Accordingly, we conclude that the board of directors of the district does not have authority to permit its employees to kill, injure or impound a dog found on park property by ordinance or regulation if the owner of the dog has complied with Division 14 of the Food and Agricultural Code by placing the requisite metal license or identification tag on a substantial collar attached to the dog.

If an ordinance or regulation of the district provided for the control of dogs on park lands in a manner which did not conflict with state law, we conclude that such an ordinance would be authorized and valid. Thus a district ordinance authorizing the killing of dogs on park land where the owner had not complied with Division 14 of the Food and Agricultural Code by placing the requisite metal tag on the dog's collar in a manner which does not violate any state statute would be authorized and valid. On the other hand, a district ordinance which purports to authorize members of the district's police force to impound untagged dogs found on district lands would duplicate Food and Agricultural Code Section 31101 and therefore be void because its conflicts with state law.

Members of the district's police force are peace officers under Penal Code Section 830.3(h). As peace officers they are authorized by Food and Agricultural Code Section 31101 to seize and impound any dog found running at large within the district without the required license or identification tag. Further, such officers are authorized by Health and Safety Code Section 1907 to kill dogs found running at large on public lands within the district which is subject to a rabies quarantine order. It should be emphasized, however, that in so acting the district's police officers are authorized and governed by the applicable state law and not by any legislative action of the district.

Opinion No. 79-601—July 3, 1980

SUBJECT: HEALTH AND SAFETY CODE SECTIONS 17922, 17922(a), and 17922(a)(2)—Authority of the aforementioned sections of the Health and Safety Code in regard to the Commission of Housing and Community Development; nature of delegation of authority contained within the Code; applicability of Chapter 70 of the Uniform Building Code to grading and erosion controls enacted by local ordinance.

Requested by: COUNTY COUNSEL, SHASTA COUNTY

Opinion by: GEORGE DEUKMEJIAN, Attorney General
Edmund E. White, Deputy

The Honorable John Sullivan Kenny, County Counsel, County of Shasta, requests an opinion on the following questions:

1. Does the reference to "the most recent editions" of certain "uniform

industry codes" in Health and Safety Code section 17922(a) require the Commission of Housing and Community Development to amend its rules and regulations as set forth in title 25, California Administrative Code, whenever any of the conferences or associations promulgating such a code publishes a new edition of its uniform industry code?

2. Does Health and Safety Code section 17922(a) amount to an unconstitutional delegation of legislative power or of regulatory authority to nongovernmental bodies?

3. Is the Commission of Housing and Community Development authorized to amend its regulations to reflect changes made in the most recent edition of each respective code, or does the use of the phrase "the most recent editions" evidence a legislative intent to lock in the regulations to whatever edition of each code was current when this language was added to section 17922 in 1974?

4. If section 17922(a) is not an unconstitutional delegation of legislative power, does the reference to the Uniform Building Code (UBC) in section 17922 (a)(2) include the appendices to the code and, more particularly, chapter 70 thereof?

5. If chapter 70 of the UBC has been specifically adopted in California by virtue of section 17922 of the Health and Safety Code and/or section 1090 of title 25 of the California Administrative Code, is chapter 70 by itself sufficient to meet the requirements of Government Code section 66411 as to grading and erosion controls to be enacted by local ordinance?

CONCLUSIONS

1. The reference to "the most recent editions" of certain "uniform industry codes" in Health and Safety Code section 17922(a) does not operate to require the Commission of Housing and Community Development to amend any of its rules or regulations whenever the industry conferences or associations promulgating a uniform code publishes a new edition.

2. The provision of Health and Safety Code section 17922(a) directing the Commission of Housing and Community Development to enact substantially the same "requirements" as may be contained in each specified uniform code or any of its revisions does not constitute an unconstitutional delegation of legislative power or of regulatory authority to nongovernmental bodies. The provision of Health and Safety Code section 17922(a) specifying that upon the failure of the Commission of Housing and Community Development to take such action within one year of the publication of future editions of such a model code, then such model code provisions "shall be considered to be adopted" by the Commission,

constitutes an unconstitutional delegation of legislative power to nongovernmental bodies.

3. The Commission of Housing and Community Development is authorized to amend its regulations to reflect changes made in the most recent edition of each uniform code that is specified in Health and Safety Code section 17922(a).

4. The reference to the Uniform Building Code in Health and Safety Code section 17922(a)(2) does not include the appendices to such code. However, chapter 70 of the appendix of the Uniform Code has been specifically adopted as part of the state housing law by title 25, California Administrative Code, section 24.

5. Under specified circumstances, chapter 70 by itself could be sufficient to meet the requirements of Government Code section 66411 as to grading and erosion controls to be enacted by local ordinance.

ANALYSIS

Health and Safety Code[1] section 17921 imposes a duty upon the Commission of Housing and Community Development, among other things, to adopt, amend, and repeal rules and regulations[2] for the protection of the public health, safety, and general welfare of the occupant and of the public with respect to the construction, alteration, repair, etc., of all hotels, motels, lodginghouses, apartment houses, and dwellings, and buildings and structures accessory thereto.

However, the discretion of the Commission of Housing and Community Development (hereinafter "commission") in performing that duty is limited, except as otherwise specifically provided by law, to its imposing "substantially the same requirements [standards] as are contained in the most recent editions" of specified uniform industry codes as published by designated private organizations. (§ 17922.)

---

[1] All unidentified section references are to the Health and Safety Code.

[2] Section 17921 provides that:
"The commission shall adopt, amend or repeal and submit building standards for approval pursuant to the provisions of Chapter 4 (commencing with Section 18935) of Part 2.5 of this division, and the commission shall adopt, amend, and repeal such other rules and regulations for the protection of the public health, safety, and general welfare of the occupant and the public governing the erection, construction, enlargement, conversion, alteration, repair, moving, removal, demolition, occupancy, use, height, court, area, sanitation, ventilation and maintenance of all hotels, motels, lodginghouses, apartment houses, and dwellings, and buildings and structures accessory thereto. Except as otherwise provided in this part, the department shall enforce such building standards and such other rules and regulations. Such other rules and regulations adopted by the commission may include a schedule of fees to pay the cost of enforcement by the department under Sections 17952 and 17965."
"(b) Except as provided in section 17959.5, local use zone requirements, local fire zones, building setback, side and rear yard requirements, and property line requirements are hereby specifically and entirely reserved to the local jurisdictions notwithstanding any requirements found or set forth in this part.
"....."

Section 17922 provides in part as follows:

"(a) Except as otherwise specifically provided by law, the building standards adopted and submitted by the commission for approval pursuant to Chapter 4 (commencing with Section 18935) of Part 2.5 and the other rules and regulations adopted, amended, or repealed from time to time pursuant to this chapter shall impose substantially the same requirements as are contained in the most recent editions of the following uniform industry codes as adopted by the organizations specified:

"(1) The Uniform Housing Code of the International Conference of Building Officials, except its definition of 'substandard building.'

"(2) The Uniform Building Code of the International Conference of Building Officials.

"(3) The Uniform Plumbing Code of the International Association of Plumbing and Mechanical Officials.

"(4) The Uniform Mechanical Code of the International Conference of Building Officials and the International Association of Plumbing and Mechanical Officials.

"(5) The National Electrical Code of the National Fire Protection Association.

"In adopting building standards for approval pursuant to Chapter 4 (commencing with Section 18935) of Part 2.5 for publication in the State Building Standards Code and in promulgating other regulations, the commission shall consider local conditions and any amendments to the uniform codes referred to in this section. Except as provided in Part 2.5 (commencing with Section 18901), in the absence of adoption by regulation, the most recent editions of the uniform codes referred to in this section shall be considered to be adopted one year after the date of publication of such uniform codes."

The first issue is whether the provisions of section 17922 compel the commission to adopt, amend or repeal its existing rules and regulations whenever any of such rules or regulations are affected by the publication of a new edition of a uniform code that is published by one of the private organizations specified in section 17922.

Section 17922, as written, evidences no such requirement. Deferring for the moment any consideration of the constitutionality of any of its provisions, it is apparent that the statutes do no impose upon the commission a duty to act in a particular way but rather impose upon the commission a duty to consider industry code changes to determine whether it believes such changes, as published, should apply in California. The statutory scheme contemplates that the commission will

consider each new edition of a uniform code for purposes of adopting in California substantially the same requirements as are set forth in the uniform codes. However, in the event that the commission elects not to act or it fails to act within one year after the date of publication of a uniform code, the statute specifies, except with respect to building standards, that the provisions of such "most recent edition" shall be considered to be adopted and shall be in effect in California at the expiration of the one-year period. We shall consider the constitutionality of this provision subsequently.

If the commission wishes to modify any provision of such model industry codes—again, excluding building standards—rather than to have such a provision take effect in California as written by the private organization, the commission will have to act within one year. While it thus may be motivated to take action, the statutes do not require such action.

Thus, the reference to the "most recent editions" does not operate to require the commission to take any action upon the occurrence of the publishing of a new edition of a uniform code as identified in section 17922(a).

The second issue is whether section 17922(a) amounts to an unconstitutional delegation of legislative power or of regulatory authority to nongovernmental bodies. The key elements of section 17922(a) with respect to this issue are: (1) that provision of section 17922(a) that might be said to permit the commission, a governmental body, to make only insubstantial changes when adopting regulations that have been established by private, nongovernmental bodies and (2) the provision that operates to make such model codes law in California in the event that the commission fails to take any regulatory action within one year of the publishing of such a model code.

Rules and regulations pertaining to building standards, as such phrase is defined by section 18909, are subject additionally to the authority of the State Building Standards Commission pursuant to the provisions of the State Building Standards Law, section 18901 *et seq.* Thus, section 17922, *supra*, (where it provides that in the absence of adoption by the commission the most recent editions of the uniform codes shall be considered to be adopted by the commission one year after their date of publication) contains an exception as to building standards that are subject to the State Building Standards Law. Section 18916 defines that which shall constitute the model building codes for purposes of the State Building Standards Law. Section 17922 and section 18909 differ only in that section 18909 also includes a reference to the Uniform Fire Code. One of the new duties of the commission is to justify, to the satisfaction of the State Building Standards Commission, that a proposed rule of regulation relating to building standards, incorporates national specifications, published standards, and model codes "where appropriate." (§ 18930, subd. (7).) Section 18931, in particular, specifies the duties of the State Building Standards Commission with respect to its review of

proposed rules and regulations pertaining to building standards such as are authorized by section 17922. (See also § 19990.) Thus, the provisions of the model uniform codes that constitute building standards that are subject to section 18901 and following are not subject to the "shall be considered adopted" language of section 17922. Thus, we are concerned here only with the operation of section 17922 in the context of provisions of the uniform codes not involving "building" standards.

The question is whether the Legislature has delegated to those private associations promulgating such model codes legislative power vested in the Legislature by the state constitution and exercisable only by it or, pursuant to appropriate standards, by another public body created by it.

Article IV, section 1 of the California Constitution provides that "[t]he legislative power of this state is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum." (See also Cal. Const., art. I, § 26 and art. III, § 3. In addition to the constitutional provision, the common law doctrine prohibiting delegation of legislative power is applicable in California. (*Kugler* v. *Yocum* (1968) 69 Cal. 2d 371.)

In setting forth the basic elements of the doctrine prohibiting delegation of legislative power the court in *Yocum* observed that "the power . . . to change a law of the state is necessarily legislative in character, and is vested exclusively in the Legislature and cannot be delegated by it. . . ." (*Kugler* v. *Yocum*, *supra*, 69 Cal. 2d at p. 375; see also *Dougherty* v. *Austin* (1892) 94 Cal. 601, 606-607.)

Having stated that the doctrine prohibiting delegation of legislative power is established in California, the court then described the principles operating to limit the scope of that doctrine (*Kugler* v. *Yocum*, *supra*, 69 Cal. 2d at pp. 375-377):

> "Several equally well established principles, however, serve to limit the scope of the doctrine proscribing delegations of legislative power. For example, legislative power may properly be delegated if channeled by a sufficient standard. 'It is well settled that the legislature may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a rule or standard previously established by the legislature. . . .' (*Domingues Land Corp.* v. *Daugherty* (1925) 196 Cal. 468, 484 [238 P. 703]; see also *State Board of Dry Cleaners* v. *Thrift-D-Lux Cleaners, Inc.* (1953) 40 Cal. 2d 436, 448 [254 P.2d 29]; Case Note (1959) 6 U.C.L.A. L. Rev. 312 and cases cited therein.)
>
> "A related doctrine holds: 'The essentials of the legislative function are the determination and formulation of the legislative policy. Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of

others. The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the "power to fill up the details" by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect. . . .' (*First Industrial Loan Co.* v. *Daugherty* (1945) 26 Cal. 2d 545, 549 [159 P.2d 921].) Similarly, the cases establish that '[w]hile the legislative body cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend.' (*Wheeler* v. *Gregg* (1949) 90 Cal. App. 2d 348, 363 [203 P.2d 37].)

"We have said that the purpose of the doctrine that legislative power cannot be delegated is to assure that 'truly fundamental issues [will] be resolved by the Legislature' and that a 'grant of authority [is] . . . accompanied by safeguards adequate to prevent its abuse.' (*Wilke & Holzheiser, Inc.* v. *Department of Alcoholic Beverage Control* (1966) 65 Cal. 2d 349, 369 [55 Cal. Rptr. 23, 420 P.2d 735]; see also Jaffe, *An Essay on Delegation of Legislative Power* (1947) 47 Colum. L. Rev. 359, 561; 1 Davis, Administrative Law Treatise, *supra*, § 2.15; *Gaylord* v. *City of Pasadena* (1917) 175 Cal. 433, 437 [166 P. 348]; *Warren* v. *Marion County* (1960) 222 Ore. 307, 313-315 [353 P.2d 257]; *Lien* v. *City of Ketchikan* (Alaska 1963) 383 P.2d 721, 723-724; *Group Health Ins.* v. *Howell* (1963) 40 N.J. 436, 445, 447 [193 A.2d 103]; *Heath* v. *Mayor & City Council of Baltimore* (1946) 187 Md. 296, 303 [49 A.2d 799] (dictum).) This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions."

Thus, delegation by the Legislature will be upheld by the courts if it has itself resolved the "truly fundamental issues" and, consequent to which, it establishes either "rules" or "standards" which effectively guide its delegatee in the implementation of such legislatively established policy, or by otherwise establishing an effective mechanism—including appropriate safeguards—to assure the proper implementation of its policy decisions.

The court in *Yocum* stated further that:

"Nor does the fact that a third party, whether private or governmental, performs some role in the application and implementation of an established legislative scheme render the legislation invalid as an unlawful delegation. Thus, in *Brock* v. *Superior Court* (1937) 9 Cal. 2d 291, [71 P.2d 209, 114 A.L.R. 127], a statute precluding the California Director of Agriculture from entering into a marketing agreement without the assent of a percentage of persons engaged in the industry was attacked

as an unlawful delegation to those private persons. In rejecting this contention, this court said: 'a statute is not invalid merely because it provides for consent of interested persons to the contemplated regulation.' (9 Cal. 2d at p. 299.)

"Furthermore, we find here, as we said in *Wilke & Holzheiser, Inc.* v. *Department of Alcoholic Beverage Control, supra,* 65 Cal. 2d 349, 369, that the 'grant of authority [is] . . . accompanied by safeguards adequate to prevent its abuse.' As Professor Davis has stated, 'The need is usually not for standards but for safeguards. . . . [T]he most perceptive courts are motivated much more by the degree of protection against arbitrariness than by the doctrine about standards. . . .' (1 Davis, Administrative Law Treatise, *supra,* § 2.15.) The requirement for 'standards' is but one method for the effective implementation of the legislative policy decision; the requirement possesses no sacrosanct quality in itself so long as its purpose may otherwise be assured.

"The Oregon case of *Warren* v. *Marion County, supra,* 222 Ore. 307, illustrates the point that safeguards inherent in a statute which protect against its arbitrary exploitation obviate the need for standards.[8] In that case, the following ordinance was attacked as an invalid delegation of legislative power because it failed to provide sufficient standards: 'ORS215.108 *Building code ordinance.* (1) The governing body of a county may adopt ordinances establishing building codes for the county, or any portion thereof, in conformity with the standards set forth in ORS215.104. . . . (2) Any governing body of a county which adopts ordinances establishing building codes shall by ordinance provide procedures for appeals from decisions made under the authority of the ordinances establishing building codes.' In rejecting this challenge, the Oregon Supreme Court stated: 'It is now apparent that the requirement of expressed standards has, in most instances, been little more than a judicial fetish for legislative language, the recitation of which provides no additional safeguards to persons affected by the exercise of the delegated authority. . . . [T]he important consideration is not whether the statute delegating the power expresses *standards,* but whether the procedure established for the exercise of the power furnishes adequate *safeguards* to those who are affected by the administrative action.' (222 Ore. at p. 314.) The court concluded: 'We believe that the appeals procedure required by ORS215.108(2) provided a sufficient safeguard to persons wishing to contest administrative action in the enforcement of the code.' (P. 315.)"

Footnote 8 of the quoted material provides:

"Other cases have also recognized that 'standards' constitute merely one method, albeit the most common one, of assuring that the legislative

body does not unlawfully delegate its power. The New Jersey Supreme Court, in striking down a delegation to The Medical Society of New Jersey, stated: 'We think such a power . . . may not validly be delegated by the Legislature to a private body . . . at least where the exercise of such power is not *accompanied by adequate legislative standards or safeguards whereby an applicant may be protected against arbitrary or self-motivated action. . . .*' (*Group Health Ins.* v. *Howell, supra,* 40 N.J. 436, 445.) (Italics added.) The Supreme Court of Maryland has asserted: "[A]n ordinance which delegates a part of the police power to a zoning board may be valid, even though it confers upon the board a certain discretion in the exercise of that power, provided that its discretion is sufficiently limited by rules and standards to protect the people against any arbitrary or unreasonable exercise of power.' (*Health* v. *Mayor & City Council of Baltimore, supra,* 187 Md. 296, 303 (dictum).)"

Finally, the court set forth its appraisal of the basic judicial rationale that should be considered when considering particular issues concerning legislative delegations of power:

"As long ago as 1917 this court recognized that legislative bodies have neither the resources nor the expertise to deal adequately with every minor question potentially within their jurisdiction. 'Even a casual observer of governmental growth and development must have observed the ever-increasing multiplicity and complexity of administrative affairs —national, state, and municipal—and even the occasional reader of the law must have perceived that from necessity, if for no better grounded reason, it has become increasingly imperative that many *quasi*-legislative and *quasi*-judicial functions, which in smaller communities and under more primitive conditions were performed directly by the legislative or judicial branches of the government, are instrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all. . . .' (*Gaylord* v. *City of Pasadena, supra,* 175 Cal. 433, 436.)

"The complexity of government in the span of a half century since that analysis has illustrated its verity. Doctrinaire legal concepts should not be invoked to impede the reasonable exercise of legislative power properly designed to frustrate abuse. [3b] Only in the event of a total abdication of that power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an 'unlawful delegation,' and then only to preserve the representative character of the process of

reaching legislative decision." (*Kugler* v. *Yocum, supra,* 69 Cal. 2d at pp. 383-384.)

Has there been a total abdication of legislative power where the Legislature directs a state agency—the commission—to follow with substantial fidelity the technical standards composed by experts whose goal is public safety on a national basis? We think not.

Section 17922 was enacted in its present form in 1974. (Stats. 1974, ch. 1268, p. 2751.) Prior to 1974, the Legislature traditionally had enacted a specific amendment to section 17922 designating the specific uniform codes that it intended be made applicable in California, including a reference to the *year* in which a given uniform code was published. (See, e.g., Stats. 1972, ch. 1224, p. 2362; Stats. 1970, ch. 1436, p. 2785; Stats. 1969, ch. 820, p. 1648.)

Thus, prior to 1974, section 17922 was amended periodically by the Legislature to incorporate references to the latest editions of the uniform codes. The 1974 amendment to section 17922 imposed a new methodology by which revisions of the uniform codes were to be made applicable to California. The new methodology simply imposed upon the commission the duty to consider appropriate changes in its rules and regulations as the uniform codes were amended thus relieving the Legislature of the burden of enacting new legislation consequent upon such a change. It may be presumed that the new methodology permitted California to be more responsive to changes in the uniform codes since the commission could respond to such changes far more rapidly than could the Legislature, given the limitations upon the legislative process. The question remains, however, whether legislative power has been delegated improperly by such action to a private, nongovernmental agency.

In 1962, we considered a similar issue with respect to section 17922 but it read then somewhat differently that it does now. (40 Ops. Cal. Atty. Gen. 223 (1962).) At that time section 17922 provided that:

> "The rules and regulations adopted, amended, or repealed from time to time pursuant to this chapter shall include provisions imposing requirements equal to or more restrictive than those contained in the Uniform Housing Code, 1958 edition, the Uniform Building Code, 1961 edition, as adopted by the Western Plumbing Officials Association, and the National Electrical Code, 1959 Edition (1960 printing), as adopted by the National Fire Protection Association. The department shall adopt such other rules and regulations as it deems necessary to carry out the provisions of this part. In promulgating rules and regulations the department shall consider any amendments to the uniform codes referred to in this section. In promulgating rules and regulations the department shall also consider among other things, geographic, topographic and climatic conditions.

"Local use zone requirements, local fire zones, building setback, side and rear yard requirements, and property line requirements are hereby specifically and entirely reserved to the local jurisdictions notwithstanding any requirements found or set forth in this part."

The precise issues considered in 40 Ops. Cal. Atty. Gen. 223, *supra*, were whether the Legislature was empowered to adopt *by reference* specified *existing editions* of the uniform building codes and, also, whether the Legislature is empowered to delegate to a state agency the authority to promulgate rules and regulations which would adopt such codes by reference.

In that opinion we expressed our views that the Legislature is empowered to adopt by reference specified *existing* editions of "uniform building" codes, such as were then identified in section 17922. We further concluded that the Legislature was empowered to delegate to a state agency the authority to promulgate rules and regulations which would adopt by reference such codes.

However, in reaching the conclusions set forth in that opinion, we noted that former section 17922 provided in part that, "in promulgating rules and regulations the department shall consider any amendments to the uniform codes referred to in this section." We construed this language as referring to amendments, if any, to the uniform codes made *prior* to the time at which the then Division of Housing promulgated its rules and regulations incorporating provisions of the uniform codes. We stated that:

"Attempts to adopt by reference existing codes together with any future amendments, which may be made thereto by the private organization compiling the code, raise serious constitutional and legal questions. *Agnew* v. *City of Culver City*, 147 Cal. App. 2d 144, 154-155 (1956); *Hillman* v. *Northern Wasco County People's Utility District*, 213 Ore. 264, 323 Pac.2d 664 (1958); *cf.*, *Natural Milk Producers Assn.* v. *San Francisco*, 20 Cal. 2d 101, 115-117 (1942); *People* v. *International Steel Corp.* 102 Cal. App. 2d Supp. 935, 938-939 (1951). In 12 Ops. Cal. Atty. Gen. 231 (1948), we were concerned with the Department of Industrial Relations' incorporating by reference in their safety orders certain specified editions of codes of the American Society of Mechanical Engineers, and of specified Interstate Commerce Commission regulations. We there advised at page 234 as follows:

" 'While the judicial authorities are not clear in the matter, and have occasionally held regulations which attempted to incorporate by reference the "codes" promulgated by private individuals or corporations to be invalid as unconstitutional delegations of legislative power, these have been cases where not only the rules as existing at the time the legislation became effective, but also prospective changes in those rules where attempted to be incorporated by reference. (*State of Kansas* v. *Crawford*,

104 Kans. 141, 171 Pac. 360; *Tucson* v. *Stewart*, 45 Ariz. 36, 40 Pac.2d 72.) Our California decisions, however, appear to support incorporation by reference in this matter of a pre-existing statute by an existing statute, pointing out that the adopting of existing provisions is no delegation of legislative power, although admitting that so far as future amendments of the incorporated statutes were attempted to be adopted, this would be an invalid delegation of legislative power. (*In re Burke*, 190 Cal. 326, 328, 212 Pac. 193). This principle has also been extended to incorporation by reference in a municipal ordinance of a theretofore existing report of a civil service commission of the same municipality, the court saying that "There is no question as to the validity of an ordinance which, by reference, adopts an existing statute, ordinance or other public document." (*Banks* v. *Civil Service Commission*, 10 Cal. 2d 435, 441, 74 Pac.2d 741; *Cf.* Stat. 1927, ch. 190, p. 347, Deering Act 5692.) In view of the fact that the codes referred to, of the American Society of Mechanical Engineers, and the orders of the Interstate Commerce Commission, appear to be published and readily procurable and are familiar to persons in the professions, we believe that the incorporation thereof by reference in the safety orders involved would not invalidate these safety orders and would be effective as set forth in the orders.'

"To avoid such constitutional and legal questions, the better approach would be for the Legislature, in its enactment or delegation, to identify with particularity existing codes by title and edition, such as was done by the Legislature in Section 17922. By such method, there is no automatic incorporation by reference of future standards or codes, but rather, simply a declared policy of making our law or rules correspond with certain uniform, accepted standards. See *Brock* v. *Superior Court*, 9 Cal. 2d 291, 297-298 (1937)."

In 1964 we were called upon to review again the provisions of section 17922, at which time it read as follows:

". . . the Division of Housing . . . shall include provisions imposing requirements equal to or more restrictive than those contained in the Uniform Housing Code, 1961 edition, the Uniform Building Code, 1961 edition, as adopted by the International Conference of Building Officials, the Uniform Plumbing Code, 1961 edition, as adopted by the Western Plumbing Officials Association, the minimum painting standards for home construction loans adopted by the Federal Housing Administration and the Department of Veterans Affairs, and the National Electrical Code, 1962 edition, as adopted by the National Fire Protection Association. The department shall adopt such other rules and regulations as it deems necessary to carry out the provisions of this part. . . ."

In construing these provisions we stated that:

> "The Legislature did not require the division to adopt the uniform codes as such nor did it require the division to adopt each provision of each code. The purpose of the legislation is to provide the people of the State of California with housing which has health and safety protection equal to or greater than that provided in the various uniform codes." (43 Ops. Cal. Atty. Gen. 27, 29 (1964).)

We stated further that:

> "The Legislature has thus established the uniform codes as *guidelines* to be used in promulgating rules and regulations which have as their purpose the protection of the public health and safety. As long as that health and safety are equally protected, the division by use of alternates or performance tests or because of geographic, topographic or climatic conditions may vary, reduce or omit provisions that are in the uniform codes. As long as the health and safety are thus protected, the division may promulgate new rules and regulations which will enable the construction industry and the public in California to benefit from technological advancements and architectural and engineering research and which will allow the public lower cost housing without a reduction in health or safety factors." (43 Ops. Cal. Atty. Gen. 27, 31 (1964); see also 39 Ops. Cal. Atty. Gen. 324 (1962).)

Turning to the language of section 17922 again, it now contains the phrase "the rules and regulations . . . shall impose substantially the same requirements as are contained in the most recent editions of the . . . codes. . . ." This language is less restrictive than that contained in former section 17922 which we construed in 1964. Thus, we view section 17922 as continuing to refer to the model codes as specific *guidelines* for consideration by the commission when considering the needs of California. This conclusion is reinforced by the provision of section 17922(a) that provides that the commission "shall consider local conditions" when adopting regulations, which provision permits the commission to omit or to modify those model code provisions which would be unreasonable or unnecessary or ill advised if applied within California.

Thus, to the extent that the commission considers the model codes as a source for its regulations it is the commission, not a private association, that is exercising legislative authority. Section 17922(a), in that respect, does not amount to an unconstitutional delegation of legislative power or of regulatory authority to nongovernmental bodies.

A far more serious constitutional issue is raised by the provision that operates to make changes in the model codes law in California in the absence of any action by the commission and upon the expiration of one year from the time of their

promulgation by such private association. That issue becomes acute when the statute operates to make applicable in California provisions of model codes not in existence at the time of the adoption by the Legislature of section 17922 as it reads presently. However, we must defer consideration of that specific issue until we have resolved the issue presented in the third question because its resolution bears upon the constitutional issue.

The issue thus presented in whether the phrase "the most recent editions" that is contained in section 17922(a) refers to a specific set of editions in existence at the time of the enactment of section 17922 by the Legislature, and only to those editions, or does it refer to each successive new edition of a model code if and as promulgated by the association publishing it.

Although section 17922 was amended recently (Stats. 1979, ch. 1152) as part of a comprehensive revision of the procedures relating to the adoption of building standards, the direction by the Legislature to adopt the "most recent editions" of the model codes first appeared in the statute in 1974. (Stats. 1974, ch. 1268, p. 2715.) Prior to the appearance of this language in 1974, the Legislature traditionally had enacted a specific amendment to section 17922 designating the specific uniform code provisions that it intended to be made applicable in California, including a reference to the *year* in which a given model uniform code was published. (See, e.g., Stats. 1972, ch. 1224, p. 2362; Stats. 1970, ch. 1436, p. 2785; Stats. 1969, ch. 820, p. 1648.)

Thus, prior to 1974, the Legislature periodically amended section 17922 to incorporate references to the latest editions of the uniform codes. The 1974 amendment to section 17922 imposed a new methodology by which revisions of the uniform codes were to be considered and made applicable to California. In divesting itself of the burden of considering each such revision of the model codes and imposing that obligation upon the commission, there is no evidence or reason to believe that the Legislature intended that only those editions that were in existence at the time of this change in methodology are to be made applicable in California.

Section 17922, by its express provisions, vests discretion in the commission to consider the needs of California when it is considering potentially new rules and regulations that may be desirable because of changes in the model uniform codes. However, the authority of the commission to act so as to impose "substantially the same requirements" as are contained in the model uniform codes is impacted by another provision of section 17922, which provision assuredly reflects the legislative intent that the most recent edition of these uniform codes be made applicable to California, subject to the limitations contained in section 17922. That provision of section 17922 reads as follows:

> "In the absence of adoption by regulation, the most recent editions of the uniform codes referred to in this section shall be considered to be adopted and in effect one year after the date of publication."

Thus, if within one year of the publication of a new edition of a uniform code, the commission were to fail to impose substantially the same requirements as should be contained in any such new edition—except as otherwise specifically provided by law—the statute ordains that the requirements of such most recent edition go into effect in California.

Viewing these provisions broadly it seems apparent that the new methodology was intended not only to relieve the Legislature from the continuing burden of considering these detailed uniform codes each time they might be revised but also was intended to permit California to be more responsive to such changes since it may be presumed that the commission might evaluate and respond to such changes in a more timely manner than would the Legislature. It is of considerable significance that the Legislature imposed a one-year requirement with respect to adopting such "most recent editions." This requirement supports the conclusion that the Legislature intended that each new edition be evaluated by the commission for possible revision to meet California's needs but in the event of the commission's failure to act within the one-year period, the most recent edition would—pursuant to the statute—go into effect thus automatically bringing California into conformity with the latest changes in these model codes.

In the light of these considerations, it is concluded that the commission is authorized to amend its regulations to reflect changes made in the most recent edition of each respective code. We must return, however, to the issue of the constitutional validity of the provision purporting to make such model codes applicable in California absent specific consideration by the commission or by the Legislature itself.

In 43 Ops. Cal. Atty. Gen. 275 (1964) we considered whether the former state Board of Public Health was authorized to adopt a regulation incorporating by reference the present and future rules, regulations and standards of the Food and Drug Administration of the United States Department of Health, Education and Welfare.

We noted that:

> "The California courts have consistently upheld the adoption of *existing* standards or regulations of other sovereignties including the federal government, *Brock* v. *Superior Court*, 9 Cal. 2d 291 (1937); *Banks* v. *Civil Service Commission*, 10 Cal. 2d 435, 441 (1937), and have made it clear that state agencies may be authorized to adopt such regulations by reference. 2 Cal. Jur. 2d Administrative Law § 57, p. 121; 82 C.J.S., Stats. § 70, pp. 123-124 (1953). Considerable doubt, however, has been cast on the ability of the Legislature to adopt such regulations *prospectively*.[1] This doubt has been based on dicta in several holdings of the California Supreme Court in which the court, while upholding the adoption by reference of existing statutes, indicated its doubt as to the validity

of adoption of such enactments prospectively. *In re Burke*, 190 Cal. 326, 328 (1923); *Brock* v. *Superior Court*, 9 Cal. 2d 291 (1937); 114 A.L.R. 137 (1937); *Palermo* v. *Stockton Theatres, Inc.*, 32 Cal. 2d 53 (1948). See also 40 Ops. Cal. Atty. Gen. 223, 224 (1962), 33 Ops. Cal. Atty. Gen. 106 (1959), 12 Ops. Cal. Atty. Gen. 231, 234 (1948). But see 43 Ops. Cal. Atty. Gen. 1 (1964).

"This has been the traditional view, and it has been given expression by many state courts. See, e.g., *Hutchins* v. *Mayo*, 143 Fla. 707, 297 So. 495, 133 A.L.R. 394 (1940); *Dawson* v. *Hamilton*, 314 S.W.2d 532 (Ky. Ct. App. 1958); *State* v. *Webber*, 125 Me. 319, 133 Atl. 738 (1926); *In re Opinion of the Justices*, 239 Mass. 606, 133 N.E. 453 (1921); *Dearborn Independent, Inc.* v. *City of Dearborn*, 331 Mich. 447, 49 N.W.2d 370 (1951); *Smithberger* v. *Banning*, 129 Neb. 651, 262 N.W. 492 (1935); *Darweger* v. *Staats*, 267 N.Y. 290, 196 N.E. 61 (1935); but see *Peo.* v. *Goldfogle*, 242 N.Y. 277, 151 N.E. 452 (1926); *State* v. *Emery*, 55 Ohio St. 364, 45 N.E. 319 (1896) (dictum); *Seale* v. *McKennon*, 215 Or. 264, 562, [sic] 336 P.2d 340 (1959); *Holgate Bros. Co. v. Bashore*, 331 Pa. 255, 200 Atl. 672 (1938); *State ex rel. Kirshner* v. *Urquhart*, 50 Wash. 2d 131, 310 P.2d 261 (1957); *Wagner* v. *City of Milwuakee*, 177 Wisc. 410, 188 N.W. 487 (1922). See Note, 114 A.L.R. 127; Note, 133 A.L.R. 394; 82 C.J.S., Statutes, § 70 p. 124 (1953); Note, 20 Cornell L.Q. 504 (1935); 2 Sutherland, Statutory Construction § 5208, p. 551 (1943).

"The holdings have made no distinction between direct legislative adoptions and those made by state administrative agencies pursuant to statutory authority. See, e.g., *Seale* v. *McKennon*, *supra*.

"Such prohibitions have generally been based on two theories; the first and most popular being that delegation of prospective rule making power constitutes an unlawful delegation of legislative authority, and the second that, where criminal sanctions are involved, the standards relied on are void for vagueness. See Elter, 'Referential Practices in Municipal Legislation,' 39 Ore. L. Rev. 209 (1960); Mermin, ' "Cooperative Federalism" Again: State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements.' 57 Yale L.J. 1 (1947)."

Footnote 1 of the quoted material provides:

"Needless to say, if the Legislature may not take such action itself, it may not authorize an administrative agency to do so."

Insofar as future editions of the uniform codes are concerned, we know of no rational basis for predicting what future provisions will be considered appropriate by each private association. We see no basis for the Legislature rationally

to consider generally or specifically that which it is requiring to be made applicable in California when it specifies that such model codes shall go into effect one year after their publication upon the failure of the commission substantially to adopt such provisions. In our view the Legislature by such a provision delegates its power to make law in California to a private association with no limitation whatsoever and with no rational basis for determining what policy thus will be implemented. (See *Bagley* v. *City of Manhattan Beach* (1976) 18 Cal. 3d 22; *City and County of San Francisco* v. *Cooper* (1975) 13 Cal. 3d 898, 923-924). Accordingly, we consider the provision that such model codes automatically will go into effect upon the stated conditions to be a violation both of article IV, section 1, of the California Constitution and of the common law doctrine prohibiting the delegation of legislative power. Further, we view this particular provision as not essential to the effective operation of the legislative scheme reflected in the applicable statutes thus permitting the remaining statutory provisions to be made operable without the objectionable feature. Section 231 of chapter 1152 of Statutes of 1979 provides that:

> "If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable."

Since we conclude that section 17922(a) is in part constitutional, we reach the fourth issue, i.e., whether the reference to the Uniform Building Code (UBC) in section 17922(a)(2) includes the appendices to the code and, more particularly, chapter 70 thereof.

Section 17922(a)(2) requires the commission's regulations to impose substantially the same "requirements" as are contained in the UBC. Section 103 of the UBC provides that "the provisions in the appendix shall not apply unless specifically adopted." Thus, the provisions of the appendix to the UBC are not "requirements" of that code and, therefore, the reference to the UBC in section 17922(a)(2) does not include the appendix to that code. This conclusion is supported by the state housing regulations which adopt the UBC while *expressly* excluding the appendices to that code. (25 Cal. Admin. Code, § 22.) With regard to chapter 70 in the appendix to the UBC, provision has been made for its adoption through section 24 of the state regulations. (25 Cal. Admin. Code, § 24.) Therefore, although the reference to the UBC in section 17922(a)(2) does not include the appendix to that code, chapter 70 of the appendix has been specifically adopted as part of the state housing law.

The final issue is whether chapter 70 of the UBC would by itself be sufficient to meet the requirements of Government Code section 66411 as to grading and erosion controls.

Government Code section 66411 requires the adoption of local ordinance for "proper grading and erosion control" concerning the development of real estate subdivisions. Standards for grading and erosion control are contained in chapter 70 of the UBC. These standards apply to commercial as well as residential development. The state housing regulations require that grading requirements be equal to or more restrictive than those of chapter 70, but only with regard to residential development. (25 Cal. Admin. Code, § 24.) With regard to nonresidential subdivision, it would be within the discretion of the local jurisdiction to determine what grading and erosion controls should be adopted. Because chapter 70 of the UBC is not limited solely to residential structures, its grading requirements could be adopted for all types of subdivisions. Therefore, the adoption of chapter 70 of the UBC code by itself could be sufficient to meet the grading requirements of Government Code section 66411.

Opinion No. 80-511—July 3, 1980

SUBJECT: INFRINGEMENT UPON LEGISLATIVE AUTHORITY—Executive Order B-54-79 does not constitute an improper infringement upon legislative authority with respect to the state civil service, providing that organizational areas within the Executive Branch of state government shall not discriminate in state employment based upon an individual's sexual preference.

Requested by: STATE SENATOR, THIRTY-THIRD DISTRICT

Opinion by: GEORGE DEUKMEJIAN, Attorney General

Anthony S. DaVigo, Deputy

The Honorable William Campbell, State Senator, Thirty-Third District, has requested an opinion on the following question:

Does Executive Order B-54-79, providing that the agencies, departments, boards and commissions within the Executive Branch of state government under the jurisdiction of the Governor shall not discriminate in state employment against any individual based solely upon the individual's sexual preference, constitute an improper infringement upon legislative authority with respect to the state civil service?

CONCLUSION

Executive Order B-54-79, providing that the agencies, departments, boards and commissions within the Executive Branch of state government under the jurisdiction of the Governor shall not discriminate in state employment against any individual based solely upon the individual's sexual preference, does not constitute