

36

2/27/68

Memorandum 68-31

Subject: Study 36 - Condemnation (Fees on Abandonment)

In view of the objections of the League of California Cities, the Attorney General, and the Department of Public Works, Assemblyman Bear requested that the Assembly Judiciary Committee reschedule the hearing on Assembly Bill No. 41 to March 18 (after the Commission's March meeting). This will permit the Commission to consider the bill further and to determine whether any changes are needed.

Briefly stated, the bill makes the following changes in existing law:

(1) Under existing law, attorneys' fees may be recovered without regard to when the proceeding is abandoned and may be recovered whether the services are rendered before or after the filing of the complaint. The bill makes no change in this rule but does make it clear that the fees must be reasonably and necessarily incurred.

(2) Under existing law, fees for other experts may be recovered whether the services are rendered before or after the filing of the complaint, but only if the action is dismissed 40 days or more prior to the date set for the pretrial conference or the date set for trial if no pretrial conference is held. The bill deletes the 40-day limitation on recovery but makes no other changes in the existing law other than to make it clear that the fees must be reasonably and necessarily incurred.

(3) Under existing law, expenses necessarily incurred in preparing for trial and during trial are recoverable only if the action is dismissed 40 days or more prior to the date set for the pretrial conference

or the date set for trial if no pretrial conference is held. The bill deletes the 40-day limitation but makes no other changes in existing law except to make it clear that the expenses must be reasonably and necessarily incurred.

It is important to keep in mind the limited situation to which the bill applies. First, the bill does not apply unless a condemnation action is commenced. Second, the bill does not apply if the action is not dismissed. Thus, the bill applies only where an action is actually commenced and later dismissed. In this limited situation, the bill seeks to compensate the property owner for his actual out-of-pocket expenses.

The public agencies make two basic objections. First, they object to permitting the recovery of attorneys' and other experts' fees for services rendered (a) before the complaint is filed, or (b) before the resolution of intention to acquire the property is adopted, or (c) before the property owner is contacted by the public agency and advised that the agency intends to acquire his property. The agencies vary in their views as to which of these time limitations would be more appropriate. The agencies fear that property owners will incur attorneys' fees and experts' fees merely because the public agency is holding hearings and discussing a particular public improvement and before the public agency determines to go ahead with the improvement. They fear that the limitation that the fees must be "reasonably and necessarily incurred" will not be applied by the courts to preclude the recovery of fees for services incurred where the project is merely in its preliminary discussion stage.

The public agencies also object to recovery of attorneys' fees for services rendered by the attorney in attempting to dissuade the public agency from taking the property at all. If the attorney is successful in his effort to persuade the public agency to abandon the project and to dismiss the action, the public agencies believe that no fees should be recoverable for services rendered in that connection.

With respect to the first objection, it should be noted that the objection goes to existing law. Under existing law, the reasonable fees for attorneys and expert witnesses may be recovered for services rendered before the complaint is filed. The bill would retain the existing rule on attorneys' fees without change and would merely make the existing rule on fees for experts applicable in cases where it does not now apply--i.e., cases where the proceeding is dismissed more than 40 days before trial or pretrial conference. The staff is not persuaded that any change should be made in the bill. See the language quoted from the California Supreme Court in the recommendation. Possibly, some revision of the Comment should be made.

There may be more merit to the second objection. Under existing practice, some trial courts allow attorneys' fees for services rendered in attempting to persuade the public agency to abandon the project or not to take the particular property for the project; other courts will not allow attorneys' fees for such services. And, of course, there is often a close factual question whether the services rendered were calculated to "defend the property owner's interests in the proceeding" (recoverable) or to "defeat the taking" (non-recoverable). If public agencies would approve the bill, it might be appropriate to add to

subdivision (c) the substance of the following additional sentence:

Attorneys' fees may not be recovered under this subdivision for services rendered in an effort to persuade the plaintiff (1) to dismiss the proceeding, or (2) not to commence the proceeding, or (3) not to take the defendant's property, or (4) not to undertake the project for which the property was sought to be taken.

It should be noted that the bill as proposed already contains one provision beneficial to public agencies--the one relating to partial abandonment.

Respectfully submitted,

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Executive Secretary