

Memorandum 68-6

Subject: Study 65 - Inverse Condemnation (Destruction of Health and Safety Menaces)

This memorandum is concerned with one portion of Part III of Professor Van Alstyne's research study on inverse condemnation (pages 43-69, relating to destruction of health and safety menaces). A careful reading of the research study is essential to an understanding of the problems in this area of the law.

At least 71 California statutes presently authorize the destruction of animals, plants, or agricultueal products when found to be affected by specified conditions that threaten public health and safety or the productivity of agriculture. These statutes appear to have been enacted in piecemeal fashion, with little consistency of either substance or procedure. See pages 44-55 of the research study.

The problems with these statutes relate to (1) the desirability of more flexible compensation policies, (2) availability of effective remedies for mistakes in statutory enforcement, and (3) the need for uniformity of procedure.

Compensation policy, as reflected in the statutes, seems haphazard in both scope and impact. Although compensation is required or permitted in some cases, the statutory provisions generally fail to require or authorize payment of compensation. Existing disparities of compensation policy, discussed in the study, appear to be the product of ad hoc legislative responses to particular problems rather

than a reflection of rational appraisal of the economic consequences of prevailing nuisance abatement programs.

The second major problem--the possibility of mistakes in the course of enforcement--is serious because under existing California law it is not clear what remedy is available and the absence of an appropriate remedy casts doubt upon the validity of health and safety abatement programs that are entirely devoid of statutory provisions for payment of compensation.

Procedural fairness and uniformity of procedure would also be appropriate for legislative consideration in relation to these statutes. For example, preliminary adjusctication, before abatement of health and safety menaces by destruction, should be required more widely.

The problem that will face the Commission if it determines to undertake to draft legislation to deal with the problems identified by the consultant is that each of the 71 statutes will need to be considered from the standpoint of compensation, mistake, and procedure. While it is likely that one general provision providing a rule on mistake could be developed and that several standard procedures could be developed for use in the 71 situations, the development of compensation and procedure rules would require consideration in detail of the purpose and effect of each of the 71 statutes. In addition, the staff is concerned about the acceptability to the Legislature of any proposed legislation that would seriously disturb existing compensation rules in this area of the law.

The staff believes that it would be more profitable for the Commission to devote its time and resources to other aspects of inverse

condemnation than it would be to devote the time needed to consider each of the 71 statutes in detail. This is especially true of the problem of whether compensation is to be provided under each of the 71 statutes. At the same time, we believe that further consideration should be given to whether a general provision can be drafted to cover the problem of mistake. We also recommend against undertaking to provide uniform procedures under the 71 statutes.

The adoption of the staff recommendation would make it impossible to enact a statutory provision that there is no liability for inverse condemnation except as provided by statute. Hence, the decision at this time on this matter should be that further study of these statutes is deferred for the time being except for those specific matters, such as the effect of mistake, which the staff would present for further consideration at future meetings. There is no doubt that there are serious problems in connection with the 71 statutes that should be resolved by legislation. However, dealing with all of these problems at this time does not appear to be a desirable allocation of Commission time and resources.

Respectfully submitted,

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Executive Secretary