

4/2/68

## Memorandum 68-42

Subject: Study 65 - Inverse Condemnation (Entry for Survey or Examination)

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

At this time, the Commission should consider the policy questions raised by the research study and this Memorandum with a view to determining the approach to be taken to this portion of the subject. At a subsequent meeting, the staff will present drafts of statutes designed to effectuate that approach and to raise problems of detail.

Background

As the research study points out, many California statutes authorize public officers, in performance of their duties, to enter private property to conduct inspections, examinations, surveys, and the like.<sup>1</sup> Exhibit I (pink pages), taken from the Commission's research study on sovereign

<sup>1</sup> The application of these provisions is affected by recent decisions of the Supreme Court of the United States. In Camarra v. Municipal Court of San Francisco, 387 U.S. 523 (1967), the Court held that administrative searches of private residences by building inspectors without a warrant and over the objection of the occupant are prohibited by the Fourth Amendment (searches and seizures) made applicable to the states by the Fourteenth Amendment. In See v. City of Seattle, 387 U.S. 541 (1967), the rule was extended to those portions of commercial premises that are not open to the public. The See case seemed to recognize an exception as to licensed enterprises or activities. This exception was recently invoked by a California court to sustain an entry. In People v. White, 259 A.C.A. Supp. 310 (Feb. 1968), the court sustained Health and Safety Code Section 1419 ("Any officer, employee, or agent of the State Department of Public Health may enter and inspect any building or premises at any reasonable time to secure compliance with, or to prevent a violation of, any provision of this chapter."). The decision approved entry by an investigator into a privately owned convalescent hospital to search for violations.

immunity, includes lists of most of these statutes. It must be borne in mind, however, that there are other and oblique statutory provisions that do not expressly authorize entry upon private property but that do impose duties upon public officers that, in the nature of things, cannot be effectively performed without such entry. In connection with the material from the sovereign immunity study (Exhibit I), it should also be noted that several of the statutes mentioned there were amended in connection with enactment of the California Tort Claims Act of 1963 and therefore no longer present some of the problems discussed in Exhibit I.

As long as the public employee remains within the scope of the authorization under which entry upon private property is made, neither he nor the employing public entity is liable in tort. Exhibit II (yellow page) is the pertinent section of the Tort Claims Act. In connection with that section, the public entity itself gains an immunity through Government Code Section 815.2(b) which provides that, "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

Notwithstanding this immunity from tort liability for the entry itself, the public entity presumably is liable for "inverse condemnation" (and also is subject to preventive relief) for any activity other than "such innocuous entry and superficial examination . . . as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property" (from the Jacobsen case discussed in the research study). It may be that Government Code Section 821.8 (Exhibit II) is ambiguous in immunizing the officer from

liability "for an injury arising out of his entry upon any property" in view of the numerous statutes that authorize not only entry but investigation, survey, examination, and the like. Presumably the section means, as the consultant suggests, that the employee is immune from liability for "innocuous entry" and "superficial examination"; that an additional immunity is conferred by case law in connection with the statutory provisions authorizing examination, investigation, and survey where the interference with property rights is slight in extent, temporary in duration, and de minimis in amount; but that for more extensive or intensive interference with property, the public entity is liable for inverse condemnation. In any event, the Tort Claims Act does not resolve this problem of liability in inverse condemnation for investigation, examination, or survey beyond "innocuous entry" and "superficial examination." The most that the act does in this connection is to subject such claims to the claims-filing and other procedural limitations of the act.

### Recommendation

The staff has examined the statutes mentioned in Exhibit I (pink pages) and believes that the feasible statutory approach to the problems is to distinguish between (1) those cases and authorizations which involve the substantial possibility of significant damage to property or interference with the use, possession, and control of the owner and (2) those cases and authorizations which do not. In short, a mere entry for a regulatory inspection presents no problems that can be rectified within the feasible confines of the law of condemnation or inverse condemnation. On the other hand, such an exploration as drilling, boring, use of machinery, and the like should be compensated whether the entity contemplates acquisition of the property or not. The staff concludes that three distinct statutory changes would be appropriate and would carry out the recommendations of the consultant.

#### I. Amendment of the Tort Claims Act

The Tort Claims Act should be amended, probably by adding a new Government Code Section 815.7, to recognize liability on the part of public entities for (1) actual damage to private property and (2) substantial interference with the use, possession, and control of the owner that results from surveys, explorations, inspections, examinations, tests, drillings, soundings, or appraisals. This proposed section would apply not only where the property is being investigated to determine its suitability for public acquisition, but also where the investigation is made for another purpose. For example, the rule of liability should be broad enough to include substantial surveys or

investigations by the water districts and similar districts (see the extensive list of statutes in Exhibit II) whether the entity does or does not contemplate acquisition of the property entered.

This proposed section would necessarily have to include an exception from liability for cases in which the interference with the private property is, to quote the consultant, "slight in extent, temporary in duration, and de minimis in amount." The statute should not even suggest liability for entry and inspection for the purpose of enforcing routine regulatory provisions such as those set forth on pages 4 and 5 of Exhibit I (pink pages).

This approach would make it unnecessary to amend the many statutes that authorize entry and investigation. In other words, the section would merely clarify the rule of liability and would not entail clarification of what may or may not be done under the existing statutory authorizations. With the exception of one or two statutes which mention the matter of damages, it would be unnecessary to amend any of the particular statutes.

## II. The General Right of Entry for Surveying and Appraising Property to Be Acquired for Public Use

A section should be prepared for inclusion in the Commission's recommended recodification of Title 7 of Part 3 of the Code of Civil Procedure (eminent domain) that would authorize the employees of the condemnor to enter upon land that is being considered for acquisition and to examine, survey, and make maps of that land. The existing statutes on this subject are Code of Civil Procedure Sections 1242 and 1242.5, which are set out as Exhibit III (green page). The new

section would replace Section 1242.<sup>2</sup>

Section 1242, of course, applies to all acquisition for public use, but its authorization, in accordance with the Jacobsen case, is limited to "innocuous entry" and "superficial examination" of the property. In other words, it does not authorize substantial injury to the property or significant interference with the rights of the owner. On the other hand, Section 1242.5 is limited to takings by public entities "for reservoir purposes" and presumably contemplates at least the possibility of compensable damage to the property owner.

The staff suggests that it is feasible to distinguish between cases in which the entry and examination are likely to cause significant damage or detriment and those cases in which such entry and survey are not likely to do so. Section 1242 has been in the code since 1872 and its application has been sustained notwithstanding the constitutional admonition that property not be taken or "damaged" until condemnation proceedings are begun and compensation is "first made to or paid into court for the owner" (Section 14 of Article I). Presumably it would be poor policy to deny, fetter, or create even the illusion of a requirement of compensation for simple entry, survey, and map making.

Statutes similar to Section 1242 are included in most of the condemnation laws of other states. However, in recent years, there has been a tendency to add an express requirement that any "actual damages" sustained by the owner be compensated. The pertinent section of the

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The requirement that the improvement be properly located--an element of the requirement of "public necessity"--should be removed to subdivision (2) of Section 1241.

recently enacted Pennsylvania Eminent Domain Code is attached as Exhibit IV (gold page).

Codification and clarification of Section 1242 would present no significant problems in connection with other statutory provisions. There are approximately 40 district laws (which have been collected by the staff) which simply repeat, sometimes with incidental variation, the authorization to enter and survey that is already conferred by Section 1242. These should simply be eliminated. There are, however, approximately the same number of district laws that authorize surveys, investigations, measurements, analyses, studies, and inspections that are not necessarily related to any contemplated acquisition of the property. These should be left in existence and the liability, if any, arising under them should be determined under the proposed additional section of the Tort Claims Act.

### III. Providing a Deposit and Compensation Procedure for Substantial Explorations

Section 1242.5 should be replaced by a much more general section that would make the deposit procedure available to all cases of acquisition for public use. However, application of the new section should be limited to situations in which there is at least a likelihood of substantial damage to the property or significant interference with the rights of the owner.

Section 1242.5 was added in 1959 presumably in recognition of the need for more intensive examinations (drillings and the like) in reservoir cases and, also presumably, to overcome the limitations imposed by the Jacobsen case.

The limitation of Section 1242.5 to takings "for reservoir purposes" causes the section to bear a superficial resemblance to "immediate possession" (such possession is limited to takings by certain public entities for "rights of way" or "lands for reservoir purposes"). There is no connection, however, as immediate possession is available only upon filing of the condemnation proceeding.

The Commissioners who have worked on or read the tentative recommendation on "possession prior to final judgment" will recognize the similarities between the problems of working out an appropriate "immediate possession" procedure and those of devising appropriate procedures for inclusion in Section 1242.5.

The only appellate decision that has arisen under Section 1242.5 is City of Los Angeles v. Schweitzer. That decision illustrates the operation of the existing statute and a copy of it is attached as Exhibit V (blue pages).

There is a considerable variety in the particular procedures and features that could be included in the revision of Section 1242.5. And, if the Commission's experience in connection with "immediate possession" is any indication, these features and procedures will be controversial. The approach recommended by the staff would be as follows:

1. In scope, the section should apply whatever the character of the condemnor or the purpose of the acquisition, but it should be expressly limited to cases in which (i) there is at least the likelihood of compensable damage to property or significant interference with the possession and control of the occupant and (ii) the potential condemnor is unable to obtain appropriate consent to enter, survey, and explore.

2. In connection with this inability to obtain appropriate consent, the section should probably expressly authorize any condemnor to (i) enter into an agreement for a right of entry, survey, and exploration in cases in which there is a likelihood of substantial detriment, to agree to repair and restore the property, and to compensate the owner for any damages incurred. The provision would at least have the effect of authorizing the expenditure of public funds for that purpose.

3. The application to the court for the order should be made upon notice to the property owner and the order should be granted after a hearing at which the property owner can raise the need for the exploration, any reasonable conditions to be imposed, and the amount of the deposit. As an alternative, the section might specify that the order can be obtained on ex parte application, but must be served upon the owner and occupant a specified number of days prior to the entry, and that in the interim the owner may move the court for a modification of the order or a change in the amount of the deposit.

The Commission was not able to completely resolve this problem in connection with "immediate possession" and in its tentative recommendation on that subject effected a compromise by requiring a noticed hearing in certain cases and only an opportunity for modification in others. (See proposed Sections 1269.01 and 1269.02 in that tentative recommendation.)

4. The court should be authorized to inquire into the nature and extent of the exploration and to impose reasonable limitations and restrictions.

5. The last paragraph of Section 1242.5 should be clarified as to the eventual disposition of the amount on deposit and should distinguish

between cases in which a condemnation proceeding is brought within the specified period and those in which such a proceeding is not begun. In cases in which a condemnation proceeding is begun respecting the property or any portion of it, disposition of the fund would be a simple matter. The damages, if any would be assessed in the condemnation proceeding and, as the last sentence of the section now seems to suggest, the fund would be disbursed as an amount on deposit upon the entry of judgment in the proceeding.

Disposition of the fund in a case in which no condemnation proceeding is begun presents a greater problem. The existing language seems to contemplate that either the fund be returned to the condemnor or that, to obtain any damages, the landowner must begin a suit for damages. The staff suggests that the court be expressly authorized on motion or application of the property owner to assess any damages and to determine costs and fees and to order distribution of the fund accordingly. Such a procedure is now provided, in connection with discontinuance of a condemnation proceeding after possession is taken, in subdivision (d) of Code of Civil Procedure Section 1255a. For the eventuality that the property owner believes that the amount on deposit will not compensate him for his damages and expenses, the section should also provide that, if a suit for such damages is begun by the property owner, the amount on deposit shall simply serve as a security deposit in that proceeding.

Respectfully submitted,

Clarence B. Taylor  
Assistant Executive Secretary

EXHIBIT II

GOVERNMENT CODE §821.8

**§ 821.8** Entry upon property. A public employee is not liable for an injury arising out of his entry upon any property where such entry is expressly or impliedly authorized by law. Nothing in this section exonerates a public employee from liability for an injury proximately caused by his own negligent or wrongful act or omission. (Added Stats.1963, c. 1681, p. 3270, § 1.)

Law Revision Commission Comment

This section expresses a principle contained in a large number of statutes scattered through the codes providing particular public employees with a similar immunity. The section nullifies the common law rule that a public employee who enters property under authority of law but then commits a negligent or wrongful act is a trespasser ab initio and liable for all damages resulting from his entry.

EXHIBIT III

CODE OF CIVIL PROCEDURE

§1242. Preliminary Location and Survey.—In all cases where land is required for public use, the State, or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of Section 1247. The State, or its agents in charge of such public use, may enter upon the land and make examinations, surveys, and maps thereof [1]. Leg.H. 1872, 1963 ch. 1681.

§1242. 1963 Delete. 1, and such entry shall constitute no cause of action in favor of the owners of the land except for injuries resulting from negligence, wantonness, or malice

Anno. CCP 1242: 17 Cal.J.2d 745-746; 18 Cal.J.2d 15, 36, 50.

McK.D. Em. Dom. §132.

Forms CCP 1242: Cal. P&A, Em. Dom., p. 21.

§1242.5. Exploration and Survey of Land for Reservoir Purposes.—In any case in which the State, a county, city, public district, or other public agency in this State has the power to condemn land for reservoir purposes, and desires to survey and explore certain property to determine its suitability for such purposes, and in the event such agency is unable by negotia-

tions to obtain the consent of the owner to enter upon his land for such purposes, the agency may undertake such survey and exploration by complying with the requirements of this section. It shall petition the superior court for permission to undertake such survey and exploration. The court shall ascertain whether petitioner in good faith desires to enter the land for this purpose, and, if it determines this issue in the affirmative, shall require that petitioner deposit with the court cash security in an amount sufficient to compensate the landowner for any damage resulting from the entry, survey, and exploration. Upon deposit of such security, the court shall issue its order granting permission for such entry, survey, and exploration.

The court shall retain such cash security for a period of 90 days following the termination of the entry, survey, and exploration activities or until the end of any litigation commenced during that period relating to such entry, survey and exploration activities and shall award to the landowner out of the cash security on deposit an amount equal to that necessary to compensate him for any damage caused by the State, county, city, public district, or other public agency while engaged in survey and exploration on his property as well as for any costs of court and reasonable attorney fees, to be fixed by the court, incurred in the proceeding before the court. Any suit for damages by a landowner under this section shall be governed by the applicable provisions of Part 2 of the Code of Civil Procedure. Such cash security shall be held, invested, deposited, and disbursed in the manner specified in Section 1254 of the Code of Civil Procedure, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that section. Leg.H. 1959 ch. 1865.

Anno. CCP 1242.5: 53 Cal.J.2d 72.  
W.S. Constitutional Law §216.

EXHIBIT IV  
(Pennsylvania Eminent Domain Code)

Section 409. Right to Enter Property Prior to Condemnation.—Prior to the filing of the declaration of taking, the condemnor or its employes or agents, shall have the right to enter upon any land or improvement which it has the power to condemn, in order to make studies, surveys, tests, soundings and appraisals, provided that the owner of the land or the party in whose name the property is assessed has been notified ten days prior to entry on the property. Any actual damages sustained by the owner of a property interest in the property entered upon by the condemnor shall be paid by the condemnor and shall be assessed by the court or viewers in the same manner as provided in section 408.

Comment:

This section is derived from existing statutes which authorize condemnors to enter upon any lands in order to make surveys. See the State Highway Law, 1945, June 1, P. L. 1242, Art. II, §205 (36 P. S. §670-205); the Second Class County Code, 1953, July 23, P. L. 723, Art. XXVI, §2603 (16 P. S. §5603). This section broadens the powers of condemnors by authorizing preliminary entry for studies, tests, soundings and appraisals as well as for surveys. The provision making the condemnor liable for any actual damages sustained by the owner by reason of the entry is new. It is intended that the condemnor should pay for any such damages where entry is made.

[Note: Section 408 provides for assessment of damages on abandonment of a condemnation proceeding.]