TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 81-904
of	:	MAY 5, 1982
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THE HONORABLE RICHARD E. ROMINGER, DIRECTOR, DEPARTMENT OF FOOD AND AGRICULTURE, has requested an opinion on the following questions:

1. May a marketing order issued under the authority of the California Marketing Act of 1937 undertake a program for the detection and eradication of "seedling yellows," a disease of citrus trees?

2. May a marketing order undertaking a program for the detection and eradication of "seedling yellows" be enforced against all, including noncommercial, citrus trees within the designated area which present a hazard to commercial production?

3. What compensation is constitutionally required to be provided to commercial and noncommercial owners for removal of trees under a marketing order undertaking a program for the detection and eradication of "seedling yellows"?

4. May a marketing order authorize a contract with or grant of funds to a county agricultural commissioner for the purpose of undertaking a program for the detection and eradication of "seedling yellows," which would (a) provide for removal of trees, or (b) be enforced against all, including noncommercial, citrus trees within a designated area which present a hazard to commercial production?

CONCLUSIONS

1. A marketing order issued under the authority of the California Marketing Act of 1937 may undertake a program for the detection and eradication of "seedling yellows," a disease of citrus trees.

2. A marketing order undertaking a program for the detection and eradication of "seedling yellows" may not be enforced against all, including noncommercial, citrus trees within the designated area which present a hazard to commercial production.

3. Assuming that the removal of trees under a marketing order undertaking a program for the detection and eradication of "seedling yellows" were statutorily authorized, no compensation would be constitutionally required.

4. A marketing order may not authorize a contract with or grant of funds to a county agricultural commissioner for the purpose of undertaking a program for the detection and eradication of "seedling yellows," which would (a) provide for removal of trees, or (b) be enforced against all, including noncommercial, citrus trees within a designated area which present a hazard to commercial production.

ANALYSIS

The California Marketing Act of 1937 (hereinafter the "Act"; Food and Agr. Code, § 58601 et seq.)[1] which is the focus of our consideration, as well as the California State Prorate Act of 1933 (see now the Agricultural Producers Marketing Law, § 59501 et seq.), was a legislative response to the chaotic condition of unregulated, unstable and fluctuating commodity markets and attendant destructive trade practices which characterized the agricultural industry of the first third of the century. The legislative findings are contained in the express declarations of section 58651 of the Act:

> "It is hereby declared that the marketing of commodities in this state in excess of reasonable and normal market demands therefor; disorderly

[1] 1Hereinafter, all references are to the Food and Agricultural Code unless otherwise indicated.

marketing of such commodities; improper preparation for market and lack of uniform grading and classification of commodities; unfair methods of competition in the marketing of commodities; and the inability of individual producers to maintain present markets or to develop new or larger markets for California-grown commodities, results in an unreasonable and unnecessary economic waste of the agricultural wealth of this state.

"Such conditions and the accompanying waste jeopardize the future continued production of adequate supplies of food, fiber, and other products of the farm and of the soil for the people of this and other states, and prevent producers from obtaining a fair return from their labor, their farms, and the commodities which they produce.

"As a consequence, the purchasing power of such producers has been in the past, and may continue to be in the future, unless such conditions are remedied, low in relation to that of persons engaged in other gainful occupations within the state. Producers are thereby prevented from maintaining a proper standard of living and from contributing their fair share to the support of the necessary governmental and educational functions, thus tending to increase unfairly the tax burdens of other citizens of this state."

The Legislature further declared in section 58652:

"These conditions vitally concern the health, peace, safety, and general welfare of the people of this state. It is hereby declared to be the policy of this state to aid producers in preventing economic waste in the marketing of their commodities, to develop more efficient and equitable methods in the marketing of commodities and to aid producers in restoring and maintaining their purchasing power at a more adequate, equitable and reasonable level."

The purposes of the Act are set forth in section 58654 as follows:

"The purposes of this chapter are to do the following:

"(a) Enable producers of this state, with the aid of the state, more effectively to correlate the marketing of their commodities with market demands for such commodities.

"(b) Establish orderly marketing of commodities.

"(c) Provide for uniform grading and proper preparation of commodities for market.

"(d) Provide methods and means for the maintenance of present markets, or for the development of new or larger markets, for commodities which are grown within this state or for the prevention, modification, or elimination of trade barriers which obstruct the free flow of such commodities to market.

"(e) Eliminate or reduce economic waste in the marketing of commodities.

"(f) Restore and maintain adequate purchasing power for the producers of this state."

The first inquiry is whether a marketing order issued under the authority of the Act may undertake a program for the detection and eradication of "seedling yellows," a disease of citrus trees.[2] A marketing order is an order which is issued by the Director of Food and Agriculture, under the Act, which prescribes rules and regulations that govern the processing, distributing, or handling in any manner of any commodity within the state during any specified period. (§ 58615.) The content and authorized terms of a marketing order are set forth in sections 58881 through 58895. Of particular significance for purposes of the present inquiry are the specific provisions of section 58895:

"A marketing order may contain provisions to detect, control, prevent damage by or to eradicate insects, predators, diseases, or parasites with respect to any commodity or group of commodities. The advisory board may recommend and the director may approve measures to assist in the prevention or reduction of losses to crops or livestock caused by predators, insects, disease or parasite infestations, including the establishment and operation of detection, inspection, spraying, dusting, fumigating or other control measures.

[2] We are advised that tristeza, sometimes known as "quick decline," is the most destructive disease of citrus in the Western Hemisphere. The disease is caused by a virus and is transmitted by aphids or moved by man in budwood or trees. It is worldwide in distribution and has many forms or strains, the most destructive of which are severe types of stem pitting and seedling yellows. Seedling yellows has been dormant in California citrus since before the turn of the century. However, it now has been determined that the virus has been transformed into a highly transmissible disease, which has been spreading rapidly for the last few years. At this time it is known to occur in several locations in Southern California, but not elsewhere in the state.

". . . . . ."

It is concluded, based upon the unequivocal provisions of section 58895, that a marketing order may undertake a program for the detection and eradication of "seedling yellows."

The second inquiry is whether a marketing order undertaking such a program may be enforced against all citrus trees within the designated area[3] which present a hazard to commercial production. Section 58881 provides, except as therein otherwise provided, that ". . . any marketing order which is issued by the director pursuant to this chapter may contain any or all of the provisions which are prescribed by this article for regulating producer marketing . . . of any commodity within this state, *but no others*." (Emphasis added.) Section 58741 provides:

> "*Subject to the provisions*, *restrictions*, *and limitations which are imposed in this chapter*, the director may issue marketing orders which regulate producer marketing, the processing, distributing, or handling in any manner of any commodity *by any and all persons that are engaged in such producer marketing*, *processing*, *distributing*, *or handling of such commodity within this state*." (Emphases added.)

Section 58617 defines the term "person" as:

> ". . . an individual, firm, corporation, association, or any other business unit, and, for the purposes of this chapter, includes any state agency *which engages in any of the commercial activities which are regulated pursuant to the provisions of this chapter*." (Emphasis added.)

Thus, a "producer" is defined as any person that is engaged within this state *in the business* of producing, or causing to be produced for market, any commodity. (§ 58620.) Hence, we have previously concluded that an individual who is not engaged in the business of producing is not a "producer," and is not subject to the provisions of or entitled to the benefits of any marketing order or program. (54 Ops.Cal.Atty.Gen. 116, 122 (1971).) Nor is an individual whose incidental activities result in the production of a commodity a "producer." (*Child* v. *Warne* (1961) 194 Cal.App.2d 623, 633.) In this regard it may be

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[3] Section 58744 provides:

"Any marketing order which is issued by the director pursuant to this chapter may be limited in its application by prescribing the marketing area or portion of the state in which it shall be effective. A marketing order shall not, however, be issued by the director unless it embraces all persons of a like class that are engaged in a specific and distinctive agricultural industry or trade within this state."

noted that even those persons who make only casual sales, or whose sales or marketings are incidental to urban home ownership, or the result of activity other than a commercial farm or business venture, who are excluded from the list of producers under section 58780 are not subject to the provisions of an otherwise applicable marketing order. It is concluded that a marketing order undertaking a program for the detection and eradication of "seedling yellows" may not be enforced against *all* citrus trees within the area designated in the order.[4]

The third inquiry is whether compensation must be provided to commercial and noncommercial owners for removal of trees under a marketing order undertaking such a program. Since noncommercial owners are not subject to the provisions of a marketing order, the sole issue concerns compensation for commercial owners. There is, of course, a clear, direct and unquestionable constitutional basis for the protection of private property. Amendment V of the United States Constitution provides that "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." This guarantee applies to the states under the due process clause of Amendment XIV. (*Duncan* v. *Louisiana* (1968) 391 U.S. 145, 148.) Section 19 of article I of the California Constitution mandates that "Private property may be taken or damaged for public use only when just compensation . . . has been paid to . . . the owner." (See *Agins* v. *City of Tiburon* (1979) 24 Cal.3d 266, 273-274.)

Nevertheless, the *police power* exception, which operates generally in the field of regulation, renders "damages" occasioned by the adoption of administrative or legislative provisions noncompensable. (*Holtz* v. *Superior Court* (1970) 3 Cal.3d 296, 305; *Rose* v. *State of California* (1942) 19 Cal.2d 713, 730-731.) This doctrine of noncompensable loss arising by virtue of a valid exercise of the police power comes into play in connection with more direct "taking" or "damaging" of property only under "emergency" conditions. (*Holtz* v. *Superior Court*, *supra*.) Instances when private property may be destroyed or confiscated by a public entity without liability would include the demolition of all or parts of buildings to prevent the spread of conflagration, the destruction of diseased animals, rotten fruit, or infected trees "under the pressure of public necessity and to avert impending peril." (*House* v. *Los Angeles County Flood Control Dist.* (1944) 25 Cal.2d 384, 391.) Thus, where an infested plant is destroyed under the police power of

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[4] The second sentence of section 58895, "The advisory board may recommend and the director may approve . . . ," may not be construed in isolation so as to suggest an unlimited application. The duties of an advisory board, whether with respect to administration or recommendation, do not exceed the parameters of a marketing order. (§ 58846: "The duties of an advisory board are administrative only and any such board may do *only* the following: . . . . (b) Recommend to the director administrative rules and regulations *which relate to the marketing order*. . . .") (Emphases added.)

the state, the owner thereof is not entitled to compensation as a matter of right. (*Skinner* v. *Coy* (1939) 13 Cal.2d 416, 418.)

A marketing order under the Act is issued under the police power of the state. Section 58653 provides:

> "The marketing of commodities within this state is hereby declared to be affected with a public interest. The provisions of this chapter are enacted in the exercise of the police powers of this state for the purpose of protecting the health, peace, safety, and general welfare of the people of this state."[5]

(See *In re Farmers Frozen Food Co.* (1963) 221 F.Supp. 385, 388, affd. sub. nom. *J. M. Dungan* v. *Department of Agriculture* (1964) 332 F.2d 793.) Nevertheless, since the question is a matter of *judicial* interpretation of *state* law, we examine further the validity of the stated premise.

A marketing order is ordinarily proposed in the first instance by members or representatives of the affected industry. After extended discussion with, and consideration by the Department of Food and Agriculture, the department drafts, gives due notice of, and an opportunity for, a public hearing upon a proposed order. (§§ 58771, 58782.) The evidence elicited at the hearing is reviewed by the Director of Food and Agriculture to determine whether the proposed order satisfies the standards, purposes and policies of the Act, whether the proposed order is reasonably calculated to attain its objectives, and whether the interests of the consumer are protected. (§ 58813; and cf. § 58811.) If approved, the proposed order must be submitted for assent by producers in the manner and by the margins prescribed in section 58993.

Although a marketing order is generally proposed and ultimately approved by the producers themselves, it is an *act of the state* which, in the execution of a governmental policy, created the machinery for its establishment, adoption, and enforcement; the efficacy of the order derives from the *legislative authority* of the state, prescribing as a condition of its application the assent of the producers of a certain commodity. (Cf. *Parker* v. *Brown* (1943) 317 U.S. 341, 350, 352.) Further, the issuance of a marketing order by the director is a quasi-legislative, as distinguished from a quasi-judicial, act of an administrative agency. (*Brock* v. *Superior Court* (1952) 109 Cal.App.2ds 594, 597-598, 606.) A marketing order, then, is an act of legislative regulation which falls within the police power of the state. (See *Agricultural Prorate Com.* v. *Superior Court* (1936) 5 Cal.2d 550, 573-583; and cf. *Ray* v. *Parker* (1940) 15 Cal.2d 275, 281.) In addition, it may be fairly said that an order of the type considered here, i.e., for the removal

[5] See also section 59543 (the Agricultural Producers Marketing Law).

of infected trees, is issued under the pressure of public necessity and to avert impending peril. Under such circumstances, no compensation would be required for removal of trees under a marketing order undertaking a program for the detection and eradication of "seedling yellows." The foregoing is predicated, however, upon the implied premise contained in the inquiry, that the removal of trees under such a program is authorized under the provisions of section 58895.[6] We next examine the validity of that premise.

The final inquiry is whether a marketing order may authorize a contract with or grant of funds to a county agricultural commissioner for the purpose of undertaking such a program, including the removal of trees, to be enforced against all citrus trees within a designated area which present a hazard to commercial production. As previously noted, the issuance of a marketing order by the Director of Agriculture is a quasi-legislative act of an administrative agency. (*Ray* v. *Parker*, *supra*, 15 Cal.2d at 291; *Jersey Maid Milk Products Co.* v. *Brock* (1939) 13 Cal.2d 620, 658.) It is clear, as a settled principle, that an administrative agency may not undertake, directly or indirectly, an activity which it is not authorized to perform. Thus, an administrative agency has only such powers as have been conferred by law, expressly or by implication. (*Ferdig* v. *State Personnel Board* (1969) 71 Cal.2d 96, 103-105; 63 Ops.Cal.Atty.Gen. 840, 841 (1980); 63 Ops.Cal.Atty.Gen. 95, 101 (1980).) Further, the quasi-legislation of an administrative agency must fall within the scope of authority conferred by the relevant enabling statutory or constitutional source. (64 Ops.Cal.Atty.Gen. 837, 844-845 (1981); 64 Ops.Cal.Atty.Gen. 425, 429-430 (1981); 63 Ops.Cal.Atty.Gen. 95, 101, *supra*.) "It is fundamental that an administrative agency may not usurp the legislative function, no matter how altruistic its motives are." (*City of San Joaquin* v. *State Board of Equalization* (1970) 9 Cal.App.3d 365, 374.) The Legislature has expressly provided that a marketing order may contain any or all of the provisions authorized under the Act, *but no others*. (§ 58881.) Hence, a producer order containing extended provisions would not be authorized and would be in excess of the director's delegated power. (*People* v. *Harter Packing Co.* (1958) 160 Cal.App.2d 464; 54 Ops.Cal.Atty.Gen. 116, 119, *supra*.) We have already determined that a marketing order may not be enforced against all citrus trees, including those of nonproducers, within the designated area. The issue remaining is whether the removal of trees is authorized under the provisions of section 58895.

For purposes of convenience, we again set forth the first paragraph of that section:

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[6] What compensation may be due by force of an unauthorized or excessive exercise of the police power does not fall within the scope of the present inquiry. (But cf., *Agins* v. *City of Tiburon*, *supra*, 24 Cal.3d at 273-275.)

> "A marketing order may contain provisions to detect, control, prevent damage by or to eradicate insects, predators, diseases, or parasites with respect to any commodity or group of commodities. The advisory board may recommend and the director may approve measures to assist in the prevention or reduction of losses to crops or livestock caused by predators, insects, disease or parasite infestations, *including the establishment and operation of detection*, *inspection*, *spraying*, *dusting*, *fumigating or other control measures*." (Emphasis added.)

Ascertaining the intent of the Legislature so as to effectuate the purpose of the law, the various parts must be harmonized by considering each clause or section in the context of the integral statutory composition. (*Moyer* v. *Workmen's Comp. App. Bd.* (1973) 10 Cal.3d 222, 230.) Thus, neither the first nor the second sentence set forth above may be construed independently, to render insignificant any part of the total statutory scheme. (*Id.*) Hence, while the first sentence states generally that a marketing order may "contain provisions" for the eradication of disease, the second suggests certain limitations, both substantive and procedural.

To be sure, tree removal is a "control measure" "other" than detection, inspection, spraying, dusting, or fumigating. Nevertheless, as explained in *Scally* v. *Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806, 819:

> ". . . the doctrine of *ejusdem generis* . . . states that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things as the same general nature or class as those enumerated. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense, it would not have mentioned the particular things or classes of things which would in that event become mere surplusage. The words 'other' or 'any other' following an enumeration of particular classes should be read therefore as 'other such like' and to include only others of *like kind or character*." (Emphasis added.)

Although any rule of statutory construction must be applied circumspectively, it has been observed that "[w]hile the word 'other' may have the meaning of 'different' or distinct from that already mentioned, yet when it follows an enumeration of a particular class, 'other' must be read as 'other such like' and includes only others of like, kind or character." (*Estate of Stober* (1980) 108 Cal.App.3d 591, 599.)

In our view, the destruction of the tree itself, effecting the total loss of its fruit for that and each succeeding production season, is a control measure *not* of a like kind or character as the other prescribed measures. While as a matter of abstract hypothesis it

may be said that the notion of pest eradication might, under another statutory scheme, be fairly understood to include the power to destroy the plant (compare *Skinner* v. *Coy*, *supra*, 13 Cal.2d at 418), we find it wholly incongruous to attribute such an intention to the Legislature which, having set forth a series of approved means of *treatment*, failed to suggest *destruction* as a remedy. Although the methods specified may not be exhaustive, they may not be conceived as including a means which, by any standard of logic or reason, constitutes a fundamental departure.

Finally, it must be emphasized that where the Legislature intended to authorize tree removal as a means of citrus tristeza virus eradication, it did so expressly and unequivocally, including special provisions for notice and compensation. (§§ 8552, 8553; and cf. § 5401 et seq.) In our view, therefore, a marketing order may not authorize, either directly or by way of a contract or grant of funds, a program for the detection and eradication of "seedling yellows," including the removal of trees, to be enforced against all citrus trees within a designated area which present a hazard to commercial production.

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