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IN THE COURT OF APPEALS OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

SUSAN PHILLIPS, RUSSELL PHILLIPS,
and MARY PHILLIPS,

Petitioners, Appellants

v.

DIRECTOR OF THE DEPARTMENT OF ANIMAL
REGULATION, SAN LUIS OBISPO COUNTY
HEALTH AGENCY, COUNTY OF SAN LUIS
OBISPO, CITY OF ATASCADERO,
and DOES 1 through XXV, Inclusive,

Respondents, Appellees

B. O. 15913

AMICUS CURIAE BRIEF
OF ANIMAL LEGAL DEFENSE FUND
ON BEHALF OF APPELLANTS SUSAN PHILLIPS,
RUSSELL PHILLIPS, AND MARY PHILLIPS

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1 "abandoned or neglected," with the owner able to reclaim
2 them only on payment of certain fees. The provisions
3 allowed for a hearing neither before nor after the
4 seizure of the animals. The court held that the owner
5 was entitled to a pre-seizure hearing, although the court
6 acknowledged special instances when summary seizure of
7 property would be justified by overriding important
8 governmental interests. The Superior Court in the present
9 proceedings believed this to be such a case. It is
10 surprising to note, however, that it took the Director of
11 Animal Regulation four days after learning of the alleged
12 last bite to remove the dog Missy from her owners, hardly
13 suggesting that it was considered a matter of the utmost
14 urgency. (Petitioners' Supplemental Memorandum of Points
15 and Authorities, Jul. 29, 1985, at p. 5, App. 97)

16 In any event, as the Carrera court made
17 abundantly clear, even where summary seizure of property
18 is justified, in all cases the owner must be given an
19 opportunity to be heard after the property has been taken.
20 Carrera, 63 Cal. App. 3d at 729. See, also, Ewing v.
21 Mytinger & Casselberry (1950) 339 U.S. 594, 598-99, 94
22 L.Ed. 1088, 70 S.Ct. 870; Hughes v. Neth (1978) 80 Cal.
23 App. 3d 952, 956, 146 Cal. Rptr. 37. Because section
24 4-1.212 fails to provide for a hearing at any time before
25 a dog is destroyed, it is unconstitutional on its face.

26 As the Superior Court recognized, Simpson v.
27 City of Los Angeles (1953) 40 Cal. 2d 271, 253 P.2d 464
28 cannot be read to limit petitioners' right to a hearing.

1 valid local regulatory scheme, Civil Code section 3342.5
2 applies, and requires that a district or city attorney
3 bring an action in municipal court against the owner of a dog
4 to determine whether or not the dog should be destroyed.

5
6 ARCUMENT

7
8 I. ATASCADERO CITY CODE SECTION 4-1.212 IS
9 UNCONSTITUTIONAL IN FAILING TO AFFORD DOG
10 OWNERS AN OPPORTUNITY TO BE HEARD AS MANDATED
11 BY DUE PROCESS

12 A. Dog Owners Are Constitutionally Entitled
13 to a Hearing Before Their Dogs Are
14 Destroyed Pursuant to This Provision.

15 It is a commonplace that notice and an opportunity
16 to be heard are essential elements of procedural due
17 process. See, e.g., Matthews v. Eldridge (1976) 424 U.S.
18 319, 333, 47 L.Ed. 2d 18, 96 S.Ct. 893; Isbell v. County
19 of Sonoma (1978) 21 Cal. 3d 61, 64, 145 Cal. Rptr. 368,
20 577 P.2d 188; Endler v. Schutzbank (1968) 68 Cal. 2d 162,
21 180, 65 Cal. Rptr. 297, 436 P.2d 297 (right to hearing is one
22 of rudiments of fair play assured by the 14th Amendment).
23 These minimum requirements were found lacking, and the
24 statutory provisions at issue declared unconstitutional, in
25 Carrera v. Bertaini (1976) 63 Cal. App. 3d 721, 134 Cal.
26 Rptr. 14, involving, as in the instant case, the seizure of
27 domestic animals. The reasoning of Carrera should
28 control here.

In Carrera, the contested provisions authorized
the impoundment of farm animals found to be "at large" or

1 Simpson interpreted an ordinance to provide for a hearing
2 on the lawfulness of the impoundment where the known owner
3 of a dog impounded as a stray had been notified and had
4 requested a hearing, in order to show that he or she was
5 entitled to reclaim the animal without payment of the usual
6 fees. The Simpson court's intention certainly was not to
7 limit the subject matter of the hearing to the legality of
8 the impoundment in all cases involving the seizure of dogs,
9 as respondents would have. Instead, this was the only
10 issue appropriate for consideration under the facts of the
11 case, since the ordinance dealt only with impounded stray
12 dogs. The court also held that where a known owner failed
13 to reclaim the dog within the prescribed time limit, owner-
14 ship rights in the dog must be deemed to have terminated.
15 This is obviously inapplicable to the present case where,
16 as the Superior Court noted, the owner of the dog is known,
17 the dog was seized from her owner's home, and the owner has
18 persevered in trying to obtain an adequate hearing since
19 the seizure.

20 B. The Superior Court Erred in Interpreting
21 Atascadero Municipal Code Section 4-1.212
22 to Require a Hearing When Demanded By The
23 Owner.

24 Atascadero Municipal Code Section 4-1.212
25 provides:

26 If any dog within the City is known to have
27 bitten any person or persons on at least
28 two (2) separate occasions, the Chief
Animal Control Officer shall notify the
owner or person having control of such dog
to so keep or surrender the dog in such
manner as the Chief Animal Control Officer

1 shall direct. If it is determined by the
2 Chief Animal Control Officer that the dog
3 cannot be properly controlled in order to
4 ensure public safety, then the Chief
5 Animal Control Officer shall destroy the
6 dog in a humane manner.

7 If any dog within the City is determined
8 by the Chief Animal Control Officer to be
9 vicious and dangerous to the safety of
10 any person or persons, the Chief Animal
11 Control Officer shall notify the owner or
12 person having control of such dog to keep
13 or surrender the dog in such a manner as
14 the Chief Animal Control Officer shall
15 direct. If it is determined by the Chief
16 Animal Control Officer that the dog cannot
17 be properly controlled in order to ensure
18 public safety, the Chief Animal Control
19 Officer shall destroy the dog in a humane
20 manner.

21 It shall be the duty of the owner or
22 person having control of a vicious and
23 dangerous dog, or a dog which has bitten
24 a human being, to surrender the dog as
25 may be ordered by the Chief Animal Control
26 Officer

27 Manifestly, no provision is made for a hearing
28 of any sort prior to the destruction of a dog under this
section. Nor does any other section of the Code redress
this lack. Section 4-1.207(b) provides for a hearing,
but only on the "sole issue of whether the dog was
lawfully seized and impounded," and, as the Superior
Court recognized, this section has no application to
dogs seized and ordered to be destroyed under section
4-1.212. Rather, this provision obviously deals only
with stray or impounded dogs, and as in Simpson, the
limitation on the issues to be addressed at a hearing
accords with its subject matter--whether an owner
should be liable for fees for claiming an impounded dog.

1 It has nothing whatsoever to do with whether or not a
2 dog should be killed for biting people.

3 Far from rescuing the "Vicious and Dangerous
4 Dogs" provisions from unconstitutionality, the existence
5 of Sec. 4-1.207(b) militates against any interpretation
6 of Sec. 4-1.212 as mandating a hearing for owners of dogs
7 ordered to be destroyed. Rather it shows that the City
8 Council was perfectly capable of explicitly providing for
9 a hearing when it intended one to be available. The lack
10 of any hearing provision in Sec. 4-1.212, then, strongly
11 suggests no hearing was contemplated for owners in these
12 circumstances. This situation is highly analogous to that
13 in Crippen v. Superior Court of the County of Los Angeles
14 (1984) 159 Cal. App. 3d 254, 260, 205 Cal. Rptr. 477,
15 where, in determining whether a time limit was imposed by
16 the Code of Civil Procedure for a particular motion, the
17 court stated:

18 (I)t is presumed that if the Legislature
19 does not provide for a time limitation in
20 procedural matters such as those here in-
21 volved, particularly where some time
22 limits are imposed in the concerned
23 statute, that the Legislature intended
24 to place no time restrictions on the
25 procedure at issue. This follows from
26 the well recognized rule of statutory
27 construction to the effect that the
28 expression of certain things in a statute
necessarily involves exclusion of other
things not expressed--expressio unius est
exclusio alterius.

205 Cal. Rptr. at 481. See also, In re Hubbard (1964) 62
Cal. 2d 119, 126-27, 41 Cal. Rptr. 393, 396 P.2d 809 (use of
specific words and phrases connotes an intent to exclude

1 that which is not specifically stated); Ford Motor Co. v.
2 County of Tulare (1983) 145 Cal. App. 3d 688, 691, 193 Cal.
3 Rptr. 511. (When the Legislature has carefully employed
4 a term in one place and has excluded it in another, it
5 should not be implied where excluded).

6 Recognizing that the absence of an opportunity
7 for a hearing under the terms of the ordinance would
8 require a finding that the ordinance is unconstitutional
9 on its face, the Superior Court helpfully interpreted
10 the ordinance to mandate a hearing, if requested by a
11 dog's owner. The court purported to be following the
12 principle that "the courts will construe a statute to give
13 it a meaning consistent with constitutional requirements
14 if this can be done by fair and reasonable construction.
15 (Emphasis added.) (See, Superior Court's opinion, at
16 p. 3, citing Los Angeles County v. Legg (1936) 5 Cal.
17 2d 349, 353, 55 P.2d 725). In Legg, the court found
18 a constitutionally required limitation in a statute "by
19 necessary inference from the words used." Such, amicus
20 curiae submits, is not true of the instant case; no "fair
21 and reasonable" constitutionally valid interpretation of
22 the ordinance is possible. And the courts must refuse to
23 supply a missing provision, even where to do so means the
24 statute is unconstitutional, where the statute is not
25 "reasonably susceptible" of a constitutional interpretation.
26 Newland v. Board of Governors (1977) 19 Cal. 3d 705, 139
27 Cal. Rptr. 620, 566 P.2d 524; Merco Construction Engineers,
28 Inc. v. Los Angeles Unified School District (1969) 274 Cal.

1 App. 2d 154, 168; 79 Cal. Rptr. 23 (proper to read a
2 legislative command for hearing into statute to save its
3 constitutionality, but must be some language in enactment
4 from which a legislative requirement for a hearing could
5 be inferred). Merco Construction Engineers distinguishes a
6 series of cases where statutes were interpreted as providing
7 for hearings because the statute allowed certain adminis-
8 trative action "for cause" or "for good cause" shown, as
9 impliedly calling for a hearing. (See cases cited in 274
10 Cal. App. 2d at 168.) Similarly, Bess v. Park, (1956) 144
11 Cal. App. 798, 802, 301 P.2d 978, held that a provision
12 that an administrative officer "shall hear and determine"
13 a controversy implies that both parties will be given
14 reasonable notice and opportunity for a hearing. The
15 Atascadero ordinance contains no such highly suggestive
16 language. Under these circumstances, it is up to the
17 appropriate legislative body to amend the statute to
18 meet any constitutional objections.

19 Carrera v. Bertaini is once again squarely on
20 point. Respondents in that case argued that the statutes
21 should be interpreted to require a post-seizure hearing
22 when demanded by the owner, citing Simpson v. City of Los
23 Angeles supra, 40 Cal. 2d 271. The court disagreed,
24 noting that in Simpson, the ordinance included a provision
25 for the return of animals unlawfully seized. The necessity
26 to make a determination whether or not the seizure was
27 legal was thus implied from the ordinance. In Carrera,
28 on the other hand,

1 neither the county ordinance nor the
2 penal statute contain a provision regarding
3 the return of animals unlawfully seized;
4 hence, there is no room to imply the
5 necessity of a hearing, and the ordinance
6 and statute must fall.

7 63 Cal. App. 3d at 730.

8 Exactly the same is true of section 4-1.212.
9 The Superior Court's attempt to analogize the instant
10 case to Simpson, and distinguish it from Carrera, is
11 untenable. The Superior Court's opinion states that
12 "(h)ere, like Simpson and unlike Carrera, there is an
13 additional fact to be determined, namely, that "... the dog
14 cannot be properly controlled in order to ensure public
15 safety" (See, opinion at p. 3, App. 275). The
16 court does not explain what is meant by the phrase
17 "additional fact." If, as it appears, it simply means
18 that a dog must be found both to have bitten people and
19 to be unable to be properly controlled, the court fails
20 to explain the relevance of the fact that the ordinance
21 specifies more than one condition for destroying a dog
22 under its terms. Surely the result of the cases cannot
23 turn on such a trivial distinction.

24 The point of Simpson is not that there was an
25 "additional" fact to be determined, but that the phrase
26 "unlawfully taken up" implies a review of the action
27 taken under the terms of the ordinance, which would be
28 meaningless without an opportunity for the owner to state
 his or her side. (Compare the cases cited in Merco
 Construction Engineers, supra).

1 Certainly in Carrera, the animal control
2 officers were also required to make certain factual
3 determinations, i.e., that an animal was "running at
4 large" or was "abandoned or neglected." But no provision
5 was made for the return of unlawfully taken animals.
6 That is, neither the statute nor the ordinance contem-
7 plated a review of actions taken pursuant to their
8 provisions. Similarly, there is no language of this
9 kind in the Atascadero ordinance on which to hinge a
10 hearing requirement.

11 II. HEARINGS GRANTED TO PETITIONERS AT THE DISCRETION
12 OF LOCAL OFFICIALS WERE CONSTITUTIONALLY INADE-
13 QUATE AS THE LEGISLATIVE ENACTMENT MUST ITSELF
14 PROVIDE FOR A HEARING, AND IN ANY EVENT, THE
15 HEARING OFFICERS LACKED THE AUTHORITY TO REVIEW
16 THE DECISION OF THE DIRECTOR OF ANIMAL
17 REGULATION.

18 A long series of cases in California, going back
19 at least to Modern Loan Co. v. Police Court (1910) 12 Cal.
20 App. 582, 586, 108 P. 56, confirms that

21 in judging the constitutionality of the
22 procedure established by the ordinance,
23 we must look to the procedure dictated
24 by the terms of the ordinance, and not
25 to informal practices implemented at the
26 discretion of municipal administrators.
27 As the United States Supreme Court has
28 stated on numerous occasions: "'It is
 not enough that the owners may by chance
 have notice, or that they may as a
 matter of favor have a hearing. The law
 must require notice to them, and give
 them the right to a hearing and an
 opportunity to be heard.'"

 (Coe v. Armour Fertilizer Works (1915)
 237 U.S. 413, 424-425 (59 L.Ed. 1027,
 1032, 35 S.Ct. 625). . .

Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal.
 3d 294, 307 note 7; 138 Cal. Rptr. 53. In Kash Enterprises,

1 although city officials claimed to afford greater pro-
2 tectons to property owners than required by an ordinance,
3 this did not save the ordinance from unconstitutionality.
4 Similarly, in Merco Construction Engineers v. Los Angeles
5 Unified School District (1969) 274 Cal. App. 2d 154 167,
6 79 Cal. Rptr. 23, the court held that although records and
7 transcripts of various proceedings indicated that the
8 defendant had been heard, after a fashion, this was
9 insufficient to satisfy due process requirements.

10 The wisdom of the requirement that a statute
11 itself provide for a hearing is exemplified by this case
12 and the petitioners' frustrating attempts to obtain an
13 adequate hearing for themselves and their dog Missy. Where
14 there is no hearing requirement in the statute itself,
15 the response of an administrative entity to a request for
16 a hearing is very likely to be haphazard and inadequate
17 to provide property owners the minimal requisites of due
18 process. This is especially true where, as in the instant
19 case, the practices of the city "fall far short of
20 establishing that the city has adopted a procedure which
21 routinely affords a (property) owner a hearing on the
22 merits of the seizure of his (property)." Kash Enterprises,
23 supra, 19 Cal. 3d 294 at 307, note 7.

24
25 In the present case, petitioners were finally
26 granted a hearing only at the insistence of Mr. William
27 Coy, Chairman of the Board of Supervisors. (Petitioners'
28 Supplemental Memorandum of Points and Authorities

1 Jul. 15, 1985, at p.2, App. 70). This first hearing was
2 conducted before Mr. Tim Mazzacano, Chief Sanitarian of the
3 County Health Department, although nothing in either the
4 Municipal or County Codes suggests that the Animal Regula-
5 tion Director's orders are reviewable by this officer. Nor
6 does it appear that Mr. Mazzacano was chosen because of any
7 particular qualification, by legal training or otherwise,
8 to conduct a hearing and review the Director's decision.
9 The same holds true for Mr. Steve Carnes, a supervising
10 environmental health officer of the County, before whom a
11 second hearing was held following petitioners' complaint
12 of numerous procedural irregularities of the first hearing,
13 and confusion regarding respondents' earlier position that
14 Mr. Mazzacano's decision could be appealed to the Board of
15 Supervisors. (Petitioners' Supplemental Memorandum of
16 Points and Authorities, Jul. 19, 1985, at p.9, App. 101)
17 In fact, however, it seems evident from San Luis Obispo
18 County Code section 2.90.030 that the Board of Supervisors
19 is the only entity with authority to review a decision of
20 the Animal Regulation Director. That section provides in
21 pertinent part:

22 The animal regulation director shall
23 generally advise, assist and be
24 responsible to the board of super-
25 visors for the proper and efficient
26 administration of the county's animal
27 rgulation programs. . .

28 (Emphasis added).

Thus, even were it possible to read a hearing
requirement into the ordinance and so preserve its

1 constitutional, the hearings actually granted to
2 petitioners were nevertheless constitutionally inadequate
3 as it is highly questionable whether these particular
4 officers had any authority to make a binding determination,
5 after a hearing, on the issue of whether petitioners' dog
6 Missy should be destroyed. Yet due process requires a
7 "hearing, after notice, before a board or officer,
8 empowered to hear and determine the issues presented."
9 (Emphasis added.) Irvine v. Citrus Pest District (1944)
10 62 Cal. App. 2d 378, 382, 144 P.2d 857. See also, State
11 of California ex rel. Dept. of Water Resources v. Natomas
12 Co. (1966) 239 Cal. App. 2d 547, 558, 49 Cal. Rptr. 64 (due
13 process requires fair hearing before court having juris-
14 diction of the proceedings). Cf. Endler v. Schutzbank
15 (1968) 68 Cal. 2d 162, 167-68, 65 Cal. Rptr. 297 (where
16 commissioner offered to hold informal hearing with the
17 understanding that it was not undertaken pursuant to any
18 specified statutory authority, not in accordance with
19 administrative procedures applicable to formal hearings,
20 and would be non-binding, hearing would not meet due process
21 requirements). Other inadequacies of the hearings held in
22 this case are detailed in Petitioners' brief on appeal.

23 III. THE TASK OF CORRECTING THE CONSTITUTIONAL DEFECT
24 IN THE ORDINANCE IS PROPERLY ONE FOR THE LEGIS-
25 LATIVE BODY, BUT IN THE ABSENCE OF SUCH LEGIS-
26 LATIVE ACTION, CIVIL CODE SECTION 3342.5 APPLIES.

26 The disturbingly confused quality of the
27 procedural background of this case points up the appro-
28 priateness of leaving to the legislative body, in this

1 case the City Council (or Board of Supervisors), the
2 task of rectifying the constitutional deficiency of the
3 ordinance by specifying a set of procedures by which the
4 owner of a dog accused of biting and condemned to des-
5 truction under Sec. 4-1.212 is given an opportunity to
6 be heard in front of an impartial, duly authorized hearing
7 officer, according to constitutionally sufficient procedures,
8 and within a prescribed time period. Alternatively, the
9 city could decide to abide by the procedures set forth in
10 Civil Code Sec. 3342.5.

11 In contrast, the result of the Superior Court's
12 farfetched reading of the statute is to allow a wide
13 margin in which a dog owner's exercise of his or her due
14 process rights may be inhibited. Ratification of the
15 procedures followed in this case means that whether or
16 not a dog owner is afforded due process in any particular
17 instance will be determined more or less at random. For
18 one thing, the city will not be required to enact
19 procedures to insure dog owners are notified of their
20 right to a hearing, an obvious inhibition in the past
21 since petitioners' was the first hearing ever held on
22 whether a dog should be destroyed. (Petitioners'
23 Supplemental Memorandum of Points and Authorities, Jul. 29,
24 1985, at p.12, App. 104) Nor will there be any specified
25 time period in which the hearing is to be held, allowing
26 city officials to drag their feet or to shunt a dog owner
27 from official to official in search of a hearing, while
28 the dog remains impounded and the owner worries about his

1 or her pet's fate.

2 Finally, the city will not be required to
3 authorize a particular official to conduct the hearing,
4 leaving dangling the question of how a hearing officer is
5 to be chosen in any given case. Will the choice be made
6 at random, or will the task be given to anyone who is not
7 particularly busy at the time, despite any lack of
8 qualifications, or to someone who can be counted on to
9 uphold the initial order of destruction, whatever the
10 merits of the case? There is clearly too much latitude
11 here for possible unfairness, or at least the appearance
12 of unfairness. Yet "a fair trial in a fair tribunal is
13 a basic requirement of due process," In re Murchison (1955)
14 349 U.S. 133, 136, 99 L.Ed. 942, 946, 75 S.Ct. 623, and
15 "even the probability of unfairness is to be avoided."
16 Applebaum v. Board of Directors of Barton Memorial Hospital
17 (1980) 104 Cal. App. 3d 648, 657; 163 Cal. Rptr. 831.

18 Respondents admit that, while Civil Code section
19 3342.5 allows a city to enact its own legislation in the
20 field of dog control, its provisions apply "in those
21 locations where the local legislative body has not
22 adopted an animal control scheme." (Respondents' Points
23 and Authorities at p.8, App. 56). As the Atascadero
24 ordinance dealing with dogs accused of biting is unconsti-
25 tutional, in effect Atascadero has no alternative scheme,
26 and the provisions of section 3342.5 must be adhered to.
27 Under the unambiguous terms of this section, the procedure
28 to be followed in determining whether a dog should be

1 destroyed for biting is for the city attorney to institute
2 an action in the municipal court against the owner, after
3 which the court may make any order it deems appropriate,
4 including, but not limited to, the removal of the animal
5 from the area or its destruction. Petitioners are entitled
6 to a hearing in accordance with these procedures, in any
7 event, the hearings they received were constitutionally
8 inadequate.

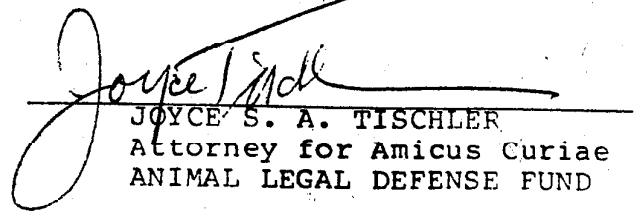
9
10 CONCLUSION

11 The position of this amicus, that Atascadero
12 Municipal Code section 4-1.212 and San Luis Obispo County
13 Code section 9.08.130 are unconstitutional, as they deprive
14 dog owners of their property without due process of law,
15 that these laws cannot be "saved" by the gratuitous grant
16 of hearings, and that Civil Code Section 3342.5 applies
17 if the legislature chooses not to correct the ordinance,
18 are soundly supported by the authorities cited hereinbefore.

19 Therefore, amicus submits that the judgment below
20 should be reversed.

21 DATED: February 11, 1986.

22 Respectfully submitted,

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25 JOYCE S. A. TISCHLER
26 Attorney for Amicus Curiae
27 ANIMAL LEGAL DEFENSE FUND
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DECLARATION OF SERVICE BY FEDERAL EXPRESS

I, Joyce Tischler, declare as follows:

I am over the age of 18 years and not a party to the within action; my place of employment and business address is 333 Market Street, Suite 2300, San Francisco, California 94105.

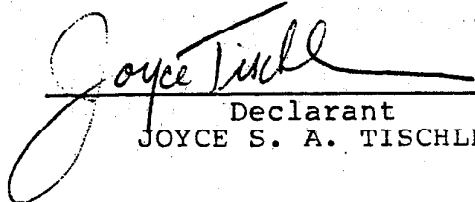
On February 11, 1986, I served the attached

AMICUS CURIAE BRIEF OF ANIMAL LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS/APPELLANTS; MOTION FOR PERMISSION TO INTERVENE ON AMICUS CURIAE; DECLARATION OF JOYCE S. A. TISCHLER;

by placing a true copy thereof in an envelope addressed to the person named below at the address set out immediately below said name, and by sealing and depositing said envelope with costs thereon fully prepaid, in the office of the Federal Express at San Rafael, CA for delivery within 24 hours.

JOHN PAUL DALY
Deputy County Counsel
County Government Center
1050 Monterey Street
San Luis Obispo, CA 93408

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on February 11, 1986 at San Rafael, California.


Declarant
JOYCE S. A. TISCHLER