void the warrant or contaminate for evidentiary purposes the property received under the warrant. Therefore, it is unclear what the court had in mind when it listed danger to the investigation in progress as an exigent circumstance supporting the search of the trash bin.

Although the *Parker* court found the search justified by exigent circumstances, the court's unarticulated conclusion seems to be that 60 people who share a trash bin do not have a reasonable expectation of privacy as to that bin. The communal nature of the trash receptacle is continually stressed,\(^5^1\) and it would appear that the court might have preferred to deal straightforwardly with that issue. The difficulty with deciding the case using an expectation of privacy analysis is that the court would have become involved in the complicated task of determining at what numerical point individuals lose fourth amendment protection with respect to shared trash.\(^5^2\)

The significance of *Parker* is that the court places a light burden on the People in justifying warrantless searches of trash cans upon probable cause. In addition, the court has sidestepped the difficult question of when and to what extent apartment owners have a reasonable expectation that their trash will not be searched by the police without a warrant. There may well be future cases where it will be difficult for the People to make an exigent circumstances argument and it will be for those cases to decide the expectation of privacy issue.\(^5^3\)

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52. The prosecution would probably point out that the commingling of one's trash with another's exposes that trash to a greater risk of being tampered with or damaged and, therefore, one's expectation of privacy is not reasonable under the circumstances. The defense would argue that since the expectation of a homeowner is that his garbage will be destroyed and not inspected by the government or its licensee, then an apartment dweller should not have to assume a greater risk of a warrantless search because that individual must of necessity share his trash receptacle.
53. Since the *Parker* decision, the California Court of Appeal has concluded that communal trash receptacles are within the ambit of the fourth amendment. *People v. Smith*, ____ Cal. App. 3d ____, ____ n.5, 125 Cal. Rptr. 192, 197 n.5 (1975). See note 35 *supra*. 

On November 18, 1971, the San Francisco Bay Conservation and Development Commission (BCDC) adopted the San Francisco Bay Plan. The plan consisted of a detailed analysis of the Bay and land use recommendations by the BCDC for the Bay and its shoreline. Among the parcels designated for specific uses was a tract owned by Navajo Terminals, Inc. (Navajo), including a 500-foot frontage on the U.S. Tidal Canal in San Francisco Bay. The 1971 BCDC Bay Plan designated the Navajo land for use as a public waterfront park; its designation was not modifiable except by the legislature.

Navajo thereafter filed an action for damages, alleging that the BCDC action constituted inverse condemnation. The BCDC's demurrer was sustained without leave to amend.

On appeal Navajo argued that the mere designation of its land as a water-orientated public park constituted a taking of private property without just compensation, even though there

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1. The San Francisco Bay Conservation and Development Commission (BCDC) was created in 1965 by the California Legislature, Cal. Gov’t Code § 66600 et seq (West 1966), as a temporary planning agency, id. § 66604, charged with the task of preparing an extensive study of the Bay, id. § 66603. BCDC was also given the power to issue and deny permits to place material in or remove material from the Bay. Id. § 66604. In 1969, the BCDC submitted the initial draft of the San Francisco Bay Plan to the legislature, with recommendations for actions to be taken by the legislature.

As a result of the study, the legislature established the BCDC as a permanent agency in 1969, id. § 66659 (West Supp. 1975), with jurisdiction over the Bay and its shoreline extending one hundred feet inland from the mean high tide, id. § 66610. The permanent BCDC was authorized to issue or deny permits to build, fill the Bay, dredge, or make any change in the use of any land, water, or structure within BCDC jurisdiction. Id. § 66632.


3. Id. at 3, 120 Cal. Rptr. at 109. Subsequent amendments delegated the power of modification to BCDC.


5. 46 Cal. App. 3d at 2, 120 Cal. Rptr. at 108.
was no indication that any public entity would begin condemnation proceedings in the foreseeable future. Specifically, Navajo attempted to show that the San Francisco Bay Plan as passed by the BCDC was something more than just a general plan.\(^6\) Navajo contended that the Bay Plan was analogous to a zoning ordinance by the BCDC,\(^7\) and that the plan's designation of the property as a public park was an unreasonable restriction on Navajo's use of its land. However, the court in Navajo found that the Bay Plan was a general plan and held that Selby Realty Co. v. City of Buenaventura\(^8\) was "dispositive of Navajo's contention that BCDC's action constituted a taking."\(^9\) The court also concluded that since Navajo alleged no action by the BCDC other than the adoption of the plan, all other issues were premature.\(^10\)

It is the determination that the San Francisco Bay Plan is a general plan that is the essence of the court's decision. Construed as part of a general plan, the BCDC's classification of Navajo's land is a mere designation of a potential public use and not a taking compensable in damages.

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6. The general plan is an intra-governmental tool for municipal land-use planning. It is important to note that the general plan has essentially no effect until implemented. See D. Hagman, Urban Planning and Land Development Control Law § 17 (1971). "The general plan is a comprehensive, long-range policy guide for development of the city as a whole." Id. at 42.

7. 46 Cal. App. 3d at 4, 120 Cal. Rptr. at 109.


9. 46 Cal. App. 3d at 4, 120 Cal. Rptr. at 109. The Navajo court reiterated the policy grounds set out in Selby:

   If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land. We indulge in no hyperbole to suggest that if every land owner whose property might be affected at some vague and distant future time by any of these legislatively permissible plans was entitled to bring an action in declaratory relief to obtain a judicial declaration as to the validity and potential effect of the plan upon his land, the courts of this state would be inundated with futile litigation. It is clear, under all the circumstances, that plaintiff has not stated a cause of action against the county defendants for either declaratory relief or inverse condemnation. Id., quoting Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d at 120-21, 514 P.2d at 117-18, 109 Cal. Rptr. at 805-06 (1973).

10. Id. at 5, 120 Cal. Rptr. at 110. The issues that the court concluded were premature were whether a waterfront park was a legitimate land-use objective, whether the designation created an impermissible island, and whether the public gain from the use of the park would be grossly disproportionate to the economic loss Navajo would sustain by the designation. Id.
Had the court construed the Bay Plan as a zoning ordinance, it would have been necessary to examine the reasonableness of the restriction on Navajo’s land uses. The court rejected the zoning analogy, however, and relied on Selby, which held that a property owner may not recover in inverse condemnation merely because a municipality has indicated through a general plan that it may eventually take the land.

The plaintiff in Selby owned one parcel of land within the city and another parcel solely under the jurisdiction of the County of Ventura. The city and the county, prior to the initiation of the action, had adopted a joint general plan, including a proposed circulation element for guiding the growth of streets. The plan proposed an extension of a city street directly through the plaintiff’s city land and partially through the county land. In 1970 the plaintiff applied to the city for a building permit to erect a series of multi-unit dwellings. The building plans showed that the proposed dwellings would be located partially on the land intended to be used for the extension of the street. The city denied the permit, allegedly because of the failure of the plaintiff to dedicate land for the street to the city.

Selby contended that the county’s adoption of a general plan amounted to a taking of his property. The supreme court dismissed this assertion and held that a land owner cannot claim that his property has been taken without compensation merely because the general plan of an area indicates that sometime in the future it may be taken for public use. The court

11. Had the Navajo court accepted the zoning analogy and directly confronted the issue of the reasonableness of the restriction imposed, the disposition of the case would have turned on the fact that the governmental regulation involved did not merely restrict the range of potential uses, but rather zoned the property to be taken by the state.

The fact that the Bay Plan designated the land to be taken, leaving Navajo no possible use, is critical in light of the California Supreme Court’s recent decision in HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), which held that oppressive zoning ordinances that reduce the value of the property affected but do not preclude all possible uses do not give rise to inverse condemnation actions; the only remedy available is a writ of mandate allowing no damages.

Of particular importance to the issues presented in Navajo is footnote 14 of the HFH case, in which the supreme court said, “Neither Selby nor this case [HFH] presents the distinct problems arising from inequitable zoning actions undertaken by a public agency as a prelude to public acquisition.” Id. at 517 n.14, 542 P.2d at 243 n.14, 125 Cal. Rptr. at 371 n.14. The court did not reach the issues presented in Navajo.


13. Id. at 115-16, 514 P.2d at 114, 109 Cal. Rptr. at 802.
stressed the clear public and legislative policy in favor of rational planning, and the tentative, uncertain nature of the general plan.\footnote{14}

Declining to recognize any distinctions between a local general plan and the San Francisco Bay Plan,\footnote{15} the court in \textit{Navajo} rejected as inapplicable two other cases, \textit{Klopping v. City of Whittier}\footnote{16} and \textit{Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission}.\footnote{17}

\textit{Navajo} argued that the designation of its property as a future publicly owned water park would oppressively and unnecessarily extend the period of time between the beginning of the taking process and the actual taking. It asserted that in this case, the taking process began with the adoption of the San Francisco Bay Plan by the BCDC.\footnote{18} In \textit{Klopping}, the California Supreme Court held that excessive pre-condemnation publicity\footnote{19} which affects the market value of the property to be condemned must be considered in determining the appropriate compensation for the land, and that any decrease in the market value caused by such publicity is chargeable to the municipality attempting to condemn the property. Further, if the condemning entity unnecessarily delays the eminent domain proceedings, the land owner may sue in inverse condemnation.\footnote{20}

The court in \textit{Navajo}, however, concluded that since the San Francisco Bay Plan announced by the BCDC was only a general plan, no taking process had begun, and that \textit{Selby} disposed of any allegation supported by \textit{Klopping}.\footnote{21}

\textit{Navajo}'s alternative contention was that the BCDC action

\footnote{14} Id. at 118-21, 514 P.2d at 115-18, 109 Cal. Rptr. at 804-06.
\footnote{15} See note 32 and accompanying text infra.
\footnote{16} 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).
\footnote{17} 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970).
\footnote{18} See Brief for Appellant at 9, Navajo Terminals, Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 46 Cal. App. 3d 1, 120 Cal. Rptr. 108 (1975), and Appellant's Reply Brief at 4, id.
\footnote{19} "Pre-condemnation publicity," as used by the \textit{Klopping} court, means public actions taken by the condemnor prior to the statutory date (\textit{Cal. Civ. Proc. Code} § 1249 (West Supp. 1975)) for determination of the market value of the property. 8 Cal. 3d at 44, 500 P.2d at 134, 104 Cal. Rptr. at 5.
\footnote{20} 8 Cal. 3d at 52, 500 P.2d at 1355, 104 Cal. Rptr. at 11.
\footnote{21} The court in \textit{Navajo} stated, "Selby made clear that \textit{Klopping} was no support for a claim that planning designations constitute takings." 46 Cal. App. 3d at 4, 120 Cal. Rptr. at 109. Although the court does not indicate exactly what language in \textit{Selby} it relied on to dismiss \textit{Klopping}, the following language from the \textit{Selby} opinion is a reasonable indication:

Neither \textit{Klopping} nor any other decision of which we are aware holds that the enactment of a general plan for the future development of an area,
should be treated as the equivalent of a zoning ordinance which created an undue restriction on Navajo's land. It argued that the designation of the tract as a waterfront park restricted potential use of the land and in fact took the property from Navajo by imposing a restraint on its ability to use the land effectively. For this proposition it relied on dictum in *Candlestick Properties*.

*Candlestick* involved a property owner whose parcel of land was partially submerged at high tide by the Bay, thereby falling within the jurisdiction of the Hunters Point Reclamation District. The district was a state body created in 1955 by the legislature for the purpose of reclaiming non-navigable submerged land in the Hunters Point area. *Candlestick* Properties applied for a permit from the BCDC to fill the land. The permit was denied and *Candlestick* brought suit.

The appellate court, after determining that the legislation creating the BCDC superseded the earlier legislation creating the Hunters Point Reclamation District, rejected *Candlestick*’s contention that the permit refusal by the BCDC created an undue restriction on the use of the land. The court agreed that undue use-restrictions on private property were as much a taking for constitutional purposes as destruction of the land; but it found that in light of the need for rational planning and the clear legislative intent to preserve the Bay, this particular action did not constitute an undue restriction.

The *Navajo* court dismissed the assertion that the Bay Plan created an unreasonable restriction on Navajo's land, apparently on the same grounds that it disposed of the *Klopping argument*. The court’s determination that the San Francisco Bay Plan constitutes a general plan and thus falls within the *Selby* rule is conclusive as to the “reasonableness” issue left open by *Candlestick*.

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10 Cal. 3d at 118, 514 P.2d at 116, 109 Cal. Rptr. at 804.
22. 46 Cal. App. 3d at 5, 120 Cal. Rptr. at 110.
24. 11 Cal. App. 3d at 562, 89 Cal. Rptr. at 899.
25. Id. at 557, 89 Cal. Rptr. at 897.
26. Id.
27. Id. at 563-64, 89 Cal. Rptr. at 900.
28. Id. at 572, 89 Cal. Rptr. at 906.
29. See note 19 and accompanying text *supra*.
30. See *Navajo Terminals, Inc. v. San Francisco Bay Conservation & Dev.*
The significance of Navajo is the court's extension of the Selby rule by its failure to distinguish between the San Francisco Bay Plan created by the BCDC and the general plan created by Ventura County in Selby. A comparative analysis of the enabling statutes for the BCDC and those under which Ventura County had planned Selby's property reveals that the Navajo court could have distinguished the plans by focusing on the difference in flexibility. This distinction can be seen primarily in two ways: first, the flexible nature of the general plan as a planning tool is not evident in the BCDC scheme; and secondly, the method of implementation of the Bay Plan is significantly more rigid than is characteristic of a general plan.

General plans by nature are tentative. They are continually updated by the planning commissions and the councils of the municipality involved. A general plan may include plans for property outside the incorporated limits of the municipality. Further, general plans accommodate most if not all possible land uses. The flexibility of the general plan is a necessary element because its purpose is primarily to serve as a planning tool within the governmental structure.

The rigidity of the Bay Plan is to some extent a function of the fact that, once submitted, it could be modified only by the legislature. Further, both the extent of the BCDC's jurisdiction and the number of possible land uses it could incorporate...
rate in the plan are severely limited.\textsuperscript{39}

The second illustration of the lack of flexibility of the Bay Plan, as compared with a general plan, is the difference in the methods of implementation. Land use control involving a general plan is a two-step process. The planning and the implementation of these controls are two distinct actions,\textsuperscript{40} with the implementation by a city or county normally accomplished through zoning regulations\textsuperscript{41} and eminent domain proceedings.\textsuperscript{42} Until recently,\textsuperscript{43} no statute required that a general plan ever be implemented. As the supreme court pointed out in Selby, the relationship between the general plan and the implementation of that plan is tentative at best.

The code is less specific as to the implementation of a general plan. Prior to 1971, it provided only that the planning agency should make recommendations and reports to the legislative body and consult with others regarding implementation of the plan, and that legislative bodies are required to give consideration to conformity with the general plan in the acquisition or abandonment of property or the construction of public works.\textsuperscript{44}

The San Francisco Bay Plan, however, is simultaneously a general plan and an implementation of that plan. Once the plan was approved by the legislature\textsuperscript{45} no further resolution was required by either the legislature or the BCDC before the BCDC became authorized to regulate the land within its jurisdiction.\textsuperscript{46} The planning-implementation distinction which was key in Selby, does not exist in the Navajo situation.

The distinction between the flexibility of a local general

\textsuperscript{39} The seven possible uses for which BCDC may designate land include ports, airports, water related industries, wildlife refuges, water orientated recreation areas, desalination plants, and power plants requiring large amounts of water for cooling purposes. \textit{Id.} § 66602.

\textsuperscript{40} \textit{Compare id.} § 65101 (authorizing local planning) \textit{with id.} § 65850 (zoning enabling section for municipalities).

\textsuperscript{41} \textit{Id.} § 65850.

\textsuperscript{42} \textit{Id.} § 40404.

\textsuperscript{43} The state legislature recently passed legislation requiring all city and county zoning ordinances to be consistent with the general plan of their area by January 1, 1974. \textit{Id.} § 65860. This legislation was not in effect at the time \textit{Navajo} was filed.

\textsuperscript{44} 10 Cal. 3d at 116, 514 P.2d at 115, 109 Cal. Rptr. at 803 (citations omitted).

\textsuperscript{45} Local general plans must also be approved by the legislative body of the locality involved. \textit{Cal. Gov't Code} § 65359 (West Supp. 1975). But this action in no way implies implementation, which must come through the independent act of passing a zoning ordinance or beginning an eminent domain proceeding. \textit{Id.} § 65860.

\textsuperscript{46} The BCDC may issue or deny permits solely on the basis of conformity to the Bay Plan. \textit{See id.} §§ 66604, 66605, 66632.5, and 66653.
plan and the rigidity of the San Francisco Bay Plan, as revealed by basic differences in enabling statutes and methods of implementation, created an alternative for the court. That alternative would have been to recognize those distinctions, hold Selby inapplicable, and compensate the loss that Navajo suffered as a result of the BCDC action.\(^\text{47}\)

Instead, the court held that the Bay Plan was a general plan. The effect of its ruling could be far-reaching. First, and most concretely, the power of the BCDC was clarified and strengthened by the decision.\(^\text{48}\) If a land-use designation in the San Francisco Bay Plan does not constitute a taking or an injury to property even when the plan designates that the property should be taken eventually, then no land owner within BCDC jurisdiction can raise a claim against it until a use permit has been denied or some other independent regulatory act has occurred. Certainly, the holding precludes actions against the BCDC for money lost through decline in the market value of property within BCDC jurisdiction caused by land use classification pursuant to the San Francisco Bay Plan.\(^\text{49}\)

Second, and perhaps more importantly, Navajo may have an effect on the disposition of cases arising under Government Code section 65860, which provides in part that by January 1, 1974, all zoning ordinances in the state of California must comply with the general plans that exist in the area.\(^\text{50}\) Navajo speaks strongly for the proposition that a municipality can

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\(^{47}\) Navajo estimated the pre-plan value of its land, which it claimed was reduced to zero, at $150,000. Complaint at 4, Navajo Terminals, Inc. v. San Francisco Bay Conservation & Dev. Comm’n, 46 Cal. App. 3d 1, 120 Cal. Rptr. 108 (1975).

\(^{48}\) This is evidenced in part by the fact that the BCDC specifically requested that the opinion of the court be published. Respondents Answer to Petition for Rehearing and Request for Publication at 3-5, Navajo Terminals, Inc. v. San Francisco Bay Conservation & Dev. Comm’n, 46 Cal. App. 3d 1, 120 Cal. Rptr. 108 (1975).

\(^{49}\) Recovery for this type of loss is difficult, at best, even if it is attempted under normal zoning regulations. See Van Alstyne, Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California, 16 U.C.L.A.L. Rev. 491 (1968).

\(^{50}\) Cal. Gov’t Code § 65860 (West Supp. 1975) provides in part:
   a) County or city zoning ordinances shall be consistent with the general plan of the county or city by Jan. 1, 1974. A zoning ordinance shall be consistent with a city or county general plan only if:
      i) The city . . . has adopted such a plan and
      ii) The various land uses authorized by the ordinance are compatible with the objectives . . . specified in such a plan.
   
   . . .
   c) In the event that a zoning ordinance becomes inconsistent with a general plan . . . such zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan.
plan and zone undeveloped unincorporated property for public use, designating it to be taken far in the future. With property owners able to invoke neither *Klopping* nor the dictum in *Candlestick*, the result might well be that the municipality could eventually acquire the land at a more advantageous price.

*Michael D. Torpey*

Mr. and Mrs. Klemp maintained their Illinois residency before and after their 1937 marriage, although they seasonally came to California for vacations, and travelled extensively each year.\(^1\) Before 1953, they maintained homes and apartments in the Chicago area; after 1953 they occupied an apartment in an apartment hotel when they were in Illinois.\(^2\) In 1955, the Klemps built a vacation home in Rancho Mirage, California.

Between 1959 and 1964, the period challenged by the California Franchise Tax Board, the Klemps had no business activities in California and owned no commercial or private properties in the state other than their vacation home at Rancho Mirage.\(^3\) They actively conducted their business in Illinois and derived their income from Illinois sources; they derived no income from activities in California.\(^4\) Except for a small household account for personal expenses which they kept in a Cali-

\(1\). From the beginning of their marriage, the Klemps travelled extensively. Their first year (1937-1938) they were out of Illinois 115 days, and in no subsequent year were they away less than 90 days. The following schedule shows where their time was spent during the period in question:

<table>
<thead>
<tr>
<th>Calendar Year</th>
<th>Days In California</th>
<th>Days In Illinois</th>
<th>Days Elsewhere</th>
</tr>
</thead>
<tbody>
<tr>
<td>1959</td>
<td>116</td>
<td>97</td>
<td>152</td>
</tr>
<tr>
<td>1960</td>
<td>164</td>
<td>98</td>
<td>103</td>
</tr>
<tr>
<td>1961</td>
<td>171</td>
<td>69</td>
<td>125</td>
</tr>
<tr>
<td>1962</td>
<td>186</td>
<td>21</td>
<td>158</td>
</tr>
<tr>
<td>1963</td>
<td>159</td>
<td>33</td>
<td>173</td>
</tr>
<tr>
<td>1964</td>
<td>171</td>
<td>25</td>
<td>169</td>
</tr>
</tbody>
</table>

During those years their usual pattern was to be in California from October to April, except for a Christmas holiday trip to Hawaii, and short trips to Chicago and elsewhere. *Klemp v. Franchise Tax Bd.*, 45 Cal. App. 3d 870, 873-74, 119 Cal. Rptr. 821, 823 (1975).

\(2\). *Id.* at 872, 119 Cal. Rptr. at 823.

\(3\). *Id.*

\(4\). *Id.* at 873-74, 119 Cal. Rptr. at 824. For many years the Klemps' principal business activity consisted of the design, construction, repair and leasing of motor freight terminals in Illinois. Their corporation, the Dale Oil Company, was liquidated in 1963; however, the purchasers defaulted and the Klemps were required to take the business back until 1965 when they again sold it. During fiscal years 1960 through 1964 they continued to receive income solely from Illinois investments in mortgages on other terminals and from loans to truck operators. *Id.* at 874, 119 Cal. Rptr. at 823.

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California bank, the Klemps maintained their bank accounts and safe deposit box in Illinois banks. In addition to being registered voters in Illinois, the Klemps carried Illinois drivers' licenses and registered their automobiles there. They had prepared and left their wills in Chicago. They relied on the services of Illinois lawyers, doctors, dentists, accountants, bankers, and investment counselors. Their business correspondence, including collections and deposit of income, was handled in Illinois. Before and after they acquired their California vacation home, they prepared and filed their federal income tax returns in Illinois. All of their insurance was handled in Illinois except coverage on the Rancho Mirage vacation home. They had no church affiliation in California, but they were members of a Chicago church. Mr. Klemp owned a burial plot in Chicago. Further, the Klemps were domiciliaries not of California but of Illinois.

The Klemps' only California contact, other than their vacation home and household bank account, was their membership and participation in the Thunderbird Country Club which was located in Rancho Mirage.

Nonetheless, basing its view on its interpretation of the statutory definition of residence, the California State Fran-

5. Id. at 874, 119 Cal. Rptr. at 823-24.
6. Id. at 874-75, 119 Cal. Rptr. at 824.

Although residence is frequently construed to mean domicile, the terms are not synonymous. See Burt v. Scarborough, 56 Cal. 2d 817, 366 P.2d 498, 501, 17 Cal. Rptr. 146, 149 (1961); Michelman v. Frye, 238 Cal. App. 2d 698, 704, 48 Cal. Rptr. 142, 145-46 (1965); CAL. CIV. CODE § 4530 (West 1970); CAL. CIV. PRO. CODE § 395 (West 1973); CAL. GOV'T CODE §§ 243, 244 (West 1966); CAL. PROB. CODE § 301 (West 1956). Residence is an objective term; it denotes any factual place of abode of some permanency. BLACK'S LAW DICTIONARY 1473 (4th rev. ed. 1968). See Sabine, Constitutional and Statutory Limits on the Power to Tax, 12 HASTINGS L.J. 23 (1960). Domicile, on the other hand, is a term involving subjective intentions of the individual; it denotes the one location with which a person is considered to have the greatest settled and permanent connnection; it is the place where he intends to remain and to which, whenever he is absent, he has the intention of returning. BLACK'S LAW DICTIONARY 572 (4th rev. ed. 1968); see Smith v. Smith, 45 Cal. 2d 235, 239, 288 P.2d 497, 499 (1955); Whittell v. Franchise Tax Bd., 231 Cal. App. 2d 278, 284, 41 Cal. Rptr. 673, 676 (1964). See generally Keeling, The Problem of Residence in State Taxation of Income, 29 CALIF. L. REV. 706 (1941); Sabine, Constitutional and Statutory Limits on the Power to Tax, 12 HASTINGS L.J. 23 (1960). Furthermore, an individual may reside in this state without being domiciled here, and conversely, may be domiciled in this state but not reside here. See generally CAL. ADM. CODE tit. 18 §§ 17014-17016(a) (1967). Although a person may have only one domicile at any given time, he may have more than one physical residence separate from his domicile at the same time. Burt v. Scarborough, 56 Cal. 2d 817, 822, 366 P.2d 498, 501, 17 Cal. Rptr. 146, 149 (1961).

8. CAL. REV. & TAX. CODE § 17014 (West 1970) defined residency as follows:
chise Tax Board considered Mr. and Mrs. Klemp to be resi-
dents of California for the fiscal years ending June 30, 1960
through 1964, and assessed taxes against their income for those
years. The Klemps appealed to the State Board of Equaliza-
tion, which sustained the assessment. They then filed this ac-
tion in the superior court praying for declaratory relief. The
superior court entered judgment in favor of the Klemps, declar-
ing they were not residents of California for income tax pur-
poses during any of the years in question. The court of appeals
affirmed.

The governing statutes fixing state income tax liability,
Revenue and Taxation Code sections 17014, 17015, 17016, and
17041, provide, inter alia, that "[e]very individual who is
in this state for other than a temporary or transitory pur-
pose" is a resident. Residence, however, is a term with multi-
ple definitions, its statutory meaning depending on the context
and the purpose of the statute in which it is used.
The Franchise Tax Board asserted that the legislature intended, in enacting these specific sections,\(^7\) to include in the category of individuals who are taxable upon their entire net income, regardless of whether derived from sources within or without the State, all individuals who are physically present in this State enjoying the benefit and protection of its laws and government, except individuals who are here temporarily . . . .\(^8\)

The underlying theory of these sections, it maintained, "is that the state with which a person has the closest connection during the taxable year is the state of his residence,"\(^9\) and the state in which he should share in the tax burden.\(^2\)

Thus, the Board's first argument dealt with a comparison between the amount of time the Klemps spent in California and the amount of time they spent in Illinois during the years in question.\(^21\) It pointed dramatically to the fact that in 1962 the Klemps spent 186 days in California and only 21 days in Illinois, and that they remained in California a greater number of days during each of the years in question than in Illinois.\(^22\)

The court of appeals ruled that the time spent in California was only one factor in the determination and was not conclusive of residency in the state.\(^23\) It was an element to be considered in assessing whether the Klemps were in the state for temporary or transitory purposes.\(^24\) However, the Board's own guideline specified that


\(^{19}\) Id.

\(^{20}\) Id.

\(^{21}\) Id.

\(^{22}\) Id.


whether or not the purpose for which an individual is in this state will be considered temporary or transitory in character will depend to a large extent upon the facts and circumstances of each particular case. . . .

Revenue and Taxation Code section 17016 raises a rebuttable presumption of residence for those individuals present in the state for more than nine months of the taxable year. Additionally, the Tax Board will, in proper cases, apply a similar presumption of residence to an individual present in the state for six months. The presumptions, however, may be defeated upon a showing that the individual’s presence in the state was for temporary or transitory purposes. The court held that the facts showed the Klemps’ purpose was “to spend the colder half of the year as visitors in the California desert.”

The Tax Board also argued that the Klemps did not, during the years in question, own or maintain an abode in Illinois. The court concluded,

[T]his lack of an abode in Illinois was simply a function of economy and convenience in a lifestyle which included not only winters in California, but other seasons habitually spent as visitors and tourists in other vacation spots. Thus the existence or non-existence of an Illinois home was “a factor to be considered” but “under the statute the decision must turn ultimately upon what the Klemps were doing in California.” The court of appeal also relied on regulations issued by the Tax Board which expressly provide that an indi-

25. CAL. ADM. CODE tit. 18 §§ 17014-17016 (b) (1967).
26. Before their amendment in 1967, the regulations issued by the Franchise Tax Board interpreted § 17016 to create an irrebuttable presumption of residence for those individuals who were present in the state for more than six months. The 1967 amendment to the Board’s regulations providing a rebuttable presumption of residence remains the current interpretation of the statute pertinent to this case. Because the statute had remained unchanged, the contemporary interpretation by the Board is entitled to great weight. 45 Cal. App. 3d at 875-76 n.4, 119 Cal. Rptr. at 824-25 n.4. See note 33 infra.
27. CAL. ADM. CODE tit. 18 §§ 17014-16 (b) (1967).
28. Id. §§ 17014-16(e) interprets CAL. REV. & TAX. CODE § 17016 and provides in relevant part:
   If an individual spends in the aggregate more than nine months of any taxable year in this State it will be presumed that he is a resident of this State. The presumption is not conclusive but may be overcome by satisfactory evidence that he is in the state for temporary or transitory purposes only.
29. 45 Cal. App. 3d at 877, 119 Cal. Rptr. at 825.
30. Id.
31. CAL. REV. & TAX. CODE § 19253 (West 1970) provides in relevant part:
individual may be a nonresident for state income tax purposes even though he owns or maintains an abode in California, or has a bank account in the state for the purpose of paying personal expenses, or joins local social clubs.\textsuperscript{32}

The \textit{Klemp} court considered each of the relationships and interests which the Klemps maintained in each state, balanced the "factors" or contacts, considered the board's interpretation of the governing statutes,\textsuperscript{33} and determined that the Klemps were most closely connected with Illinois. It held that they did not become California residents, within the meaning of section 17014.

\textit{Klemp} is significant because it is the only decision by a California court to delineate the basic residency requirements for state income tax liability.\textsuperscript{34} It has determined that tax liability depends on the facts and circumstances of each case. There is also much import in the court's implicit consideration of each of the Klemps' contacts with the state as factors on a cumulative basis rather than as absolute and inelastic measurements for tax liability.\textsuperscript{35}

The court in \textit{Klemp} neither sought to establish a new basis for state taxation nor proposed to allow individuals to enjoy the benefits and protections of the state's government while escaping the state tax burden. Rather, it applied the standards established in the statute and the regulations in a fair and practical manner, halting the Franchise Tax Board's past practice of

\textsuperscript{32} CAL. ADM. CODE tit. 18 §§ 17014-17016(b) (1967).

\textsuperscript{33} The contemporaneous administrative construction of a statute by the agency charged with its enforcement is entitled to great weight and the courts will not depart from such construction unless it is clearly erroneous or unauthorized. Select Base Materials Inc. v. Bd. of Equalization, 51 Cal. 2d 640, 647, 335 P. 2d 672, 677 (1959); \textit{accord}, Whittell v. Franchise Tax Bd., 231 Cal. App. 2d 278, 286, 41 Cal. Rptr. 673, 678 (1964).

\textsuperscript{34} In Whittell v. Franchise Tax Bd., 231 Cal. App. 2d 278, 41 Cal. Rptr. 673 (1964), the court considered whether Californians had given up their California residence when they moved their domicile to Nevada. The court concluded, because of the amount of time the Whittells spent in California and the substantial business and social activities which they maintained in California, their presence in that state was neither temporary nor transitory. \textit{Id.} at 288, 41 Cal. Rptr. at 681. The \textit{Klemp} decision is the first case to determine whether persons from another state have acquired a residence in California. 45 Cal. App. 3d 870, 119 Cal. Rptr. 821.

\textsuperscript{35} See 45 Cal. App. 3d at 876-77, 119 Cal. Rptr. at 825-26.
interpreting the tax code sections on residency in a non-uniform manner.\textsuperscript{36}

\textit{Michael D. Weiner}

\begin{quote}
36. The Franchise Tax Board has on prior occasions contended that individuals in situations similar to the Klemps\' were residents of California for purposes of state income taxation. \textit{see, e.g.}, Allen Sherman & Suzanne Sherman, 10 Cal. St. Bd. Equalization R. 133, 4 CCH \textsc{State Tax Cas. Rep., Cal.} ¶ 201-964 (1962). The Shermans first visited California in 1945, and in 1948 they purchased a house in the state. For each of the years 1949-1956 the Shermans divided their time approximately equally between Illinois and California. They maintained their business and economic interests and most of their social activities in Illinois. They were domiciliaries of Illinois. The State Board of Equalization overruled the Franchise Tax Board, and determined on the basis of all the facts that the Shermans were most closely connected with Illinois, that they were not residents of California for state income tax purposes, and that their time spent in California was consistent with their position that California was their vacation home from which they sought relief from Illinois winters.
\end{quote}