

#36

2/13/67

Memorandum 67-21

Subject: Senate Bill No. 253 (Discovery in Eminent Domain Proceedings)

Attached is a copy of the Annual Report which contains the Recommendation on Discovery in Eminent Domain Proceedings.

Also attached as Exhibit I (pink) is a copy of Senate Bill No. 253 (introduced to effectuate this Recommendation), showing the amendments adopted by the Commission at the January meeting.

Attached as Exhibit II (yellow) is an alternative draft of an amendment to Section 1272.02. The staff presents this for Commission consideration. We believe that the alternative draft is a better way of expressing the policy decision of the Commission.

Attached as Exhibit III (green) is a letter from the office of the County Counsel of the County of San Diego. This letter contains a suggested revision of the Comment to Section 1272.04. We have incorporated the substance of this revision in the Report set out as Exhibit IV.

Attached as Exhibit IV (buff) is a draft of a report for the Senate Committee on Judiciary on Senate Bill No. 253. This report contains revised Comments to two sections.

After approval of the amendments to Senate Bill No. 253 and of the draft of the Report of the Senate Committee on Judiciary, we will take the necessary action to have the amendments made and the report adopted.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

SENATE BILL

No. 253

Introduced by Senator Bradley

February 6, 1967

REFERRED TO COMMITTEE ON JUDICIARY

An act to add a chapter heading immediately preceding Section 1237 of, and to add Chapter 2 (commencing with Section 1272.01) to Title 7 of Part 3 of, the Code of Civil Procedure, relating to eminent domain.

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

- 1 SECTION 1. A chapter heading is added immediately pre-
- 2 ceding Section 1237 of the Code of Civil Procedure, to read:
- 3
- 4 CHAPTER 1. EMINENT DOMAIN GENERALLY
- 5
- 6 SEC. 2. Chapter 2 (commencing with Section 1272.01) is
- 7 added to Title 7 of Part 3 of the Code of Civil Procedure, to
- 8 read:

LEGISLATIVE COUNSEL'S DIGEST

SB 253, as introduced, Bradley (Jud.). Eminent domain.
 Adds Ch. heading, and adds Ch. 2 (commencing with Sec. 1272.01), Title 7, Pt. 3, C.C.P.
 Specifies procedures for discovery in eminent domain proceedings.
 Sets time for which demands and cross-demands of valuation data must be made, prescribing the form and contents of such demands.
 Allows Judicial Council to prescribe, by rule, times for serving and filing demands in eminent domain proceedings different from those prescribed in the Code of Civil Procedure.
 Specifies what information shall be contained in the statement of valuation data.
 Requires party who has served and filed a statement of valuation data to give notice if he plans to call prescribed witnesses not listed in his statement of valuation data, or witnesses to testify to data required to be listed in his statement but which was not. Requires that notice be given where information is discovered which was not listed.
 Limits admission to evidence which was required to be, but which was not, listed in the valuation statement.
 Vote—Majority; Appropriation—No; State Expense—No.

CHAPTER 2. DISCOVERY IN EMINENT DOMAIN PROCEEDINGS

1272.01. (a) Not later than 10 days after the memorandum to set has been served and filed, any party to an eminent domain proceeding may serve upon any adverse party and file a demand to exchange valuation data.

prior to the date set for the pretrial conference

(b) A party on whom a demand is served may, not later than 10 days after the service of the demand, serve upon any adverse party and file a cross-demand to exchange valuation data relating to the parcel of property described in the demand.

(c) The demand or cross-demand shall:

(1) Describe the parcel of property upon which valuation data is to be exchanged, which description may be made by reference to the complaint.

(2) Include a statement in substantially the following form: "You are required to serve and file a statement of valuation data in compliance with Sections 1272.01 and 1272.02 of the Code of Civil Procedure not later than 10 days prior to the day set for trial and, subject to Section 1272.05 of the Code of Civil Procedure, your failure to do so will constitute a waiver of the right to introduce on direct examination during your case in chief any matter required to be set forth in your statement of valuation data."

(d) Not later than 10 days prior to the day set for trial, each party who served a demand or cross-demand and each party upon whom a demand or cross-demand was served shall serve and file a statement of valuation data. A party who served a demand or cross-demand shall serve his statement upon each party on whom he served his demand or cross-demand. Each party on whom a demand or cross-demand was served shall serve his statement upon the party who served the demand or cross-demand.

20

~~(e) The Judicial Council may, by rule, prescribe times for serving and filing demands and cross-demands, and a time for serving and filing statements of valuation data, that are different from the times specified in this section, but such rule shall provide that the trial will be held within 35 days from the day on which the statements of valuation data are required by such rules to be served and filed. Such rule may provide for a different form of statement than that specified by paragraph (2) of subdivision (c).~~

deleted

1272.02. The statement of valuation data shall contain:

(a) The name and business or residence address of each person intended to be called as an expert witness by the party.

(b) The name and business or residence address of each person intended to be called as a witness by the party to testify to his opinion of the value of the property described in the demand or cross-demand or as to the amount of the damage or benefit, if any, to the larger parcel from which such property is taken.

1 (c) The name and business or residence address of each
2 person upon whose opinion the opinion referred to in subdivi-
3 sion (b) is based in whole or in substantial part.

4 (d) The opinion of each witness listed as required in sub-
5 division (b) of this section as to the value of the property
6 described in the demand or cross-demand and as to the amount
7 of the damage and benefit, if any, to the larger parcel from
8 which such property is taken and the following data to the
9 extent that the opinion is based thereon:

- 10 (1) The highest and best use of the property.
- 11 (2) The applicable zoning and the opinion of the witness
- 12 as to the probability of any change in such zoning.
- 13 (3) A list of the sales, contracts to sell and purchase, and
- 14 leases supporting the opinion.
- 15 (4) The cost of reproduction or replacement of the existing
- 16 improvements on the property less whatever depreciation or
- 17 obsolescence the improvements have suffered and the method
- 18 of calculation used to determine depreciation.

19 (5) The gross income from the property, the deductions
20 from gross income, the resulting net income, the reasonable
21 net rental value attributable to the land and existing improve-
22 ments thereon, the rate of capitalization used, and the value
23 indicated by such capitalization.

24 (6) If the property is a portion of a larger parcel, a de-
25 scription of the larger parcel from which the property is taken.

26 (e) With respect to each sale, contract, or lease listed under
27 paragraph (3) of subdivision (d):

- 28 (1) The names and business or residence addresses, if
- 29 known, of the parties to the transaction.
- 30 (2) The location of the property subject to the transaction.
- 31 (3) The date of the transaction.
- 32 (4) If recorded, the date of recording and the volume and
- 33 page where recorded.
- 34 (5) The price and other terms and circumstances of the
- 35 transaction. In lieu of stating the terms contained in any con-
36 tract, lease, or other document, the statement may, if the docu-
37 ment is available for inspection by the adverse party, state
38 the place where and the times when it is available for in-
39 spection.

40 1272.03. (a) A party who has served and filed a statement
41 of valuation data shall diligently give notice to the parties
42 upon whom the statement was served if, after service of his
43 statement of valuation data, he:

- 44 (1) Determines to call an expert witness not listed in his
- 45 statement of valuation data;
- 46 (2) Determines to call a witness not listed in his statement
- 47 of valuation data for the purpose of having such witness tes-
48 tify to his opinion of the value of the property described in
49 the demand or the amount of the damage or benefit, if any, to
50 the larger parcel from which such property is taken;
- 51 (3) Determines to have a witness called by him testify on
- 52 direct examination during his case in chief to any data re-

separately listing

as to value, damages, or benefits

and the estimated gross rental
income and deductions therefrom
upon which such reasonable net
rental value is computed

1 quired to be listed in the statement of valuation data but
2 which was not so listed; or

3 (4) Discovers any data required to be listed in his state-
4 ment of valuation data but which was not so listed.

5 (b) The notice required by subdivision (a) shall include
6 the information specified in Section 1272.02 and shall be in
7 writing; but such notice is not required to be in writing if it
8 is given after the commencement of the trial.

9 1272.04. Except as provided in Section 1272.05, if a de-
10 mand to exchange valuation data and one or more statements
11 of valuation data are served and filed pursuant to Section
12 1272.01:

13 (a) No party required to serve and file a statement of valu-
14 ation data may call an expert witness to testify on direct
15 examination during the case in chief of the party calling him
16 unless the name and address of such witness are listed in the
17 statement of the party who calls the witness.

18 (b) No party required to serve and file a statement of valu-
19 ation data may call a witness to testify on direct examination
20 during the case in chief of the party calling him to his opinion
21 of the value of the property described in the demand or cross-
22 demand or the amount of the damage or benefit, if any, to the
23 larger parcel from which such property is taken unless the
24 name and address of such witness are listed in the statement
25 of the party who calls the witness.

26 (c) No witness called by any party required to serve and
27 file a statement of valuation data may testify on direct exami-
28 nation during the case in chief of the party who called him to
29 any data required to be listed in a statement of valuation data
30 unless such data is listed in the statement of valuation data
31 of the party who calls the witness, except that testimony that
32 is merely an explanation or elaboration of data so listed is not
33 inadmissible under this section.

34 1272.05. (a) The court may, upon such terms as may be
35 just, permit a party to call a witness, or permit a witness
36 called by a party to testify to data on direct examination, dur-
37 ing the party's case in chief where such witness or data is
38 required to be, but is not, listed in such party's statement of
39 valuation data if the court finds that such party has made a
40 good faith effort to comply with Sections 1272.01 and 1272.02,
41 that he has complied with Section 1272.03, and that, by the
42 date of the service of his statement of valuation data, he:

43 (1) Would not in the exercise of reasonable diligence have
44 determined to call such witness or discovered or listed such
45 data; or

46 (2) Failed to determine to call such witness or to discover
47 or list such data through mistake, inadvertence, surprise, or
48 excusable neglect.

49 (b) In making a determination under this section, the court
50 shall take into account the fact that the opposing party may
51 have relied upon the statement of valuation data and will be

1 prejudiced if the witness is called or the testimony concerning
2 such data is given.
3 1272.06. The procedure provided in this chapter does not
4 prevent the use of other discovery procedures or limit the
5 matters that are otherwise discoverable in eminent domain
6 proceedings.
7 1272.07. Nothing in this chapter makes admissible any evi-
8 dence that is not otherwise admissible or permits a witness to
9 base an opinion on any matter that is not a proper basis for
10 such an opinion.

EXHIBIT II

Alternative Amendment of Subdivisions (b) and (d)
of Section 1272.02

1272.02. The statement of valuation data shall contain:

(a) The name and business or residence address of each person intended to be called as an expert witness by the party.

(b) The name and business or residence address of each person intended to be called as a witness by the party to testify to his opinion as to any of the following matters:

(1) ~~of the~~ The value of the property described in the demand or cross-demand.

(2) ~~ex-as-to-the~~ The amount of the damage ~~or-benefit~~, if any, to the larger parcel from which such property is taken.

(3) The amount of the benefit, if any, to the larger parcel from which such property is taken.

(c) The name and business or residence address of each person upon whose opinion the opinion referred to in subdivision (b) is based in whole or in substantial part.

(d) ~~The opinion of~~ With respect to each witness listed as required in subdivision (b) ~~, of this section as to the value of the property described in the demand or cross-demand and as to the amount of the damage -- and benefit, if any, to the larger parcel from which such property is taken~~ a statement as to whether the witness has an opinion as to each of the matters listed in subdivision (b) and as to each such matter upon which he has an opinion, the following data to the extent that the opinion on such matter is based thereon:

[No change in remainder of section except for revision of subdivision (d)(5)]



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February 3, 1967

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

Re: Discovery in Eminent Domain Proceedings

At the January meeting of the Law Revision Commission you suggested that we submit a proposed revision of the comment to Section 1272.04, paragraph two, as set forth in the California Law Revision Annual Report, December 1966, page 28. Accordingly, it is our suggestion that said paragraph be amended to read as follows:

"It should be noted that nothing in Section 1272.04 precludes a party from calling a witness on rebuttal or having a witness testify concerning valuation data on rebuttal that is otherwise proper. (San Francisco v. Tillman Estate Co. [1928] 205 Cal. 651.) The section limits only the calling of a witness or testimony concerning valuation data on direct examination during his case in chief. Thus, ~~a party is free to call additional witnesses or to use valuation data not listed in his valuation statement where it is necessary to do so in order to rebut the other party's contentions.~~ A party also is free to bring out additional valuation data on redirect examination where it is necessary to meet matters brought out on the cross-examination of his witness even though such valuation data was not listed in his statement."

We believe the addition of the underlined material in the first sentence and the deletion of the second sentence would make crystal clear the Commission's intent that a party would

John H. DeMouilly

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not be able to "sandbag" by producing valuation witnesses on rebuttal contrary to the rule of the Tillman case, supra.

Very truly yours,

BERTRAM McLEES, JR., County Counsel

By

David B. Walker
DAVID B. WALKER, Deputy

DBW:KIG

EXHIBIT IV

DRAFT OF REPORT FOR SENATE COMMITTEE ON JUDICIARY

REPORT OF SENATE COMMITTEE ON JUDICIARY ON SENATE BILL NO. 253

In order to indicate more fully its intent with respect to Senate Bill No. 253, the Senate Committee on Judiciary makes the following report.

Except for the revised comments set out below, the comments contained under the various sections of Senate Bill No. 253 as set out in the Recommendation of the California Law Revision Commission Relating to Discovery in Eminent Domain Proceedings, contained on pages 19-29 of the Annual Report of the California Law Revision Commission (December 1966) reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Senate Bill No. 253.

The following revised comments to various sections of Senate Bill No. 253 also reflect the intent of the Senate Committee on Judiciary in approving Senate Bill No. 253.

Section 1272.01

Comment. Section 1272.01 provides a procedure to facilitate a simultaneous exchange of valuation data in eminent domain cases. The procedure is not mandatory; it applies only if it is invoked by a party to the proceeding. The procedure does not prevent the use of other discovery procedures. See Section 1272.06.

Section 1272.04

Comment. The sanction provided by Section 1272.04 is necessary to insure that the parties will make a good faith exchange of the statements of valuation data. Under exceptional circumstances, the court is authorized to permit the use of a witness or of valuation data not included in the statement. See Section 1272.05 and the Comment to that section.

Section 1272.04 limits only the calling of a witness, or the presentation of testimony concerning valuation data on direct examination, during the case in chief of the party calling the witness or presenting the testimony.

~~It should be noted that~~ Nothing in Section 1272.04 precludes a party from calling a witness on rebuttal or having a witness testify concerning valuation data on rebuttal. ~~the section limits only the calling of a witness or testimony concerning valuation data on direct examination during his case in chief. Thus, a party is free to call additional witnesses or to use valuation data not listed in his valuation statement where it is necessary to do so in order to rebut the other party's contentions. A party also is free to bring out additional valuation data on redirect examination where it is necessary to meet matters brought out on the cross-examination of his witness even though such valuation data was not listed in his statement.~~

that is otherwise proper. See San Francisco v. Tillman Estate Co., 205 Cal. 651, 272 Pac. 585 (1928). No does the section preclude a party from bringing

The court should exercise diligence to confine a party's rebuttal case and his redirect examination of his witnesses to their purpose of meeting matters brought out during the adverse party's case or cross-examination of his witnesses. A party should not be permitted to defeat the purpose of this chapter by reserving witnesses and valuation data for use in rebuttal where such witnesses should have been used during the case in chief and such valuation data presented during direct examination.