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The power of public authorities, particularly municipal corporations, to order the destruction of a building without compensation as a matter of public protection, has long been of interest to attorneys for municipal corporations, as the moving parties, and to private practioners. It is my purpose here to suggest a manner whereby the destruction of buildings deemed to be a public nuisance may be accomplished, without undue delay, under a valid exercise of police power.

The line between the eminent domain provision of the Federal Constitution requiring compensation for property taken for public use and the proper exercise of the police power has rested on the question as to whether there has been an appropriation, plus a taking. If these two elements exist there is a taking for which compensation must be awarded.[1] If the element of appropriation is missing, and there is merely a destruction for the public welfare, the police power of the state has been called into play.[2]

It is not enough that a city say the destruction is necessary for the public welfare, for not only must the ends be reasonable but the means must be appropriate.[3] Further, procedural due process must be satisfied to the extent that a citizen's property will not be subjected to the possibly arbitrary and irresponsible action of a group of citizens[4] or the city itself,[5] that the property owner be given adequate notice, and that a full hearing be afforded.[6]

When faced with the problem as to how to safely proceed toward the destruction of certain buildings without compensation as a matter of public protection, the City of Seattle, Washington, first brought a civil action seeking abatement by judicial process upon

1 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
2 Miller v. Schoene, 276 U.S. 272 (1928).
3 Buck v. Bell, 274 U.S. 200 (1927).
4 See note 2 *supra*; cf., Eubank v. Richmond, 266 U.S. 137 (1924).
5 Nashville v. Weakley, 170 Tenn. 278, 95 S.W.2d 37 (1936).
6 Morgan v. U.S., 304 U.S. 1 (1938).

a finding of a public nuisance. This procedure proved to be impractical and was abandoned because it involved a title report, service of process, establishment of jurisdiction, findings of fact, conclusions of law, judgment, and an order of execution addressed to the sheriff of the local county, who required a bond for his protection,—all of which took, on the average, nine months to a year's time.

Now, the procedure for summary abatement in Seattle is as follows: When the local legislative authority, upon petition or its own motion, finds that a certain building is in such condition as to be a danger to the public, a complaint is referred to the heads of administrative departments of the city, particularly of the fire, health and building departments, who are concerned with the public peace, health, safety and welfare of the citizens, to make findings of fact as to the condition of the building and in what respects and to what extent the public may be affected thereby. The findings are transmitted back to the local legislative authority, which legislatively adopts such findings by specific ordinance and declares that by reason of such facts the building constitutes a danger to the public and a nuisance and should be summarily abated, and provides for notice to the property owner to correct the dangerous conditions within a certain time. If the property owner fails to correct the dangerous conditions, the administrative officer designated, usually the chief of the fire department or the superintendent of buildings, is authorized and directed to destroy the buildings.

In the past this procedure has involved little or no expense to the city because the contractor employed by the administrative officer did the work for the salvage. This is no longer practical and the city has recently expended certain public moneys in connection with the demolition which it has sought, without too much success, to recover from the often absentee owner. This procedure is an extreme remedy which is not often used but has not been challenged in the courts and in my opinion is lawful.

There has been at least judicial recognition of this procedure in the state of Washington[7] and by way of dictum the court suggests that if the officer involved acts under an appropriate ordinance, he will not be personally liable because the doctrine of *respondeat superior* applies even if it is found that the abatement was unlawful because no nuisance in fact existed, in which case the municipality is liable for taking or damaging under the state constitution.[8] An interesting Colorado case in which the latter result was reached is *McMahon v. City of Telluride*.[9] The court reasoned that since there was no nuisance to abate there must have been an element of appropriation.[10] Thus the building was deemed to have been taken for public use and required the loss to the owner to be compensated for by the municipality.

It is only under the auspices of emergency, grounded on the imminence of harm, that a building may be demolished without previous judicial or quasi-judicial process.[11] If the property is in fact a nuisance, the owner has no constitutional right to maintain it,

7 Hotel Cecil Co. v. City of Seattle, 104 Wash. 460, 177 Pac. 347 (1918).
8 *Ibid.*
9 79 Colo. 281, 244 Pac. 1017 (1926).
10 See note 1 *supra*.
11 E.g., Miller v. Valparaiso, 10 Ind. App. 22, 37 N.E. 418 (1893).

and when that nuisance creates an imminent danger, a necessity for immediate action arises.[12].

Although, one has no right to maintain his property as a public nuisance, it is equally clear that he has a constitutional right to have the fact of the nuisance determined in accordance with the due process clause. A mere declaration by the city that a certain building is a nuisance is not tolerated.[13] Without question, the general rule is that, except in cases of immediate necessity, public authorities may not destroy a building without prior notice and a hearing as provided by law, irrespective of the fact of an actual nuisance.[14] The same result has been reached when there has been a legislative determination in advance as to what is a nuisance.[15]

The limitations on the police power in this area are not wholly unstaked. Buildings cannot be destroyed under this power merely because they are unsightly and offend the aesthetic refinements of the citizens.[16] On the other hand, the emergency doctrine is given broad application when there is a fire hazard.[17] If the building in fact violates an ordinance setting fire limits, i.e., bounds within which buildings of combustible materials cannot be erected, it is a nuisance per se and the owner has no right to complain of summary action.[18]

Another factor which enters into the reasonableness of a city council's order to destroy is whether there is a more appropriate means to remedy a nuisance than destruction. Generally speaking, there may be a valid exercise of the police power by a state despite an alternative means to accomplish the same end.[19] However, since the remedy here is extreme, the alternative means, e.g., reasonable alterations and repairs instead of destruction, has been given special countenance by the courts.[20]

In conclusion there remains only to be considered the question whether the power and authority of municipal corporations in the exercise of the police power to provide for abatement of buildings as public nuisances by destruction in the manner herein suggested and without liability if the nuisance in fact, exists, is augmented by laws relating to urban renewal. This question has not, to the writer's knowledge, been addressed to or passed on by the courts but, generally speaking, it would seem that urban renewal laws do not change the questions of law and fact, authority and liability above discussed, although such urban renewal laws do in many instances undertake to define "blight" in such a manner as to purport to extend the powers of abatements by destruction of buildings even if they are not in law or fact "public nuisances."

12 *Ibid.*
13 Yates v. Milwaukee, 10 Wall. 497 (1870).
14 E.g., Lyons v. Prince, 281 N.Y. 557, 24 N.E.2d 466 (1939).
15 Nashville v. Weakley, 170 Tenn. 278, 95 S.W.2d 37 (1936).
16 E.g., Crossman v. Galveston, 112 Tex. 303, 247 S.W. 810 (1923).
17 King v. Davenport, 98 Ill. 305, 38 Am. Rep. 89 (1881). *But see* Bennington v. Hawk, 100 Vt. 37, 134 A. 638 (1926).
18 Annot., 14 A.L.R.2d 81 (1950).
19 E.g., Carolene Products Co. v. U.S., 323 U.S. 18 (1944).
20 State Fire Marshal v. Fitzpatrick, 149 Minn. 203, 183 N.W. 141 (1921), Iverson v. Keedick, 151 Neb. 802, 39 N.W.2d 797 (1949).