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THE APPLICATION OF QUASI-CONTRACTUAL LIABILITY AGAINST A PUBLIC ENTITY

Under present California law a municipal corporation or other public entity may incur contractual liability only in the manner prescribed by applicable statutory or charter requirements.[1] A private party who has contracted with a public agency is entitled to the agreed consideration only if the public officials involved were authorized to enter into the agreement. Where there has been a failure to comply with a requirement of competitive bidding, the agreement, which would otherwise have been valid, is deemed illegal and unenforceable. As a result, the private party cannot recover the reasonable value of the benefit conferred[2] though the public entity is allowed to retain at least what has been incorporated into its own property.

Since its decision in *Zottman v. City and County of San Francisco*,[3] the California Supreme Court has followed this rule which practice has proven painful to many a private party dealing with a public entity. The purpose of this note is to examine the rationale for this severe position and to question its applicability in 1972. This note will also explore methods of allowing relief in situations similar to *Zottman* without nullifying legislation designed to limit the contractual power of public entites and to protect the public interest.

The Zottman Decision

Zottman held that since the contract was invalid because of noncompliance with city charter bidding requirements, no claim could be made against the municipality despite its acceptance and retention of the benefits received from the contractor. The original contract, which was let in accordance with charter requirements, provided for certain improvements to be made on San Francisco city property known as Portsmouth Square. Part of the work called for was the construction

1. Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 291 P. 839 (1930); *see* 10 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 29.02, at 215 (3d ed. rev. vol. 1966) [hereinafter cited as McQUILLIN].

2. 10 McQUILLIN, *supra* note 1, at 215-17.

3. 20 Cal. 96 (1862). This rule has been applied, at the expense of private contractors, in favor of school districts, counties, and municipalities. *See, e.g.*, Miller v. McKinnon, 20 Cal. 2d 83, 124 P.2d 34 (1942); Reams v. Cooley, 171 Cal. 150, 152 P. 293 (1915); Gamewell Fire Alarm Tel. Co. v. City of Los Angeles, 45 Cal. App. 149, 187 P. 163 (1919); Clinton Constr. Co. v. Clay, 34 Cal. App. 625, 168 P. 588 (1917).

of an iron fence around the square. The problem arose when the city's authorized representatives ordered the contractor to perform some additional work; namely, to construct a more durable stone base and to paint the iron fence to prevent corrosion. The contractor, in the presence of various city officials, was assured that he would be compensated for this work. The city did not, however, solicit competitive bids in authorizing this extra work, in direct violation of charter requirements.[4] Upon the subsequent refusal of the city to pay for the additional work, the contractor filed suit to recover for its value.

Chief Justice Field, ruling in favor of the city, explained that the city could only bind itself by a contract made in the manner prescribed by its charter. The court refused to recognize a request not made in compliance with the charter and held that no obligation to pay for the benefit could arise absent such a request. Thus, the retention of the extra work was immaterial since it was deemed to be unsolicited.[5]

The contractor involved conceded the city had no authority to contract for the extra work. He founded his basis for recovery on two other theories: (1) a presumption of ratification of the additional work existed because individual members of the city council were aware of the request and voiced no opposition; (2) the municipality had received the benefit of the extra work and was liable on the basis of an implied contract.[6]

Dealing with his first contention, the court explained that the charter is the source of all power exercisable by a city on a given subject. It gave the city council exclusive authority to contract for public improvements and expressly prescribed the mode for so doing. Thus, the individual council members had no power to authorize the work but could only do so collectively via the passage of an ordinance awarding the contract to the lowest bidder.[7] Since specific requirements had been ignored in *Zottman,* the agreement could not be subsequently affirmed. To allow the municipality to confirm the illegal and void contract would in effect repeal the charter requirement of competitive bidding. The court reasoned further that to allow such ratification would enable public authorities to do retroactively what they could not do originally.[8] Granting the power of ratification would imply the power to have made a contract in a similar manner, and the law will

4. The requirements of the charter, which was replaced in 1932, included the passage of an ordinance for each improvement and the letting of the contract to the lowest bidder after due notice in public journals. *See* 20 Cal. at 101.

5. *Id.* at 104, 106-07.

6. *Id.* at 100.

7. *Id.* at 101.

8. *Id.* at 103.

not imply a duty to do that which it will not allow the party to agree to do.[9]

The court dismissed the contractor's second contention holding that the theory of implied liability for the benefit retained was not applicable. It reasoned that since the request for the additional work was made in an unauthorized manner, the work had been, in effect, performed without any request. It compared the instant case with one where an individual constructed a building on another's land without his request. In such a case, the owner need not accept or ratify the improvement nor compensate the builder for the unsolicited work. Thus, in the situation at hand, no obligation to pay could arise since the city had not requested the benefit, and since it had been incorporated into city property, there was no duty to return it in species.[10]

The denial of liability in *Zottman* was based on the court's refusal to allow the subsequent ratification of an illegal contract and its finding that no obligation could arise absent a request for the benefit. Treating the benefit conferred as unsolicited, equitable estoppel was not available. The validity of these findings rests upon the premise that where there has been a failure to comply with the statutory requirement of competitive bidding, the agreement attempted to be made is wholly beyond the scope of public authority. Although the California Supreme Court has acknowledged that implied liability may be applicable against the public entity where general power to contract exists, it has not been applied where a specific statutory requirement such as competitive bidding has been violated.[11]

The purpose of competitive bidding requirements is to protect the taxpayer from the dissipation of public funds by public agencies via fraudulent or frivolous agreements,[12] and to secure, through competition, the highest quality work at the least cost.[13] Relying on *Zottman,* California courts have reasoned that the allowance of quasi-contractual relief to prevent unjust enrichment would undercut such legislation designed to regulate the contractual power of public bodies.[14] These courts have charged people dealing with a public body with the knowledge of any and all limitations imposed on it by charter or statute. Such people act at their peril that enabling requirements, such as competitive bidding, have been complied with.[15]

9. *Id.* at 105.

10. *Id.* at 106-07.

11. Miller v. McKinnon, 20 Cal. 2d 83, 91, 124 P.2d 34, 39 (1942).

12. *Id.* at 88, 124 P.2d at 37; Zottman v. City and County of San Francisco, 20 Cal. 96, 101 (1862).

13. 10 MCQUILLIN, *supra* note 1, § 29.29, at 321.

14. *See, e.g.,* Reams v. Cooley, 171 Cal. 150, 157, 152 P. 293, 295 (1915); Greer v. Hitchcock, 271 Cal. App. 2d 334, 336, 76 Cal. Rptr. 376, 378 (1969).

15. Miller v. McKinnon, 20 Cal. 2d 83, 89, 124 P.2d 34, 38 (1942); *accord,*

Although *Zottman* is still the law of California, its rationale has rarely been examined in subsequent decisions. Such decisions instead have somewhat blindly followed its precepts and continue to absolve the public entity from any form of liability.[16] Recently, *Zottman* was cited as controlling in *Greer v. Hitchcock*.[17] After being awarded the contract for construction of a drainage system for Contra Costa County, the contractor discovered that due to his clerical error $22,000 had been omitted from the bid. Addition of this amount to his original bid would have left the figure $10,000 below the next bid. Citing *Zottman* as the leading case,[18] the court of appeals held that the contractor could recover only the amount of the original bid since only the original contract had been let in accordance with statutory requirements.[19] Thus, absent compliance with competitive bidding requirements, one conferring a benefit on a public entity at present has no remedy in California to recover the reasonable value thereof.

Zottman Rejects Established Principles of Governmental Contractual Liability

Immunity is the Exception

In absolving San Francisco from implied liability, *Zottman* held that the city was immune from the established doctrines of ratification, estoppel, and quasi-contractual liability. This immunity appears to rest upon the underlying premise that agreements made without required competitive bidding are wholly outside the scope of public authority. This premise was inconsistent with earlier decisions[20] and has been

City of Pasadena v. Estrin, 212 Cal. 231, 235, 298 P. 14, 16 (1931); Reams v. Cooley, 171 Cal. 150, 157, 152 P. 293, 295-96 (1915); Greer v. Hitchcock, 271 Cal. App. 2d 334, 337, 76 Cal. Rptr. 376, 378 (1969).

16. *Compare* Zottman v. City and County of San Francisco, 20 Cal. 96 (1862) *with* Miller v. McKinnon, 20 Cal. 2d 83, 124 P.2d 34 (1942) *and* Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 291 P. 839 (1930).

17. 271 Cal. App. 2d 334, 76 Cal. Rptr. 376 (1969) (taxpayer action to recover payments made under invalid contract).

18. *Id.* at 336, 76 Cal. Rptr. at 378.

19. *See* CAL. WATER CODE APP. § 69-29 (West 1968) which provides: "All contracts for any improvement or unit of work when the cost thereof . . . will exceed two thousand dollars ($2,000), shall be let to the lowest responsible bidder or bidders in the manner hereinafter provided."

20. In Argenti v. City of San Francisco, 16 Cal. 255, 265-66 (1860), Justice Cope stated: "It is well settled that the contracts of corporations stand upon the same footing as those of natural persons, and depend upon the same circumstances for their validity and effect. The doctrine of ratification and estoppel is as applicable to corporations as to individuals, and the former are bound by the acts of their agents in the same manner and to the same extent, as the latter. There is no difference in this respect between public and private corporations; for, in matters of contract, a public corporation is regarded merely as a legal individual, and treated in all respects as a

questioned and criticized in a number of courts within and outside of California.

California has long recognized that a public entity should be held to the same standard as a private individual and thus be unable to assert immunity, unless valid public policy considerations dictate otherwise. In *Sacramento County v. Southern Pacific Co.*[21] the California Supreme Court said:

> [I]t is apparent that public corporations, like individuals, are bound to act in good faith and deal justly; that they cannot be allowed to enter into contracts involving others in expensive engagements, silently permit these contracts to be executed, and then repudiate them because the statutory steps have not been pursued in the letting of the contracts.

In *Contra Costa Water Co. v. Breed*[22] the court reiterated that "[w]hen a municipal corporation engages in ordinary business transactions, such as purchasing supplies, it exercises merely the right of a private corporation or natural person. . . ." And in *San Francisco Gas Co. v. City of San Francisco*,[23] Justice Field said that the obligation to do justice rests equally upon a municipality as upon an individual. He considered it no defense that no ordinance had been passed on the subject where the city had benefited from the property or labor of a party and the implication of a promise to pay was equally applicable against the city.

Indeed, the court in *Zottman* did not consider the limitations on the principle of governmental immunity enunciated in the subsequent cases. Quite possibility, *Zottman* has, in theory at least, been overruled by these latter cases.

Ratification of Invalid Contracts

The liability of San Francisco was also excused in *Zottman* by the court's rejection of the ability of the municipality to ratify an invalid contract.[24] This, however, is subject so some question today.

In *Contra Costa Water Co. v. Breed*[25] the Supreme Court of California recognized the subsequent ratification of an agreement which had not complied with constitutional requirements.[26] The city of Oak-

private person." *But see* Tooke, *Quasi-Contractual Liability of Municipal Corporations,* 47 HARV. L. REV. 1143, 1160 (1934).

21. 127 Cal. 217, 223-24, 59 P. 568, 570 (1899).

22. 139 Cal. 432, 436, 73 P. 189, 191 (1903); *accord,* Brown v. Town of Sebastopol, 153 Cal. 704, 709, 96 P. 363, 365 (1908).

23. 9 Cal. 453, 469-70 (1858) (alternative holding).

24. See text accompanying notes 8 & 9 *supra.*

25. 139 Cal. 432, 73 P. 189 (1903).

26. The rationale for allowing the subsequent ratification of an invalid contract was well stated in Adams v. Ziegler, 22 Cal. App. 2d 135, 138, 70 P.2d 537, 538

land was held liable for the reasonable value of water furnished to it during the year despite its failure to establish applicable rates. The California Constitution required that, prior to each fiscal year, the city pass an ordinance or resolution fixing water rates. While the validity of a proposed rate was being litigated the city received water despite the absence of an established rate. This decision upheld a subsequent compromise by the parties to compensate the company at the rate which was the subject of independent litigation.[27]

The court saw no reason to deny payment of a reasonable value of the water furnished as it was the city's responsibility to provide it. It would not permit the city to retain and use the company's property and then refuse to pay on the grounds that "it had not proceeded in strict conformity with some part of the complicated internal machinery of its complex corporate organization."[28] To the contrary, when a municipal corporation engages in ordinary business transactions

> it is subject to the principle that after it has received the benefit of a contract within the scope of its power to make it is estopped from denying its validity in an action based upon such contract.[29]

The court attempted to distinguish its holding from that of *Zottman* on three grounds: (1) in this case the city council had absolutely approved the company's claims by the subsequent passage of an ordinance; (2) the charter did not absolutely prohibit the action taken by the city council; and (3) here there was a continuous use of property throughout the year rather than one isolated instance.[30]

The first ground relied on by the court is unsound because *Zottman* specifically denied a public entity the power of subsequent ratification.[31] The second basis for distinction is hard to fathom. Logic dictates that a violation of a constitutional requirement, as here, is a stronger case for denial of any recovery than that of a mere charter mandate, as was true in *Zottman*. The third point seems as illogical as the first two. A benefit conferred in a single tranasaction might often be greater than in a series of transactions. The availability of equitable relief should not hinge upon the length of time necessary to render the performance called for by the contract.

(1937): "Regardless of the question of power to make the contracts it is sufficient to say that the contracts were ratified by the council and the city accepted the benefits from them. The making of the contracts being within the powers of the city, and the council having approved the presentation of the play and having ratified the action of the commission, the city is not now in position to deny the validity of the claims."

27. 139 Cal. at 434-35, 73 P. at 190-91.
28. *Id.* at 436, 73 P. at 191.
29. *Id.*
30. *Id.* at 439, 73 P. at 192.
31. See text accompanying note 8 *supra*.

Unfortunately, the result of the lip service paid to *Zottman* in *Breed* has been that subsequent decisions in this state have continually referred to *Zottman* as authority in denying relief in similar factual situations.[32] In failing to overrule *Zottman,* the *Breed* court paved the way for later decisions to ignore its actual holding that a municipality might not deny the validity of a contract where a legitimate benefit, within its power to acquire, has been conferred, and that subsequent ratification is permissible. However, the court's clear holding that an invalid contract could be subsequently ratified substantially weakens any contention today that *Zottman* is valid law to the contrary.

Estoppel of the Public Entity

In treating the additional work as unsolicited, the *Zottman* court failed to apply the traditional doctrine of estoppel against the city of San Francisco. However, subsequent decisions of the California Supreme Court strongly suggest that estoppel might be available in similar situations.

The application of estoppel against a public entity is not novel in California. In *Farrell v. County of Placer*[33] the Supreme Court of California held that estoppel was available where procedural steps had not been followed, but not where a statute had been violated which was in effect the "measure of the power" of the public entity. The court reaffirmed its refusal to apply estoppel where the effect would be to expand the authority of the public entity.[34] However, when determining whether in fact an expansion of public authority would result from the application of estoppel, the court's interpretation of the "measure of the power" standard has been inconsistent.[35]

In *Sacramento County v. Southern Pacific Co.*[36] the court held that the county was estopped from denying the validity of the contract, and at the same time rejected the claim that the contract was void because of the failure to get required plans and specifications or to solicit competitive bids. The court stressed the fact that the county had the general power to build the subject bridge and that the parties had acted in good faith. In applying estoppel the court was not giving validity

32. *See* Miller v. McKinnon, 20 Cal. 2d 83, 124 P.2d 34 (1942); Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 291 P. 839 (1930); Reams v. Cooley, 171 Cal. 150, 152 P. 293 (1915); Greer v. Hitchcock, 271 Cal. App. 2d 334, 76 Cal. Rptr. 376 (1969).

33. 23 Cal. 2d 624, 631, 145 P.2d 570, 573 (1944).

34. Boren v. State Personnel Bd., 37 Cal. 2d 634, 643, 234 P.2d 981, 986 (1951).

35. *Compare* Miller v. McKinnon, 20 Cal. 2d 83, 124 P.2d 34 (1942) *with* Sacramento County v. Southern Pac. Co., 127 Cal. 217, 59 P. 568 (1899).

36. 127 Cal. 217, 220-25, 59 P. 568, 569-71 (1899).

to the agreement. Moreover, had the contract been executory it would have been void.

In *Miller v. McKinnon*[37] the court overruled this decision by reverting to the measure of the power standard in *Zottman*.[38] The application of this standard in *Zottman* led to the court's conclusion that since the council acted without authority in requesting the additional work, no request in fact had been made. By resorting to this fiction the court avoided dealing directly with the problem. Clearly there was a request made for the extra work, albeit in an unauthorized manner. Rather the issue should be not whether a request was made, but to what extent the city should be held accountable for the action of its officials.

Quite recently in *City of Long Beach v. Mansell*[39] the court squarely acknowledged the conflicting doctrines which have led to such inconsistency in the application of equitable estoppel against a public entity. On the one hand there is the natural desire to avoid manifest injustice, and on the other, the wish to preserve the public interest.[40] It stated that the proper rule for applying estoppel against the government was that it

> may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and . . . the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.[41]

The court refused to allow the assertion that the city wholly lacked the power to dispose of lands because it did possess such power under certain circumstances.[42] In applying estoppel against the city the court stressed "the fact that the rare combination of government conduct and extensive reliance here involved will create an extremely narrow precedent for application in future cases."[43] The court felt that

> the great injustice which would result in this case from the failure to uphold an equitable estoppel against the state and city justifies the minimal effect upon public policy which would result from the raising of such an estoppel—and therefore that this is one of those

37. 20 Cal. 2d 83, 90, 124 P.2d 34, 38 (1942).

38. See text accompanying note 7 *supra*.

39. 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970). The court noted the four elements essential to the application of equitable estoppel: (1) the party estopped must be apprised of the facts; (2) it must have intended to induce action on the part of the other party; (3) the other party must have been ignorant of the true facts; (4) the other party must have been injured by detrimental reliance. *Id.* at 489, 476 P.2d at 442, 91 Cal. Rptr. at 42.

40. *Id.* at 496, 476 P.2d at 448, 91 Cal. Rptr. at 48.

41. *Id.* at 496-97, 476 P.2d at 448, 91 Cal. Rptr. at 48.

42. *Id.* at 499, 476 P.2d at 450, 91 Cal. Rptr. at 50.

43. *Id.* at 500, 476 P.2d at 451, 91 Cal. Rptr. at 51.

> 'exceptional cases' where 'justice and right require' that the government be bound by an equitable estoppel.[44]

The conclusion seems inescapable that the *Mansell* court would no longer uphold the decision in *Zottman.* It is difficult to imagine this court holding that the city council in *Zottman* wholly lacked the power to request the additional work. Where, as in *Zottman,* the public entity has received a legitimate benefit from an agreement entered voluntarily, the *Mansell* court would consistently estop the public entity from denying the validity of such agreement. Indeed, *Zottman* appears to be one of those "exceptional cases" where public policy does not justify the burden inflicted upon the individual.

The Intra Ultra Vires Distinction

The failure of the court in *Zottman* to distinguish between intra and ultra vires municipal power is the significant factor lending to the court's ultimate disregard of traditional concepts of municipal liability. An ultra vires contract is one "which is not within the power of a municipal corporation to make under any circumstances or for any purpose."[45] *Zottman* fails to distinguish the case where the public entity could in no situation enter an agreement, the subject matter of which is outside the scope of its power, from that where a binding agreement could have been made had the antecedent conditions been performed. Since *Zottman,* however, there has developed extensive authority in California which holds that in the latter situation implied liability may be imposed against the public entity.[46]

In *Higgens v. San Diego Water Co.*[47] an agreement to lease a waterworks plant was found invalid because it included a subsidy to a railroad and thus was outside the scope of the city's authority. The subject matter of the agreement, however, was held to be within city power as

44. *Id.* at 501, 476 P.2d at 451, 91 Cal. Rptr. at 51.

45. 10 MCQUILLIN, *supra* note 1, § 29.10, at 250; *see* Miner's Ditch Co. v. Zellerbach, 37 Cal. 543, 578 (1869).

46. A number of jurisdictions which have allowed a recovery where *Zottman* did not have done so by explicitly distinguishing acts of a public entity as intra vires and ultra vires. In Gamewell v. City of Phoenix, 216 F.2d 928 (9th Cir. 1954), where there had been a failure to solicit required competitive bids, the Ninth Circuit, applying Arizona law, ruled that one must distinguish a contract which a city had authority to enter but was invalid because of failure to follow the prescribed method for so doing, from an ultra vires contract which the city could not enter under any circumstances. *Id.* at 941; *accord,* Rieth-Riley v. Town of Indian Village, 138 Ind. App. 341, 347-48, 214 N.E.2d 208, 211 (1966); Kotschevar v. North Fork Tp., 229 Minn. 234, 236-37, 39 N.W.2d 107, 109 (1949); Capital Bridge Co. v. Saunders County, 164 Neb. 304, 310, 83 N.W.2d 18, 22 (1957); Finch v. Matthews, 74 Wash. 2d 161, 172, 443 P.2d 833, 840 (1968).

47. 118 Cal. 524, 45 P. 824 (1897).

> the city had the general power to contract for a water supply for itself and its inhabitants, and under this power could undoubtedly have taken a lease of the water company's plant for a year. . . . Its express contract . . . was invalid . . . but there is no reason why it should not pay the reasonable value of the use of the plant which it has actually enjoyed.[48]

The California Supreme Court cited *Zottman* in support of its conclusion while reaching a contrary result.[49] The decision holds that where the subject matter of the agreement is within the power of the city, the city is liable for the reasonable value of the benefit conferred.

Evidently, numerous subsequent decisions of the California Supreme Court[50] are ultimately based on the same proposition as the *Higgens* case. Consequently, it seems clear that because it was evident that the additional work called for in *Zottman* was certainly within the power of the city to authorize,[51] the *Zottman* decision does not reflect the true state of the law in California today which dictates that a distinction between ultra and intra vires be drawn.

A primary factor in the court's failure to recognize the agreement in *Zottman* as intra vires rather than ultra vires was its desire to avoid the nullification of legislation designed to protect the taxpayer by means of regulating the contractual power of public entities.[52] Many cases in California, however, have made such a distinction and have reached a result contrary to *Zottman*. Given alternative means of protecting the taxpayer, it is no longer necessary to regard an agreement which is within the power of the public entity to make, but invalid for failure to comply with statutory requirements, as ultra vires for policy reasons. *Zottman* should, however, still correctly be applied where the agreement is truly ultra vires.[53]

Not only is the failure to make the intra-ultra vires distinction unnecessary to protect the public interest but the consequences of this failure may well be unconstitutional. Recently, in *City of Long Beach v. Mansell*[54] the California Supreme Court tolerated a degree of en-

48. *Id.* at 555, 45 P. at 832. In Contra Costa Water Co. v. Breed, 139 Cal. 432, 436, 73 P. 189, 191 (1903), the court reiterated this distinction saying: "It is only when the subject-matter of the contract is entirely outside the scope of the corporate powers, or the contract in question is clearly prohibited, that the plea of *ultra vires* will be listened to." *Cf.* Brown v. Town of Sebastopol, 153 Cal. 704, 709, 96 P. 363, 365 (1908); Wheeler v. City of Santa Ana, 81 Cal. App. 2d 811, 817, 185 P.2d 373, 377 (1947).

49. 118 Cal. at 555, 45 P. at 832.

50. See text accompaning notes 25-39 *supra.*

51. *Compare* Zottman v. City and County of San Francisco, 20 Cal. 96 (1862) *with* Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 P. 189 (1903) *and* Higgens v. San Diego Water Co., 118 Cal. 524, 45 P. 824 (1897).

52. See text accompanying notes 12-14 *supra.*

53. See text accompanying notes 45 & 46 *supra.*

54. 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).

croachment upon public interest to avoid a much greater burden placed upon the private party. Given the substantial burden imposed on the contractor in *Zottman* its allowance of the retention of benefits without payment of compensation might well contravene constitutional due process requirements.[55] Under the test of *State v. Marin Municipal Water District*[56] the result might constitute a "taking" for which compensation is required by the eminent domain provision of this state.[57] In *Bacich v. Board of Control*[58] the court said "the policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of public improvements."[59]

In *Zottman* a good faith mistake resulted in receipt by the city of a valid public improvement. To say that the benefit received by the public from denying any form of compensation, outweighs the burden on the individual would seem to distort the meaning of "police power."[60] Rather, given the above purpose of the eminent domain provision, it would appear that compensation is constitutionally required to charge the community rather than an individual with the cost of such an improvement. Hence, any policy argument relied on in *Zottman* in refusing to make a distinction between ultra and intra vires contracts would seem unfounded.

Many cases such as *Breed*, *Higgens*, and *Mansell*, demonstrate the inequity of the result of *Zottman*, and its harsh impact by making the

55. *E.g.*, U.S. CONST. amend. XIV, § 1 provides in part: "nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

56. 17 Cal. 2d 699, 111 P.2d 651 (1941). The court held that: "The determination of whether a statute constitutes a taking of property without due process of law or an impairment of the obligation of a contract consists in balancing the burden placed on the individual or corporation on the one hand against the benefit which will accrue to the public as a whole on the other. If the benefit to the public outweighs the burden on the individual, the statute is a valid exercise of the 'police power'." *Id.* at 706, 111 P.2d at 655.

57. *See* CAL. CONST. art. I, § 14 which provides: "Private property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner. . . ."

58. 23 Cal. 2d 343, 144 P.2d 818 (1943).

59. *Id.* at 350, 144 P.2d at 823. It was found that the addition of "or damaged" to the word "taken" in the eminent domain clause indicated an intention to apply the provision to a variety of situations. While acknowledging that granting liberal compensation under the provision would increase the cost of public improvements, the court felt that individual property rights should not be sacrificed to secure an improvement of the general public convenience. Deploring the tendency to sacrifice the individual to the community, no reason was found why the state should not pay for property which it has taken. *Id.* at 350-51, 144 P.2d at 823.

60. In Miller v. Board of Pub. Works, 195 Cal. 477, 484, 234 P. 381, 383 (1925), it was held that police powers could be exercised only when "reasonably necessary to promote the public health, safety, morals . . . or general welfare of the people of a community."

distinction between ultra and intra vires contracts. A similar awareness is evident in *Lunden v. County of Los Angeles*[61] where the court rather ingeniously applied California Civil Code section 1638[62] in construing California Government Code section 23006[63] and California Constitution article IV, section 32.[64] This application enabled an architect to recover a reasonable value for his services based on a reasonable interpretation of the parties' contract.[65] Citing *Bohman v. Berg*,[66] the court found it

> impossible . . . to escape the conclusion that the parties, both by the inadequate language of their written agreement and by their actions taken thereunder, rather clearly indicated their understanding and intention that respondent eventually would be compensated for these services.[67]

A recent opinion by the California attorney general[68] may well be motivated by a similar awareness of the problem. Its significance lies in its indication that statutory competitive bidding requirements need not always be followed in modifying existing contracts. The opinion, contrary to *Zottman*, allows modification in accordance with the terms of the contract, thus giving a public entity needed flexibility to deal with

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61. 233 Cal. App. 2d 811, 43 Cal. Rptr. 849 (1965).

62. CAL. CIV. CODE § 1638 (West 1954) provides: "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

63. CAL. GOV'T CODE § 23006 (West 1968) provides: "Any contract, authorization, allowance, payment, or liability to pay, made or attempted to be made in violation of law, is void, and shall not be the foundation or basis of a claim against the treasury of any county."

64. CAL. CONST. art. IV, § 17 which replaced art. IV, § 32 in 1966, with no material change, provides: "The Legislature has no power to grant, or to authorize a city, county, or other public body to grant, extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or to authorize the payment of a claim against the State or a city, county, or other public body under an agreement made without authority of law."

65. 233 Cal. App. 2d at 816, 43 Cal. Rptr. at 852.

66. 54 Cal. 2d 787, 356 P.2d 185, 8 Cal. Rptr. 441 (1960). The court stated: "It is well-settled law that, although an agreement may be indefinite or uncertain in its inception, subsequent performance by the parties under the agreement will cure this defect and render it enforceable. When one party performs under the contract and the other party accepts his performance without objection it is assumed that this was the performance contemplated by the agreement." *Id.* at 794-95, 356 P.2d at 190, 8 Cal. Rptr. at 446.

67. 233 Cal. App. 2d at 816-17, 43 Cal. Rptr. at 852.

68. 53 OP. CAL. ATT'Y GEN. 72 (1970). The opinion stated that "[t]he State is empowered by section 11010.5 of the Government Code to modify contracts; but in the case of contracts entered into by the State pursuant to any statute requiring the contract to be let on the basis of competitive bids, such modification is allowed only if the *contract* or the law so provides." *Id.* at 73 (emphasis added); *see generally* 10 MCQUILLIN, *supra* note 1, § 29.40, at 346-47.

unpredictable or unforeseen occurences. Fortunately, the opinion does not immunize such modification from appropriate tests of its legitimacy.[69]

Relief From Zottman—Quasi Contract

Because any policy reason that could be advanced in support of the *Zottman* court's failure to distinguish between intra and ultra vires contracts seems to be unfounded today,[70] the distinction should be made in each case. The courts have effectively made the distinction in many cases in any event.[71] The remedy that should be applied in the intra vires situation after the distinction has been made, is that of quasi contract. Certain fears, however, have led courts to deny such relief where the contract is illegal though the municipality has voluntarily entered into it, and the community has received a valuable benefit.

Primarily, courts have been reluctant to allow a municipal corporation to expand its own power by contract rather than by legislation. However, even assuming that a municipality would deliberately seek to act without authority, the state has sufficient remedy by *quo warranto* proceedings[72] to punish the municipality and enjoin the continuation of such activities. With this direct relief available there is little justification for injuring a third party via indirect measures.

A second concern of the courts has been that an unreasonable burden will be placed upon municipal taxpayers if public entities are allowed to circumvent statutory procedures. However, there is no persuasive evidence that municipal representatives seriously extend the community's liabilities beyond the wishes of its taxpayers.[73] But if necessary, injunctive relief is available by means of taxpayer actions to prohibit or recover unauthorized public expenditures.[74]

Third, courts have been prone to charge one dealing with a municipality with knowledge of the limitations on its power to contract.[75] With the tremendous volume of litigation concerning the existence of particular city powers—about which the typical city attorney is in considerable doubt—it seems harsh to impose on a private party, who is serving the city, the necessity of correctly ascertaining the extent of

69. See text accompanying notes 72 & 74 *infra.*

70. *Id.*

71. See text accompanying notes 28 & 36 *supra.*

72. *See* CAL. CODE CIV. PROC. § 803 (West 1955).

73. Antieau, *The Contractual and Quasi-contractual Responsibilities of Municipal Corporations,* 2 ST. LOUIS L.J. 230, 237-38 (1952-53).

74. *See* Miller v. McKinnon, 20 Cal. 2d 83, 124 P.2d 34 (1942); Greer v. Hitchcock, 271 Cal. App. 2d 334, 76 Cal. Rptr. 376 (1969).

75. See text accompanying note 15 *supra.*

municipal power.[76] This court imposed imputation seems indefensible when one considers the result. The city, as in *Zottman,* is unjustly enriched via an illegal contract even though its officials, acting under the auspices of the charter, would seem to be in a far better position to be aware of their own contractual limitations.

Under the rationale of *Mansell*[77] there is no justification for denying quasi-contractual relief given these alternative remedies since the public interest need not be sacrificed to alleviate the burden on the individual. In order to allow the equitable remedy, courts, as in *Sacramento County,*[78] must find that the party seeking equitable relief acted in good faith[79] without intention to violate the law. He also must have had a reasonable belief that the public official had the power to make the agreement. No evidence of fraud or collusion must be present and, as seen in *Higgens*[80] and *Breed,*[81] the public body must have had authority to contract for the subject purpose, and the benefit retained must be a valid public improvement. In short, the agreement must have been intra vires or one which the public entity could have entered had it complied with applicable requirements.

The recovery granted where a contract is invalid for reason of failure to comply with statutory requirements has invariably been based on the reasonable value of the benefit retained by the public entity.[82] California recognizes the recovery in quantum meruit based on a reasonable value of the benefit conferred. It is a law imposed duty based on quasi contract when in fact no contract exists.[83] The rationale lies in the fact that:

> The action is based on quasi contract, and it is no defense to such an action to allege that the parties did not contract. . . . But the fact remains that a public corporation, like a private individual, may be liable on a quantum meruit if, having the power to make a contract, but having made none, it has nevertheless enjoyed the benefits of work performed or materials furnished to it, when no statute forbids or deprives it of the power to contract therefor.[84]

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76. Antieau, *supra* note 73, at 238.

77. See text accompanying note 41 *supra.*

78. See text accompanying note 36 *supra.*

79. In Gamewell Co. v. City of Phoenix the court defined good faith as " 'in the absence of bad faith.' " 219 F.2d 180, 181 (9th Cir. 1955).

80. See text accompanying note 48 *supra.*

81. See text accompanying note 28 *supra.*

82. *E.g.,* Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 P. 189 (1903); County of Sacramento v. Southern Pac. Co., 127 Cal. 217, 59 P. 568 (1899); Higgens v. San Diego Water Co., 118 Cal. 524, 45 P. 824 (1897); Lunden v. County of Los Angeles, 233 Cal. App. 2d 811, 43 Cal. Rptr. 849 (1965).

83. Palmer v. Gregg, 65 Cal. 2d 657, 660, 422 P.2d 985, 986-87, 56 Cal. Rptr. 97, 98-99 (1967).

84. Antieau, *supra* note 73, at 232.

Conclusion

The harsh mandate of *Zottman* appears to be controlling law in California today.[85] Although the decision has not been overruled, the courts have struggled to escape from its severe results.[86] Certainly today, there is no need to subvert individual interests to those of a public body under the guise of protecting the taxpayer, and hence, *Zottman* should be expressly overruled.

It is acknowledged that any viable solution to the problem of the "unauthorized" public expenditure must not nullify clear legislative intent. However, where the competitive bidding requirement has not been met, the allowance of quasi-contractual relief where the additional work was within the power of the municipality will not be inconsistent with the statutory purpose.[87] This solution would not dissipate public funds and would achieve a far more just result than that of the *Zottman* decision which, at the present time, stands as an obstacle that the California courts have to side-step to achieve equitable results.

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85. *See e.g.*, Greer v. Hitchcock, 271 Cal. App. 2d 334, 76 Cal. Rptr. 376 (1969).

86. *See e.g.*, City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970); Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 P. 189 (1903); Higgens v. San Diego Water Co., 118 Cal. 524, 45 P. 824 (1897).

87. See text accompanying notes 12 & 13 *supra.*

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