

November 28, 1972

Time

December 1 - 9:30 a.m. - 5:00 p.m.
December 2 - 9:00 a.m. - 12:00 noon

Place

State Bar Building
601 McAllister Street
San Francisco 94102

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

December 1-2, 1972

1. Minutes of November 9-11, 1972, Meeting (sent 11/21/72)
2. Administrative Matters
3. Study 36 - Condemnation

36.30 - Substitute Condemnation (Relocating by Condemnor of Public Use)

Memorandum 72-66 (sent 10/17/72; another copy sent 11/17/72)

36.26 - Acquisition, Removal, and Relocation of Structures and Related Improvements

Memorandum 72-74 (sent 11/17/72)

First Supplement to Memorandum 72-74 (sent 11/21/72)

36.71 - Risk of Loss; Subsequent Improvements

Memorandum 72-73 (sent 11/17/72)

36.50 - Just Compensation--Compensation for Property Taken or Damaged

Memorandum 72-75 (sent 11/21/72)

36.53 - Just Compensation--Additives

Memorandum 72-76 (sent 11/22/72)

Kanner law review article on compensation for loss of goodwill,
6 Cal.-Western L. Rev. 57 (1969)(sent 11/22/72)

4. Study 39.30 - Wage Garnishment and Related Matters

Memorandum 72-77 (sent 11/17/72)

Recommendation (attached to Memorandum)

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5. Study 39.90 - The Claim and Delivery Statute

Recommendation Relating to the Claim and Delivery Statute
(sent 11/17/72)

Note. In addition to the materials listed on agenda, please bring to the meeting: Looseleaf binder containing your Comprehensive Eminent Domain Statute

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION

December 1 AND 2, 1972

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on December 1 and 2, 1972.

Present: John D. Miller, Chairman
Noble K. Gregory
John N. McLaurin
Thomas E. Stanton, Jr.
Howard R. Williams

Absent: Marc W. Sandstrom, Vice Chairman
Alfred H. Song, Member of Senate
Carlos J. Moorhead, Member of Assembly
John J. Balluff
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Jack I. Horton, Nathaniel Sterling, Stan G. Ulrich, and Bruce Donald (December 1 only), members of the Commission's staff, also were present. Gideon Kanner, Commission consultant on condemnation law and procedure, also was present.

The following persons were present as observers:

Norval Fairman, Department of Public Works, San Francisco
James T. Markle, Department of Water Resources, Sacramento (December 1 only)
Terry C. Smith, Los Angeles County Counsel, Los Angeles
Charles E. Spencer, Department of Public Works, Los Angeles

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ADMINISTRATIVE MATTERS

The Commission directed the staff to send copies to any materials distributed at the meetings to absent Commissioners. [The staff plans to attach these materials to the copy of the Minutes sent to each Commissioner.]

BACKGROUND RESEARCH GENERALLY

The Commission requested submission of a staff memorandum on the construction of the term "substantial" in recent court decisions.

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STUDY 26 - ESCHEAT

The Commission considered a letter handed out at the meeting from the Office of the State Controller regarding the effect of Pennsylvania v. New York on California's Unclaimed Property Law. The letter suggested that the Law Revision Commission undertake a study of the problems created by this decision and recommend appropriate legislation. The letter indicated that the Office of the State Controller would provide any assistance and information needed in connection with this study.

After discussion, the Commission indicated that this matter should be placed on the agenda for the January 1973 meeting with a view to submitting a recommendation to the 1973 Legislature.

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STUDY 36.26 - CONDEMNATION (ACQUISITION, REMOVAL, AND
RELOCATION OF STRUCTURES AND RELATED PROBLEMS)

The Commission considered Memorandum 72-74, the First Supplement thereto, and a proposed draft of Section 1240.420 handed out at the meeting. relating to acquisition of structures located partly on property taken by eminent domain. The Commission approved the draft statute set out in Exhibit IV to Memorandum 72-74, with the following qualifications:

Section 1240.150. The last paragraph of the Comment was deleted and the following is to be added to the Comment:

Cf. Govt. Code § 7267.7 ("If the acquisition of only a portion of a property would leave the remaining portion in such a shape or condition as to constitute an uneconomic remnant, the public entity shall offer to and may acquire the entire property if the owner so desires.").

Section 1240.160. The phrase "together with" was substituted for "including" and the word "demolish" was substituted for "remove."

Section 1240.410. Subdivision (c) was revised to substitute the word "Property" for the phrase "A remnant" and to substitute the word "property" for the word "remnant" in its next occurrence in the sentence.

The Comment discussing subdivision (c) should be revised to substitute the phrase "In most cases" for "Clearly, in almost every case." A reference should be added that damages to remaining property are to be computed on the basis of the project as designed including the effect of any physical solutions provided. The sentence commencing, "Thus, the cost" was revised to read, "Thus, the total of the cost of the solution, the compensation paid for the part taken, and any remaining damages, should be less than the amount that would be required to be paid if the entire parcel were taken."

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There should be added to the Comment the same addition as is to be made to the Comment to Section 1240.150 above.

Section 1240.420. The staff was requested to redraft this section and rewrite the Comment for resubmission to the Commission. In so doing, the staff should consider any comments received from Mr. Kanner regarding the potential for and possible prevention of coercion on the property owner by the condemnor.

Section 1240.440. This section should be moved to the procedural part of the Eminent Domain Law.

Unnumbered Section (p. 16). "When" should replace "whenever." In subdivision (a), the phrase "on other property" should replace "on property immediately adjacent to it." In subdivisions (a) and (b), the phrase "equal to or greater than" should replace "not less than." This section should be placed in the compensation chapter of the Eminent Domain Law.

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STUDY 36.30 - CONDEMNATION (SUBSTITUTE CONDEMNATION)

The Commission considered Memorandum 72-66 relating to condemnation of substitute property for the purpose of relocating public utility property. The Commission approved Section 1240.330 as set out in Exhibit I for inclusion in the Eminent Domain Law; the Commission approved Public Utilities Code Section 861 as set out in Exhibit II for inclusion in the conforming changes; and the Commission approved the repealer bill as set out in Exhibit III for submission to the Legislature when the Eminent Domain Law is submitted.

STUDY 36.50 - CONDEMNATION (JUST COMPENSATION--COMPENSATION
FOR PROPERTY TAKEN OR DAMAGED)

The Commission considered Memorandum 72-75 relating to the determination of compensation for property taken and for damage to the remainder along with the attached study on the market value concept. The Commission took the following action with respect to the draft statute set out in Exhibit I to the memorandum:

Section 1245.010. Section 1245.010 was revised to read substantially as follows:

1245.010. As used in this chapter, the fair market value of property is the price on the date of valuation that would be agreed to by a seller being willing to sell, but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer being ready, willing and able to buy, but under no particular necessity for so doing, dealing with each other in the open market and with a full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

The Comment to Section 1245.010 should indicate that omission of the phrase "highest price estimated in terms of money" from the traditional definition of market value in Sacramento etc. R.R. v. Heilbron, 156 Cal. 408, 104 P. 979 (1909), is intended merely to eliminate confusing language and is not intended to make a substantive change in the law. The Comment should also indicate that the evidence admissible on the issue of market value is governed by the Evidence Code, which permits a showing of the terms and conditions of comparable sales in appropriate cases.

Section 1245.020. This section should be redrafted with the following considerations in mind: (1) The discounting of enhancement and blight should be phrased in a positive rather than an arithmetical fashion if possible. (2) Subdivision (a)(1) should be deleted if the concept it embodies will

not be lost in so doing. (3) Subdivision (b) should restate the Woolstenhulme holding in more clear language. The Comment to subdivision (b) should indicate that it codifies the constitutional requirement of Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971).

Sections 1245.050-1245.090. These sections relating to the date of valuation were approved subject to a possible staff reorganization.

Section 1240.110. This section was approved after deletion of the word "just" from the phrase "just compensation." The caption should be adjusted accordingly.

Section 1245.120. Subdivision (a) of this section was deleted in its entirety.

Subdivision (b) was revised to read substantially as follows:

(b) Subject to subdivisions (c) and (d), the owner of the property shall be awarded, in addition to the fair market value of the property taken, compensation for the damage to the remainder caused by:

(1) Its severance from the part taken; and

(2) The construction and use of the project in the manner proposed by the plaintiff whether located on the part taken or elsewhere.

The Comment to subdivision (b) should state that the subdivision continues existing law except that the rule of People v. Symons, 54 Cal.2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960), is abrogated.

The first sentence of subdivision (c) was revised to read substantially as follows:

(c) Subject to subdivision (d), the amount of the benefit to the remainder caused by the construction and use of the project in the manner proposed by the plaintiff whether located on the part taken or elsewhere shall be deducted from the compensation for damage to the remainder.

The Comment to subdivision (c) should state that the subdivision continues existing law.

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Subdivision (d)(1) was revised to read substantially as follows:

(d) The compensation for the damage to the remainder provided by this section and the amount of the benefit to be deducted therefrom shall (1) reflect any delay in the time when the damage or benefit caused by the construction and use of the project in the manner proposed by the plaintiff will actually be realized

The Comment to this subdivision should indicate that damages and benefits are computed for the project as proposed and, if the project is not completed as proposed, the property owner has a remedy, citing People v. Schultz Co., 123 Cal. App.2d 925, 298 P.2d 117 (1954). The concept embodied in subdivision (d)(2) was approved, but the Commission requested that the language be redrafted for purposes of clarity.

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STUDY 36.53 - CONDEMNATION (JUST COMPENSATION--ADDITIVES)

The Commission considered Memorandum 72-76 and the attached study relating to the compensability of business losses in eminent domain. The Commission took no action with regard to business losses.

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STUDY 36.71 - CONDEMNATION (RISK OF LOSS;
SUBSEQUENT IMPROVEMENTS)

The Commission considered Memorandum 72-73 and a letter from Mr. Kanner, along with draft provisions relating to protection of partially completed improvements, which were distributed at the meeting.

The Commission reviewed the risk of loss provision (which continued the language of the existing statute) attached to Memorandum 72-73 as Exhibit I. Additional staff analysis was requested on the following matters: (1) the time title to condemned property is taken and its recordation, (2) the burden of insuring against loss, and (3) the effect of inverse condemnation, including a de facto taking, on the risk of loss. In this connection, the implications of the recent cases of Klopping v. City of Whittier and Selby Realty Co. v. City of Buenaventura should be considered.

The Commission reviewed the provisions relating to protection of partially completed improvements. Additional staff analysis was requested including, but not limited to, consideration of the following alternative approaches to the problem: (1) allowing compensation for improvements reasonably made to preserve the structure from damage and denying compensation for improvements made solely for the purpose of obtaining a higher amount of compensation; (2) allowing compensation for subsequent improvements made with the consent of the condemnor or upon order of the court in its discretion; (3) allowing compensation for completion of any construction that is near completion; (4) allowing compensation for continuance of construction pending either the consent of the condemnor or a court order as described in (2) above; (5) allowing compensation for improvements other than ordinary maintenance

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to a structure in use as a residence; (6) allowing compensation for improvements made during the time there is a successful attack on the right to take; (7) limiting any such compensation to improvements made to structures that enhance the value of the property within the meaning of the Evidence Code; (8) allowing damages for construction losses if the proceeding is subsequently abandoned; (9) allowing no compensation for subsequent improvements but permitting the property owner to require the condemnor to take immediate possession of the property within three days after notice; and (10) preventing jury view of partially completed improvements.

In addition, a memorandum should be prepared on the effect on construction contracts and on the rights of secured parties where the security is impaired in the case of condemnation of a partially completed structure.

A memorandum also should be prepared discussing the compensability of construction plans made in good faith prior to service of summons even though no construction has commenced at the time of service.

The provision relating to improvements to a public utility system appearing on page 2 of Exhibit II to Memorandum 72-73 was revised to read:

Improvements required to be made by a public utility to its system subsequent to the date of the service of summons shall be included in the assessment of compensation and damages.

The Comment to this section should indicate that the standard is based on the case of Citizen's Util. Co. v. Superior Court, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963), and not on Public Utilities Code Section 1418.

The provision relating to harvesting and marketing of crops appearing on page 3 of Exhibit II to Memorandum 72-73 should be redrafted to make clear the following policies:

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(1) The property owner has the right to make and be compensated for necessary improvements for the purpose of harvesting any crops planted prior to service of summons except that, if the plaintiff indicates that it will take possession of the property prior to the time the crops are ready for harvest, the cost of any improvements will not be allowed, but the value of the crops in their unharvested state at the time of service of summons should be included in the award.

(2) The plaintiff and property owner may by agreement permit the harvest of crops whether planted before or after service of summons.

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STUDY 36.85 - CONDEMNATION (LITIGATION EXPENSES)

The Commission requested submission of a memorandum concerning the application of Code of Civil Procedure Section 998 to eminent domain cases but requested that this matter be given lowest priority.

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STUDY 39.30 - WAGE GARNISHMENT AND RELATED MATTERS

The Commission considered Memorandum 72-77 and the attached material sent to the Commission by the Chairman of the State Bar Committee.

The Commission directed the staff to prepare an amendment to Section 723.101(d) to require that the judgment creditor who served the intervening order be given notice of the hearing on the application made under subdivision (d). The amendment will be made to the bill introduced to effectuate the Commission's recommendation after the amendment has been approved at the January 1973 meeting. The staff was further directed to advise the State Bar Committee of the reasons why certified or registered mail is required and the reasons why the judgment debtor rather than the employer is to bear the cost of personal service if the employer refuses service by certified or registered mail.

STUDY 39.90 - CLAIM AND DELIVERY STATUTE

The Commission considered the tentative recommendation relating to the claim and delivery statute as revised after the November 1972 meeting. The Commission directed the staff to make the following changes to the recommendation before it is printed:

Preliminary portion of the recommendation. A footnote should be added following the first paragraph on page 1 to explain that this recommendation is one of a series of recommendations on creditor's remedies, that self-help repossession is a matter that the Commission has been assigned to study, but that this recommendation deals only with claim and delivery, i.e., judicial repossession. Commissioner Gregory abstained from the action taken with regard to self-help repossession. The preliminary portion must also be conformed to the changes made in the proposed legislation.

Section 512.020. This section should be revised (and other sections conformed) to permit repossession on an ex parte order of the court where the property claimed has been stolen from the plaintiff. For this purpose, theft should not include situations where the property was originally obtained through fraud, trick or device, or similar means. In connection with this procedure, a severability clause should be added so that the basic procedure can be preserved if the ex parte procedure is constitutionally deficient.

Section 516.030. The second sentence should be revised to provide in part: "Except where specifically permitted to be shown by information and belief, each affidavit shall show"

APPROVED

Date

Chairman

Executive Secretary



HOUSTON I. FLOURNOY

Controller of the State of California

SACRAMENTO, CALIFORNIA 95805

November 28, 1972

Mr. John H. DeMouilly
Executive Secretary
Law Revision Commission
School of Law
Stanford, California 94305

Dear Mr. DeMouilly:

This is in reply to your letter of October 30 regarding the effect of Pennsylvania v. New York on California's Unclaimed Property Law.

We are concerned, of course, that as a result of this decision, California may lose a significant amount of money to other states unless our statute is amended to comply with the Supreme Court's criteria. Since the Law Revision Commission was responsible for drafting the present provisions of the law relating to travelers checks and money orders, it would be appreciated if the Commission would undertake a study of the matter and recommend appropriate legislation.

Mr. S. J. Cord, Chief of our Division of Accounting, and Mr. L. E. Gercovich, Administrative Adviser for the Controller's Office, will be happy to provide whatever assistance or information the Commission may request in connection with its study of this subject.

Very truly yours,

HOUSTON I. FLOURNOY, STATE CONTROLLER

By


Kirk West
Chief Deputy Controller