

36.70

9/29/72

Memorandum 72-63

Subject: Study 36.70 - Condemnation (Date of Valuation)

This memorandum concerns the date of valuation--the date for ascertaining value and damages for the taking of property by eminent domain. Related to this problem but considered at a future meeting is the problem of enhancement and blight.

Code of Civil Procedure Section 1249 provides in substance that the property shall be valued as of the date on which the summons is issued unless, without fault on the part of the defendant, the trial does not occur within one year. In the latter event, the property is valued as of the date of the trial even though possession of the property may have been taken by the condemnor long before trial. People v. Murata, 55 Cal.2d 1 (1960), held that the date of valuation upon retrial of a condemnation case is the same as the date of valuation used in the original trial.

In 1967, after several years of consideration of this problem and after taking into account the strongly opposed views of condemnors and attorneys for condemnees, the Commission published a tentative recommendation that included its conclusions as to how this problem should be resolved. The pertinent parts of the printed tentative recommendation and background study are attached (yellow pages).

We believe that the attached material adequately presents the policy question for Commission review. (We are not concerned at this time with enhancement and blight, but we have included the amendment of Section 1249 that was included in the tentative recommendation to put the date of valuation problem in context.)

The staff believes that there is no entirely satisfactory solution to this problem. We believe that the tentative recommendation presents a reasonable compromise that would remedy the two major defects in existing law: (1) the failure to recognize the significance of a deposit of probable just compensation in fixing the date of valuation and (2) the gross inequity to the property owner that results from the rule established in People v. Murata which held that the date of valuation upon retrial of a condemnation case is the same as the date of valuation used in the original trial even though many years have passed since the original trial. Accordingly, we recommend that the Commission approve the substance of Section 1249a as set out in the attached material for inclusion in the comprehensive statute.

Respectfully submitted,

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Executive Secretary

### Date of Valuation

Since 1872, Code of Civil Procedure Section 1249 has required that the property to be taken be valued as of the date the summons is issued. In an attempt to improve the position of the property owner and to compel the condemnor to expedite the proceeding, a provision was added in 1911 specifying that, if a case is not brought to trial within one year and the delay is not caused by the defendant, the date of valuation is the date of trial. Neither the taking of possession nor the depositing of approximate compensation has any bearing in determining the date of valuation. In cases in which the issue of compensation is once tried and a new trial is necessary, the Supreme Court of California has held that the date of valuation remains the same date used for that purpose in the original trial.

The Commission has considered the oft-made proposal that the date of valuation be, in all cases, the date of trial. Much can be said in favor of that change. Unless the condemnor deposits approximate compensation and takes possession of the property at that time, the date the proceedings are begun is not an entirely logical date of valuation. It would seem more appropriate to ascertain the level of the general market and the value of the particular property in that market at the time the exchange of the property for "just compensation" actually takes place. Also, in a rapidly rising market, property values may have increased so much that the property owner cannot purchase equivalent property when he eventually receives the award. In other states in which the power of eminent domain is exercised through judicial proceedings, the majority rule is to fix the date of trial as the date of valuation. Nonetheless, the existing California rules appear to have worked equitably in most cases. The alternative rule might provide an undesirable incentive to condemnees to delay the proceedings to obtain the latest possible date of valuation. And, as a matter of convenience, there is merit in fixing the date of valuation as of a date certain, rather than by reference to the uncertain date that the trial may begin.

The Commission therefore recommends retention of the existing rules with the following modifications:

1. The condemnor should be permitted to establish an early date of valuation by depositing the probable amount of compensation for withdrawal by the property owner. In addition to providing a needed incentive to condemnors to deposit approximate compensation, the rule would accord with the supportable view that the property should be valued as of the time payment is made. For convenience, the date of valuation should be the date the deposit is made unless an earlier date is made applicable by the existing rules. A date of valuation thus established should not be subject to change by any subsequent development in the proceeding.

2. In case of a new trial, the date of the new trial, rather than the date used in the original trial, should be the date of valuation unless the condemnor deposits the amount awarded in the original trial within a reasonably brief period after entry of judgment in the original trial. Unless such a deposit has been made, the date used in the original trial is of no practical or economic significance. To clarify existing law, a similar rule should be provided for a "retrial" following a mistrial, except that the amount to be deposited should be determined in the same manner as a deposit made to obtain possession before judgment.

3. As a technical matter, provisions respecting the date of valuation should be changed to compute that date from the filing of the complaint rather than from the issuance of summons. Under early law, the issuance of summons marked the inception of the court's jurisdiction over the property. Since that rule no longer prevails, the date of filing of the complaint would be more appropriate.

4. The Street Opening Act of 1903 (Strs. & Hwys. Code §§ 4000-4443) and the Park and Playground Act of 1909 (Govt. Code §§ 38000-38213) specify dates of valuation that differ from those provided by the Code of Civil Procedure. As there appears to be no justification for the discrepancy, these acts should be amended to conform them to the provisions of the Code of Civil Procedure.

Section 1249 (amended)

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

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

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

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

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

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

*Subdivision (b).* The term "market value" has been substituted for "actual value" in subdivision (b). This change codifies the decisional law which uniformly construed "actual value" to mean "market value." See *Sacramento So. R.R. v. Heilbron*, 156 Cal. 408, 104 Pac. 979 (1909); *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585 (1899). For simplicity of expression, the phrase "date of valuation" has been substituted for former language that referred to "accrual" of the right to compensation and damages. No change is made in existing rules as to persons entitled to participate in the award of compensation or damages (see, e.g., *People v. City of Los Angeles*, 179 Cal. App.2d 558, 4 Cal. Rptr. 531 (1960); *People v. Klopstock*, 24 Cal.2d 897, 151 P.2d 641 (1944)).

The provisions relating to dates of valuation formerly contained in this section are superseded by Section 1249a.

**Note.** Substantial portions of the Comment to Section 1249 have been omitted as not relevant to the date of valuation problem.

The problem of enhancement or blight (dealt with in subdivision (a) of amended Section 1249) is considered in a separate memorandum.

Section 1249a (added)

SEC. 6. Section 1249a is added to the Code of Civil Procedure immediately following Section 1249, to read:

1249a. (a) The date of valuation shall be determined as provided in this section.

(b) If the issue of compensation is brought to trial within one year after the filing of the complaint, the date of valuation is the date of the filing of the complaint.

(c) If the issue of compensation is not brought to trial within one year after the filing of the complaint, the date of valuation is the date of the commencement of the trial unless the delay is caused by the defendant, in which case the date of valuation is the date of the filing of the complaint.

(d) If a new trial is ordered by the trial or appellate court and the new trial is not commenced within one year after the filing of the complaint, the date of valuation is the date of the commencement of such new trial, except that the date of valuation in the new trial shall be the same date as the date of valuation in the previous trial if (within 30 days after the entry of judgment or, if a motion for new trial or to vacate or set aside the judgment has been made, within 10 days after disposition of such motion) the plaintiff has deposited the amount of the judgment in accordance with Chapter 3 (commencing with Section 1270.01) of Title 7.1.

(e) In any case in which a mistrial is declared and the retrial of the case is not commenced within one year after the filing of the complaint, the date of valuation is the date of the commencement of the retrial of the case, except that the date of valuation in the retrial of the case shall be the same date as the date of valuation in the trial in which the mistrial was declared if, within 30 days after the declaration of the mistrial, the plaintiff deposits the probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01) of Title 7.1.

(f) Unless an earlier date of valuation is applicable under subdivisions (b) through (e), inclusive, if the plaintiff deposits the probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01) of Title 7.1 or deposits the amount of the judgment in accordance with Chapter 3 (commencing with Section 1270.01) of Title 7.1, the date of valuation is the date on which the deposit is made.

*Comment.* Section 1249a supersedes those portions of Code of Civil Procedure Section 1249 that formerly specified two alternative dates of valuation.

*Subdivision (a).* Section 1249a provides a date of valuation for all eminent domain proceedings other than certain proceedings by political subdivisions to take property of public utilities. See the Comment to Section 1249.

*Subdivisions (b) and (c).* Subdivisions (b) and (c) establish the date of valuation for cases in which that date is not established by an earlier deposit in accordance with subdivision (f).

The date of the filing of the complaint, rather than the date of the issuance of summons, is used in determining the date of valuation. Code of Civil Procedure Section 1243 requires that all proceedings in eminent domain "be commenced by filing a complaint and issuing a summons." Ordinarily, the dates are the same but this is not always the case. See *Harrington v. Superior Court*, 194 Cal. 185, 228 Pac. 15 (1924). As the issuance of summons is not essential to establish the court's jurisdiction over the property (see *Harrington v. Superior Court*, *supra*, and *Dresser v. Superior Court*, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964)), the date of the filing of the complaint is a more appropriate date.

Subdivision (c), which continues in effect a proviso formerly contained in Section 1249, retains the date specified in subdivision (b) as the date of valuation in any case in which the delay in reaching trial is caused by the defendant.

With respect to the date that a trial is commenced, see Evidence Code Section 12 and the Comment to that section.

If a new trial is ordered or a mistrial is declared and the new trial or retrial is not commenced within one year after the filing of the

complaint, the date of valuation is determined under subdivision (d) or (e) rather than under subdivision (b) or (c). However, if the new trial or retrial is commenced within one year after the filing of the complaint, the date of valuation is determined by subdivision (b).

Notwithstanding subdivision (c), the date of valuation may be an earlier date if a deposit is made. See subdivision (f).

*Subdivision (d).* Under language formerly contained in Section 1249, questions arose whether the original date of valuation or the date of the new trial should be employed in new trials in eminent domain proceedings. The Supreme Court of California ultimately held that the date of valuation established in the first trial, rather than the date of the new trial, should normally be used. See *People v. Murata*, 55 Cal.2d 1, 9 Cal. Rptr. 601, 357 P.2d 833 (1960). Subdivision (d) reverses the result obtained by that decision unless the date of valuation has been established by the deposit of the amount of the judgment in accordance with Chapter 3 (commencing with Section 1270.01) of Title 7.1. The subdivision applies whether the new trial is granted by the trial court or by an appellate court. However, if a mistrial is declared, further proceedings are not considered a "new trial," and the date of valuation is determined under subdivision (e) rather than under subdivision (d).

Under subdivision (d), the date of valuation is the date of valuation used in the previous trial if the deposit is made within 30 days after entry of judgment or, if a motion for a new trial or to vacate or set

aside the judgment has been made, within ten days after disposition of such motion. If the deposit is made thereafter but prior to the commencement of the new trial, the date of valuation is the date of deposit under subdivision (f).

*Subdivision (e).* Under the language formerly contained in Section 1249, the effect, if any, of a mistrial upon the date of valuation was uncertain. An unpublished decision of the court of appeals held that the abortive trial proceeding was of no consequence in this connection and that, if the retrial began more than one year after the date of issuance of summons, the date of valuation was the date of the retrial if the delay was not caused by the condemnee. *People v. Hull*, 2 Civil No. 29159 (2d Dist. 1965). To provide an appropriate rule, subdivision (e) adopts the principle established by subdivision (d) which governs the date of valuation when a new trial is ordered. See the Comment to subdivision (d).

For the purpose of subdivision (e), a "retrial" following a mistrial is distinguished from a new trial following an appeal or a motion for new trial granted under Code of Civil Procedure Section 657. See subdivision (d) and the Comment to that subdivision. As to the distinction, see 3 WITKIN, CALIFORNIA PROCEDURE, *Attack on Judgment in Trial Court*, § 24 at 2072 (1954).

*Subdivision (f).* Subdivision (f) permits the plaintiff, by making a deposit, to establish the date of valuation as of a date no later than the date the deposit is made. The rule under the language formerly contained in Section 1249 was to the contrary; neither the making of a deposit nor the taking of possession had any bearing on the date of valuation. See *City of Los Angeles v. Tower*, 90 Cal. App.2d 869, 204 P.2d 395 (1949). The date of valuation may be earlier than the date of the deposit, and subsequent events may cause such an earlier date of valuation to shift to the date of deposit. But a date of valuation established by a deposit cannot be shifted to a later date by any of the circumstances mentioned in the preceding subdivisions.

### Date of Valuation

Since 1872, section 1249 of the Code of Civil Procedure has fixed the date of issuance of summons as the date of valuation in all eminent domain proceedings. The single judicially created exception is that the date of valuation in takings of public utility property is the date of trial rather than the date of summons.<sup>230</sup> In an attempt to improve the position of the property owner and to compel the condemnor to expedite the proceeding, a provision was added in 1911 specifying that, if a case is not tried within one year from its commencement, and the delay is not caused by the defendant, the date of valuation is the date of trial.<sup>231</sup> In cases in which the issue of compensation is once tried, and a new trial is necessary, the California Supreme Court recently held that the date of valuation remains the same date used for that purpose in the original trial.<sup>232</sup>

Under existing law, the dates of valuation specified in Code of Civil Procedure section 1249 are not affected in any way by the plaintiff's taking possession of the property and depositing probable just compensation prior to trial. This result has been reached because no explicit provision for a different date of valuation is made in such cases and, secondly, because section 1249 is viewed as a purely "procedural" statute.<sup>233</sup>

The principal criticism of section 1249, however, has not been directed to its anomalous application in immediate possession cases. Rather, the view of property owners and their advocates has been that fixing the basic date of valuation as the date of summons, instead of the date of trial or payment of the award is supported only by analogy to other civil actions; that in eminent domain proceedings, however, commencement of the proceedings is not logically relevant to ascertaining the date at which the level of the general

<sup>230</sup> See *Citizens Util. Co. v. Superior Court*, 59 Cal. 2d 805, 31 Cal. Rptr. 316, 382 P.2d 356 (1963).

<sup>231</sup> As to the purposes of the alternate date of valuation, see *People v. Murata*, 55 Cal. 2d 1, 9 Cal. Rptr. 601, 357 P.2d 833 (1960); *Redevelopment Agency v. Maxwell*, 193 Cal. App. 2d 414, 14 Cal. Rptr. 170 (1961).

<sup>232</sup> See *People v. Murata*, 55 Cal. 2d 1, 9 Cal. Rptr. 601, 357 P.2d 833 (1960).

<sup>233</sup> *City of San Rafael v. Wood*, 144 Cal. App. 2d 604, 301 P.2d 421 (1956); *City of Los Angeles v. Tower*, 90 Cal. App. 2d 869, 204 P.2d 395 (1949). See also *County of Los Angeles v. Hoe*, 138 Cal. App. 2d 74, 291 P.2d 98 (1955).

market, and the value of the particular property in that market, should be considered; and that, in a rising market, by the time the property owner receives the award, property values often will have increased so much that he cannot purchase equivalent property with the award.

Before the adoption of section 1249 in 1872, the rule appears to have been to value the property as of the time of taking<sup>284</sup> or the date of the actual payment of compensation.<sup>285</sup> Immediately after its adoption, the date-of-issuance-of-summons rule was held unconstitutional, but that departmental decision was overruled by the full supreme court.<sup>286</sup> Since that time, the rule has been challenged, but uniformly sustained by the appellate courts, on many occasions.<sup>287</sup>

Although the matter soon became highly controversial as a question of compensation and economics, it seems clear that the draftsmen of the Code of Civil Procedure considered the date of valuation to be purely a point of civil procedure. Under the law of that era, issuance of summons in actions *in rem* was deemed to mark inception of the court's jurisdiction over the property, and that date was accordingly chosen.<sup>288</sup>

In a minority of states in which the date of valuation is fixed at the inception of the proceedings,<sup>289</sup> however, justifications have been found for the rule. An early Massachusetts decision puts these succinctly, as follows:

This affords a definite and invariable rule, which has relation to the time at which the property is designated and set apart for the pub-

<sup>284</sup> *Central Pac. R.R. v. Pearson*, 1 Cal. Unrep. 790 (1873).

<sup>285</sup> *Bensley v. Mountain Lake Water Co.*, 13 Cal. 307 (1859).

<sup>286</sup> *California So. R.R. v. Colton Land & Water Co.*, 2 Cal. Unrep. 247, 4 Pac. 44 (1884), *overruling department decision in* 2 Cal. Unrep. 244, 2 Pac. 38 (1884).

<sup>287</sup> See, e.g., *City of Pasadena v. Porter*, 201 Cal. 381, 257 Pac. 576 (1927); *Tehama County v. Bryan*, 68 Cal. 57, 8 Pac. 673 (1885); *California So. R.R. v. Kimball*, 61 Cal. 90 (1882); *City of Los Angeles v. Oliver*, 102 Cal. App. 299, 283 Pac. 298 (1929); *City of Oakland v. Wheeler*, 34 Cal. App. 442, 168 Pac. 23 (1917); *Sacramento Terminal Co. v. McDougall*, 19 Cal. App. 562, 126 Pac. 303 (1912); *City of Los Angeles v. Gager*, 10 Cal. App. 378, 102 Pac. 17 (1909).

<sup>288</sup> See *Harrington v. Superior Court*, 194 Cal. 185, 228 Pac. 15 (1924).

<sup>289</sup> In most jurisdictions in the United States, including many in which no date of valuation is specified by statute, the date of valuation is deemed to be the date of "taking." "Taking," in turn, may refer to a number of events in the acquisition process, including the taking of possession or the filing of a document that passes title to the condemnor. See 3 NICHOLS, *EMINENT DOMAIN* § 8.5[1] (3d rev. ed. 1965); 4 *id.* § 12.23[1]. This is also federal practice. See *United States v. Dow*, 357 U.S. 17 (1958). It is only in those jurisdictions in which compensation is determined prior to the "taking" that it is necessary to fix a more or less arbitrary date of valuation. See 3 NICHOLS, *EMINENT DOMAIN* § 8.5[2] (3d rev. ed. 1965); 4 *id.* § 12.23[2]. Even in these states, the majority rule is to assess compensation and damages as of the date of trial. See 1 ORCEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* § 21 n.29 (2d ed. 1953).



lic use, the owners ascertained who are entitled to be compensated, and the judicial proceedings instituted for the purpose of determining such compensation; and is not liable to be affected by the duration of these proceedings, or by increase or diminution in value, whether occasioned by the taking itself, or by the acts of the owners, lapse of time, or other circumstances. In all these respects, it is a juster measure of compensation than a valuation of the estate at any subsequent point of time.<sup>240</sup>

This reasoning obviously is much more persuasive in those states employing the so-called "administrative method" of condemnation in which the estimated amount of compensation is deposited for withdrawal by the property owner at the outset of the court proceedings.

Proposals for change in California's basic rule have been many and well considered. Counsel for property owners uniformly urge adoption of the date of trial as the basic date of valuation. The following suggestion is typical:

Generally, the client will be better off if the date of valuation is the date of trial. As a matter of equity, there should be legislation providing that in all condemnation proceedings the date of valuation shall be the date of trial. The client will have to replace his property or otherwise reinvest the award at the price that is prevailing after the trial. It therefore seems that just compensation would be better provided by the trial date valuation in every case, except perhaps where the defendant deliberately stalled the proceeding.<sup>241</sup>

A refinement of this change in the date of valuation would select the date *initially set* for trial, and add a provision that if the trial is continued upon motion of either party, the date of valuation would be, at the option of the opposing party, either the date then set for trial or the date to which trial is continued. The considerations favoring this change in existing law have been stated as follows:

1. It would provide for valuation in eminent domain proceedings at current prices in keeping with the real estate market in general where properties are bought and sold at current prices rather than, as under the existing CCP 1249, as of a price level existing approximately 8 to 12 months prior to trial. This is both fair and realistic whether the market be rising, falling or remaining static.

2. It would facilitate the trial of eminent domain proceedings, particularly when tried to a jury in that the trier of fact would not be required to perform the mental gymnastic feat of projecting his thinking backward for a period of 8 to 12 months.

3. It would eliminate the frequently occurring and troublesome question of who caused a delay in the trial of an eminent domain proceeding, which exists under the present form of CCP 1249.

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<sup>240</sup> *Burt v. Merchant's Ins. Co.*, 115 Mass. 1, 14 (1874).

<sup>241</sup> CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE § 1.25 (1960). See also *id.* §§ 9.1-29.

4. It would eliminate the anomalous and unfair situation where, on a falling market, (a) the condemnee by his own delay can secure a higher price for his property than its market value at date of trial and (b) the condemnor by delaying can acquire the property at a lower price. . . .<sup>242</sup>

On the other hand, counsel for condemnors uniformly urge retention of the existing rules. They believe that these rules work well and equitably in practice and that any alternative would provide an undesirable incentive to condemnees to delay the proceedings to obtain the latest possible date of valuation.<sup>243</sup> They also point out that as a matter of convenience, there is merit in fixing the date of valuation as of a date certain, rather than by reference to the uncertain date when the trial begins, as appraisals and appraisal testimony must be directed to market value as of a specific date.

Although these conflicting views and considerations cannot be completely reconciled, reasonable compromises seem possible. The first change in existing rules should permit any condemnor to establish an early date of valuation by depositing probable just compensation for withdrawal by the property owner. If it does so, the date of valuation should be the date of the deposit. A date of valuation thus established should not be subject to change by any subsequent development in the proceeding. In other cases, a compromise should be made between California's two existing rules, and the date of valuation fixed as the date six months after the filing of the complaint. The provision making the date of valuation the date of trial if, without fault of the defendant, the case is not tried within one year, should be retained. In case of a new trial, the date of the new trial, rather than the date used in the original trial, should be the date of valuation unless the condemnor deposits the amount awarded in the original trial within a specified and reasonably brief period after the entry of judgment in the original trial.

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<sup>242</sup> E.g., Letter From Thomas G. Baggott to California Law Revision Commission, Feb. 22, 1966. See also *County of Los Angeles v. Bartlett*, 203 Cal. App. 2d 523, 21 Cal. Rptr. 776 (1962); *County of San Mateo v. Bartole*, 184 Cal. App. 2d 422, 7 Cal. Rptr. 569 (1960); *People v. Murata*, 55 Cal. App. 2d 1, 9 Cal. Rptr. 601, 357 P.2d 833 (1960) (containing a good discussion of these problems).

<sup>243</sup> Letter From Robert E. Reed, California Department of Public Works, to California Law Revision Commission, March 13, 1961; Letter From Terry C. Smith, Office of the Los Angeles County Counsel, to California Law Revision Commission, Dec. 15, 1965.