

12/5/67

## Memorandum 68-7

Subject: Study 65 - Inverse Condemnation (Building and Safety Code Enforcement)

Part III (pages 70-80) of the research study on Inverse Condemnation is concerned with the inverse condemnation problems presented by the destruction of private property as a means of enforcement of building and safety regulations.

The California State Housing Law authorizes state-wide administrative regulations prescribing minimum standards relating to the construction, alteration, maintenance, repair, sanitation, occupancy, and use of all forms of housing. City and county ordinances or regulations imposing requirements equal to or stricter than the state regulations are expressly permitted, and enforcement of the state-wide regulations is made a duty of county and city enforcement officers.

Strict enforcement of structural requirements aimed at promoting the health and safety of occupants, and preventing destruction by fire, may impose substantial economic burdens upon the owners of the buildings.

In general, fully retroactive application of newly promulgated building and safety regulations to preexisting nonconforming structures is regarded as impermissible, although discrete phrases of such regulations may be enforced when justified by urgent health and safety objectives. Two doctrinal devices have been invoked, often in conjunction, to circumvent the retroactivity barrier:

(1) Vigorous utilization of the doctrinal resources inherent in the concept of nuisance. (Local entities in California have not been slow to devise comprehensive legislative definitions of structural "nuisances," invoking the sanction of demolition to induce owners of preexisting structures to repair or remodel them in conformity with

current building and safety requirements. On the whole, the courts have accorded a considerable degree of deference to legislative measures of this sort. Compelled demolition of buildings conceded to be of substantial value, without payment of compensation, has repeatedly been approved by California appellate courts under this rationale.)

(2) It is often required that present-day building and safety regulations be complied with where there is a substantial reconstruction as distinguished from alterations and repairs which do not amount to substantial reconstruction. (In California and elsewhere, prevailing legislative policy generally requires full compliance with present code requirements if the total cost of repairs exceeds 50% of the present cost of replacement of the structure in its nonconforming state. Not only do the voluntary repairs or alterations have to conform to present building requirements, but in some cases ordinances ban any voluntary repair of a structure if the estimated repair costs exceed the 50% standard, unless the entire building (not merely the portion under repair) is brought up to present standards. Some ordinances go further. The validity, under California law, of such ordinances is not entirely clear.)

The consultant recommends that statutory guidelines be developed to provide statewide uniformity of policy in building and safety code enforcement, to clarify the rights of public entities and property owners, and to promote building and safety enforcement programs.

Specifically, he suggests that a statutory classification scheme, assigning differing levels of public urgency to various types of building requirements would substantially improve the administration

of these laws by providing a more rational basis for assessing the reasonableness of the impositions upon property owners and the sanctions invoked to enforce them. For example, a minimum cubic footage standard for hotel and apartment sleeping quarters is less important than a rule that forbids maintenance of toilet and cooking equipment in the same room. Obviously, to undertake to classify all such requirements and to indicate the available sanctions for enforcement of each of them would be a substantial and difficult undertaking.

The consultant also suggests the development of more flexible statutory guidelines that would give the owner more choice in whether to conform the building to current standards or to destroy the building.

A careful reading of the study is essential for an understanding of the consultant's suggested approach to this problem. He makes many suggestions that are not referred to in this memorandum. The staff believes that it would not be desirable at this time to undertake to draft legislation to implement the consultant's general recommendations. We believe, however, that this area of the law should be given a higher priority than the area of law considered in Memorandum 68-6 (Destruction of Health and Safety Menaces).

At the same time, we believe that the Commission should at this time undertake to draft legislation to prevent the arbitrary or discriminatory use of building code enforcement practices to reduce the cost of condemnation of private property scheduled for acquisition for public purposes. (See discussion at pages 77-78 of study.)

Respectfully submitted,

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Executive Secretary