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Memorandum 68-52

Subject: Study 65 - Inverse Condemnation (Denial Destruction)

Attached to this Memorandum is a tentative recommendation on denial destruction. It is designed to carry out the decisions reached by the Commission at the last meeting. If the tentative recommendation is satisfactory, the staff would like to send it out for comment after this meeting.

Respectfully submitted,

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TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

DENIAL DESTRUCTION

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) the release of artificially impounded water onto private property to prevent or reduce general damage from a serious flood, (2) the destruction of property to deny its combustible elements to a conflagration, and (3) the destruction of private property to prevent it from falling into enemy hands in wartime.

Litigation concerning denial destruction is rare. However, present political and social conditions make it desirable to clarify the ambiguities that exist in case law. In the context, for example, of a large scale urban riot, destruction of a house to stop a conflagration or the destruction of privately owned inventories of guns and ammunition in sporting goods stores or pawn shops might be considered essential. In addition, the Commission is informed that the release of artificially impounded waters onto private property is sometimes effectuated to avoid the severe flooding of the rest of the community.

Denial destruction is not a basis of personal tort liability for the public officer. See Surocco v. Geary, 3 Cal. 69 (1853); A. Van Alstyne, California Government Tort Liability § 7.29 (Cal. Cont. Ed. Bar 1964). This rule is justified by the general policies affording a public official statutory immunity for the exercise of official

discretion; the fear of possible personal liability should not be permitted to deter vigorous official action necessary to the safety of the community.

Public entities apparently are immune from tort liability for denial destruction, but the extent of their liability under inverse condemnation law is unclear. Compare Dunbar v. The Alcalde & Ayuntamiento of San Francisco, 1 Cal. 355 (1850)(dicta indicating no tort or inverse condemnation liability), with Lipman v. Brisbane Elementary School Dist., 55 Cal.2d 224, 229, 11 Cal. Rptr. 97, 99, 359 P.2d 465, 467 (1961)(citing, inter alia, Hall & Wigmore, Compensation for Property Destroyed to Stop the Spread of a Conflagration, 1 Ill. L. Rev. 501, 514 (1907), which argues for public liability). The general rule in other states is that, in the absence of statute, the public entity is not liable. Van Alstyne, Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction, 20 Stan. L. Rev. 617, 620 (1968); Sovereign Immunity Study, 5 Cal. L. Revision Comm'n Reports 480-481 (1963).

The Commission has concluded that the same considerations that give the public employee immunity for denial destruction do not justify the same immunity for public entities. Destruction of private property to prevent it from falling into the hands of rioters or to deny its elements to a raging fire has all the earmarks of a taking of private property for public purposes within constitutional standards. An early Georgia court held, "those for whose supposed benefit the sacrifice was made, ought, in equity and justice, to make good the loss which the individual has sustained for the common advantage of all." Bishop v. Mayor of Macon, 7 Ga. 200, 202 (1849). More than a century ago, Chief

Justice Murray made a plea for legislation to ameliorate the situation in California:

The legislature of the State possess [sic] the power to regulate this subject by providing the manner in which buildings may be destroyed, and the mode in which compensation shall be made; and it is to be hoped that something will be done to obviate the difficulty [Surocco v. Geary, 3 Cal. 69, 74 (1853).]

The Commission recommends that a provision be added to the California Governmental Liability Act of 1963 to provide a measure of damages where denial destruction has been accomplished by a public employee acting in the course of his employment. The statute should not spell out the occasions on which denial destruction is authorized because of the difficulty in predicting the need for such destruction. The statute should provide a general measure of damages that can be applied to each case to protect the property owner who has lost property that would not otherwise have been destroyed. To accomplish this purpose, the statute should provide that the property owner can recover for that portion of the destroyed property which would have been preserved if the denial destruction had not been ordered. Thus, if a building directly in the line of an otherwise uncontrollable fire is destroyed to prevent the spread of the fire, the owner should not be able to recover compensation because the building would have been destroyed in any event. However, if the owner, through the exercise of ordinary care, could have saved part of the building, he should be entitled to the value of that portion of the building that could have been saved. This will provide a minimal level of protection to private interests against the danger of needless or premature demolition.

The statute should include two exceptions: (1) No recovery should be allowed for any damage to or destruction of a building or structure

in which a fire started or for any property located in the building. This exception will prevent, for example, the owner of property located in a multistory building from recovering for water damage caused by flooding upper floors to prevent the spread of the fire from lower levels. (2) A property owner should not be permitted to recover any damage that is covered by insurance. This exception will prevent a double recovery and will minimize the impact of the statute by providing for recovery only where the injury is uncompensated.

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to add Section 816 to the Government Code, relating to denial destruction.

The people of the State of California do enact as follows:

Section 816. Destruction of property in emergency

Section 1. Section 816 is added to Division 3.6 of Title 1 of the Government Code, to read:

816. (a) As used in this section, "denial destruction" means damage to or destruction of the property of one or more persons to protect the lives or property of others in an emergency, such as the destruction of a house to prevent the extension of a conflagration to the property of others or the release of artificially impounded waters onto property to prevent or reduce damage to other property from a threatened flood.

(b) Notwithstanding Section 850.4, except as provided in subdivisions (c), (d), and (e), when denial destruction is committed

by a public employee acting in the scope of his employment, the public entity for which the public employee acted is liable to the owner of the property for the damage caused by its denial destruction.

(c) No recovery may be had under this section for any loss that would have been incurred as a result of the emergency had there been no denial destruction.

(d) Any amount recoverable under this section shall be reduced by the amount of any insurance proceeds received by the owner for the same loss.

(e) No recovery may be had under this section for damage to a building or structure in which a fire started or to property located in such building or structure.

Comment. In times of great emergency or disaster, public officials may destroy or damage private property to protect the public safety and welfare. Section 816 provides minimal protection to the owner of the property damaged or destroyed by making the public entity responsible for damage that would not otherwise have been incurred.

Subdivision (a). Subdivision (a) defines "denial destruction." It does not change existing law as to when property may be destroyed in an emergency or who may order the destruction. Rather, it merely provides a definition for determining when compensation may be recovered under subdivision (b).

Subdivision (b). Subdivision (b) states that a public entity will be liable for denial destruction committed by one of its employees acting in the scope of his employment. The liability is limited by the provisions of subdivisions (c), (d), and (e). The subdivision controls

over Section 850.4, which provides that a public entity is not liable for any injury caused in fighting fires. If, for example, a house is destroyed to prevent the spread of a conflagration and the owner proves that it would not have been destroyed by the fire, he can recover for the damage even though the public entity would not be liable for the destruction of the house because of the immunity provided by Section 850.4.

Subdivision (c). Subdivision (c) limits the damages recoverable under this section to those that could have been avoided if the property had not been destroyed by the public employee. 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 ordinary care, could have saved part of the building, he is entitled to the value of that portion of the building that could have been saved.

Subdivision (d). Under subdivision (d), to the extent that the owner's fire, flood, or other insurance compensates his loss, he has no right to compensation from the public entity.

Subdivision (e). Subdivision (e) limits the right of an owner to recover for damage to property that was destroyed to prevent the spread of a fire; the owner or tenant of a building in which the fire started is not entitled to recover any damages under this section for damage to the building or property located in the building.