

11/17/60

Memorandum No. 99 (1960)

Subject: Study No. 36(L) - Condemnation

On November 14 and 15 the Subcommittee on Eminent Domain of the Senate Judiciary Committee held a public hearing on the recommendations of the Law Revision Commission relating to eminent domain. The two-day period was devoted exclusively to the three final recommendations of the Commission on eminent domain. Time did not permit consideration of the tentative recommendation on pretrial conferences and discovery.

The hearing revealed certain defects in the Commission's proposed legislation. It also became apparent that some portions of the Commission's recommendations could be improved by developing in more detail the reasons for certain recommendations. In addition, Mr. Burton J. Goldstein and Wilson R. Ogg have submitted to the Commission a memorandum containing their comments concerning the recommendations relating to eminent domain (we are advised by them that you were sent a copy of the memorandum). Accordingly, the staff submits the following matters to the Commission for consideration at the November meeting. We will change the galley or page proofs to reflect any changes made at the November meeting in the previously approved recommendations.

The witnesses at the hearing objected to many provisions of the Commission's proposed legislation. The Goldstein-Ogg memorandum raises many other objections. Most of these have already been considered by the Commission. The only matters raised here are ones that the staff

believes should be considered by the Commission to remove what may be defects in the proposed legislation.

Evidence Recommendation

- (1) The staff suggests that Section 1248.4 be revised to read:

1248.4. If the court finds that the opinion of a witness as to the amount to be determined under subdivision 1, 2, 3 or 4 of Section 1248 is inadmissible [~~under Section 1248.2 or Section 1248.3~~] because it is based in whole or in part upon incompetent facts or data, the witness may then give his opinion as to such amount after excluding from consideration the facts or data determined to be incompetent.

The deleted reference to specific sections is deleted because this reference is unnecessarily limiting. The deletion was suggested by the Legislative Counsel and the staff concurs. The language has been deleted from the copy already sent to the printer. The addition of the words "in whole or in part" was suggested by the subcommittee. The staff has no objection to this addition which will make Section 1248.4 consistent with Section 1248.3 (introductory clause).

(2) The staff suggests that in Section 1248.2 the words "including but not limited to" at the end of the introductory clause be changed to "which may include but which is not limited to." This change was suggested in the Goldstein-Ogg memorandum. At the hearing the point was repeatedly made that our statute would require the use of the capitalization and reproduction approach in every case. The language suggested above would indicate more clearly that the use of these approaches is permissive not mandatory. It might be possible for a court to construe the suggested revised language to refuse to permit the use of these approaches in a case where the court finds that they are not applicable.

This is not believed to be likely. But even if it were so construed, the statute would accomplish our objective -- that these approaches could be used where a willing buyer and seller would use them. Moreover, the statute would change the present rule which permits the use of these approaches only on cross examination to test the opinion of the expert.

(3) It has become obvious that there will be substantial opposition to the recommendation by condemnees who object to the inadmissibility of offers, especially offers on the subject property. What are the reasons why the Commission is making an offer freely made in good faith to purchase the subject property inadmissible?

Moving Expense Recommendation

(1) At the hearing before the Senate Judiciary Subcommittee on Eminent Domain the question was raised by Senator Rattigan whether moneys from fuel taxes and motor vehicle registration and license fees were available under the Constitution for payment of moving expenses. Section 1, Article XXVI, of the California Constitution provides in part:

all moneys collected from any tax now or hereafter imposed by the State upon . . . motor vehicle fuel . . . shall be used exclusively and directly for highway purposes, as follows:

(1) The construction, improvement, repair and maintenance of public streets and highways, whether in incorporated or unincorporated territory, for the payment for property, including but not restricted to rights of way, taken or damaged for such purposes and for administrative costs necessarily incurred in connection with the foregoing.

Motor vehicle registration and license fees, under Section 2, Article XXVI are made available for the same purpose.

In order to resolve the doubt, the staff suggests the following

change in Section 1270.1 (page 6 of recommendation). On the third line of Section 1270.1 after the word "entitled" insert ", as part of the compensation for the taking of or damage to his property,". The same language should be inserted in Section 1270.2 after "entitled" on the last line of page 6 of the recommendation.

It is also suggested that an opinion be obtained from the Legislative Counsel on this matter.

(2) The question was also raised at the hearing as to the meaning of the words "his personal property" appearing in the draft. What if a person does not "own" the property but has possession of it for the purpose of sale? The staff suggests that the problem can be solved by the deletion of the word "his" in various places in the draft (Section 1270.1(a), 1270.3 (two places)). If this change is made, the person will be entitled to reimbursement from the acquirer only for "his actual, but not exceeding the reasonable, costs necessarily incurred as a result of the acquisition"

(3) The Goldstein-Ogg memorandum suggests the substance of the following addition to Section 1270.8 (page 9 of recommendation):

1270.8. In lieu of reimbursing a person for moving and storage costs under this title, the acquirer may provide for the moving and storage of the personal property at its own expense by serving on such person and filing in the proceeding a notice of its election to do so at least 20 days prior to the day on which the acquirer is authorized to take possession of the real property. If the acquirer so elects, such person is not entitled to reimbursement under this title except to the extent that such costs are incurred prior to the receipt of the notice.

The addition of the above language will, the staff believes, improve the provision.

Taking Possession and Passage of Title Recommendation

The staff suggests the following changes in the recommendation and statute:

Page 3. In the second line of paragraph 2, insert the word "record" between "the" and "owners".

This change will reflect the provisions of the existing law more accurately.

Page 4. Delete the existing paragraph 3 and substitute the following:

3. Delay in effective date of order. Within the 20-day period after notice is given, the owner or an occupant of the property to be taken should be able to apply to the court for an order postponing the date that immediate possession may be taken if he can demonstrate to the court that the hardship to him of having immediate possession taken clearly outweighs the hardship that a delay may cause the public. There is no provision in existing law that permits the court to relieve a condemnee from unnecessary hardship. The Commission does not believe that a condemnee should have the right to appeal from an order denying such a request, for the Commission believes that the questions involved would become moot by the time the appeal is decided unless the order of immediate possession were stayed pending the appeal. The Commission does not think that the order of immediate possession should be stayed in this situation, for a stay would nullify the right of immediate possession. However, the condemner should have the right to appeal from an order granting a postponement, for the question whether the lower court abused its discretion in granting the postponement would not become moot and should be subject to review.

Page 6. On page 6, after the last sentence of the first paragraph on Possession Pending Appeal, the following sentences should be added:

The rule may also cause hardship to condemnees, for if the condemner chooses to withhold payment of the judgment and to appeal, the condemnee will have no money from the condemnation to defray the continuing costs of litigation. On the other hand, if possession is taken pending appeal, the condemnee will have available to him the amount of the judgment and will be able to proceed with his plans for the future.

Page 8. The last sentence on page 8 (which continues on page 9) does not appear to state adequately the extent to which a defendant is entitled to be compensated if the condemnation is not completed. Therefore, the following should be substituted for it:

If a condemnation proceeding is abandoned, or if the proceeding is not completed for any other reason, and the plaintiff has taken possession of the property, provision should be made for compensating the condemnee for the use of his property, for all losses he may have suffered as a result of the taking and for any loss or impairment of value which the property may have suffered while the plaintiff was in possession.

Page 9. The Continuing Education of the Bar book on condemnation law and procedure indicates that interest may not cease upon deposit of the judgment in court in all cases. We think that the statement is based upon inadequate analysis of the decision in People ex rel. Dept. of Pub. Works v. Loop, 161 C.A.2d 466, 326 P.2d 902 (1958), but, nonetheless, the statement makes it inappropriate to say in the paragraph on interest that "These rules are settled." Therefore, the following modification of the last sentence of the first paragraph on Interest is suggested:

These rules have been established by both cases and statutes with the result that some are difficult to find and others have been questioned by some writers.

Page 13. To point out the advantages of immediate possession to condemnees, the following should be added at the end of the recommendation:

Moreover, expanding the right of immediate possession will often benefit the landowner. Upon commencement of condemnation proceedings, a landowner is deprived of many of the valuable incidents of ownership. He can no longer place improvements upon the property for which he may be compensated. He is practically precluded from selling or renting the property for few persons wish to purchase a law suit. Without immediate possession, this condition may continue for long periods of time. But if the condemner may take the property upon the commencement of the proceedings, the condemnee will have a substantial portion of the compensation available immediately and will be able to make his plans for the future promptly.

Page 15. Senator Rattigan pointed out that the date specified in the order mentioned in subdivision (2)(d) is not the date upon which the plaintiff may take possession. It is merely the earliest date the plaintiff may take possession if he accomplishes service in sufficient time. Therefore the word "upon" should be changed to "after".

In subdivision (3) questions were raised concerning the meaning of "person or persons in possession" and "record owner". Some fear was expressed that a person in possession is not necessarily the same thing as an occupant. Therefore, the words "person or persons, if any, in possession", which appear at the bottom of 15, should be deleted and the word "occupants" should be substituted for them. On page 16, the words "if any" that were previously deleted should be restored.

Page 16. The question raised about "record owner" indicated that the words do not indicate clearly that persons who own interests of record are not to be served. To clarify the matter, it is suggested that the following language, adapted from Streets and Highways Code Section 7012, be added as a new paragraph at the end of subdivision (3):

As used in this subdivision, "record owner or owners of the property" means both the person or persons in whose name the legal title to the fee appears by deeds duly recorded in the recorder's office of the county in which the property is located and the person or persons, if any, in possession of the property under a written and duly recorded lease or agreement of purchase.

The office of the Attorney General pointed out that if a party has an attorney of record, service under subdivision (3) should be made upon the attorney. Therefore, the following should be added after the word "mail" at the end of the first full sentence on page 16: "upon such person or his attorney of record."

Several condemners complained of the delays incident to conducting a search for missing record owners. They indicated that this would unduly encumber the process of taking immediate possession and would unduly delay immediate possession in certain cases where it might be very important. Moreover, the consequences of immediate possession are most important to the occupant of the property who will be served in every case. It is not as essential that record owners who are not occupying the property receive notice prior to the time possession of the property is taken. Two remedies may be considered either as alternatives or together. The first would be to restore the sentence relating to the assessment roll after modifying it to read: "The latest secured assessment roll in the county where the property is located may be used to ascertain the addresses of the record owners of the property."

Another remedy would be to provide a posting procedure. This might be accomplished by adding the following sentence to the end of the first paragraph of subdivision (3):

In lieu of personal service on the record owners, the court may, for good cause shown by affidavit of the plaintiff, authorize

the plaintiff to post a copy of the order authorizing immediate possession in a conspicuous place upon the property continuously from the time service is required to be made, as provided in this subdivision, until the time possession is taken.

The Goldstein-Ogg memorandum points out that the word "alter" is ambiguous as it is used in subdivision (4). Therefore, the following changes should be made:

Substitute "order an increase or a decrease in" for "alter" in the third line of subdivision (4). Substitute "this section" for "such order" in the fourth line. In the last line of subdivision (4), substitute "of the probable just compensation theretofore deposited" for "set forth in such order" at the end of the sentence.

Page 17. Some committee members, as well as the condemners, were concerned about the stay provided in subdivision (5)(a) for there is no limit provided. Senator Rattigan suggested that the stay should be to a date certain, at least. Therefore, the following words should be added after "order": "until a date certain".

Page 21. The Goldstein-Ogg memorandum points out that the judgment against the sureties should not be in excess of their undertaking. This, of course, is implicit, but it should be made explicit by adding the following to the end of subdivision (8): "except that in no event is the judgment against a surety to be entered for an amount greater than that for which such surety is bound under subdivision (2) of this section."

Page 22. Senator Rattigan suggested that "time" be substituted for "date" throughout Section 1249.1. The change is needed in the interest of precision, for a substantial amount of improvement can be accomplished in one day either before or after service.

Page 23. The Goldstein-Ogg memorandum questions the need for an ex

parte order of possession after judgment. The situation is different from that involved prior to judgment where all interested parties and their interests may not yet be known or served. Therefore, the words "ex parte" should be deleted and the words "by motion" substituted for them.

Page 24. In subdivision (4), the word "alter" should be deleted and the words "order an increase or decrease in" should be substituted. In the last line of subdivision (4), the words "as a further sum" should be inserted after deposit and the words "subdivision (1) of this section" should be substituted for "such order."

These changes are necessary because the court should not have power to permit the condemner to deposit less than the judgment.

There has not been time to examine the recommendations carefully to make sure that all the adjustments required by the changes suggested above have been made in the recommendations as previously approved by the Commission. However, the staff will carefully check the recommendations after such of the above changes as are approved have been incorporated into the approved recommendations and will make any additional adjustments that are necessary to carry out the policy decisions made by the Commission at the November meeting.

Respectfully submitted,

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(36)

CALIFORNIA LAW REVISION COMMISSION
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RECOMMENDATION AND PROPOSED LEGISLATION

Relating to

REIMBURSEMENT FOR MOVING EXPENSES
WHEN PROPERTY IS ACQUIRED FOR PUBLIC USE

October 31, 1960

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to

Reimbursement for Moving Expenses

When Property is Acquired for Public Use

The California Constitution provides that private property shall not be taken for public use without "just compensation" having first been made. The statutes and decisions implementing this provision provide that the person whose land is taken for public use is entitled to be paid only for its market value. As a result, no compensation is provided for the expense of moving to another location when land is permanently taken for public purposes.*

In some states, the courts have held that the cost of moving is to be considered in determining the market value of the land taken. Courts in other states, taking a more direct approach, have held that "just compensation" is not made unless the owner is compensated for his moving expenses. Neither of these judicial solutions to the problem is satisfactory. The first is unsatisfactory because the concept of market value correctly

*The United States Supreme Court has held that the moving and storage expenses of a tenant should be considered in determining the value of his interest when property subject to a lease is taken temporarily for public use and the tenant has an obligation to return to the property at the end of the public occupancy. *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945). There is no reported decision of a California court involving this problem. Thus, it is uncertain at present whether a tenant would be entitled to compensation for moving expenses under these circumstances under California law.

interpreted does not include moving expenses. Neither is administratively feasible because frequently the property owner does not move before the trial of the eminent domain proceeding, and it is, therefore, difficult if not impossible to determine the amount of moving expenses he will necessarily incur when the amount of his compensation is determined. Moreover, these judicial solutions place no limit on the amount of moving expense that must be reimbursed. The Federal Government and several states have enacted legislation providing for the payment of moving expenses in order to recognize the property owner's right to be reimbursed for such expenses, to place limitations on the amount of moving expenses that may be reimbursed and to provide a procedure for claiming such reimbursement.

The Commission believes that, subject to reasonable limitations, the owner of property acquired for public use should be reimbursed for the expense of moving his personal property. Inasmuch as this expense must be incurred because the land is taken for the public's benefit, the public should bear at least a substantial part of the burden imposed by reimbursing a person for moving expenses. Such a change in the law would more nearly effectuate the constitutional objective of "just compensation." Moreover, in some instances out-of-court settlement may be facilitated, for the condemning agency will be able to reimburse a property owner for an element of damage that cannot be compensated at the present time.

Accordingly, the Commission recommends:

1. When land is taken for public use, the owners should, subject to certain limitations discussed below, be reimbursed for the actual and

reasonable costs necessarily incurred in moving their personal property, i.e., dismantling, packing, loading, transporting, temporarily storing, unloading, unpacking, reassembling, and installing such personal property.

2. Reimbursement for the transportation element of moving expense should be provided only for the first 25 miles traveled. If the person moving desires that the property be moved a greater distance, he should bear the additional mileage costs himself. However, packing, unpacking and other costs of moving should be borne by the public no matter how far the property is moved, for these expenses must be incurred whether the property is relocated within the same general area or not. The 25-mile limitation should not apply, however, to negotiated settlements. The condemning agency may be relied upon to protect the public interest, and settlement may be facilitated if there is no mileage limitation upon negotiated settlements.

3. When land is taken for public use for a term only, an occupant who has to move and who has a right to reoccupy the property at the end of the term should be reimbursed not only for expenses incurred in moving his personal property off the land, but also for the actual and reasonable costs necessarily incurred in storing his personal property and moving it back to the land at the end of the term.

4. Where the parties cannot agree on the amount to be paid, the amount of reimbursement to be made for moving expenses should be determined as a part of the condemnation proceeding in a manner similar to that used to determine costs. Such a procedure would permit the determination of moving expenses separately from the determination of compensation for the real property, but would not require the commencement of a distinct judicial proceeding for that purpose.

5. Evidence of moving expenses should be expressly made inadmissible in an eminent domain proceeding upon the issue of the compensation to be paid for the property to be taken. Such a provision is necessary to preclude the possibility that a person might be compensated twice for the same loss.

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

An act to add Title 7a (beginning with Section 1270) to Part 3 of, and to add Section 1248.5 to, the Code of Civil Procedure, relating to the payment of compensation and damages when property is acquired for public use.

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

SECTION 1. Title 7a (beginning with Section 1270) is added to Part 3 of the Code of Civil Procedure, to read:

TITLE 7a.

REIMBURSEMENT FOR MOVING EXPENSES WHEN PROPERTY
IS ACQUIRED FOR PUBLIC USE

1270. As used in this title:

(a) "Acquirer" means a person who acquires real property or any interest therein for public use.

(b) "Acquisition" means the acquiring of real property or an interest therein for public use either by the consent of the owner or by eminent domain.

(c) "Person" includes a natural person, corporation, association, partnership, joint venture, receiver, trustee, executor, administrator, guardian, fiduciary or other representative of any kind, the State, or a city, county, city and county, district or any department, agency or instrumentality of the State or of any governmental subdivision in the State.

(d) "Public use" means a use for which property may be taken by eminent domain.

(e) "Moving" means dismantling, removing, packing, loading, transporting, unloading, unpacking, reassembling and installing personal property.

1270.1. Except as otherwise provided in Section 1270.3, a person whose real property or interest therein is acquired for public use by eminent domain is entitled to reimbursement from the acquirer for his actual, but not exceeding the reasonable, costs necessarily incurred as a result of the acquisition in:

(a) Moving his personal property from the real property acquired or from the larger parcel from which the part acquired is severed.

(b) Temporarily storing such personal property until the real property at which the personal property is to be relocated for use is available for occupancy by such person, but not in any event in excess of 30 days.

1270.2. (a) A person is entitled to reimbursement under this section only if:

(1) He is lawfully occupying real property when such property or any interest therein is acquired for public use by eminent domain for a term only; and

(2) He has, at the time of the acquisition, the right to the possession of the real property immediately after the term acquired for public use.

(b) Except as otherwise provided in Section 1270.3, in addition to any reimbursement to which he may be entitled under Section 1270.1, a person described in subdivision (a) of this section is entitled to reimbursement from

the acquirer for his actual and reasonable costs necessarily incurred as a result of the acquisition in:

(1) Storing the personal property that was removed from the real property acquired or from the larger parcel from which the part acquired was severed during the time the real property is occupied by the acquirer.

(2) Moving such personal property back to the real property acquired after the expiration of the term for which the real property was acquired for public use.

1270.3. Whenever a person is entitled to reimbursement under Section 1270.1 for the cost of transporting his personal property, such reimbursement may not exceed the cost of transporting such property 25 miles.

Whenever a person is entitled to reimbursement under subdivision (b)(2) of Section 1270.2 for the cost of transporting his personal property, such reimbursement may not exceed the cost of transporting such property 25 miles.

Reimbursement under this title may not exceed the value of the property moved.

1270.4. A person who claims reimbursement under Section 1270.1 for moving personal property shall serve upon the acquirer and file in the condemnation proceeding affecting the real property on which the personal property was located a verified memorandum of his moving and storage costs. The memorandum shall be filed within 90 days after removal of the personal property from such real property has been completed

and shall state:

(a) The date the removal was completed.

(b) The location from which and the location to which the property was moved.

(c) If the property was stored temporarily, the location where the property was stored and the duration of such storage.

(d) An itemized statement of the costs incurred.

(e) The amount of reimbursement claimed.

(f) That the costs for which reimbursement is claimed are reasonable and were necessarily incurred.

1270.5. A person who claims reimbursement under Section 1270.2 shall serve upon the acquirer and file in the condemnation proceeding affecting the real property from which the personal property was moved a verified memorandum of his moving and storage costs. The memorandum shall be filed not later than the ninetieth day after the term for which the real property was acquired for public use expires and shall state:

(a) The location where the property was stored and the duration of such storage.

(b) An itemized statement of the costs incurred.

(c) The amount of reimbursement claimed.

(d) That the costs for which reimbursement is claimed are reasonable and were necessarily incurred.

1270.6. The acquirer may, within 20 days after service of a memorandum under Section 1270.4 or 1270.5, serve and file a notice of motion to have the amount of reimbursement to be made determined by the court.

Not less than 10 days' notice of the hearing on the motion shall be given to the claimant, and the notice shall state the acquirer's objections to the amount claimed in the memorandum or other basis for the motion. Upon the hearing the court shall determine the reimbursement to which the claimant is entitled, if any, and shall order the acquirer to pay such amount within 30 days from the date of such order. If the acquirer does not file a notice of motion to have the amount of reimbursement determined by the court, the court shall order the acquirer to pay the amount claimed in the memorandum within 30 days after the date of such order.

1270.7. The acquirer and the person whose real property or interest therein is acquired for public use may by agreement determine the amount of reimbursement to be made for moving and storage costs whether the acquisition is by consent or by eminent domain. The limitations contained in Section 1270.3 do not limit the amount the acquirer may agree to reimburse a person for moving and storage costs under this section.

1270.8. In lieu of reimbursing a person for moving and storage costs under this title, the acquirer may provide for the moving and storage of the personal property at its own expense.

SEC. 2. Section 1248.5 is added to the Code of Civil Procedure, to read:

1248.5. Notwithstanding any other provision of law, the opinion of a witness as to the amount to be ascertained under subdivisions 1, 2, 3 or

4 of Section 1248 is inadmissible if it is based, wholly or in part, upon the cost of dismantling, removing, packing, loading, transporting, storing, unpacking, reassembling or installing personal property.

SEC. 3. Section 1248.3 of the Code of Civil Procedure as proposed by Senate Bill No. is amended to read:

1248.3. Notwithstanding the provisions of Section 1248.2, the opinion of a witness as to the amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248 is inadmissible if it is based, wholly or in part, upon:

(1) The price or other terms of an acquisition of property or a property interest if the acquisition was made for a public use for which property may be taken by eminent domain.

(2) The price or other terms of any offer made between the parties to the action to buy, sell or lease the property or property interest to be taken or injuriously affected, or any part thereof.

(3) The price at which an offer or option to purchase or lease the property or property interest to be taken or injuriously affected or any other property was made, or the price at which such property or interest was optioned, offered or listed for sale or lease, unless such option, offer or listing is introduced by a party as an admission of another party to the proceeding. Nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 1248.1.

(4) The value of any property or property interest as assessed for taxation purposes.

(5) An opinion as to the value of any property or property interest

other than that to be taken or injuriously affected.

(6) The influence upon such amount of any noncompensable items of damage or injury.

(7) The capitalized value of the income or rental from any property other than the property to be taken or injuriously affected.

(8) The cost of dismantling, removing, packing, loading, transporting, storing, unpacking, reassembling or installing personal property.

SEC. 4. Section 3 of this act shall become operative only if Section 1248.3 of the Code of Civil Procedure as proposed by Senate Bill No. is enacted by the Legislature at its 1961 Regular Session, and in such case Section 3 shall become operative at the time this act takes effect pursuant to Section 6.

SEC. 5. If Section 1248.3 of the Code of Civil Procedure as proposed by Senate Bill No. is enacted by the Legislature at its 1961 Regular Session, Section 1248.5 of the Code of Civil Procedure as added by Section 2 of this act is repealed.

SEC. 6. This act takes effect on July 1, 1962. This act does not apply to any proceeding in eminent domain commenced prior to its effective date.