#36.35 6/29/70

Memorandum 70-59

Subject: Study 36.35 - Condemnation (Possession Prior to Final Judgment and Related Problems)

BACKGROUND

We recently sent you a copy of the printed Tentative Recommendation and Study Relating to Condemnation Law and Procedure: Number 1--Possession Prior to Final Judgment and Related Problems (September 1967). (This pamphlet is the first in a series that the Commission plans to publish containing tentative recommendations relating to condemnation. The second pamphlet in the series will relate to the right to take; the Commission is now engaged in preparing statutory provisions dealing with the right to take.)

The printed tentative recommendation relating to possession prior to final judgment and related problems was distributed for comment to approximately 1,000 persons. Only five letters commenting on the printed tentative recommendation were received (Exhibits I though V, attached). This is not surprising since the Commission received and reviewed comments from persons interested in this topic before the tentative recommendation was printed.

This memorandum presents Title 7.1 of the tentative recommendation for Commission review and revision before it is redrafted for inclusion in the comprehensive statute.

The Chairman is the only Commission member who is familiar with the problems involved in possession prior to judgment and with the tentative recommendation on that subject. However, all Commissioners will need to have a thorough understanding of this complex area if the Commission is to draft a sound comprehensive eminent domain statute.

You should read the preliminary portion of the tentative recommendation with care; it is a good synopsis of the detailed research study published with

the recommendation. Then, the recommended legislation with comments should be read with care.

The tentative recommendation contains a constitutional amendment and a draft statute. Since the Constitution Revision Commission has determined to amend the Constitution to permit expansion of the right of eminent domain, the staff believes that the Commission should not attempt at this time to determine language suitable for a constitutional amendment. At the time we are ready to recommend our comprehensive statute for enactment by the Legislature, we can consider whether a constitutional amendment is necessary and, if so, the language that should be used in the Constitution.

The tentative recommendation contains some provisions that are distantly related to possession prior to final judgment but we will not discuss these in this memorandum. We reserve such provisions for future consideration. We discuss at this time only those miscellaneous provisions which involve directly the proposed scheme for deposit and possession prior to final judgment.

We will assume that you have read the tentative recommendation, including the draft statute. It should be recognized that a great deal of work is reflected in the printed tentative recommendation. It also reflects the views of various interested persons and organizations. There is considerable background material available on various matters that are covered in the tentative recommendation. The staff believes that the Commission should review these additional background materials before making any basic changes in the tentative recommendation. Accordingly, if it appears that any portions of the tentative recommendation are unsound, the staff suggests that a memorandum be prepared concerning each such portion for consideration at future meetings. This will permit the Commission to make a decision on the particular matter after it has had the opportunity to become thoroughly familiar with the particular problem.

GENERAL REACTION TO TENTATIVE RECOMMENDATION

The tentative recommendations and proposed legislation with comments, as printed and distributed, were quite well received. (This is not surprising since the tentative recommendation had previously been distributed in mimeographed form for comment and revised in light of the comments received.)

Extension of Right of Immediate Possession

The need for expedited possession of property by condemning agencies in many instances not involving rights of way or reservoirs was recognized. (See the case of Miro v. Superior Court, 5 Cal. App.3d 87 (1970) attached below as Exhibit VI--buff. Here the city needed the property in question for airport space, but was unable to obtain sufficiently rapid possession for lack of available procedures.) The Commission's proposed immediate possession scheme was seen as a generally good and effective procedure, by both condemnors and condemnees, who made comments such as the following:

> We agree with the recommendation of the Commission that the range of cases in which possession prior to judgment is available should be extended. (San Diego County Counsel, Exhibit II--yellow.)
>
> We believe that you have accomplished a generally commendable proposed revision of the law of eminent domain . . . . (Burbank City Attorney, Exhibit III--green.)
>
> On the whole, we are pleased with the Commission's current recommendation and study of the condemnation law and procedure. (Pacific Lighting Service and Supply Co., Exhibit IV--gold.)
>
> I think that over-all the recommendations are excellent, and they certainly are an improvement on the present law. (A. J. Forn, Attorney, Exhibit V--blue.)

Organization and Numbering of Statutory Provisions

The State Bar Committee on Governmental Liability and Condemnation expressed concern over the organization and numbering of the various provisions

of the statute. (See comment of State Bar Committee, Exhibit I--pink.) These problems will be resolved in the organization and numbering of the final comprehensive statute when all sections of the statute have been drafted. Hence, we do not consider this problem at this time.

COMMENTS ON SPECIFIC PROVISIONS

Proposed Constitutional Amendment

The need for constitutional revision is discussed on pages 1118-1119 of the Tentative Recommendation. The recommended constitutional amendment is set out, with Comment, on pages 1167-1170. In connection with this constitutional amendment, it should be noted that the Constitution Revision Commission is currently considering changes in this section, and no Commission action is necessary at this time. Nevertheless, the Commission should be familiar with the constitutional provision, and for this reason we believe that the provision and the comments relating to it should be considered.

The Article I Committee of the Constitution Revision Commission recommended a provision the same in substance as the one included in the Tentative Recommendation. However, the Constitution Revision Commission itself did not accept this recommendation; the latest information we have indicates that the Constitution Revision Commission has decided to preserve in the Constitution the right to immediate possession in right of way and reservoir cases and to authorize the Legislature to extend the right to other condemnors for other purposes.

The State Bar Committee approved the proposed amendment, with the following exception:

> as to any public use to which the right of immediate possession is granted by the legislature, a reciprocal right to require immediate possession is given to the owner, and further provided that the legislature must retain the right of immediate possession to reservoirs and rights of way.

Although the staff agrees that the owner should have the right to require deposit and possession early in all cases, the Commission has already rejected this proposal as politically unattainable. The Commission has commented, on page 1112 of its recommendation, that, "Although these provisions have obvious merit, integration of such a requirement into California condemnation procedure does not appear feasible at this time." The Commission has made provision, however, for deposit on demand of the defendant in certain limited cases involving hardship to resident-owners. See discussion of Section 1269.05 below. Even this limited protection is strongly opposed by various public entities including the Department of Public Works.

As to the suggestion that the right of immediate possession be granted for right of way and reservoir cases in the Constitution, the staff feels that this is unnecessary, for Section 1269.02 allows immediate possession in takings for any purpose. Further, should the Legislature decide that these two uses, some time in the future, should not be entitled to immediate possession treatment, there will probably be valid reasons. However, if retention of these two uses in the Constitution itself is necessary to obtain approval of the amendment, their inclusion would not be something that appears to be a matter of basic principle. This is a case where the Commission recommended what is right. The Constitution Revision Commission apparently has concluded that what is right is not politically feasible.

Draft Statute - Title 7.1 (pages 1142-1162)

Chapter 1. Deposit of Probable Just Compensation Prior to Judgment. You should note that a deposit may be made under this chapter whether or not the condemnor is authorized to take immediate possession. In cases where immediate

possession is not authorized, the making of the deposit is in effect an offer to allow the property owner to withdraw the estimated just compensation; and, if he does so, the condemning agency is then authorized to take possession. For further discussion of this point and other purposes served by the deposit, see the Comment on pages 1142-1143.

Section 1268.01 (pages 1143-1144). One comment (Exhibit II--County of San Diego) suggests that the condemning agency should not be required (1) to have an expert appraisal made prior to deposit and (2) to make available a statement of valuation data. The reasons given are that this would give all the information ("unfairly") to the condemnee (because not a mutual exchange of data by both sides), and that the requirement would be a great expense to the public. These arguments are without merit; the condemnor should have a true and accurate appraisal as the basis of its deposit of probable compensation. The appraisal would not give an unfair advantage to the condemnee (who has few if any advantages in these cases anyway), for he must determine whether the deposit is adequate at the time it is made. Also, the agency may use its own appraisal staff, if qualified, as pointed out in the Comment, thus cutting down expense. Finally, subdivision (d) permits obtaining a court order to defer preparation of the statement of valuation data.

Section 1268.10 (page 1151). Exhibit V--Mr. Forn objects to the provision that the expert's appraisal is not admissible at the trial. Mr. Forn would allow the appraisal to be used as an admission of the condemnor as to value at the trial. He is concerned primarily about the practice of some condemnors of making an offer and then, if the offer is not accepted, presenting at the trial the so-called "fighting figures"--appraisal testimony by independent experts

retained for the trial who testify lower than the staff appraisal upon which the offer was based. The staff appraiser often does not even testify.

The revision made by Section 1268.10 recognizes the need to provide clear protection to the initial appraisal upon which the deposit is based. Recognizing that often this appraisal is not as complete as the ones prepared for trial, the provision is designed to encourage the condemnor to deposit the full amount it concludes is the just compensation. If such deposit were to constitute an admission of the condemnor as to the value of the property, it is hard to believe that the staff appraisers who make the appraisals that determine the amount of the deposit would not become extremely conservative as to the value of the property in order to avoid later embarrassment at the trial. The Commission concluded that the adequate deposit was of more value to the condemnee than the right to use the appraisal made in connection with the deposit.

That the problem we discuss here is a real one is made clear by the case of People v. Cowan, 1 Cal. App.3d 1001, 81 Cal. Rptr. 713 (1969)(attached as Exhibit VII--white). In Cowan, the appraiser of the Division of Highways staff had made an appraisal for deposit purposes which was substantially higher than the subsequent testimony of the plaintiff's experts at trial. The staff appraiser was not a witness for the Division of Highways at the trial. Defendants attempted to call the appraiser as an expert witness on their own behalf, in order to get around the existing provisions of Code of Civil Procedure Section 1243.5(e), upon which our Section 1268.10(a) is based. The appellate court held that the defendant does have the right to have the initial appraiser testify, despite the general ban on evidence of the appraisal and despite plaintiff's claim that the "danger of having their own appraisers called by the other side, would cause condemnors to seek to make unreasonably low security deposits." 1 Cal. App.3d at 1006.

In view of this recent case, it is necessary to enact the extended provisions of Section 1268.10(b) and (c) which address themselves precisely to this point, for as the court points out, "if the Legislature had wished to exclude such opinions from evidence it would have done so." 1 Cal. App.3d at 1006. The staff feels that the Comment should be expanded to recognize this case, by changing the wording of the final sentence as follows:

> Subdivision (c) is intended to prevent a party from circumventing subdivision (b) by calling another party's appraiser as his own witness, and thus changes existing law as expressed in People ex. rel. Dept. Pub. Wks. v. Cowan, 1 Cal. App.3d 1001, 81 Cal. Rptr. 713 (1969).

We understand that condemnors are avoiding the effect of the Cowan case; our recollection is that the Commission was advised that the affidavit in support of the deposit of probable just compensation is made by the condemnor's attorney. In any case, the staff believes that the Cowan case will generally have an adverse effect on condemnees and that little, if any, benefits will be realized by condemnees as a result of the case.

Chapter 2. Possession Prior to Judgment (pages 1152-1159). This chapter provides for orders for possession prior to judgment.. Note that separate procedures for obtaining orders for possession are provided, depending on whether possession is sought for a right of way or reservoir or for another purpose.

There were no comments on our proposed dual treatment of rights of way and reservoir rights, as opposed to takings in other cases. Section 1269.01 (dealing with takings for rights of way and reservoirs) provides for possession in those cases as a matter of right, with no showing of need, and upon ex parte application of the plaintiff. On the other hand, Section 1269.02 (which relates to possession in other cases) provides for hearing on noticed motion and a weighing of the need for immediate possession against the hardship to the owner or occupant.

The staff suggests that consideration be given to providing one unified procedure for obtaining an order for immediate possession. Among the reasons for this suggestion are that simplicity is a virtue, that any right of the public agency which may cause hardship to the private citizen should be based upon demonstrated need, and that a noticed hearing may be constitutionally required. The constitutional argument is based on the due process clause of the Fourteenth Amendment to the U. S. Constitution, which provides that no "State shall deprive any person of life, liberty, or property, without due process of law." This phrase has been applied by the Supreme Court expressly to condemnation proceedings:

> Under the requirements of [the Fourteenth] Amendment, property may not be taken for public use without reasonable notice of the proceedings authorized for its taking and without reasonable opportunity to be heard as to substantial matters of right affected by the taking. [North Laramie Land Co. v. Hoffman, 268 U.S. 276, 282-283 (1925).]

The Supreme Court has also recently applied the due process requirements of the Fourteenth Amendment to proceedings in garnishment where the property (wages) is seized prior to judgment without a hearing. The court there stated:

> Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf. Coe v. Armour Fertilizer Works, 237 U.S. 413, 423, 59 L.Ed. 1027, 1031, 35 S. Ct. 625) this prejudgment garnishment procedure violates the fundamental principles of due process. [Snaidach v. Family Finance Corp., 395 U.S. 337, 342 (1969).]

This case, by analogy, would apply even more forcefully to a taking of real property prior to judgment which involves not only seizure of the property, but possibly substantial destruction of its previous state. See also a California case, Mihans v. Municipal Court, 7 Cal. App.3d 479 (1970), (Exhibit VIII attached) holding that due process of law requires a hearing in order for a landlord to take immediate possession prior to unlawful detainer judgment.

This suggestion presents the following policy questions:

(1) What justification is there for an ex parte procedure in any case?

Even if possession is a matter of right, the property owner should be given an opportunity to object to the adequacy of the deposit before an order for possession is made, rather than having to take the initiative in commencing a proceeding to get the deposit increased.

(2) Merely because the taking is for a right of way or reservoir, should the public entity be permitted to take possession even when it is not needed and when it will cause the owner or occupant great hardship? The existing tentative recommendation permits this. Perhaps a better approach would be to permit possession as a matter of right in certain specific kinds of cases--such as takings for state highways.

(3) Assuming that possession prior to judgment is to be permitted in a particular case, should there be no provision for the court ordering an extension beyond 60 days where the taking is for a right of way or reservoir? Here again, specific provisions might be included giving the public entity an absolute right to possession in specific kinds of cases--such as takings for state highways.

Section 1269.02 (pages 1153-1155). Exhibit IV notes that consideration of the hardship to the owner or occupant should be a consideration in determining when the condemnor can take possession, but that whether or not possession can be taken prior to judgment should depend on whether the condemnor can establish a need to take possession prior to judgment. This is a good point. We suggest that subdivision (c) of Section 1269.02 be revised to read:

> (c) On hearing of the motion, the court shall consider all relevant evidence, including the schedule or plan of operation for execution of the public improvement and the situation of the property with respect to such schedule or plan, and shall make an order that authorizes the plaintiff to take possession of the property if the court determines ~~that~~ all of the following :

(1) The plaintiff is entitled to take the property by eminent domain ~~;~~ .

(2) The ~~need of the~~ plaintiff ~~for~~ needs possession of the property prior to judgment. ~~clearly outweighs any hardship the owner or occupant of the property will suffer if possession is taken; and~~

(3) The plaintiff has deposited the amount indicated by an appraisal to be the compensation for the taking of the property in accordance with Chapter 1 (commencing with Section 1268.01).

(d) ~~The date after which the plaintiff is authorized to take possession of the property shall be determined by the court and shall not be less than 60 days after the making of the order.~~ The order for possession shall:

(1) Describe the property and the estate or interest to be acquired, which description may be by reference to the complaint.

(2) State the purpose of the condemnation.

(3) State the date after which the plaintiff is authorized to take possession of the property. Such date shall be determined by the court to be not less than 60 days after the making of the order. In determining the time for transfer of possession of the property, the court shall take into consideration the hardship the owner or occupant of the property will suffer if possession is taken before judgment and the need of the plaintiff for possession of the property. The court may, in case of emergency and for good cause shown, shorten the time specified in this subdivision to a period of not less than three days.

(e) Before making an order for possession under this section the court shall dispose of any pending motion under Section 1268.03 to determine or redetermine the amount of probable compensation and, if an increase in the amount of the deposit is determined, shall require the additional amount to be deposited by the plaintiff.

Section 1269.04 (page 1155-1156). Concerning subdivision (c), Exhibit IV (Pacific Lighting--gold) suggests that, rather than requiring an order for possession prior to judgment to be served 10 days after making of the order, it should be served 50 days prior to the date set for transfer of possession. The argument given for this suggestion is that this wording would make the provision consistent with other portions of Section 1269.04. The staff feels, however, that the purpose of the notice, as Exhibit IV mentions, is the defendant's need of a reasonable period of time before he must divest himself of possession; this purpose can best be accomplished by notice as early as possible, particularly since orders for possession requiring a period of greater than 60 days

will involve some defendant upon whom there is a hardship anyway. Of course, the point is somewhat mooted by the fact that the order results from a noticed motion, so that the defendant is presumably already aware of the date of the order. However, this presumption is not necessarily accurate and probably many default orders will be entered, necessitating notice as early as possible.

A second point made in Exhibit IV is that there are no sanctions specified for violation of the service provisions of this section. The staff feels that this is a valid criticism and recommends that the Commission deal with violations strictly, for extreme hardship will result to a defendant who is not made timely aware that his property is about to be taken from him. Failure to give timely notice should invalidate any order plaintiff has obtained; if the condemnor still desires early possession, it must return to court, obtain a new order, and proceed properly. This provision could be enacted to read as follows, by inserting a new provision between (f) and (g):

> (x) Failure of the plaintiff to make proper and timely service of an order for possession as provided in this section shall make the order void.

Add the following to the Comment to Section 1269.04:

> Comment. Subdivision (x) is new and has been added to make it clear that the service provisions of this section must be strictly observed. A plaintiff who desires to enforce a void order may not do so, but must return to court to obtain a new order and then proceed with service properly.

An alternative method of dealing with this problem would be to delete subdivision (c) entirely and to revise the introductory portion of subdivision (b) to read:

> (b) At least 60 days , or such longer time as the court prescribes, prior to the time possession is taken pursuant to an order for possession ~~made under Section 1269.01~~ ,

The effect of this provision is to not permit the taking of possession until the required period of notice has been given. At the same time, an objection that adequate notice has not been given merely extends the time until adequate notice has been given; it does not require that the condemnor start all over again to obtain an order of possession after a noticed motion.

Section 1269.05 (pages 1156-1157). Exhibit II (County of San Diego--yellow) disapproves this provision. As pointed out in the discussion of the constitutional amendment, above, there is substantial political opposition to allowing the condemnee to demand a deposit in all cases in which the condemnor is allowed possession prior to judgment. The Commission has compromised on this limited exception to allow a resident owner, on whom hardship is normally very great, to require a deposit to aid him in obtaining a new residence.

However, there is substantial opposition to even this limited provision, as indicated by Exhibit II's disagreement, and as indicated by excerpts from letters to the Commission concerning earlier drafts of this tentative provision:

(1) Letter to John H. DeMoully from California Department of Public Works, Division of Contracts and Rights of Way (Legal), dated September 14, 1966:

> Section 1269.05 has most serious consequences in that it would require the unnecessary deposit of public funds where possession is not needed by the governmental agency concerned. This would prevent the use of such funds for actual construction or other purposes while the public funds are required to be on deposit. This one feature of the statute could delay the completion of public works projects where substantial amounts of money are tied up in court deposits.

(2) Letter to California Law Revision Commission from California Department of Finance, dated September 14, 1966:

> Where the property to be acquired contains not more than two residential units and one of the untis is occupied as the residence of the condemnee, proposed Section 1269.05 permits the condemnee to require the condemnor to either deposit probable just compensation with the court or have

the compensation awarded draw legal interests from the 21st day after the date of the order determining probable just compensation, such interest to be paid even if the condemnor later abandons the proceedings. We believe that the condemnor should have the sole discretion prior to judgment and the condemnor should not be required to bear the burden of short-term management of property for which it does not have an immediate need. The effect of Section 1269.05 is to penalize the condemnor for problems created by the long delay from the time of filing a complaint until the actual date of trial. Inasmuch as this delay is generally not the fault of the condemnor it appears unfair to so penalize the condemnor.

Since monies deposited by the condemnor under Section 1269.05 will not draw interest for the condemnee, it can be assumed that in most cases the condemnee will withdraw any such deposit. This could result in a substantial loss of revenue to the State since the money withdrawn would have been invested by the State and be accruing interest for the State at a rate of about 4% (Section 16480, et seq. Government Code). In the cases where the State fails to deposit the money, while the State will generally have the money invested at about 4%, it will be required to pay 7% to the condemnee. This also could cost the State a substantial sum.

The staff feels that these sorts of objections, while strong, are overweighed by the protection needed to be given the relatively weak residential tenant. The statute as it stands is a watered-down compromise from initially stronger suggestions of a broader right in all condemnees. Further, those public agencies which feel themselves unable to live with the provisions as they stand may be advised to simply plan better and not to file against a property owner until they are in actual need of the property and have the money to purchase it.

Exhibit II makes the added comment that the section as worded may result in a windfall to a tenant at the expense of the owner of the property. This problem, of course, is not limited to the case of condemnee demand of the deposit, but also exists where the public agency makes the deposit voluntarily, and in fact where no early possession is involved at all, but simply the standard eminent domain proceeding. The answer to this problem is that the court determines the rights of the various parties to the deposit under procedures prescribed

in Sections 1268.04 and 1268.05. The Commission has not as yet considered a rule as to when the right to receive the just compensation accrues for purposes of determining who is entitled to the award. This is a matter which was also raised by Exhibit III as to Section 1249(b) and is a matter which the staff will look into later.

Chapter 3. Deposits and Possession After Judgment (pages 1159-1162). The Commission received very little comment on any provisions of this chapter. Exhibit II (County of San Diego--yellow) states, "We agree with the proposal of the commission to enact a new chapter 3, commencing with Section 1270.01 to provide for one uniform postjudgment deposit procedure."

The State Bar Committee (Exhibit I--pink) made several comments with regard to former Code of Civil Procedure Section 1254, portions of which we have recommended repealed and transferred to Sections 1270.01 and 1270.05:

(1) Section 1254(a) is criticized on the ground that the possession procedure should be on noticed motion rather than ex parte. This is existing law which is retained in the tentative recommendation. Noticed motion is not required because we deal only with parties to a judicial proceeding after a judgment. The parties can expect that the condemnor will seek possession after judgment and the statute specified the amount of the deposit. The order for possession is automatic. The condemnor cannot, however, take possession until notice of the order is given.

(2) Section 1254(f) is criticized on the ground that withdrawal of deposit constitutes an unfair burden on a property owner if he is required to waive substantive defenses. This criticism, too, is directed at existing law which is retained in the tentative recommendation. The answer to this criticism is that the major function of the new legislation is to expedite procedures and to make

them more fair to the property owner. The withdrawal and waiver provision expedites condemnation if the owner chooses to withdraw; but he has an option not to withdraw and to contest the taking on its merits, thus increasing the number of options available to him. It is difficult to see how we can rationally allow the property owner to withdraw the deposit and yet also to claim the condemnor has no right to take the property--he can't eat his cake and have it too.

SUGGESTED ACTION

This concludes the specific criticisms and suggestions received concerning proposed Title 7.1, Deposit of Probable Just Compensation Prior to Judgment; Obtaining Possession Prior to Final Judgment. The staff suggests that the Commission approve the substance of the title in its entirety for inclusion in the comprehensive statute with those changes the Commission determines should be made.

CONFORMING CHANGES

There are other miscellaneous provisions of the Code of Civil Procedure which should be altered in accordance with the new statutory scheme. Sections 1243.4 (page 1120), and 1243.5 (pages 1120-1122), 1243.6 (pages 1122-1123), 1243.7 (pages 1123-1125), and 1254 (pages 1133-1135) should be repealed as shown in the Tentative Recommendation, with Comments adjusted as required. Corresponding provisions of the Government Code, Article 9 (Condemnation Deposits Fund), Sections 16425-16427 should be added as printed with any needed revisions in the Comments. We are not concerned about the numerous other conforming changes (see page 1166) at this time.

OTHER PROVISIONS

Section 1255b. Section 1255b, relating to accrual of interest on awards, is approved generally by the San Diego County Counsel (Exhibit II--yellow):

> We agree with the proposal of the commission for retention of the substance of the existing rules for payment of interest. (Interest runs from date of entry of judgment until payment of the award. If possession is taken before judgment, interest begins on the date the condemnor is authorized to take possession. Sec. 1255[b].) We agree also with the proposed change that interest on amounts deposited prior to judgment should cease to accrue upon entry of judgment. (Section 1255[b].)

However, the State Bar Committee suggests that the last sentence of subdivision (b) be deleted--"This subdivision shall not apply to interest accrued under Section 1269.05." The Committee gives no indication of their reasons for this suggestion, which is inconsistent with their recommendation on the constitutional amendment, to guarantee the ability of the condemnee to demand deposit. Since the accrual of interest is the only sanction on the condemnor to force deposit under Section 1269.05, requiring set-off would nullify this homeowner's ability to require deposit for all practical purposes. For this reason, the staff strongly suggests that Section 1255b be adopted as printed for inclusion in the tentative Comprehensive Statute.

Other Provisions. There are other miscellaneous Code of Civil Procedure provisions only remotely related to proposed Title 7.1. Of these, the staff requests approval of Section 1252 (abandonment)(pages 1131-1132) and Section 1253 (order of condemnation)(pages 1122-1133) for incorporation into the Comprehensive Statute. No comments were received on these sections other than unanimous State Bar Committee approval. Section 1255a (pages 1136-1138) was enacted into law substantially as recommended by the 1968 Legislature upon Commission recommendation, and it also should be incorporated into the Comprehensive Statute in the form in which it was enacted.

PROVISIONS TO BE CONSIDERED LATER

Other sections which received comment are sections which the staff intends to deal with in separate comprehensive memoranda. These sections are Sections 1249, 1249a, and 1249.1, dealing with date and measure of valuation; Section 1257, relating to costs of new trial; and Government Code Sections 38090-38091 and Streets and Highways Code Sections 4203-4204, concerning date of valuation.

Respectfully submitted,

Nathaniel Sterling
Legal Assistant

Memorandum 70-59

EXHIBIT I

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May 27, 1969

California Law Revision Commission
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Attention: John H. DeMoully, Executive Secretary

Gentlemen:

The California State Bar Committee on Governmental Liability and Condemnation, at a joint meeting, took the following action on matters which have been under consideration by the Law Revision Commission, and this memo is being submitted as the position of the entire State Bar Committee.

[Portion of letter relating to other recommendations omitted.]

(7) The Committee unanimously agreed as follows re LRC Tentative Recommendation re Condemnation Law and Procedure of September, 1967, Pamphlet No. 1, "Possession Prior to Final Judgment and Related Problems":

(a) Re proposed amendment to Code of Civil Procedure 1249a, the existing law as now framed in BAJI Instruction No. 502-G (Revised) is satisfactory and workable, and the codification set forth in the proposed 1249a will unnecessarily complicate and confuse the issue, prolong the trial, and raise issues which may well be incapable of solution. BAJI Instruction No. 502-G (Revised) is satisfactory and reads as follows:

"The property being taken may not be valued with reference to enhancement or depreciation in value, if any, to said property arising solely and directly from the public improvement proposed by the plaintiff. Increase or decrease in value, if any, caused by the construction of knowledge of the construction of the (freeway) (public improvement) is excluded in the determination of fair market value."

A more clear method of numbering the various sections in this area would greatly aid the discussion in references to them, i.e., § 1249, subdivision (a), is too easily confused with § 1249a.

(8) Re any proposed changes in § 1249a C.C.P. regarding the date of value, the Committee agreed by a vote of 6 yes and 4 no that the existing rules regarding the date of value be retained.

(9) The Committee unanimously agreed that proposed § 1249.1(b) C.C.P. be amended by inserting the words "in bad faith" after the word "property," and that the following sentence be added: "Bad faith means those improvements put upon the property for the purpose of increasing the amount of compensation."

(10) The Committee unanimously agreed that proposed § 1249.1(a) C.C.P. be amended to read: "All improvements pertaining to the realty which affect its value shall be considered in the assessment of compensation unless they are removed or destroyed before the earliest possible times:" (The language as proposed in subdivisions 1, 2 and 3 is satisfactory and would then follow the above quoted sentence.)

(11) The Committee unanimously agreed that proposed C.C.P. § 1252 (Amended), 1253 (Amended) and 1255a (Amended) are satisfactory as proposed and should be approved.

(12) The Committee unanimously agreed re proposed C.C.P. § 1255b (Amended) that the last sentence in subdivision (4), subdivision (b), be deleted, i.e., that sentence reading: "This subdivision shall not apply to interest accrued under § 1269.05."

(13). The Committee unanimously agreed that proposed C.C.P. § 1257 (Amended) (a) be approved, and that subdivision (b) of said section be disapproved.

(14) The Committee approved by a vote of 6 yes and 4 no that existing C.C.P. § 1254 should be amended by inserting the words "on noticed motion" after the word "plaintiff" and before the word "may," in the first sentence of § 1254(a), and that the words "ex parte" be deleted from said sentence; and, further, that existing law re possession after judgment, with minor exceptions, is reasonable, practical and workable, and the Committee is not in favor of extensive revision; further, that the Committee is concerned regarding the constitutionaltiy of possession absent prior notice.

(15) The Committee approved by a vote of 6 yes and 3 no re C.C.P. § 1254(f) to eliminate everything after the word "therefor" and inserting a period; the Committee feels that this deletion will remove a fundamental unfairness to the owners who may have a legitimate challenge to public use.

(16) The Committee agreed by a vote of 6 yes and 3 no re C.C.P. § 1254(k) that said section be approved.

(17) The Committee agreed by a vote of 9 yes and 1 no re amendment of Section 14, Article I of the California Constitution that it is in favor of the proposed amendment provided that as to any public use to which the right of immediate possession is granted by the legislature, a reciprocal right to require immediate possession is given to the owner, and further provided that the legislature must retain the right of immediate possession to reservoirs and rights of way.

[Portion of letter relating to another recommendation omitted.]

Very truly yours,

George C. Hadley
Chairman

Memorandum 70-59 EXHIBIT II

BERTRAM MC LEES, JR.
COUNTY COUNSEL

County of San Diego

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February 28, 1969

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Attention John H. DeMoully, Executive Secretary

Gentlemen:

Re: Tentative Recommendation - Condemnation Law and Procedure: No. 1 - Possession Prior to Final Judgment

We have reviewed the tentative recommendation and study relating to condemnation law and procedure, possession prior to final judgment, and wish to make the following comments:

1. Extension of provisions for possession and payment prior to judgment. (Calif. Const. Art. I, Sec. 14; Code Civ. Proc. Section 1269.01, et seq.)

We agree with the recommendation of the commission that the range of cases in which possession prior to judgment is available should be extended.

As noted in the recommendation, an assured date of possession is not now available for acquisition of school sites. Frequently in cases handled by this office there is an urgent need for a school district to acquire a school site to meet growing population needs. The problem, for example, arises where an entire block is to be acquired containing several parcels. Under present law construction of the school must wait until the district is able to acquire title to all the property. Litigation over one or two parcels may consume a long period of time and hold up construction of the school to the detriment of the community.

2. Deposit and withdrawal of probable compensation.

We disagree with the proposal that before making a deposit to obtain possession of the property the condemnor should be required to have an appraisal made by an expert appraiser and to make available a statement of valuation data. (Code Civ. Proc. Sec. 1268.01, et seq.)

Chapter 2 (commencing with Section 1272.01) of Title 7, Part 3 of the Code of Civil Procedure now provides a procedure for exchange of information in eminent domain proceedings. Commencing with Section 1272.01 the Code provides for demand and cross demand for exchange of lists of expert witnesses and statements of valuation data. Section 1272.01 basically is a discovery procedure and provides a "two-way street". If the recommendations of the commission are enacted the condemnee would have all the information at an early date in the proceedings without the necessity of entering into an exchange as is now provided by Section 1272.02.

Moreover, in some cases the public agency may not have a full appraisal of the property available at the time property is sought to be acquired. The proposal of the commission will impose a burden on the public agency that would result in greatly added costs to the public.

3. Deposit on demand of property owner.

We disagree with the proposal for enactment of a provision permitting the condemnee to demand that a deposit be made if the property being taken is a residential property having not more than two dwelling units and the condemnee resides thereon. (Sections 1255[b], 1269.05.) If such a section is enacted, it should be limited by the use of the words "record owner" rather than "defendant". Tenants leasing the premises, if on more than a month-to-month basis, are usually made defendants in a condemnation proceeding. The proposed section would allow a tenant named as a condemnee to force the condemnor to take the property and the record owner-lessor to share with the lessee his award for the leasehold interest in the unexpired term. This might amount to a windfall for the lessee without any corresponding benefit to the lessor who otherwise would be protected by the terms of his lease until such time as the actual judgment in condemnation is rendered and possession is taken.

4. Possession after entry of judgment.

We agree with the proposal of the commission to enact a new chapter 3, commencing with Section 1270.01 to provide for one uniform postjudgment deposit procedure.

5. Date of valuation.

We agree with the recommendation of the commission to the extent that it proposes to retain the existing rules as to date of valuation.

The general rule should remain the same, that the date of valuation shall be the date of issuance of summons (Code of Civ. Proc. Sec. 1249) or filing of complaint as recommended by the commission (Sec. 1249[a] added). As noted by the commission (page 1114) the existing California rules have worked equitably. An alternative rule (that the date of valuation should be the date of trial) would provide an undesirable incentive to condemnees to delay the proceedings to obtain the latest possible date of valuation.

6. Changes in market value before the date of valuation.

We agree with the commission's proposal that the statute should specify 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 the proposed public use and improvement. (Section 1249.)

As noted by the commission (page 1115) case law establishes that any increase in the value of the property that directly results from the improvement is not to be considered, and decisions as to the treatment of any decrease in value are uncertain. We agree that the rule should be uniform.

7. Interest on award.

We agree with the proposal of the commission for retention of the substance of the existing rules for payment of interest. (Interest runs from date of entry of judgment until payment of the award. If possession is taken before judgment, interest begins on the date the condemnor is authorized to take possession.

Sec. 1255[b].) We agree also with the proposed change that interest on amounts deposited prior to judgment should cease to accrue upon entry of judgment. (Section 1255[b].)

Very truly yours,

BERTRAM McLEES, JR., County Counsel
By Donald L. Clark
DONALD L. CLARK, Deputy

DLC:KIG

Memorandum 70-59

EXHIBIT III

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ASSISTANTS

MYLES M. MATTENSON
DEPUTY

January 20, 1969

California Law Review Commission
School of Law
Stanford University
Stanford, California 94305

Subject: Tentative recommendation and study relating to condemnation law and procedure.

Gentlemen:

We acknowledge with gratitude receipt of your above mentioned study and the supplementary material relating to the right to take byroads, the use of the power of eminent domain to acquire byroads, and inverse condemnation, the privilege to enter, survey and examine property.

We believe that you have accomplished a generally commendable proposed revision of the law of eminent domain, but we are seriously concerned with your proposed amendments of Code of Civil Procedure Section 1249 and Streets and Highways Code Section 4203.

At present Section 1249 provides:

"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 value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in 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. * * * "

The quoted portion of this Section therefore includes two different subjects: (1) accrual of the right to compensation and damages, and (2) the date of value in a condemnation proceeding.

Your proposal includes deletion of the words "right thereto shall be deemed to have accrued at the date of the issuance of summons". The relevant part of your comment is as follows: "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 and damages (see e.g., People v. City of Los Angeles, 179 Cal.App.2d 558, 4 Cal.Rptr. 531 (1960; hearing by Supreme Court denied); People v. Klopstock, 24 Cal.2d 897, 151 P.2d 641 (1941))."

People v. City of Los Angeles, supra, was a condemnation proceeding in which the court denied the defendant Van M. Griffith any compensation in connection with the construction of the Golden State Freeway through Griffith Park in the City of Los Angeles. Griffith, the owner of the reversionary interest in the Park, claimed compensation. He appealed from a judgment adverse to him, and the District Court held that the appellant Griffith had (179 Cal.App.2d 574, 4 Cal.Rptr., 541, 542):

> " * * * no interest of any kind in the fee estate which might justify his participation in the award; thus, the only right he could claim as reversionary heir would be that arising out of a showing that the limited lands conveyed under the 1898 deed would, within a reasonable time had there been no condemnation, have vested in him for the city's violation of the condition subsequent (City of Santa Monica v. Jones, 104 Cal.App.2d 463 [232 P.2d 55]). Although it is true that when a reversionary interest is condemned the reversioner must be compensated, it appears from the record that appellant's only claim was for the value of the entire fee; he sought no reversionary right or compensation therefor. Further, any reversionary interest terminated upon the State's taking and was then so remote, speculative and contingent as to justify no consideration by the court, and even had it a value capable of estimate, appellant offered no proof thereof."

This opinion neither cites nor mentions Code of Civil Procedure Section 1249, nor does it deal with accrual of the right to compensation and damages or date of value.

The other cited case, People v. Klopstock, supra, in which the only point in controversy was (24 Cal.2d 898, 151 P.2d 641) "the matter of participation in the compensation award incident to the state's exercise of its right of eminent domain", cites Section 1249 and is squarely in point as to accrual of the right to compensation and damages and concerning those who are entitled to participate in the award in a condemnation proceeding.

Involved in this case was an assignment to the defendant Elerding of a one-year lease, executed in 1924, which provided that if the lessee held over such holding should be deemed a tenancy from month to month. The lessee held over, and when the condemnation proceeding was commenced on February 23, 1940, the property thereafter condemned, on which an asphalt plant was situated, was subject to the month to month tenancy provided for by the lease.

On the date the proceeding was commenced the court made an order of immediate possession under the provisions of Article 1, Section 14 of the Constitution of the State of California. Thereafter the plaintiff took possession of the property and on July 23, 1940, completely destroyed the asphalt plant and its appurtenances.

The interest of the defendant Elerding arose under mesne assignments transferring to him under date of May 28, 1941, all of the rights of the lessee under the lease, and (24 Cal.2d 900, 151 P.2d 642) "all claims and demands of every kind and character against * * * all persons, including the State of California, for damage to and the destruction, dismantling and removal of said plant and its appurtenances and the value thereof."

The trial court denied any compensation to the assignee Elerding and he appealed. In reversing the judgment the court said (24 Cal.2d 902-903, 151 P.2d 643-644):

> "The state Constitution (art. I, §14) provides that compensation for the taking of private property shall be paid to the owner. In fixing awards in condemnation cases compensation must be paid to the owners as their respective interests shall appear at the time when the taking of property for a public use is deemed to occur -- at the date of the issuance of summons. Code Civ. Proc. §§1248, 1249; Brick v. Cazaux, 9 Cal.2d 549, 556 [71 P.2d 588]; City of Los Angeles v. Blondeau, 127 Cal.App. 139, 140 [15 P.2d 554];

People v. Joerger, 12 Cal.App.2d 665, 671 [55 P.2d 1269].) At the time of the constructive taking here--February 23, 1940 -- the lessee indisputably was the owner of the asphalt plant and appurtenances it had theretofore erected on the leased premises, and it had the right to remove them therefrom according to the terms of the lease. Subsequently the defendant Elerding succeeded--through assignment and bill of sale--to the right to compensation for the state's destruction of this original property interest of the lessee. Upon such basis there can be no question as to the propriety of his claim to participate in the condemnation award."

Klopstock therefore applied the rule set forth in Code of Civil Procedure §1249 that the right to compensation and damages is deemed to have accured at the date of the issuance of summons.

In City of Los Angeles v. Tower (90 Cal.App.2d 869, 204 P.2d 395 (1949), the issue on the appeal in that eminent domain case was the applicable date of value. The court quoted from §1249 and said in part (90 Cal.App.2d 874, 204 P.2d 399):

"It may not be questioned that appellant had a right to be paid the value of its land at the time it was taken. It is, however, well established that the legislature may designate, for the purpose of assessing compensation, any stage of the proceedings prior to the judgment by which the owner is wholly divested of title to the land or interest taken. The issuance of summons has generally been deemed to be a constructive taking, and, as we have seen, determining compensation as of this time accords the owner the full benefit of his constitutional right. So, too, where the statute in like manner specified the order appointing referees to be a constructive taking (City of Pasadena v. Porter, 201 Cal. 381 [257 P.526, 53 A.L.R. 679]), or the setting of the case for trial (City of Los Angeles v. Oliver, supra, 102 Cal.App. 299 [appeal dismissed by U.S. Supreme Court for want of substantial federal question, 283 U.S. 787 (51 S.Ct. 348, 75 L.Ed. 1415)]), or the hearing before the Railroad Commission (Marin M.W. Dist. v. Marin W. etc. Co., 178 Cal. 308 [173 P. 469]; Sacramento etc. Dist. v. Pacific G. & E. Co., 72 Cal.App.2d 638 [165 P.2d 741])."

And thereafter (90 Cal.App.2d 876-877, 204 P.2d 400):

> "Appellant cites People v. Klopstock, 24 Cal.2d 897 [151 P.2d 641], and People v. Joerger, 12 Cal. App.2d 665 [55 P.2d 1269], in support of its contention that values must be fixed as of the time when the condemnor takes actual possession. Neither case so holds. It was held in each case that the rights of interested parties to compensation accrued as of the time the property was deemed to be taken for public use. In the Klopstock case this was stated to be the date of the issuance of summons, and in the Joerger case it was said to be the date the condemnor entered into possession under order of court, which appears to have been made the day following the issuance of summons. The question was not raised, and the court did not decide, in either case, whether values should have been fixed as of the date when the condemnor entered into actual possession. We can conceive of no reason why the Legislature may not, within the Constitution, provide that the amount of compensation shall be assessed as of a time other than when the right thereto accrues." (Emphasis added)

In City of Los Angeles v. Blondeau, 127 Cal.App. 139, 140, 15 P.2d 554 (1932) the court said with reference to Section 10 of the Street Opening Act of 1903 (Stats. 1903, p. 376, as amended), a provision parallel to the above quoted portion of Code of Civil Procedure Section 1249 and now codified as Streets and Highways Code Section 4203 (127 Cal.App. 140-141, 15 P.2d 555):

> "The legislature fixed a time when the taking of property for a public use is deemed to occur. * * * As the Louis K. Liggett Company had a leasehold interest in the property at the time of the constructive taking for a public use, it was proper for the court to fix its damage for a disturbance of its leasehold interest."

The applicable rule as to accrual of the right to compensation in the absence of such statutes as Code of Civil Procedure Section 1249 and Streets and Highways Code Section 4203 is set forth as follows in Danforth v. United States, 308 U.S. 271, 84 L.Ed. 240, 60 S.C. 231 (1939), an eminent domain proceeding brought under the Flood Control Act of May 15, 1928, 45 Stat. at L. 534, Chap. 569, 33 USCA §§702a - 702m, 704 (308 U.S. 284, 84 L.Ed. 246):

> "For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment. Unless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action, we are of the view that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor."

See also United States v. Dow 357 U.S. 17, 20-21, 2 L.Ed.2d 1109, 1113-1114, 78 S.C. 1039 (1958).

Your proposed elimination from Code of Civil Procedure Section 1249 of the words "right thereto shall be deemed to have accrued at the issuance of summons" and from Streets and Highways Code Section 4203 of the words "For the purpose of assessing the compensation and damages, the right thereto shall be deemed to have accrued at the date of the issuance of summons" would work substantial changes in the law, and your comment respecting the proposed amendment of Section 1249 that "No change is made in existing rules as to persons entitled to participate in the award of compensation or damages" is incorrect and misleading.

Van Etten v. City of New York, 226 N.Y. 483, 124 N.E. 201 (1919) was an inverse condemnation proceeding wherein part of the property involved was conveyed to the claimant subsequent to the closing of a dam by the City of New York and the consequent destruction of the flow of water from the dam into a creek to which all property involved was riparian. The question was whether the grantee Van Etten or his predecessor in title was entitled to the compensation to be awarded as to property conveyed after the closing of the dam. Van Etten first presented a claim for damages dated October 21, 1913, the month after the dam was closed, alleging ownership of five parcels of land described in specified deeds and of other adjoining lands. Thereafter Van Etten received conveyances to other tracts of land, one on March 31, 1915, some 18 months subsequent to the closing of the dam. On December 15, 1915, the claimant presented an amended claim practically in the language of the original claim save that land described in seven different conveyances referred to therein was included in addition to the property described in the five deeds mentioned in the original claim and that the damages demanded were increased in amount. The claimant was awarded damages to all

land described in the twelve conveyances set out in the amended claim. "Upon the hearing of the claim for the purpose of establishing damages, and as bearing upon a depreciation in the value of his land, he offered evidence of the value of his land as a whole in September 1913, before the dam was closed on September 9th, and the value of the same thereafter" (124 N.E. 208). By a four to three decision the award of damages to the claimant's parcel, parts of which were acquired at various times, including 18 months, after the date of the damaging, was upheld, but the views of the three dissenting justices were encapsulated as follows (124 N.E. 209):

> "The appropriation by the city and its rights under the statute became complete upon the execution of the plan, and by the physical act of the city in closing the dam and assumption of its rights thereby on September 9, 1913, and a claim thereunder arose on that day as to any land then owned by the claimant, but does not embrace lands thereafter acquired."

This office is now confronted with a case parallel to Van Etten. In the proceeding in eminent domain entitled City of Burbank, etc., vs. Appel Development Co., etc., et al., Los Angeles County Superior Court case No. NCC 6105B (Transferred to Central District), wherein the complaint was filed, summons was issued and lis pendens was recorded on June 3, 1968, the owner of an entire parcel of land at one end of the right of way received on June 19, 1968, a non-escrowed conveyance from his son and daughter-in-law to contiguous property and now asserts that the property conveyed pendente lite is part of a larger parcel of land.

The rule as to accrual of the right to compensation and damages set forth in Code of Civil Procedure Section 1249 and in Streets and Highways Code Section 4203 is fair and has worked well in practice. To change that rule would at the very least foster inflated claims for damages.

The following from Vinciguerra v. State, 22 A.D.2d 93, 254 N.Y.S.2d 58, 59-60 (1964), an eminent domain proceeding involving a conveyance pendente lite, is pertinent: "In the typical case, however, the question is only whether the claimant is entitled to a recovery; whereas here, as the State points out, the result will be a joinder of contiguous plots to enhance their valuation. That this could lead

to fraudulent practices is self-evident. It is one thing when the proceeding is adversary and quite another where the grantor and grantee are working in concert."

We urge your Commission to modify its recommendations respecting the above mentioned Sections and to leave in effect the rule they prescribe as to accrual of the right to compensation and damages.

Very truly yours,

SAMUEL GORLICK
City Attorney

By Eldon V. Cooper
Eldon V. Cooper
Assistant City Attorney

EVS:lh

Memorandum 70-59 EXHIBIT IV

PACIFIC LIGHTING SERVICE AND SUPPLY COMPANY

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JOHN ORMASA
VICE PRESIDENT AND SYSTEM GENERAL COUNSEL

December 30, 1968

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94304.

re: Comments on Law Revision Commission's Tentative Recommendation relating to Condemnation Law Revision

Gentlemen:

Pursuant to your invitation, the Pacific Lighting Companies (Southern California Gas Company, Southern Counties Gas Company, and Pacific Lighting Service and Supply Company) submit their comments concerning the Commission's tentative recommendations relating to condemnation law and procedure.

In an effort to provide some perspective to our comments, we should explain that the Pacific Lighting Companies distribute natural gas to consumers throughout the Southern California area and supply natural gas at wholesale to the City of Long Beach and to San Diego Gas and Electric Company. The Pacific Lighting system is the largest natural gas distribution system in the world. While we uniformly attempt to purchase our rights of way and easements for pipelines by negotiation, it is occasionally necessary for us to resort to condemnation proceedings. Because this alternative has often afforded an unsatisfactory remedy for our companies, we have welcomed the Commission's efforts toward reform of the condemnation law.

On the whole, we are pleased with the Commission's current recommendation and study of the condemnation law and procedure. A few areas do exist, however, in which the Commission's proposals could be revised in order to strike a better balance between the legitimate, but often conflicting interests of the condemnor and condemnee.

1. POSSESSION PRIOR TO JUDGMENT: We have previously advised the Commission of our view that the most urgent need for reform in the condemnation field is the extention of the right to immediate possession to privately-owned, public utilities. We are pleased to note that this subject has occupied a significant portion of the Commission's efforts in the present proposal. The attention which the Commission has afforded this topic is a recognition of the practical fact that a delay or uncertainty in the time of transferring possession can result in a denial of condemnation remedies to the condemnor.

With due respect to the Commission's efforts, we feel the tentative recommendation extending this right of possession prior to judgment to public utilities casts an unrequired and inconsistent emphasis upon the element of hardship to the condemnee. Specifically, Section 1269.02(c) would permit a public utility to obtain possession prior to judgment, following a noticed motion and findings by the court that:

> "(1) a plaintiff is entitled to take the property by eminent domain;
> (2) the need of the plaintiff for possession of the property clearly outweighs any hardship the owner or occupant of the property will suffer if possession is taken; and
> (3) the plaintiff has deposited the amount indicated by an appraisal to be the compensation for the taking of the property in accordance with Chapter I (commencing with Section 1268.01)."

The requirement of the condemning authority demonstrating that its need for possession of the property "... clearly outweighs any hardship the owner or occupant of the property will suffer if possession is taken ..." is a new concept in the condemnation law. Indeed, this concept would be immaterial to the ultimate issues in the condemnation case if it is pursued to final judgment. We are aware of no authority which suggests that condemnation will be denied merely due to "hardship" on the part of the condemnee. On the contrary, the principal inquiry in a condemnation suit (apart from the amount of compensation) is the question of the

condemnor's necessity for the public use of the property (CCP § 1241, subd. 2). This concept of "necessity" has achieved thorough definition in the case law of California. (People vs. Chevalier [1959], 52 C. 2d 299; Linggi vs. Garovotti [1955] 45 C.2d 20; People vs. City of Los Angeles [1960] 179 C.A.2d 558, Appeal dismissed 364 U.S. 476, 5 L.Ed 2d 221, 81 S.Ct. 243; City of Hawthorne vs. Peebles [1959] 166 C.A.2d 758.)

Yet, the Commission's current proposal makes the condemnor's "necessity" subservient to "any hardship" on the part of the condemnee in determining the issue of possession prior to judgment. Unless the condemnor can show that its necessity "clearly outweighs" the condemnee's hardship, the remedy of possession prior to judgment will be denied. If the defendant's hardship were the dominant consideration upon final judgment in a condemnation case, we could see merit in the Commission's present position relating to possession prior to judgment. But this is not the case; the condemnor's "necessity" remains the ultimate issue upon final judgment. Since the denial of condemnation remedies altogether, we recommend that Section 1269.04 (c)(2) be revised to provide that possession prior to judgment will be ordered upon the court's finding that:

> "(2) the plaintiff's possession of the property is necessary to the public improvement; and"

In recommending this change, we do not suggest that the hardship of the defendant be completely disregarded. Certainly, the court's determination of plaintiff's "necessity" for possession of the property will involve a "...balancing of the greatest public good and the least private injury." (City of Hawthorne vs. Peebles [1959] 166 C.A.2d 758, 763.) The Commission's proposal could afford even greater recognition to this hardship element by implementing safeguards on the manner of transferring possession prior to judgment, without impairing the condemnor's right to immediate possession. Specifically, Section 1269.02(d) could be revised to apprise the court of the importance of considering the defendant's hardship when setting the time for transfer of possession:

"(d) the date after which the plaintiff is authorized to take possession of the property shall be determined by the court and shall not be less than 60 days after the making of the order. In determining the time for transfer of possession of the property beyond this 60 day period, the court shall give due consideration to a delay which will ameliorate any hardship to the defendant without frustrating plaintiff's plans for the public improvement."

This revision would specifically alert the court to consider the element of hardship to the defendant in setting the time for transfer of possession of the property. We submit that this change would achieve a more accurate balance between the competing interests of the parties by giving as much consideration as possible to the defendant's potential hardship without making this consideration a complete bar to the plaintiff's right to immediate possession.

2. SERVICE OF ORDER FOR POSSESSION: The Commission's proposed Section 1269.04 generally provides the requirements for service of the order of possession on the "record owner" of the property after such an order has been made pursuant to one of the other sections in the chapter. When an order is granted under Section 1269.01 (Possession by a Public Entity for Right of Way or Reservoir), this Section provides that the order must be served ". . . at least 60 days prior to the time possession is taken . . . ." (Section 1269.04 [b]). Similarly, if the order of possession is granted under Section 1269.06 (Possession of Property after Vacation or Withdrawal of Deposit), the service must occur ". . . at least 30 days prior to the time possession is taken . . . ."

However, with respect to an order obtained pursuant to Section 1269.02, the proposed requirement states that service shall occur ". . . within 10 days after the making of the order." This provision is inconsistent with the complimentary subdivisions of the same section in that it provides a time requirement which relates to the time of the making of

the order, rather than the time when possession may be acquired. This inconsistency also appears to conflict with the probable purpose for promulgating service requirements, i.e. to give the record owner and occupants a reasonable period of time in which to arrange for vacation of the property.

The present form of Section 1269.04 (c) also presents questions of substantial importance if service of the order is not accomplished within the 10 day period. What would be the status of an order which is not served until 11 days after it is made by the court? Would the answer to this question be different if the failure to make timely service resulted from (1) inadvertance on the part of plaintiff's counsel, or (2) avoidance of personal service by the defendant?

We feel that these issues are not relevant to the purposes sought to be served by the Commission's drafting of this section. The current form of Section 1269.04 (c) probably results from the Commission's consideration of this section in conjunction with Section 1269.02 (d) which provides that the court cannot award plaintiff possession of the property within 60 days after making of the order. If all action is taken in a timely manner, these sections would afford the record owner and occupants at least 50 days after the court's order within which to vacate the property. Thus, we suggest that Section 1269.04 (c) be revised as follows:

> "(c) At least 50 days prior to the time possession is taken pursuant to an order for possession made under Section 1269.02, the plaintiff shall serve a copy of the order on the record owner of the property and on the occupants, if any."

We submit that this revision would incorporate the valid policy behind this notice requirement in that it relates to the defendant's need for a reasonable period of time before he must divest himself of possession of the property.

3. RECOVERY OF CONDEMNEE'S EXPENSES ON ABANDONMENT OF AN EMINENT DOMAIN PROCEEDING: The Commission's tentative draft proposal would amend the current statutory provisions relating to abandonment of condemnation proceedings to provide that the defendant may recover all fees for attorneys, appraisers and

other experts regardless of whether those fees are incurred prior to or after commencement of the action. The Commission's proposal would eliminate the existing provision of Section 1255 (c) of the Code of Civil Procedure which precludes recovery of ". . . expenses incurred in preparing for trial where the action is dismissed 40 days or more prior to the time set for the pretrial conference in the action or, if no pretrial conference is set, the time set for the trial of the action." We feel that the Commission's proposal is premised upon a mistaken understanding of the reason for the "40 day" rule, and would inject an illogical and inequitable principle in the condemnation law.

The entire approach of Anglo-American jurisprudence to the subject of recovery of litigation expenses is difficult to integrate with principles of fairness. A criminal defendant may succeed in establishing his innocence, but his acquittal is often accompanied by the severe economic problems resulting from his investment in his defense. A personal injury victim may have to expend all or substantial portions of his ultimate recovery in paying the expenses of prosecuting his action. Yet, in most instances the law prohibits recovery of litigation expenses to the successful party. The reality and existence of the expenditure cannot be denied, but the law has adopted the almost-uniform policy that the expenses of resorting to the decision-making facilities of the courts shall be borne by the party incurring them.

This concept is also firmly entrenched in the California law of condemnation. Thus, under existing rules (and under the Commission's proposal) expenses for attorneys, appraisers and experts cannot be recovered by a proposed condemnee when the condemnor's project is abandoned prior to the filing of an action, (La Mesa-Spring Valley School District vs. Otsuka [1962] 57 C. 2d 309, 317; Commission's Recommendation relating to Recovery of Condemnee's Expenses, p. 9); nor can a condemnee recover such expenses if the condemnation action is pursued to a conclusion (City of Los Angeles vs. Vickers [1927] 81 C.A. 737; Pacific Gas & Electric Co. vs. Chubb [1914] 24 C.A. 265).

The one existing statutory exception to this principle is contained in Code of Civil Procedure, Section 1255 (c) which upon plaintiff's abandonment permits recovery of ". . . all

necessary expenses incurred in preparing for trial and during trial and reasonable attorney's fees." The section goes on to restrict this award by stating that these recoveries shall not include ". . . expenses incurred in preparing for trial where the action is dismissed 40 days or more prior to trial. . ." or pretrial if one is held. The Commission (and the courts) have assumed that this rule was added by the Legislature ". . . in 1911 to assure the condemnee that his costs, fees and expenses would be defrayed upon abandonment of the proceeding." (Commission's Recommendation relating to Condemnee's Recovery of Expenses, p. 3.) But this explanation reveals a curious lack of concern by the Legislature with a condemnee's expenses when no action has been commenced, or when the action proceeds to a judgment limited to the value of the property taken. We submit that this section was in fact adopted to provide condemnors with a penalty for abandoning the action after pursuing it through or to the brink of a condemnation trial. True, the amount of this penalty is measured by the condemnee's "expenses" in preparing for and engaging in the trial, but this does not change the fact that the principal thrust of the section is to influence the condemnor's decision to abandon the proceeding at an early stage if it is to be abandoned at all. This interpretation finds support in the fact that expenses cannot be recovered if the condemnor's abandonment is not "voluntary," regardless of the timing of the abandonment, (City of Los Angeles vs. Agardy [1934] 1 C. 2d 76; City of Los Angeles vs. Abbott [1932] 217 C. 184). The "40 day" provision is thus the heart of the entire section since it apprises the condemnor of the time by which abandonment must be made without incurring the penalty.

In submitting this conclusion, we are not unmindful of the Supreme Court's decision in La Mesa-Spring Valley School District vs. Otsuka [1962] 57 C. 2d 309, which held that the condemnee could recover attorney's fees incurred more than 40 days prior to trial upon the condemnor's abandonment of the project. This decision is based upon a tenuous distinction between "expenses" and "attorney's fees" and proceeds from the mistaken assumption that the statute is essentially concerned with reimbursing the condemnee, rather than influencing the condemnor's decision to abandon the project. We submit that a logical construction of this statute requires the conclusion that a penalty is imposed upon the condemnor only if abandonment occurs within 40 days prior to trial, and then

only to the extent of the condemnee's expenses (including attorney's fees) incurred during that period. Thus, the Commission's efforts at revision of Code of Civil Procedure Section 1255 (c) should be directed at closing the "loop-hole" opened in the La Mesa-Spring Valley School District case. The Commission's present proposal goes in the opposite direction and creates an illogical exception to the recog-nized rule that litigation expenses are borne by the party incurring them. In the absence of similar reform in other areas of the law (including the condemnation law), we perceive no justification for the Commission's present proposal relating to recovery of the condemnee's expenses.

We wish to thank the Commission for providing us with this opportunity to comment upon its proposals.

Sincerely,

PACIFIC LIGHTING SERVICE
AND SUPPLY COMPANY

John Ormasa

JOHN ORMASA
Vice President and
System General Counsel

PDK/nm

Memorandum 70-59 EXHIBIT V

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May 27, 1968

John H. DeMoully,
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Re: Condemnation Law and Procedure

Dear Sir:

I hope that this letter, which refers to your booklet on the above subject matter dated September 1967, is timely; but I have only recently had an opportunity to review the Commission recommendations on this subject.

I think that over-all the recommendations are excellent, and they certainly are an improvement on the present law. However, I hope you will listen to a few suggestions made as a result of my experience in the trial of eminent domain cases.

As a preface, it seems to me that condemnation law is based on the assumption that government employees are superior beings who can be trusted to be honest and honorable in dealing with property owners. This is as they should be -- so should we all; but this is not how they are in actual life. The whole American system was born out of a mistrust of government, and with good reason, which still persists today.

Proposed Section 1249a is an improvement on the present situation, but it gives all the options to the condemning agency. Why not simplify that section so that whoever is at fault for the delay in trial thereby gives the other party an option to choose between the date of filing or the date of trial as the date of valuation. Where neither party is at fault, the condemning agency's failure to set the case for trial within twelve months of chargeable time (time lost in the appellate processes would not be chargeable) would give such option to the landowner.

I can understand the purpose and psychology involved in proposed Sections 1268.01 and 1268.10. In my experience,

however, there is less to fear from a plaintiff making an inadequate deposit in order to protect itself than there is from a plaintiff bringing in a so-called "independent" appraiser who will deliberately prostitute himself by testifying to values of only 30% to 50% of the original State appraisal, thereby assuring himself of repeat business from the condemning agency. This is far less likely to happen with an expert witness for a landowner for the simple reason that there is very little repeat business from private landowners. I would suggest that where the witness in court testifies to a value 10% or 20% below the appraisal used in connection with the deposit, the first appraisal report may be introduced as an admission against the interest of the condemning agency in order to impeach the testimony of the witness who wanders too brazenly from the line of value at the trial. At the same time, in order to protect the condemning agency from wild testimony by a landowner's expert witness, CCP Section 997 could be amended to permit the condemning agency the same option that that section now gives an ordinary defendant.

I would also endorse the recommendation of Clarence B. Taylor that a uniform rule for both increases and decreases in value due to the influence of the public improvement should be adopted.

In my observation, the greatest injustice in the impact of eminent domain law is felt by the owners of single-family residences. Except where there is a great political tumult or a great deal of cooperation among the affected homeowners, the condemning agency invariably offers the homeowner an amount that is $1,000.00 to $3,000.00 below market value. I think the State Bar should propose legislation which would give to a landowner whose opinion of value is within $3,000.00 of the condemning agency's appraisal (or perhaps $5,000.00, using Municipal Court jurisdictional amounts as a guide) the option to avoid a jury trial and to submit his case to arbitration or to a type of court hearing based on written appraisals and written rebuttals to opposing appraisals, thereby saving the landowner the unconscionable expense in this situation that the condemning agencies can now force upon him. As a practical matter, the lone homeowner who is not tied in with some group defense is a helpless beggar who has no choice but to accept what the condemning agency condescends to offer him.

Your Commission recommendations overlook the plight of the small landowner in this situation. Yet this class of landowner undoubtedly constitutes the numerical majority of the people affected by eminent domain proceedings, although necessarily they are rarely, if ever, seen in court. Nevertheless, the

Law Revision Commission was charged to make a study to "safeguard the rights of all parties" affected by condemnation laws.

Sincerely yours,

ALBERT J. FORN

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