#36(L) 11/2/65

First Supplement to Memorandum 65-74

Subject: Study No. 36(L) - Condemnation Law and Procedure (General Philosophy Concerning Method and Extent of Compensation)

A number of materials relating to this matter were attached to the basic memorandum. We will assume that you have read these attachments prior to reading this supplement. Reference will be made in this supplement to material attached to the basic memorandum. In making such references, we use the form of citation indicated in the basic memorandum.

BACKGROUND

At the outset, it should be noted that the 1963 California governmental liability act was intended to provide liability to the extent justified in cases where a public entity or public employee is guilty of tortious conduct. It may be that the Commission will conclude in the course of its consideration of the inverse condemnation study that changes are needed in the governmental liability act. However, we do not consider tort liability in this supplement, for it appears to us that the major problem to be considered now is the extent to which compensation should be provided where an individual suffers loss as a result of a public improvement and there is no tortious conduct involved. In other words, the compensation we are considering here ordinarily would be paid without a showing of fault on the part of the public entity.

In the study of inverse condemnation and condemnation law and procedure, the task that must be undertaken is to locate the specific boundaries within which:

(1) Cost may be imposed on public entities for detriment resulting from public improvements without unduly frustrating or interfering with the accomplishment of such improvements; and

(2) Cost of improvements justifiably may be imposed on individuals to the extent that they receive benefits as a result of a public improvement without imposing unworkable procedures that would not be justified by the amounts that would be received by public agencies if they were permitted to recover for such benefits.

GENERAL POLICY CONSIDERATIONS

The staff has reviewed the material attached to the basic memorandum. Based on this material and our own thinking, we have formulated a number of propositions which are set out below. We do not present these for adoption by the Commission. Instead, they are presented as statements of policy considerations that should be kept in mind in evaluating particular alternatives in specific situations requiring a policy decision as to where the detriment or benefits resulting from a public improvement are to be placed. Indeed, we believe that consideration of the propositions set out below will be helpful in considering all aspects of the problems of condemnation law and procedure.

Obviously, no one proposition will be decisive of any particular problem. In making a choice between various available alternatives that might be adopted to resolve a particular problem, each proposition should be considered and given such weight as is justified when applied to that problem. Hence, the order in which the propositions are stated is not intended to indicate the relative importance of a particular proposition as applied to a particular problem.

Nevertheless, we believe that all of the propositions stated represent a valid policy consideration that should be taken into account in resolving policy questions. We believe that it will be profitable to discuss these propositions at the November meeting.

The staff recommendations as to the possible alternative general schemes for compensation that might be adopted are included as the last portion of this supplement. These recommendations represent the staff's conclusions after giving to each proposition set out below such weight as we believe is justified.

Proposition 1. The basic theory of just compensation is that the individual property owner will be placed in as good a position financially as he would have been but for the establishment of the public improvement and that the economic impact of the improvement be borne by the public as a whole and not be a single property owner or a group of individual property owners.

The following extract from pages 615-616 of Kratovil (second goldenrod) may be helpful in consisting the extent to which this theory is followed in practice in cases where some property is actually taken and the results that would flow from its unqualified adoption in such cases:

> The decisions clearly illustrate two irreconcilable theories of compensation in true condemnation proceedings. One is the principle of indemnity, the "owner's loss" theory, under which the owner is entitled to be put in as good a pecuniary position as he would have been if his property had not been taken. The other is the "taker's gain" viewpoint, that the government should pay only for what it gets. It stems from the fear that to allow compensation for such items as disturbance of a business on the land condemned would impose an inordinate drain on the public purse because of the discrepancy between the value of the thing obtained and the losses suffered. Thus it has been observed that to make the owner whole for losses consequent on the taking of fee simple title of land occupied by a going business would require compensation for future loss of profits,

expense of moving removable fixtures and personal property, and loss of goodwill that inheres in the location; yet compensation must be denied for such "consequential" damage because, it is said, "that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and . . . damage to those rights of ownership does not include losses to his business." This may be paraphrased: when the government takes only the land, having no use for the business operated thereon, it should pay only for what it gets, namely, the market value of the land.

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Until recently, the "taker's gain" view seemed predominant. Lip service was paid to the principle of indemnity, but statement of the principle was invariably followd by a catalogue of emasculating exceptions. Lately there has been a pronounced shift toward genuine recognition of the principle of indemnity. This has occurred in several areas. [Footnotes omitted.]

As indicated in the following quotation from page 8 of the Report of the Legislative Council Committee to Revise the Condemnation Laws of Maryland (November 14, 1962), the adoption of the indemnity theory not only meets the demand for fairness to the individual property owner, but also the public welfare generally will be served by it:

This is clearly indicated by the internationally-known economist, formerly a professor at the University of London and now a professor of the University of Chicago, Friedrich A. Von Hayek, in his recent book "The Constitution of Liberty," published in 1960 by the University of Chicago Press, in which he states at pages 217-218:

"The principle of 'no expropriation without just compensation' has always been recognized wherever the rule of law has prevailed. It is, however, not always recognized that this is an integral and indispensable element of the principle of the supremacy of the law. Justice requires it; but what is more important is that it is our chief assurance that these necessary infringements of the private sphere will be allowed only in instances where the public gain is clearly greater than the harm done by the disappointment of normal individual expectations. The chief purpose of the requirement of full compensation is indeed to act as a curb on such infringements of the private sphere and to provide a means of ascertaining whether the particular purpose is important enough to justify an exception to the principle on which the normal working of society rests. In view of the

> difficulty of estimating the often intangible advantages of public action and of the notorious tendency of the expert administrator to overestimate the importance of the particular goal of the moment, it would even seem desirable that the private owner should always have the benefit of the doubt and that compensation should be fixed as high as possible without opening the door to outright abuse. This means, after all, no more than that the public gain must clearly and substantially exceed the loss if an exception to the normal rule is to be allowed."

Others have reached the conclusion that it is only fair that those reaping the benefits of an improvement--the public--should bear the full cost of that improvement and that damages inflicted thereby should be a part of that cost. See, for example, the 1957 Virginia Law Review Note (Virginia-pink).

The principle of indemnification has been extended in some states to require compensation where no property is taken. Thus, the Supreme Court of Washington in a 1964 decision has apparently adopted the rule that recovery should be permitted "when the land of an individual is diminished in value for the public benefit," even though no property is taken. It remains to be seen what limitations the Washington Supreme Court will place on this general proposition. The Oregon Supreme Court in 1962 decided that a "continuing and substantial interference with the use and enjoyment of property" is a taking for which the constitution requires compensation and apparently the jury determines whether the taking is substantial enough to permit recovery. For an analysis and discussion of the Washington and Oregon decisions, see Washington (yellow) and Michigan (buff).

Both England and Canada have, to a considerable extent, adopted the basic proposition that the damages inflicted by a public improvement should be paid by the public, not the affected property owner. For example, even

where no property is actually taken, both Canada and England allow recovery for "injurious affection." It is important to note, however, that recovery where no property is taken is limited to the decrease in market value and does not include loss of business and the like. On the other hand, under the English and Canadian rules, where some property is taken, the property owner recovers not only the decrease in the market value of the property remaining, but also business losses and the like. See British Columbia (white) and Alberta (blue) sheets for discussion and note the criticism in Alberta (blue) of the limitation on recovery when no property is taken.

One might speculate on likely results in future decisions of the California Supreme Court. The California Constitution requires "just compensation" when property is taken "or damaged." It is possible that the California Supreme Court may follow the lead of the Washington and Oregon courts and impose liability for a decrease in the market value of property resulting from a public improvement even though no property is taken. However, we think this unlikely. In Albers v. County of Los Angeles, 42 Cal. Rptr. 89 (Sup. Ct. 1965), the court imposed liability for actual physical damage to property resulting from a landslide resulting from construction of a road. The Supreme Court held that (except where the state has a common law right to inflict damage or where damage is inflicted in proper exercise of police power) any actual physical injury to real property (whether foreseeable or not) proximately caused by an improvement as deliberately designed and constructed is compensable under the constitutional provision that private property shall not be taken or damaged for public use without just compensation. The following language from the Albers case gives some indication of the basis of the court's holdings and, we think, indicates that it is unlikely that the court will extend liability to cases where there is no actual physical injury but merely a decrease in market value resulting from an improvement:

From the foregoing analysis of the cases and other legal authorities it is apparent that we are not required to choose between two absolute rules, one of liability and one of nonliability, but are faced with a more limited issue. The question is not whether in all cases, a property owner should not be permitted to recover in an inverse condemnation action if a private party would not be liable for damages similarly inflicted,[3] but whether there is or should be a qualification or limitation of that rule to the effect that the property owner may recover in such an action where actual physical damage is proximately caused to his property by a public improvement as deliberately planned and built, whether such damage is foreseeable or not.

To restate the question: The issue is how should this court, as a matter of interpretation and policy, construe article I, section 14, of the Constitution in its application to any case where actual physical damage is proximately caused to real property, neither intentionally nor negligently, but is the proximate result of the construction of a public work deliberately planned and carried out by the public agency, where if the damage had been foreseen it would render the public agency liable?

This somewhat limited statement of the question serves to explain several of the most important cases relied on by the county. The qualification in the question "where if the damage had been foreseen" takes care of the cases like Archer, supra, 19 Cal.2d 19, 119 P.2d 1, where the state at common law as an upper riparian proprietor had the *right* to inflict the damage; and like Gray, supra, 174 Cal. 622, 163 P. 1024, where the court held the damage noncompensable because inflicted in the proper exercise of the police power. Such cases as People ex rel. Department of Public Works v. Symons, supra, 54 Cal.2d 855, 9 Cal.Rptr. 363, 357 P.2d 451, involving loss of business and diminution of value by diversion of traffic, circuity of travel, etc., do not involve direct physical damage to real property, but only diminution in its enjoyment. The court in Reardon, supra, clearly differentiated actual physical damage, saying: "Here the damage is to the houses affixed to the land. This is special damage to the plaintiffs, for which they are entitled to recover, though they may be of the class usually styled consequential." (66 Cal. p. 506, 6 P. p. 326.)

This court in considering a similar policy question in Clement v. State Reclamation Board, supra, said at 35 Cal.2d page 642, 220 P.2d page 905: "The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking." In the concurring opinion of Traynor, J., in House v. Los Angeles County Flood Control Dist., supra, 25 Cal.2d 384, 397, 153 P.2d 950, 956, the same statement is followed by the language: "It is irrelevant whether or not the injury to the property is accompanied by a corresponding benefit to the public purpose to which the improvement is dedicated, since the measure of liability is not the benefit derived from the property, but the loss to the owner."

The competing principles are stated in Bacich v. Board of Control, supra, 23 Cal.2d 343, 350, 144 P.2d 818, 823: "It may be suggested that on the one hand the policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of the public improvements. * * * On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost."

3. It is assumed in this statement of the question that a private party would not be liable under the circumstances here involved. It should be mentioned that plaintiffs argue that, under the court's findings, liability would exist against a private party, on several different grounds, under the facts here involved. Because of the conclusion we have reached it will not be necessary to discuss these contentions.

The following factors are important. First, the damage to this property, if reasonably foreseeable, would have entitled the property owners to compensation. Second, the likelihood of public works not being engaged in because of unseen and unforeseeable possible direct physical damage to real property is remote. Third, the property owners did suffer direct physical damage to their properties as the proximate result of the work as deliberately planned and carried out. Fourth, the cost of such damage can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners of the individual parcels damaged. Fifth, to requote Clement, supra, 35 Cal.2d page 642, 220 P.2d page 905, "the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking."

This court said in Bacich, supra, 23 Cal.2d page 351, 144 P.2d page 823, quoting from Sedgwick on Constitutional Law: "'The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes. * * *'"

[1] For these reasons we conclude that in the appeal of the county the judgments should be affirmed on the ground that with the exceptions stated in Gray, supra, and Archer, supra, any actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable under article I, section 14, of our Constitution whether foreseeable or not.

In cases not involving actual physical damage to property, the California Supreme Court has required that there be a "taking" of "property." In Bacich v. Board of Control, 23 Cal.2d 343 (1943), the majority of the Supreme Court recognized a "new property right"--substantial impairment of the easement of access--for which compensation must be paid. Justice Traynor dissented, stating in 23 Cal.2d at 379-380:

> Under the majority opinion new private property rights representing millions of dollars have been carved out of public streets and highways, at the expense not alone of the public treasury but of the public safety. Of recent years the growth of traffic has necessitated the construction of highways with fewer intersecting streets to expedite the flow of traffic and reduce the rate of motor vehicle accidents. Such highways have been constructed through the city of San Rafael, and the Arroyo Seco Parkway from Los Angeles to Pasadena, and the construction of many more is contemplated. In such cases it will be necessary either to close the cross streets or to carry them under or over the freeway, both costly projects. The plans contemplate overhead or subway crossings every few blocks over the freeway, necessarily creating cul-de-sacs of the remaining streets. Similar improvements are involved in the separation of grades of railroads and highways, for it is usually necessary to make a dead end of one or more streets as a highway is raised or lowered to cross the railroad tracks. In the present case the cul-de-sac on Sterling Street was an integral part of the rearrangement of the streets of the city of San Francisco made necessary by the construction of the San Francisco-Oakland Bay Bridge.
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> The cost of making such improvements may be prohibitive now that new rights are created for owners of property abutting on streets that would be at right angles to the improvements, for these rights must be condemned or ways constructed over or under the improvements. The construction of improvements is bound to be discouraged by the multitude of claims that would arise, the costs of negotiation with claimants or of litigation, and the amounts that claimants might recover. Such claims could only be met by public revenues that would otherwise be expended on the further development and improvement of streets and highways.
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> It must be remembered that the question is not whether existing easements should be taken without compensation, but whether private rights should be created for an arbitrarily chosen group of private persons, necessitating tribute from the public if it exercises public rights of long standing in the interest of safe and expeditious travel on public thoroughfares.

In Breidert v. Southern Pacific Company, 61 Cal.2d 659 (1964), the Supreme Court made clear that recovery under the Bacich case "depends upon a

showing of substantial impairment" of the general right of access.and, we believe, restricted to some extent the holding in the Bacich case. Other recent California cases have taken a restricted view toward permiting recovery for a decrease in market value resulting from an improvement even where some property is taken. E.g., People v. Symons, 54 Cal.2d 855, 861 (1960)(no damages may be recovered for injury to the part of the parcel not taken where the injury results from the use of the improvement and the improvement does not lie upon the portion of the parcel taken).

From our review of the cases, we think it unlikely that the California Supreme Court will make any modifications in existing law that will significantly extend the right of compensation in cases where property is taken or in cases where no property is taken.

Proposition 2. Persons suffering similar damage or receiving similar benefits should be similarly treated.

As Professor Haar (Haar--second pink) points out on pages 872-874, equity is not a mathematical concept; it is an equitable concept and the principal criterion is fairness. This still leaves the question of scope. Is the goal satisfied by equality among owners whose property is condemned? Should it be broadened to take in all property owners affected by the improvement? Should it go the whole way, striving for an equality which comprehends the entire community?

Spater (Michigan--buff) at pages 1408-1409 points out the problem of drawing the line:

> In deciding where the line is to be drawn, consideration should be given to a number of subjects—the first that come to mind are the fairness of one line compared with another as it affects the individuals on whom the loss first falls and the cost to the government of socializing the loss. However, additional considerations are the ease of applying the rule, the importance of avoiding multiplicity of suits, and the ability of property owners and their lawyers to know when and how the rule applies. The common-law concept of physical invasion which was embodied in our constitutions is probably the easiest to apply of all possible choices, assuming that compensation is to be granted at all. The extended controversy over this relatively simple standard illustrates what would happen if a standard like that suggested by *Martin* were adopted.
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> What is clear is that the line has to be drawn somewhere, and wherever it is drawn there will be some who will argue persuasively that this results in injustice:
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> > "[A] tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other. But the theory of the law is that such lines exist, because the theory of the law as to any possible conduct is that it is either lawful or unlawful. As that difference has no gradation about it, when applied to shades of conduct that are very near each other, it has an arbitrary look."

> *Where* the line is to be drawn is considerably harder to answer than who should draw it. Here, it would seem that the line had already been drawn, and that it is only for the courts to determine whether particular cases fall on one side or the other. But even if that were not the case and the problem was solely one of what the rule should be, one might think that courts would be especially reluctant to embark on a novel course in a field involving so many considerations requiring the type of broad factual investigation and analysis characteristic of the legislative rather than the judicial function. The judicial expansion of constitutional language through interpretation is familiar enough, but we must not forget that this is largely either an effort to find a way to carry out the will of the people as expressed through the legislature or an attempt to accommodate a new social or economic fact within the framework of old words of general purport. A court cannot lawfully expand the constitution simply because it disagrees with what the constitution says.

[Footnotes omitted.]

Courts have struggled with the concept of equality primarily in the area of determining the extent to which benefits should be recognized. Thus, fear that adjacent properties might be treated disparately has played a role in the tendency of some courts to disregard benefits in computing condemnation awards. If two properties received exactly the same benefit, but only one suffered a taking, that one would pay for the benefit, while his neighbor enjoyed the benefit free. But, as one court has pointed out, if a property owner is receiving full value for what he is giving up, there is no reason why he should be heard to complain that someone else is getting a greater benefit. Consider the other side of the coin: The condemnee whose entire property is taken is denied a share of the newly created benefits. Should the condemnee a portion of whose property is taken be permitted to retain the benefits (without offset against the part taken) when the property owner all of whose property is taken receives none of such benefits? Haar suggests that the solution is to require all property owners to pay for benefits received, whether or not any property is taken. We do not believe that this

is a practical solution and Haar himself concludes that it is unlikely that this solution can be attained. He suggests:

> A compromise with the ideal, or an evolutionary stage in the transition, but still a gain over present practices, would be federal legislation deferring the attempt to recoup benefits where no part of the property is taken, and simply making market value the measure of condemnation awards for both state and federal proceedings.

By "making market value the measure of condemnation awards," Haar means the difference between the market value of the property before condemnation unaffected by the improvement and the market value of the property remaining after condemnation as affected by the improvement.

There is considerable California statutory law that permits the cost of improvements to be charged against benefited property by special assessments upon the benefited property in an improvement district. In substance, the levy of such a special assessment is the exercise of the same power as that exerted in the levy of an ordinary tax for governmental purposes--the sovereign power of taxation. But a special or local assessment differs from a general tax in that it is imposed on property within a limited area for payment for a local improvement supposed to enhance the value of the property taxed. Ordinarily it is the function of the local governing body to determine the amount of the benefit. Where conditions are such that the local governing body might reasonably conclude that there is special benefit to the property assessed, the courts cannot set aside the assessment on the ground that it exceeds the benefits received from the improvement. The general rule is that a hearing on benefits must be afforded at some time before any land is finally burdened by an assessment. This is the only real protection afforded to the land owner, for the decision on the correctness of the amount of the assessment is conclusive; except where an appeal is expressly provided by

law, the decision of the legislative body will not be interfered with by a court unless the assessment is plainly arbitrary or unreasonably discriminatory or there is a showing of fraud, gross injustice, or mistake.

Without attempting to list all the types of public improvements that may be financed in whole or in part by special assessments against benefited property, it may be noted that either a statute or the charter of a municipality may provide authority for the cost of a public improvement to be assessed on a special area or district. There are a great number of California districts that are authorized to levy special assessments against benefited property. We will compile a list of such districts in the course of our research on condemnation law and procedure. It is sufficient to note now that to a large extent benefits are charged to benefited property for many types of improvements made by many types of districts. Thus, to a considerable extent the principle suggested by Haar already is included in the California law.

In the case of injurious affection of property no part of which is taken, Washington and Oregon, at least in aircraft noise cases, have provided recovery. The same is true under the English and Canadian expropriation laws. However, even in these jurisdictions some inequality of treatment exists. In California and most other states, the owner of property injuriously affected by a public improvement is not entitled to recover the loss of market value unless a property interest is taken or (in California) unless there is actual physical injury to the property resulting from a public improvement.

Thus, although we suspect that benefits are to a considerable extent now equalized under existing law, there is no similar equality in treatment of detriment. Consider, however, Government Code Sections 38400 et seq. (compensation of abutting property owners where a park financed by special

assessments in to be abandoned). In determining the extent to which recovery should be permitted in cases where no property is taken, the Commission must consider the other propositions stated in this supplement for many of these propositions are opposed to extending compensation in such cases.

Proposition 3. No person recovering compensation in connection with an improvement should receive a windfall, i.e., receive more compensation than that amount which places him in as good a position after the improvement is made as he was before the improvement was proposed.

Justice requires only that a person be made whole. As applied to eminent domain proceedings, this would require use of an indemnification theory of compensation. Other considerations ignored, it might be considered to require that the property owner receive the difference in the value of his property before the taking and the value of his remaining property after the taking and in addition receive full compensation for all other losses he suffers such as moving expenses and incidental business losses (such as good will, lost business profits). As previously indicated, Haar (second pink) is consistent with this proposition for he advocates that the property owner receive the difference between the value of his property unaffected by the improvement and the value of his remaining property as affected by the improvement. Moreover, he recommends charging for benefits to the full extent that this is practical and politically feasible. See also Kratovil (second goldenrod) pages 624-625.

The extent to which this proposition should not be applied because of inequality of treatment of persons affected by an improvement must be considered, i.e., to what extent does the fact that others who have no property taken receive no compensation for detriment and no charge for benefit offset the general proposition stated above.

Proposition 4. The law should protect reasonable expectations of property owners.

One of the policy considerations identified by Kratovil (second goldenrod) is stated in the following extract from pages 612-615 of his article:

> There is a pronounced tendency in the law to give protection to reasonable expectations, to protect those who have relied where withholding of protection would cause injustice. Protection of expectations is not confined to cases where a change of position has occurred. For example, in contract law, without insisting on reliance by the promisee, courts may seek to give the promisee the value of the expectancy which the promise created. This protection of reasonable expectations, moreover, is no novelty. In the law of torts it goes back at least as far as 1621. These tendencies are clearly discernible in modern condemnation law. For example, so strong was the feeling among property owners that they ought to be protected when they made investments in reliance upon an existing street grade that adoption of "or damaged" constitutions was the result. In other jurisdictions, courts themselves arrived at the same result by liberalizing their views of "taking" of "property." Even in jurisdictions that refused protection against most changes of grade, it was almost universally recognized that total destruction of access is compensable. Here the frustration of reliance interests is so complete as to compel general recognition. Of the profusion of novel property rights, easements of light, air, view, and the like, many, if not most, were invented by the courts in an effort to extend protection to the reasonable expectations of property owners.
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> Where compensation has been denied, often the motivating factor has been the feeling that no defeat of reasonable expectations was involved. For example, addition of the "or damaged" clause to a state constitution has not resulted in an award where governmental activity conducted entirely on public property, such as construction of a pest-house, jail or police station, has depressed the value of adjoining property, for in general it may be said that the reasonable expectations of property owners do not include protection against governmental activities if equally offensive activities might be conducted by private persons on their land without liability to their neighbors. [Footnotes omitted.]

Thus, it probably was in recognition of reasonable expectations that the Legislature enacted the statute referred to above which requires abutting property owners to be compensated in some cases where a public park is to be

abandoned. On the other hand, care should be taken in extending compensation to property owners who do not have any property taken in cases where they have no reasonable expectation of protection against the particular type of public improvement. Moreover, public activities should not be placed at a disadvantage when compared to similar private endeavors--in effect a discrimination against governmental works. The balancing process should recognize that traditionally a private owner has been allowed to use his land in many ways which adversely affect the value of neighboring land without resulting liability. See Wash. (yellow) at pages 931-932. In other words, although the law should protect reasonable expectations, the law also must recognize the right of the public entities as property owners. See Kratovil (second goldenrod) at pages 623-624.

Proposition 5. The cost of compensation should not be increased so as to unduly deter or interfere with socially desirable improvements. The ideal of full compensation for all individual losses resulting from public improvements must be balanced with the need for the unimpeded continuance of public improvements through the necessary exercise of the power of eminent domain. Assuming that public improvements are a general benefit to the public, the cost of such improvements can not be so great as to make it impossible to construct them. Apart from the public policy issue thus presented, the very practical consideration that the Commission must keep in mind is that any proposed legislation that would substantially increase the cost of public improvements would have little chance of passage through the Legislature and even less chance of being signed by the Governor.

Proposition 6. Creation of potential liability where there is little likelihood of substantial recovery should be avoided.

The possibility of a multiplicity of claims is an important factor in determining the extent to which compensation should be paid. Consider the fears expressed by Justice Traynor in the portion of his opinion quoted above under Proposition 1 and consider that this opinion was directed toward a majority opinion that merely permitted recovery for substantial impairment of loss of the right of access, i.e., recovery was permitted by a limited number of property owners who could be fairly easily identified. To the extent that a cause of action is given to persons not abutting on an improvement, the increase in the administrative, appraisal, and legal expenses of public agencies and the expense and delay caused by court congestion must be considered.

See also discussion at pages 931-932 of Wash. (yellow), suggesting the recovery (where no property is actually taken) be limited to cases of "substantial damage."

Proposition 7. Rules of compensation should be formulated so that they are easily applied administratively or by the trier of fact, as the case may be, and so that all parties will know when and how a rule applies.

It is important that the property owners and their lawyers as well as the public agencies will be able to determine how particular rules of compensation apply in particular cases. This proposition involves weighing certainty and ease of administration against injustice in particular cases. It is important that there be certainty in proof of damages. This consideration may justify such provisions as dollar limits on moving expenses and a mathematically computed amount for good will and loss of business instead of proving such

loss by the actual situation in a particular case. Moreover, this consideration would work against general formulations of rules of compensation that create potential causes of action in wide areas where such causes of action do not now exist.

Proposition 8. The principles of compensation should, to the fullest extent possible, be formulated upon the foundations of existing law with such alterations as may be necessary to promote clarity, consistency, and justice, and thereby discourage unnecessary litigation.

In the formulation of a legislative program, care must be taken to avoid disturbing existing law except where deemed clearly necessary in the light of applicable policy considerations. The ability to estimate the cost of proposed legislation decreases as the legislation departs from established law and will no doubt give rise to extravagant estimates of cost that cannot be rebutted. Moreover, changes must be justified to legislative committees and as more changes are proposed, more objections will result. On the other hand, the Commission should not hesitate to make changes where it can clearly be shown that existing law is unsatisfactory.

BALANCING OF CONFLICTING PROPOSITIONS

It is apparent that the basic propositions previously stated will often conflict when applied to a particular problem. As Kratovil (second goldenrod) points out at page 626, "it is not an overstatement to say that perhaps the principal concern of the courts in the law of eminent domain is to draw the line equitably between compensable and non-compensable governmental interferences with property owners, and the process of arriving at a decision that is fair both to the public and to private interests involves a careful weighing and balancing of these interests."

Kratovil (second goldenrod) goes on to state at pages 626-629:

It is evident that non-compensability for minor injuries caused by public projects is a product of this balancing process. Illustrative are the cases denying compensation for damages resulting from temporary conditions incident to a public improvement, even under "or damaged" constitutions, and the cases holding that an entry for the purpose of a preliminary survey is not a compensable taking. Holdings that compensable damage must be substantial are commonplace, as in the cases applying the doctrine *de minimis non curat lex*. Moreover, if government activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a windfall or special bounty; hence such slight damage is not compensable.

In the balancing process, the social utility of the various interests involved is accorded due weight. Economic factors may so strongly favor particular private enterprises that substantial damage to other property owners resulting from the operation of such enterprises may be regarded as non-compensable. Thus the real reason for the holding that a railroad is not liable to abutting landowners for smoke, noise, vibration and other damages incident to non-negligent operation was the fear of hindering railway development. For similar reasons, in more recent times, the conflict between landowners and operators of aircraft is being resolved in favor of the latter, except in cases of special damage. In other words, a private interest that substantially promotes a public interest may be preferred over another private interest. As the policy considerations favoring an enterprise grow stronger, a landowner's claim for compensation for damage caused by the enterprise appears to grow correspondingly weaker.

On the other hand, uses that have a low social utility receive only limited protection, as is illustrated by the cases holding that a court cannot consider the value of land for a purpose prohibited by a zoning ordinance unless there is a reasonable probability of removal of such restriction. Most cases hold that value for a present illegal use is not protected by the Constitution. Such interests are not deemed worthy of protection. It would be stultifying indeed were the state to protect economic interests that owe whatever value they possess to a defiance of state laws. Harmful uses, though not in themselves illegal, are also given only limited protection.

In the process of balancing, policy considerations must often be weighed, one against the other. For example, the policy of allowing public

control over public areas often conflicts with the policy of protecting the reasonable expectations of property owners, and the policy of allowing full indemnity for damage may conflict with the policy of requiring certainty of proof of damage. The process of weighing one policy against another is also illustrated by the zoning cases. Historically, the first crucial issue in zoning law was whether the owner of vacant land well adapted for high-value industrial and commercial uses could be made to bear the loss when such uses, obviously not noxious in themselves, were forbidden in neighborhoods zoned for private residences. The validity of such zoning was sustained and the resulting sharp drop in value of the vacant land was held non-compensable. The expectations of the landowner in purchasing the property must yield to the public interest in the enforcement of a comprehensive zoning plan. The welfare of large numbers of urban residents, therefore, outweighs the private loss, the defeat of the expectations of property owners. But if a zoning ordinance unduly curtails the use of a particular tract of land without the counterbalance of promoting the public welfare appreciably, as to that particular tract of land it is invalid.

Traditionally, the zoning ordinance, whatever the impairment in the value of vacant land, allows the preservation of the value of existing improvements and enterprises under the exception in favor of non-conforming uses. Thus the conflict between the interests of the public and of property owners is resolved by a compromise that preserves some property values and sacrifices others. There is some incongruity in a device that destroys hundreds of thousands of dollars of vacant land value, while preserving from destruction the value, for example, of a non-conforming neighborhood delicatessen. Nevertheless, the job needs to be done; the line must be drawn somewhere and the fact that some persons on one side or the other of the line are dissatisfied with the legislative judgment does not militate against its validity. [Footnotes omitted.]

STAFF RECOMMENDATIONS

Scope of study of condemnation law and procedure. After considering the material attached to the basic memorandum and giving the matter considerable thought, the Executive Secretary recommends that the Commission proceed to develop a comprehensive eminent domain statute covering only cases where some property is actually taken by eminent domain. Cases where compensation should be paid where no actual taking is involved should be considered later when Professor Van Alstyne's study is available. Our statute which, we hope, will be in tentative draft form by that time can be reviewed and modified to the extent considered necessary after Professor Van Alstyne's study has been considered.

I make this recommendation because I believe that the problems involved in determining the extent to which compensation should be provided in cases where no property is taken are primarily the problems that ordinarily are considered as a part of the subject of inverse condemnation. I do not believe that it would be desirable to attempt to make any meaningful decisions concerning these problems until we have received Professor Van Alstyne's study.

Moreover, if we are to undertake to draft a statute to cover compensation in cases where property is taken, I believe that we must accept to a large extent the present theory of compensation except to the extent that changes are suggested below or are later determined to be required. Even though significant and controversial changes in existing law are suggested below, the proposed basic approach is one that is generally accepted in recent studies in the field of eminent domain. I believe that it would be a profitable expenditure of our time to proceed immediately to the drafting of such a statute,

for I suspect that ultimately we will find that this is about all that we can hope to achieve in this area of the law. Moreover, it would be extremely useful to have such a statute available when we consider the extent to which compensation should be provided in cases where no property is taken.

On the other hand, if the Commission is unwilling to proceed on this basis, I suggest that further work on "just compensation" be deferred until we have received Professor Van Alstyne's study.

Basic approach in determining "just compensation." Taking into account the various general policy considerations previously discussed, the Executive Secretary recommends that the basic approach to determining just compensation be as indicated below:

1. Where all of the property interest is taken, the property owner should receive the market value of interest taken as unaffected by the public improvement and, in addition, he should receive moving expenses (subject to any limits set by the Federal Government) and a mechanically computed amount for lost business profits, good will that will be lost if the business is relocated, and the like, and perhaps additional items of compensation.

2. Where only part of a parcel is taken, the property owner should receive the difference between the market value of the entire parcel as unaffected by the public improvement and the market value of the remaining property as affected by the improvement and, in addition, he should receive moving expenses (subject to any limits set by the Federal Government) and a mechanically computed amount for lost business profits, good will that will be lost if the business is relocated, ant the like, and perhaps additional items of compensation.

The significant portion of this recommendation is the suggested method of computing damages in partial takings. The present concepts of "severance damages" and "special benefits" are eliminated and a "market value" concept is substituted. Instead of discussing severance damages and special benefits as such, the appraisers will be discussing the market value of the whole parcel and the market value of the remainder of the parcel. This is the approach suggested by Haar (second pink). Moreover, it is the recommendation contained in the Study of the Select Subcommittee:

> It is recommended that the market value standard be retained as the basic measure of compensation "for the real property taken" by Federal agencies, but that the Congress provide a definition of the standard which will assure--
>
> * * * * *
>
> (c) That in partial takings, the Government will pay only the difference between the value of the entire property immediately before the taking and the value of the remaining property immediately after the taking, considering all benefits and all damages that affect the value of the remaining property which are caused by the project for which the part is taken.
>
> Comment.--This provision would provide parallel rules for the treatment of damages and benefits in Federal land takings, and would permit the full use of the "before and after" process in determining compensation. It would eliminate a restriction in the present rule of severance damages which sometimes results in inequities to property owners; and would make it clear that all damages and all benefits affecting the value of remaining property, that are caused by the project for which a part is taken, are to be considered in determining compensation.
>
> The legal issues are discussed at chapter VII, parts G, H, and I.

This recommendation is effectuated by Section 102 of the proposed Federal Legislation, which reads in part:

SEC. 102. (a) If the head of any Federal agency acquires real property for public use in any State or the District of Columbia, by purchase or condemnation, the fair value of such property shall be paid as compensation therefor.

(b) As used in this title—

(1) the term "fair value" means—

(A) the highest cash price which a property could reasonably be expected to bring if exposed for sale in the open market for a reasonable time, taking into consideration all lawful uses to which such property is adapted and could reasonably be put: *Provided*, That any change in such price prior to the date of valuation caused by the public improvement for which the property is acquired, and any decrease in such price caused by the likelihood that the property would be acquired for the proposed public improvement, other than that caused by physical deterioration within the reasonable con-

trol of the owner, shall be disregarded in determining such price; or

(B) if only a part or an interest in a property is acquired, the difference between the fair value of the entire property immediately before the acquisition, determined as in paragraph (A), and the highest cash price which the remaining property could reasonably be expected to bring immediately after the acquisition allowing a reasonable period of exposure for sale in the open market, taking into consideration all lawful uses to which such property is adapted and could reasonably be put, and all benefits and damages affecting such price which result to the remaining property because of its severance from, and the use to be made of the property or property interests acquired, and because of the use of other property or property interests acquired for the same public improvement.

Although the drafting of Section 102 could be improved, we believe that it is a sound statement of policy.

Pennsylvania adopted the same standard in Section 602, the significant portion of which provides:

> Section 602. Measure of Damages.--Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of his property interest remaining immediately after such condemnation and as affected thereby, and such other damages as are provided in this article.

Wisconsin adopted a somewhat different standard. In effect, under the Wisconsin standard the "before and after" test is used but general benefits are not considered. The pertinent portions of the Wisconsin statute read:

> 32.09. In all matters involving the determination of just compensation in eminent domain proceedings, the following rules shall be followed:
>
> * * * * *
>
> (3) Special benefits accruing to the property and affecting its market value because of the planned public improvement shall be considered and used to offset the value of the property taken or damages under sub. (6), but in no event shall such benefits be allowed in excess of the damages described under sub. (6).
>
> * * * * *
>
> (6) In the case of a partial taking, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:
>
> (a) Loss of land including improvements and fixtures actually taken. [balance of sub. (6) omitted.]

The 1963 Kansas statute contains the following pertinent provision:

> Sec. 13. Compensation.
>
> * * * * *

(c) If only a part of a tract of land or interest is taken, the compensation and measure of damages are the difference between the value of the entire property or interest immediately before the taking, and the value of that portion of the tract or interest remaining immediately after the taking.

The proposed New Jersey statute, which we are advised is being redrafted, apparently adopts the existing California scheme of offsetting special benefits to the remaining property against severance damages only.

From the various statutory provisions set out above, it is apparent that the basic approach suggested by the Executive Secretary is the one recommended by the Report of the Select Subcommittee and is the one adopted in most states that have recently revised their eminent domain laws. It is an approach that is consistent with the indemnity theory, assuming that additional compensation will be given for other losses (such as moving expenses) suffered as a result of the condemnation. It has the advantage of simplicity since the appraisers will be comparing market values rather than discussing "special benefits" (a term that has a wide variety of meaning in the various states and is difficult to apply in particular cases) and "severance damages" as separate items of compensation. Instead, the appraisers will be using comparable sales and other valuation approaches to determining the value of the entire parcel before and the remaining portion after. The approach insures that the condemnee will not obtain a windfall and at the same time insures that he will recover the full extent of his loss in market value as a result of the condemnation.

Of course, there are many details that need to be considered in drafting a tentative statute drawn along these lines. We will consider these at subsequent meetings as we proceed to the drafting of a statute on just compensation.

Alternative approaches to valuation. This supplement represents one of those rare instances when the staff is unable to agree upon the best solution to a problem faced by the Commission. The Assistant Executive Secretary suggests that the Commission should adopt the basic approach to be outlined in the Second Supplement to Memorandum 65-74.

Respectfully submitted,

John H. DeMoully
Executive Secretary