#65 3/27/68

Memorandum 68-40

Subject: Study 65 - Inverse Condemnation (Denial Destruction)

Introduction

This Memorandum is concerned with the portion of Professor Van Alstyne's research study dealing with "denial destruction" (pages 34-40 of the study). At this time, the Commission should consider the policy questions involved and also should consider the staff's draft of a possible statute that is set forth in this Memorandum. The statute is based on Professor Van Alstyne's suggestions.

The major policy questions are:

(1) Should a statute dealing with denial destruction be formulated by the Commission?

(2) If a statute is adopted, should it provide rules for determining when denial destruction is authorized or only a measure of damages?

(3) Should the damage provision provide for recovery in all cases or only under limited circumstances? This question involves both drafting and policy considerations.

Discussion

In times of extreme emergency or disaster, public officials may order the selective destruction of private property to protect the community from widespread and calamitous loss. The most typical examples of this so-called "denial destruction" are: (1) destruction of private property to prevent it from falling into enemy hands in wartime and (2) the destruction of property to deny its combustible elements to a conflagration. The latter situation was decided, in

Surocco v. Geary, 3 Cal. 69 (1853), to be noncompensable. The incidence of denial destruction obviously is rare. Other fact situations that might lead to such destruction are: (1) the release of artificially impounded water onto private property to prevent or reduce general damage from a serious flood; (2) destruction or taking possession of a house to prevent the spreading of an extremely contagious disease; (3) destruction of private arms and ammunition to prevent the spread of a riot (i.e., sporting goods store in a riot area); (4) destruction of private property to prevent the spread of destructive insects or animals (i.e., locusts).

Denial destruction is not a basis of personal tort liability for the public officer, and the consultant believes that this rule is justified. Public entities apparently are immune from tort liability for denial destruction, but the extent of their liability under inverse condemnation law is unclear. The general rule appears to be that in the absence of statute there is no liability. The consultant believes that clarification by statute would be desirable.

The consultant recommends alternative statutory provisions. One would provide that the property owner is entitled to damages for the value of the destroyed property measured under the circumstances existing at the moment prior to destruction. The second suggestion would allow recovery for that portion of the property which, in the exercise of ordinary care, would have been preserved if the denial destruction had not been ordered. Either of the recommendations would afford at least a minimal level of protection to private interests against the danger of a needless or premature demolition. Either would also eliminate the artificial distinction that now exists between

requisitioning and denial destruction. (See Memorandum 68-41 as to requisitioning.) For example, in the famous Caltex case, the U. S. Government had previously requisitioned oil and other petroleum supplies for use. When the Japanese were approaching the Phillipines, the government ordered the refineries destroyed. The court held that the refineries did not need to be paid for because they were "destroyed," not "used." The government paid for the previously requisitioned oil without contest. It is noteworthy that the British House of Lords recently held the British government liable for destroying refineries in Burma on almost identical facts.

The staff recommends that the second alternative be adopted. If the first suggestion were adopted, it would probably lead to litigation of all cases. Although the second provision also might prove unduly litigious, its wording might discourage some of the suits.

Statutes in at least two states provide a measure of recovery in the fire cases. The Georgia provision, which was apparently repealed in a recent revision of the health laws, provided protection on a broader scale although it has never been applied in any cases other than fire cases:

> Destroying property for public good. Analogous to the right of eminent domain is the power from necessity, vested in corporate authorities of cities, towns, and counties, to interfere with and sometimes destroy the private property of the citizen for the public good, such as the destruction of houses to prevent the extension of conflagration, or the taking possession of buildings to prevent the spreading of contagious diseases. In all such cases, any damages accruing to the owner from such acts, and which would not otherwise have been sustained, must be paid by such municipal corporation or county. [Ga. Code Ann. § 88-401 (1933)(repealed 1964).]

The Massachusetts statute provides only for destruction to prevent the spread of fire:

> If such demolition of a building [to prevent spread of fire] is the means of stopping the fire or if the fire stops before it comes to it, the owner shall be entitled to recover reasonable compensation from the town unless it was the building in which the fire started. Such compensation shall be determined under chapter seventy-nine, as if the building demolished were taken by eminent domain. [Mass. Gen. Laws, Ch. 48, § 5 (1933).]

It is noteworthy that this statute in effect provides for compensation where a mistake is made by the official and the fire never reaches the house.

The Virginia statute also applies only to the fire cases, but carefully limits recoverable damages:

> The owner of such property shall be entitled to recover from the city or town the amount of actual damage which he may have sustained by reason of the same having been pulled down or destroyed. . . .[Va. Code § 27-21.]

> The preceding section shall not enable anyone to recover compensation for property which would have been destroyed by the fire if the same had not been pulled down or destroyed . . . but only for what could have been saved with ordinary care and diligence, had no directive been given. [Va. Code § 27.22.]

Recommendation

The staff recommends that the Commission give consideration to a statute on denial destruction in accord with the consultant's recommendation. To encompass all cases involving denial destruction, the statute should be general. However, the staff recommends that the statute not delineate the authority to destroy, but merely provide the measure of damages if that is done. The alternative would be to devote a great deal of time and study to determine the circumstances under which denial destruction should be authorized, including the degree of necessity and the persons in each case authorized to exercise the

discretion. The occurrence of denial destruction is rare, and the staff does not believe that such provisions are sufficiently necessary to justify the Commission's formulating them. Accordingly, the following statute, to be included in the Government Code as Section 816, is suggested:

> 816. (a) Whenever private property is destroyed by a public entity or a public employee to protect the lives or property of the public in an emergency, the person or persons whose property is destroyed may recover reasonable compensation from the public entity for the value of the destroyed property.
>
> (b) The compensation recoverable under subdivision (a) shall be equal to the actual damage to the property which would not otherwise have been sustained, less any insurance proceeds paid to the owner of the property for the same loss. The property owner shall in no case recover any damages for injury to the property that would have been sustained had the destruction of the property not been ordered.

Comment. In times of great emergency or disaster, public officials may destroy private property to protect the public safety and welfare. Surocco v. Geary, 3 Cal. 69 (1853). When this is done in good faith and under reasonably apparent necessity, the courts have held that the officer is personally immune from tort liability for the damage or loss suffered by the owner of the property. Surocco v. Geary, supra. However, the decisional law is inconclusive as to whether the public entity is required to compensate the owner in such cases. No decisions on this point have been rendered in California since 1850. Dunbar v.

The Alcade & Ayuntamiento of San Francisco, 1 Cal. 355 (1850). Compare Surocco v. Geary, supra (dictum), with Lipman v. Brisbane Elementary School Dist., 55 Cal.2d 224, 229, 11 Cal. Rptr. 97, 99, 359 P.2d 465, 467 (1961)(by inference from citation of, inter alia, Hall & Wigmore, Compensation for Property Destroyed to Stop the Spread of a Conflagration, 1 Ill. L. Rev. 501, 514 (1907)).

Section 816 does not change existing law as to when property may be destroyed in an emergency or who may order the destruction. Rather, it provides a measure of damages for property that is damaged or destroyed by a public entity (see Section 811.2) or a public employee (see Section 811.4) in an emergency. The damages recoverable under this section are limited to those that could have been avoided if the property had not been destroyed by the public entity. Thus, if a building directly in the line of an otherwise uncontrollable fire is destroyed to prevent the spread of the fire, the owner can recover no compensation because the building would have been destroyed in any event. However, if the owner, through the exercise of reasonable diligence, could have saved part of the building, he is entitled to the value of that portion of the building that could have been saved. His right is against the public entity and not the public employee. If his fire insurance fully compensates the loss, he has no right to additional compensation from the public entity.

Respectfully submitted,

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