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Memorandum 68-5

Subject: Study 65 - Inverse Condemnation (Exploratory Surveys and Investigations)

This memorandum is concerned with the last portion of Part III of the research study on inverse condemnation (pages 103-108, dealing with exploratory surveys and investigations).

At this time, the Commission need only determine the broad general policy that should apply to the matters discussed in this memorandum. At subsequent meetings, the staff will present drafts of statutes designed to carry out those general policy decisions and, at the same time, various details of policy will be presented for Commission determination.

Many California statutes authorize public officers, in the performance of their duties to enter private property for the purpose of inspection, examination, or survey. Exhibit I (pink pages) includes a list of many of these statutes.

As long as the public employee remains within the scope of the authorization under which the entry was made, and acts with reasonable care and in good faith, neither he nor the employing entity are responsible in tort. See Exhibit II (yellow page) for the pertinent section of the Governmental Liability Act. However, the public entity apparently is liable under inverse condemnation law for substantial damages to the private property (as distinguished from de minimis damages which are noncompensable).

It is suggested that a general statutory provision is needed to codify the rule that a public entity is liable for actual damages to private property as a result of an injury caused by a public employee, acting within the scope of his employment, whose entry on the property was expressly or impliedly authorized by law, but that no liability exists for interference with private property rights that are slight in extent, temporary in duration, and de minimis in amount. This proposed rule should apply not only where the property is being examined to determine whether it is suitable for public acquisition but also where the entry is made for the purpose of enforcing regulatory legislation.

It is also suggested that the law relating to when a public entity may enter on property being considered for public acquisition and the consequences of such entry should be codified and clarified. The general statutes on this subject are Code of Civil Procedure Sections 1242 and 1242.5 which are set out in Exhibit III (green). The following general propositions are presented for Commission consideration:

1. Where the entry and survey is not likely to cause significant private detriment, a public entity or other person with power to condemn land for a particular purpose should be authorized to enter upon the land to make an exploratory survey to determine the suitability of the land for that purpose. This is the rule stated in Section 1242.

2. Where the entry and survey is likely to cause significant private detriment, a public entity or other person authorized to condemn the land should be required to obtain a court order permitting the entry and survey in accordance with the procedure provided in Section 1242.5 as suggested to be modified.

3. The scope of Section 1242.5 should be expanded to cover entries for any purpose for which the land could be acquired by condemnation. Since the section would apply only where the entry and survey is likely to cause significant private detriment (recommendation 2), the court order procedure provided by Section 1242.5 would not be required where the survey could be made without major interference with ownership rights or significant physical injury to the land.

4. The procedure provided by Section 1242.5 should apply only where the owner's consent cannot be obtained. To make it easier to obtain such consent, the section should require the entity at its sole expense to repair and restore the property, so far as possible, after the survey is concluded and, in addition, to compensate the owner for damages incurred by reason of its inability to fully restore the premises to their previous condition. The entity should also be authorized to pay the owner a reasonable amount as compensation for prospective apprehension and annoyance (in addition to assurance of payment of actual damages).

5. In cases covered by Section 1242.5, entry should be permitted only pursuant to a court order made after a noticed hearing.

6. The court should fix a deposit in the amount of the estimated damages and the statute should permit the owner to have the deposit increased where it appears that the deposit has become inadequate. Probably, the deposit procedure applicable to orders for possession before judgment could be adapted for use in these cases.

7. The court should be authorized to investigate the techniques of exploration and survey that are contemplated and to impose reasonable

limitations and restrictions in the interest of reducing the prospective damages or requiring utilization of the least detrimental techniques where alternatives are technologically feasible.

8. Where the condemnor fails to invoke the statutory procedure, whether inadvertently or by design, the property owner should be permitted to initiate proceedings to require a deposit and court supervision.

9. Other ambiguities in the section should be eliminated and certain procedural details improved. These will be suggested in the draft of the statute prepared by the staff to carry out the Commission's determinations on the basic policy questions outlined above.

Respectfully submitted,

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Executive Secretary