

# 65

4/3/68

Memorandum 68-43

Subject: Study 65 - Inverse Condemnation (Discriminatory Enforcement of Building and Safety Codes)

One portion (pages 70-80) of the research study on inverse condemnation is concerned with the enforcement of building and safety codes by cities and counties. Under the existing scheme of things, of course, there is no connection between this enforcement and liability in inverse condemnation. In other words, the legislation providing for such codes does not contemplate the payment of money to property owners in connection with any enforcement technique. And, a successful contention by the property owner that the proposed action would involve "inverse condemnation" does not lead to his receipt of any money, but rather to invalidation of the proposed action.

The consultant makes a number of recommendations (that should be carefully considered) which would not involve any liability in inverse condemnation but would require substantial revision of the pertinent state legislation. Among other things, the consultant recommends that statutory guidelines be formulated to provide statewide uniformity of policy in the enforcement of building and safety codes; that the powers of public entities and the rights of property owners be clarified; that there be established a more rational classification of the particular requirements of the codes and of the sanctions available to enforce the particular requirement; and that a more flexible choice of alternatives be given the property owner in his efforts to conform to the standards.

Although the staff is aware that the requirements and enforcement of the building and safety codes represents a significant contact between government and private property, we do not believe that it would be

desirable at this time for the Commission to undertake formulation of legislation to implement the consultant's general recommendations. In general, the staff believes that the Commission should assign a higher priority to those areas of law in which a possible remedy might be found in the law of inverse condemnation or condemnation law and procedure, rather than by revision of the body of regulatory law concerned.

At pages 77-78 of the research study, the consultant raises one problem that might be susceptible to special treatment. He mentions that, in connection with the enforcement of building and safety codes, a city or county has at least the power to engage in the vigorous and discriminatroy enforcement of such codes to reduce the cost of condemnation of private property scheduled for acquisition for public purposes. In the simplest case, the city or county may obtain the demolition of a substandard building and thereafter acquire the land without paying the cost of the building. As the consultant notes, this problem has been dealt with in only two appellate decisions. One of the decisions expresses the view that this seeking of a demolition order while acquisitive plans are in progress "would come perilously close to passing fair bounds of limitation of the police power."<sup>1</sup> In the other decision, the court sees no inconsistency in vigorous enforcement of the building codes in an area marked for subsequent redevelopment.<sup>2</sup>

The consultant's specific suggestion (page 78) is that the demolition of any building be taken into account in the subsequent condemnation proceeding if the property owner can show that there was, in effect, a connection between the obtaining of the demolition order and the intention to acquire the property.

There are at least two larger contexts in which the limited problem can be placed. These are (1) the general problem of "pre-condemnation" and (2) the several problems inherent in the concerted use of the police power and the power of eminent domain.

The Commission has previously wrestled with the problem of "pre-condemnation" in connection with its work on the date of valuation. The portion of its tentative recommendation (Possession Prior to Final Judgment and Related Problems) on "Changes in Market Value Before the Date of Valuation" and the proposed revision of Code of Civil Procedure Section 1249 are attached as Exhibit I (pink pages). Although the proposed change in subdivision (a) of Section 1249 would eliminate the effect on "market value" of "any preliminary actions on the part of the condemnor relating to the taking or damaging of the property," the change would not be of any benefit to the property owner whose building has been demolished in anticipation of acquisition for public purposes. Nonetheless, the approach taken by the Commission in its revision of Section 1249 is generally consistent with the approach recommended by the consultant to this particular problem.

Enforcement of building codes is not the only exercise of the police power that is sometimes questioned in connection with related exercises of the power of eminent domain. In one widely noted California decision,<sup>3</sup> for example, the appellate court upheld the "freezing" of building permits for a period of one year in an area marked for redevelopment. Similarly, a municipality may withhold subdivision approval to further its acquisitive intentions, but it has been held that in this case it may be possible for the property owner to show that his land is available and adaptable for subdivision purposes notwithstanding his inability to gain subdivision approval.<sup>4</sup>

The only well developed line of these cases deals with zoning. These decisions seem to establish the propositions that, if the zoning is imposed "in bad faith" and in order to reduce the costs or otherwise facilitate subsequent condemnation of the property, the zoning ordinance may be invalidated or, in the condemnation proceeding, the property may be shown to be adaptable and valuable for a prohibited use.

The staff is aware of one interesting development in this area. The San Francisco Bay Development and Conservation Commission is charged with rendering its report and recommendation on "saving the Bay" to the next session of the Legislature. One of the major research contracts let by that commission was for an exploration of the police power techniques available in the effort to "save the Bay." However, that commission also contemplated recommending the massive acquisition of property by the affected units of local government. This raised the problem of the relationship between exercises of the police power and related condemnation proceedings. In other words, the commission is concerned about such problems as the result that would obtain if, as a result of a general plan, land is first zoned as a "wild life refuge" or "salt extraction area" and then is acquired by eminent domain. That study is not now available, but it will be before the year's end, and perhaps it will shed light on some of these problems.

The staff recommends that the Commission not undertake at this time the drafting of a particularized provision that would implement the consultant's recommendation on the discriminatory enforcement of building codes.

Rather, the staff suggests that the problem be deferred until the consultant's work on zoning, subdivision control, and other police power techniques is completed. It might then be possible to draft a provision that would require the taking into account in the condemnation proceeding of the adverse effects of these various exercises of the police power.

Respectfully submitted,

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Footnotes Memorandum 68-43

1. *Armistead v. Los Angeles*, 152 Cal. App.2d 319, 313 P.2d 127 (1957) at 325:

It is stated in the briefs that this demolition order is part of a program of the city to raze a large number of buildings in this vicinity. Reference to the vicinity is sometimes made as a "rehabilitation area"; reference to the program is sometimes made as a "slum clearance project."

There is no evidence in this particular record to support this statement.

But if this statement be true we would come perilously close to passing fair bounds of limitation of the police power.

2. *Yen Eng v. Los Angeles*, 184 Cal. App.2d 514; 7 Cal. Rptr. 564 (1960) at 521:

However, it is not the province of this reviewing court in this case to consider the cautiously disclosed hope of appellants that with property in the Bunker Hill area being taken for an extensive community redevelopment project that if they can keep their building from falling down or burning until condemnation proceedings are instituted they might receive an award of money in payment for a structure which under the present judgment they must at their own expense demolish and remove. We find no comment by appellants on the danger to the lives, persons and property of their tenants and others in case of collapse or fire in the intervening time.

3. *Hunter v. Adams*, 180 Cal. App.2d 511 (1960); noted 50 Cal. L. Rev. 549 (1961).
4. See *Buena Park School Dist. v. Metrim Corp.*, 176 Cal. App.2d 255 (1959).

## EXHIBIT I

**Changes in Market Value Before the Date of Valuation**

It is generally recognized that announcement of a public improvement may cause property to fluctuate in value before any eminent domain proceedings are begun. Existing California statutes do not deal with the problem. Case law establishes, however, that any increase in the value of the property that directly results from the improvement itself is not to be considered in arriving at the compensation to be made for the property. Decisions as to the treatment of any decrease in value are uncertain. Notwithstanding the rule as to increases in value, demands by property owners that alleged decreases in value be considered have most frequently been denied. The reason commonly given is that any attempt to determine the existence or amount of such a decrease would be to engage in "unfathomable speculation." As recognized by recent cases, however, the injustice to the property owner is clear if general knowledge of the proposed improvement has actually depreciated the market value of the property prior to the date of valuation. Equitably, the amount awarded to the owner should be equivalent to what the market value of the property would have been on the date of valuation but for the proposed improvement's influence on the market. Such influence can be shown by expert testimony and by direct evidence as to the general condition of the property and its surroundings as well where the value is depressed as where the value is enhanced.

The Commission therefore recommends that a uniform rule for increases and decreases be established by statute. The statute should provide that "market value" on the date of valuation means such value unaugmented by any increase and undiminished by any decrease in such value resulting from (1) the public use to which the property is to be devoted, (2) the public improvement or project for which it is being taken, (3) the eminent domain proceeding itself, or (4) any preliminary actions on the part of the condemnor related to the taking or damaging of the property.

\* \* \* \* \*

**Section 1249 (amended)**

SEC. 5. Section 1249 of the Code of Civil Procedure is amended to read:

1249. (a) As used in this section, "market value" means market value unaugmented by any increase and undiminished by any decrease in such value resulting from (1) the public use to which the property is to be devoted, (2) the public improvement or project for which it is being taken, (3) the eminent domain proceeding itself, or (4) any preliminary actions on the part of the condemnor related to the taking or damaging of the property.

(b) For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the issuance of summons and its actual market value of the property on the date of valuation at that date shall be the measure of compensation for all property to be actually taken; and the basis of measure of the value of the property before injury for the purpose of assessing damages to prop-

erty not actually taken but injuriously affected, in all cases where such damages are allowed as provided in under Section 1248; provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

**Comment.** Section 1249 states the measure of compensation in eminent domain proceedings.

**Subdivision (a).** The problems to which subdivision (a) is directed have not heretofore been dealt with in California statutory law, but have been considered in judicial decisions. This subdivision requires that the market value be determined as if there had been no enhancement or diminution in market value due to any of the four mentioned factors.

In *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 20 Pac. 372 (1888), and subsequent decisions, the courts have held that any increase in the market value of the property to be taken that results directly from the proposed public improvement is not to be included in arriving at the compensable market value. See *United States v. Miller*, 317 U.S. 369 (1943); *City of San Diego v. Boggeln*, 164 Cal. App.2d 1, 330 P.2d 74 (1958); *County of Los Angeles v. Hoe*, 138 Cal. App.2d 74, 291 P.2d 98 (1955). This subdivision is intended to codify the results of these and similar decisions.

Notwithstanding the rule as to enhancement in value, the California decisions are uncertain respecting any decrease in value due to such factors as general knowledge of the pendency of the public project. Several decisions indicate that the rules respecting enhancement and diminution are not parallel, and that value is to be determined as of the date of valuation notwithstanding that such value reflects a decrease due to general knowledge of the pendency of the public project. See *City of Oakland v. Partridge*, 214 Cal. App.2d 196, 29 Cal. Rptr. 398 (1963); *People v. Lucas*, 155 Cal. App.2d 1, 317 P.2d 104 (1957); and *Atchison, T. & S. F. R.R. v. Southern Pac. Co.*, 13 Cal. App.2d 505, 57 P.2d 575 (1936). Seemingly to the contrary are *People v. Lillard*, 219 Cal. App.2d 368, 33 Cal. Rptr. 189 (1963), and *Buena Park School Dist. v. Metrim Corp.*, 176 Cal. App.2d 255, 1 Cal. Rptr. 250 (1959) (both cited with approval in *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966)). Subdivision (a) is intended to make the rules respecting appreciation and depreciation parallel by codifying the views expressed in the *Lillard* and *Metrim* decisions.

Under subdivision (b) of this section, the market value of the property on the date of valuation is the "measure of compensation" for property actually taken and the "measure of the value of the property before injury" as to property not taken but injuriously affected. Subdivision (a), however, requires that the influence, if any, of the three mentioned factors upon market value be eliminated in determining compensable market value on the date of valuation. Thus, with respect

to property taken, adjustment for the effect, if any, of those factors has a direct bearing upon the compensation to be awarded. In cases of partial takings, however, the effect is indirect. For the purpose of assessing severance damages and special benefits under Code of Civil Procedure Section 1248, although the influence of those factors is eliminated in determining the value of the remainder in its so-called "before condition," the nature of the public improvement is taken into account in determining the value of the remainder in its "after condition." See *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799 (1943).

The purpose of the first exclusion listed in subdivision (a) is to codify the proposition that any increase or decrease in the market value resulting from the use which the condemnor is to make of the property must be eliminated in determining compensable market value. If, however, the condemnor's proposed use is one of the highest and best uses of the property, the adaptability of the property for that purpose may be shown by the property owner. See *San Diego Land & Town Co. v. Neale*, *supra*.

With respect to the effect of the proposed public improvement itself on the market value of the property being taken for that improvement, compare *City of Oakland v. Partridge*, *supra*, and *People v. Lillard*, *supra*. Subdivision (a) adopts the view expressed in the *Lillard* case. See Anderson, *Consequences of Anticipated Eminent Domain Proceedings—Is Loss of Value a Factor?*, 5 SANTA CLARA LAWYER 35 (1964).

As to the effect on market value of preliminary actions on the part of the condemnor related to the taking or damaging of the property and of the eminent domain proceeding itself, see *Buena Park School Dist. v. Metrim Corp.*, *supra*. Subdivision (a) codifies the view expressed in the *Metrim* decision.

*Subdivision (b)*. The term "market value" has been substituted for "actual value" in subdivision (b). This change codifies the decisional law which uniformly construed "actual value" to mean "market value." See *Sacramento So. R.R. v. Heilbron*, 156 Cal. 408, 104 Pac. 979 (1909); *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585 (1899). For simplicity of expression, the phrase "date of valuation" has been substituted for former language that referred to "accrual" of the right to compensation and damages. No change is made in existing rules as to persons entitled to participate in the award of compensation or damages (see, e.g., *People v. City of Los Angeles*, 179 Cal. App.2d 558, 4 Cal. Rptr. 381 (1960); *People v. Klopstock*, 24 Cal.2d 897, 151 P.2d 641 (1944)).

The provisions relating to dates of valuation formerly contained in this section are superseded by Section 1249a. The provision denying compensation for improvements made subsequent to the service of summons is superseded by subdivision (b) of Section 1249.1.

Decisions construing Code of Civil Procedure Section 1249 held that its provisions governing the date of valuation and the making of subsequent improvements do not apply in proceedings by political subdivisions to take the property of public utilities brought either under the general eminent domain statutes or under the provisions of the

Public Utilities Code. *Citizen's Util. Co. v. Superior Court*, 59 Cal. 2d 805, 31 Cal. Rptr. 316, 382 P.2d 356 (1963); *Marin Municipal Water Dist. v. Marin Water & Power Co.*, 178 Cal. 308, 173 Pac. 469 (1919). This construction is continued under this section and Sections 1249a and 1249.1(b).