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OPINION	:	No. 80-906
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of	:	<u>MAY 6, 1981</u>
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The Honorable Philip C. Favro, State Fire Marshal, has requested an opinion on the following question:

What is the enforcement responsibility of the State Fire Marshal under the provisions of Health and Safety Code section 13108 with respect to buildings owned and occupied by the state, including high-rise structures, which do not conform to the applicable fire and panic safety regulations adopted by the State Fire Marshal?

CONCLUSION

The enforcement responsibility of the State Fire Marshal under the provisions of Health and Safety Code section 13108 with respect to buildings owned and occupied by the state, including high-rise structures, which do not conform to the applicable fire and panic safety regulations adopted by the State Fire Marshal is to enforce compliance by employing a range of administrative and judicial remedies, appropriately determined on a case by case basis.

## ANALYSIS

Under Health and Safety Code section 13108,1 the State Fire Marshal (hereafter “Marshal”) is required to adopt and enforce fire and panic safety regulations with respect to state institutions, state-owned buildings and state-occupied buildings. The statute provides in full:

“(a) Except as limited by Chapter 6 (commencing with Section 140) of Division I of the Labor Code and Section 18930 of this code, *the State Fire Marshal shall prepare and adopt building standards, not inconsistent with existing laws or ordinances, relating to fire protection in the design and construction of the means of egress and the adequacy of exits from, and the installation and maintenance of fire alarm and fire extinguishment equipment or systems in, any section references hereafter are to the Health and Safety Code unless otherwise indicated state institution or other state-owned building or in any state-occupied building and submit such building standards to the State Building Standards Commission for approval pursuant to the provisions of Chapter 4 (commencing with Section 18935) of Part 2.5 of Division 13 of this code. The State Fire Marshal shall prepare and adopt regulations other than building standards for the installation and maintenance of equipment and furnishings that present unusual fire hazards in any state institution or other state-owned building or in any state-occupied building.* The State Fire Marshal shall adopt such regulations as are reasonably necessary to define what buildings shall be considered as state-occupied buildings.

“(b) The fire chief of any city, county, or fire protection district, or such person’s authorized representative, may enter any state institution or any other state-owned or state-occupied building for the purpose of preparing a fire suppression preplanning program or for the purpose of investigating any fire in a state-occupied building.

“(c) Except as otherwise provided in this section, *the State Fire Marshal shall enforce the regulations adopted by him and building standards relating to fire and panic safety published in the State Building Standards Code in all state-owned buildings, state-occupied buildings, and state institutions throughout the state.* Upon written request from the chief fire official of any city, county, or fire protection district, the State Fire Marshal may authorize such chief fire official and his authorized representatives, in their geographical area of responsibility, to make fire prevention inspections of state-owned or state-occupied buildings, other than state institutions, for

the purpose of enforcing the regulations relating to fire and panic safety adopted by the State Fire Marshal pursuant to this section and building standards relating to fire and panic safety published in the State Buildings Standards Code. Authorization from the State Fire Marshal shall be limited to those fire departments or fire districts which maintain a fire prevention bureau staffed by paid personnel.

“(d) Any requirement or order made by any chief fire official pursuant to this section may be appealed to the State Fire Marshal. The State Fire Marshal shall, upon receiving an appeal and subject to the provisions of Chapter 5 (commencing with Section 18945) of Part 2.5 of Division 13 of this code, determine if the requirement or order made is reasonably consistent with the fire and panic safety regulations adopted by him and building standards relating to fire and panic safety published in the State Building Standards Code.” (Italics added.)

From time to time, the Marshal has requested our opinion as to his specific responsibilities under the statute, and we have interpreted the original enactment and its various, later amendments on numerous occasions. (See, e.g., 58 Ops. Cal. Atty. Gen. 13 (1975); 57 Ops. Cal. Atty. Gen. 477 (1974); 27 Ops. Cal. Atty. Gen. 59 (1956); 20 Ops. Cal. Atty. Gen. 31 (1952); 18 Ops. Cal. Atty. Gen. 148 (1951); 9 Ops. Cal. Atty. Gen. 46 (1947); 3 Ops. Cal. Atty. Gen. 226 (1944).) We have generally limited our previous discussions to the issues of (1) the proper public agency responsible for ensuring compliance with the fire regulations and (2) the scope of the right of inspection. Heretofore, we have not considered the manner in which compliance is to be achieved where a violation continues to occur.

We are now faced with that question. Specifically, we are asked to delineate the enforcement responsibility of the Marshal under section 13108 where the condition of a state-owned building is in continued violation of his fire and panic safety regulations. The question arises particularly with regard to the regulations for high-rise structures adopted pursuant to section 13211 (see 58 Ops. Cal. Atty. Gen. 13, 20 (1975)) and made applicable to state institutions, state-owned buildings, and state-occupied buildings pursuant to section 13108. (See 27 Ops. Cal. Atty. Gen. 59, 63 (1956).) Under certain specified circumstances, the time for compliance with these regulations may be extended for existing high-rise structures to a date not later than April 26, 1981. Section 13213 provides in pertinent part:

“(a) Building standards and other regulations of the State Fire Marshal applicable to existing high-rise structures shall provide to the greatest feasible extent for the safety of occupants of the high-rise structure and

persons involved in fire suppression activities. All existing high-rise structures shall be conformed to the requirements contained in such building standards and such other regulations on or before April 26, 1979.

“(b) The period for compliance with such requirements may be extended upon showing of good cause for such extension if a systematic and progressive plan of correction is submitted to, and approved by, the enforcing agency. Such extension shall not exceed two years from the date of approval of such plan. Any plan of correction submitted pursuant to this subdivision shall be submitted and approved on or before April 26, 1979.”

If compliance is not achieved by April 26, 1981, what remedies are available to the Marshal in performing his enforcement responsibilities under section 13 108?

There are four basic types of remedies which may be utilized in enforcing the fire safety regulations. These are: (1) administrative procedures, (2) criminal prosecution, (3) civil action, and (4) abatement. Each of these remedies has advantages and limitations which the Marshal must consider in determining which remedy to pursue in a particular case. We will examine these remedies and the considerations applicable in determining the appropriate course of action to be undertaken.

#### A. Administrative Procedures

The Marshal's regulations (Cal. Admin. Code, tit. 19, §§ 1.00–80.18.7) provide for enforcement as follows:

“In most instances the application of regulations to existing occupancies will necessitate the granting of sufficient time to effect the necessary changes. The inspection authority must, therefore, exercise good judgment in authorizing sufficient time to complete the required changes, taking into consideration the degree of danger to life in event of fire while rectification is being carried out. The inspection authority may require immediate compliance with any or all of the regulations, or he may grant a reasonable length of time in which to conform.” (Cal. Admin. Code, tit. 19, § 1.11.)

It is apparent from this regulatory provision and our prior opinions that enforcement of the Marshal's fire and panic safety regulations has been considered primarily to be a matter of inspection and notification resulting in “voluntary” compliance. These administrative procedures are effective in most cases, and the Marshal should continue their use after the statutory compliance date in those cases where he determines

such measures would be effective. Clearly such administrative procedures are the most satisfactory remedies in terms of minimizing enforcement costs and disruption of building use. Occasionally, however, such administrative procedures alone may not result in compliance and other more coercive remedies will be necessary.

## B. Nuisance

Before analyzing the other remedies, the concept of “nuisance” should be discussed as it relates to fire hazards. Civil Code section 3479 provides:

“Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.”

A fire hazard constitutes a nuisance within the meaning of this statute. (*City of Bakersfield v. Miller* (1966) 64 Cal. 2d 93, 100.)

Civil Code section 3480 defines a “public nuisance” as follows:

“A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.”

Civil Code section 3491 provides:

“The remedies against a public nuisance are:

“1. Indictment or information;

“2. A civil action; or,

“3 Abatement.”

Under a “nuisance” theory, therefore, the Legislature has provided for general enforcement of the Marshal’s regulations by criminal prosecution, civil action, and abatement. More specific statutory provisions are also applicable to our discussion.

### C. Criminal Prosecution

Section 13112 provides:

“Every person who violates any provision of this chapter, or any order, rule, or regulation made pursuant to this chapter, is guilty of a misdemeanor punishable by a fine of not less than fifty nor more than two hundred dollars, or by imprisonment for not less than thirty nor more than one hundred eighty days, or by both.

“A person is guilty of a separate offense each day during which he commits, continues, or permits a violation of any provision of, or any order, rule, or regulation made pursuant to, this chapter.”

Additionally, where the violation creates a “fire hazard,” it may constitute a public nuisance (see Pen. Code S 370; *City of Bakersfield v. Miller, supra*, 64 Cal. 2d 93, 100) and maintaining a public nuisance is a misdemeanor under Penal Code section 372.

The Marshal’s role in criminal prosecutions is limited to investigating and reporting the facts and evidence available in support of the violation to the city prosecutor or district attorney. The prosecutor will determine whether a criminal action will be filed and will prosecute the case. Since the state itself may not be charged with a crime, it may be difficult to ascertain a person who is criminally responsible for a violation of the Marshal’s fire regulations in a state-owned building. Nevertheless, the Legislature has directed district attorneys and city prosecuting attorneys “to prosecute all persons guilty of violating this section [maintaining a public nuisance after notification] by continuous prosecutions until the nuisance is abated and removed.”

### D. Civil Action

Where the violation creates a fire hazard which constitutes a public nuisance, the Marshal may also institute a civil action to enjoin or abate the nuisance. (See Civ. Code § 3494; *Diamond v. General Motors Corp.* (1971) 20 Cal. App. 3d 374, 378; *O’Hagen v. Board of Zoning Adjustment* (1971) 19 Cal. App. 3d 151, 161; *City etc. of San Francisco v. City Investment Corp.* (1971) 15 Cal. App. 3d 1031, 1041–1042.)

Where the violation consists of the failure of a public officer or employee to perform an act required by law, the Marshal may seek a writ of mandate under Code of Civil Procedure section 1085 “to compel the performance of an act which the law specially enjoins.” (See *People ex rel. Younger v. County of El Dorado* (1971) 5 Cal. 3d 480, 490–

491; *Parker v. Bowron* (1953) 40 Cal. 2d 344, 351.) The writ will issue against a public body or a public officer. (*Housing Authority v. City of L.A.* (1952) 38 Cal. 2d 853, 869–871.)

The chief disadvantage of a civil action is the amount of time and expense required for obtaining the court order. While the Attorney General may represent the Marshal rather than the state agency occupying the nonconforming building and the state officers and employees sued by the Marshal, the Attorney General cannot represent both sides in such litigation. The cost of retaining counsel for one of the sides would be an added expense for the state. On the other hand, the civil action remedies have the advantage of providing all parties an opportunity to be heard and does not commit the Marshal to action without the support and mandate of a disinterested branch of government.

#### E. Abatement

Civil Code section 3494 provides: “A public nuisance may be abated by any public body or officer authorized thereto by law.”

Sections 13100–13153 delineate the duties and powers of the Marshal’s office. The only provisions concerning the abatement of fire hazards are sections 13104.5 and 13104.6. Section 13104.5 states:

“Except on property which has been deeded to the State for taxes, the State Fire Marshal may abate fire hazards existing on property owned, controlled, or held in trust by the State, in areas nor under the jurisdiction of the State Forester, upon the request of the legislative body of the city, county, or city and county within which the property is situated. The cost of the abatement shall be paid out of any money in the State treasury appropriated for that purpose.”

Section 13104.6 provides:

“The State Fire Marshal may determine the existence of a fire hazard on any property which has been deeded to the State for taxes and may serve a written notice of condemnation of the fire hazard on the State Controller, or on any person designated by the Controller. The fire hazard is then subject to removal in accordance with the law relating to removal of public nuisances on tax deeded property.

We assume that the state-owned buildings referred to in the question are not deeded to the state for taxes; hence, section 13104.6 would be inapplicable. Section 13104.5 places two specific limitations on the power of the Marshal to abate a fire hazard.

First, he may not abate such hazards if they are located in areas under the jurisdiction of the State Forester. Second, with respect to fire hazards in areas outside the jurisdiction of the State Forester, the Marshal may abate the hazard only upon the request of the city council if it is located in a city or upon the request of the board of supervisors if it is located in unincorporated territory. Without such a request, the Marshal has no statutory authority to abate a fire hazard by direct action. “The mode prescribed is the measure of the power.” (*People v. Zamora* (1980) 28 Cal. 3d 88. 98.)

The elimination of a fire hazard by direct physical action has the advantages of speed and effectiveness. It may subject the Marshal, however, to legal liability for damages incurred if he exceeds his abatement authority. While an emergency may authorize the destruction of property in order to abate a nuisance, the emergency must be proved to defeat liability for such destruction in an action for damages. The Marshal would also be required to establish that there was no other reasonable way to eliminate the fire hazard. (See *Leppo v. City of Petaluma* (1971) 20 Cal. App. 3d 711, 716–719.) In the case of a fire hazard in a state-owned building, such alternatives as removal of combustible materials or the limitation or prohibition of occupancy may constitute more reasonable methods of abatement.

The cases also speak of abatement in the sense of an action ordered by a court for elimination of the nuisance. In *O’Hagen v. Board of Zoning Adjustment*, *supra*, 19 Cal. App. 3d 151, 164, the court noted “that in proper cases injunctive relief which accomplishes the purposes of abatement, without its harsh features, is permissible [citations],” while in *City etc. of San Francisco v. City Investment Corp.*, *supra*, 15 Cal. App. 3d 1031, 1042, the court concluded “that the proper remedy for abatement of a nuisance is a mandatory injunction.” (See Code Civ. Proc. § 526.) Such court ordered “abatement” requires litigation with its attendant delays and expense.

#### F. Legislative Appropriations

Since we are dealing here with state-owned buildings, compliance with the Marshal’s regulations may well necessitate legislative appropriations. The power to appropriate state monies from the state treasury resides only in the Legislature. (Cal. Const., art. XVI, S 7; Gov. Code § 12440, *Ingram v. Colgan* (1895) 106 Cal. 113, 117.) It is thus not the province of an administrative agency or the judicial branch of government to compel payment of funds by the Legislature. (See *Payne v. Superior Court* (1976) 17 Cal. 3d 908, 920, fn. 6; *Sharp v. Contra Costa County* (1867) 34 Cal. 284, 290–291; *Veterans of Foreign Wars v. State of California* (1974) 36 Cal. App. 3d 688, 697; *California State Employees’ Assn. v. State of California* (1973) 32 Cal. App. 3d 103, 108–109.)



If appropriations are necessary for compliance with the regulations, the Marshal should notify the appropriate officials responsible therefor, perhaps in the report the Marshal is required to submit to the Governor under section 13110.

Summarizing these considerations, we conclude that the enforcement responsibility of the Marshal under the provisions of section 13108 with respect to buildings owned and occupied by the state, including high-rise structures, which do not conform to the applicable fire and panic safety regulations adopted by the Marshal is to employ those administrative and judicial remedies which are most appropriate to obtain compliance as he determines on a case by case basis.

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