#36.250 3/26/73

Memorandum 73-33

Subject: Study 36.250 - Condemnation (Special Improvement Acts)

Background

Some time ago the Commission authorized the staff to work with a few attorneys who are familiar with the operation of the special improvement acts (such as the Improvement Act of 1911, the Municipal Improvement Act of 1913, and the Improvement Bond Act of 1915) to conform those acts to the provisions of the comprehensive eminent domain statute.

I prepared a brief memorandum outlining the problem (Exhibit I) and sent it to these attorneys. I also discussed the problem with Mr. Assaf and Mr. Randolph. As a result of our discussion, they prepared the attached six-page letter (Exhibit II) outlining their suggestions for conforming the improvement acts to the comprehensive eminent domain statute. They believe--as does Mr. Rodney R. Atchison (Exhibit III), the only other attorney who responded--that it is both possible and desirable to revise the improvement acts to remove inconsistencies with the comprehensive eminent domain statute.

I have decided to take a somewhat more conservative approach than is suggested in the letter from Assaf and Randolph; I want to be sure that the revision does not result in any significant loss of authority (1) to engage in improvements or (2) to condemn property for improvements. Mr. Atchison indicated concern lest this might occur.

The revision of the improvement acts has proved to be an exceedingly difficult task. The following progress has been made in the revision:

Street Opening Act of 1903--The elimination of assessment procedures and special condemnation provisions would permit the repeal of 179 sections and would require the addition of one section to authorize the use of assessment procedures of the more generally used acts.

Park and Playground Act of 1909--The elimination of the assessment procedures and special condemnation provisions would permit repeal of 119 sections and would require the addition of one section to authorize the use of assessment procedures of the more generally used acts.

Sewer Right of Way Law of 1921--This act would be repealed entirely, thus permitting repeal of 122 sections of existing law.

Street Opening Bond Act of 1911--This act would be repealed entirely, thus permitting repeal of 70 sections of existing law.

Vehicle Parking District Law of 1943--The conforming revisions of this act would result in the repeal of 167 sections, the addition of 4 sections, and the amendment of 10 sections.

By way of summary, the work already finished--if ultimately approved--would result in the repeal of 657 sections, the addition of 6 sections, and the amendment of 10 sections. Unfortunately, although the work finished has been time consuming, the work remaining is exceedingly difficult because the method of conforming the remaining acts is not apparent.

Requested Commission Action

I would like to be authorized to prepare a staff draft of a recommendation to conform the various special improvement acts to the eminent domain statute and to distribute the draft to approximately 15 to 25 experts in the field for comment so that the staff can review the comments before this matter is brought to the Commission for action. If the various experts in the field approve all or substantially all of the staff draft, the task faced by the Commission in reviewing the draft will be relatively modest. On the other hand, it is unlikely that the substantial repeals contemplated by the staff can be accomplished over the strong objections of the persons who are expert in this field; and if the staff draft is not acceptable to the experts, a different approach may need to be taken.

Accordingly, the staff would like to determine the views of various experts before using the time of the Commission to consider or approve anything for general distribution for comment. This preliminary solicitation of the views of the experts will be possible only if they have something specific to review, and the staff draft will serve this purpose without putting the Commission in a position where it has been given even preliminary approval.

The staff .makes this suggestion because we plan to draft the statute--despite contrary suggestions from Assaf and Randolph (Exhibit II)--to make an absolute minimum of change in existing law. We view the task of preparing the draft as primarily technical, not involving substantial policy questions.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

MEMORANDUM

PROBLEM OF CONFORMING SPECIAL IMPROVEMENT ACTS TO COMPREHENSIVE EMINENT DOMAIN STATUTE

Pursuant to a legislative directive, the California Law Revision Commission is drafting a general eminent domain law. One important part of this project is the elimination of duplicating or inconsistent provisions in other laws.

A difficult problem is presented by some of the improvement acts. No particular problem is presented by the Improvement Act of 1911 (Sts. & Hwys. Code § 5000 et seq.), the Municipal Improvement Act of 1913 (Sts. & Hwys. Code § 10000 et seq.), or the Improvement Bond Act of 1915 (Sts. & Hwys. Code § 8500 et seq.). These acts (with one insignificant exception--Sts & Hwys. Code §§ 6120-6123) do not provide procedures for the condemnation of property.

There are a number of other improvement acts, however, that provide procedures that are inconsistent with existing law and will be inconsistent with the new eminent domain statute. The Street Opening Act of 1903 (Sts. & Hwys. Code § 4000 et seq.), Vehicle Parking District Law of 1943 (Sts. & Hwys. Code § 31500 et seq.), Park and Playground Act of 1909 (Govt. Code § 38000 et seq.), Parking District Law of 1951 (Sts. & Hwys. Code § 35100 et seq.), Sewer Right of Way Law of 1921 (Govt. Code § 39000 et seq.), and perhaps others contain procedures and provisions that will be inconsistent with the new statute. These statutes adopt a system under which a condemnation action is brought, an interlocutory judgment obtained, a decision made on whether to go ahead with the project, assessments made against benefited property (with offsets of damages against benefits where appropriate), and judgments (and contracts for purchase of property) paid when money comes in from the assessment.

These latter statutes apparently are designed to permit a public entity to "shop" for property and to abandon the proceeding if the judgment obtained is too high. Some contain provisions designed to preclude the property owner from recovering the amounts he is entitled to recover under Code of Civil Procedure Section 1255a upon an abandonment. Cf. Code Civ. Proc. § 1246.4 (enacted in 1971). It will be necessary to conform the abandonment provisions of the improvement acts to the policy reflected in Code of Civil Procedure Section 1255a. I assume that the public entity will have to pay the costs on abandonment and that these costs could not be assessed against "benefited" property.

If abandonment of the proceeding were the only problem, conforming the improvement acts would present no serious problem. However, some of the improvement acts provide for special valuation commissions, contain special condemnation provisions, and result in delay in payment to the property owner until money is received from special assessments or bonds are issued to fund such assessments. A matter of great concern to the Commission and others--see, e.g., Klopping v. City of Whittier, 8 Cal.3d 39 (1972)--is the adverse effect that knowledge of a planned public improvement has on a property owner. Further, once a condemnation action has been instituted, the owner's freedom to deal with the property or to sell it is seriously curtailed. To some extent this may be unavoidable and acceptable. However, to permit a possibly lengthy delay in payment to the property owner after a condemnation action has been brought to judgment is difficult to justify.

As you know, the Improvement Act of 1911 and the Municipal Improvement Act of 1913 contain no special condemnation procedures. In fact, the 1911 act requires that the property be owned by the public entity or that an order

of possession be obtained before the act applies. Other statutes dealing with various types of improvements provide a procedure under which the estimated cost of the improvement is determined, the improvement is approved, the assessments are made on basis of the estimated cost, and the owners of property needed for the improvement are paid within the 30 days after the judgment is entered as required by Section 1251 of the Code of Civil Procedure.

The following are the basic problems on which your views are solicited:

(1) Is it essential that the Street Opening Act of 1903 (and similar improvement acts) retain the "shopping" feature? In other words, would it create substantial problems if these improvement acts were revised to provide for an estimate of the cost of the improvement, approval of improvement on basis of estimates, payment to property owners within 30 days from judgment, and supplemental assessments if necessary because original estimates are too low?

(2) Would it be feasible and desirable to combine various improvement acts, such as the Street Opening Act of 1903, the Park and Playground Act of 1909, and others, in a new comprehensive statute based on the scheme suggested above? Whatever is done, it is not contemplated that any significant changes would be made in the Improvement Act of 1911, the Municipal Improvement Act of 1913, or the Improvement Bond act of 1915. These acts would remain substantially as is. The question is whether, in view of the substantial procedural revisions that would be needed in the other acts, it would be desirable to consolidate one or more of those acts in a comprehensive statute which would supplement the 1911, 1913, and 1915 acts.

Memo 73-33 EXHIBIT II

January 8, 1973

Mr. John H. De Moully
Executive Secretary
California Law Revisions Commission
School of Law - Stanford University
Stanford, California 94305

Dear Mr. De Moully:

In reference to your letter of November 6, 1972, we have jointly analyzed the condemnation features of the improvement acts cited, viz; Street Opening Act of 1903 (Sts. & Hwys. Code § 4000 et seq.), Park and Playground Act of 1909 (Gov't. Code § 38000 et seq.), Sewer Right-of-Way Law of 1921 (Gov't. Code § 39000 et seq.), Vehicle Parking District Law of 1943 (Sts. & Hwys. Code § 31500 et seq.), Improvement Act of 1911 (Sts. & Hwys. Code § 5000 et seq.) and the Municipal Improvement Act of 1913 (Sts. & Hwys. Code § 10000 et seq.).

As a result of this analysis and based upon many years of experience in the fields of Municipal Law and Municipal Financing, it is our considered opinion that, with the repeal of certain of these acts and the amendment of others, the main objective of the Law Revision Commission may be obtained. We feel, however, that it is important to point out that some of these acts are used particularly in Southern California and that a certain amount of resistance to their repeal or amendment may be encountered.

With this in mind, we would make the following recommendations:

Street Opening Act of 1903:

The Street Opening Act of 1903 should be repealed. The Street Opening Act, which contains a detailed condemnation procedure, is not necessary in modern usage and all of the work provided to be accomplished pursuant to this Act can be accomplished under the Improvement Act of 1911 or the Municipal Improvement Act of 1913, the most commonly used special assessment acts. The latter acts provide for the acquisition of necessary lands, easements or rights-of-way without any condemnation procedure provided for therein and hence, any such acquisitions are made pursuant to the general laws governing condemnation.

Park and Playground Act of 1909:

The Park and Playground Act of 1909 provides a procedure

whereby a local benefit assessment district may be formed for the purpose of acquiring and constructing public parks, urban open space lands, playgrounds and libraries. We feel that it is unnecessary to perpetuate a separate act for this purpose, particularly one which incorporates the condemnation procedures to be found in § 38080 et seq. However, we believe this act is used in Southern California and an amendment to the act has been made as late as in the year 1970. For this reason, we feel that the existing right to acquire and construct these improvements as spelled out in this act should not be lost. We would therefore recommend that the definition of improvement as set forth in § 38002 of the Government Code ("As used in this Chapter 'improvement' includes a public park, urban open space lands, playground or library") be added to both the Improvement Act of 1911, at § 5101, and the Municipal Improvement Act of 1913, at § 10100, and that the Park and Playground Act of 1909 be repealed. By this procedure, direct lien assessments may be levied in a benefited area to acquire and construct that which is now permitted under the Park and Playground Act of 1909 and bonds issued to represent unpaid assessments as presently authorized by the Street Opening Bond Act of 1911.

Street Opening Bond Act of 1911:

If the Street Opening Act of 1903 and the Park and Playground Act of 1909 are repealed, as recommended, the Street Opening Bond Act of 1911 (Sts. & Hwys. Code § 4500 et seq.) can then also be repealed. This Act is used as the act under which bonds are issued to represent unpaid assessments for the cost of any work or improvement authorized under the Street Opening Act of 1903, the Park and Playground Act of 1909, or under any other act providing for the acquiring of property, easements, and rights-of-way necessary or convenient for the construction of sewers and drains by cities for sanitary or drainage purposes. Should a project entail necessary acquisitions for sewers and drains, either the Improvement Act of 1911 or the Municipal Improvement Act of 1913 may be used with bonds issued to represent unpaid assessments pursuant to the Improvement Act of 1911 or the Improvement Bond Act of 1915.

Sewer Right-of-Way Law of 1921:

The Sewer Right-of-Way Law of 1921 has no good and sufficient reason for its continued existence and should be repealed. All acquisitions and improvements authorized under this Act may be accomplished under the Improvement Act of 1911 or the Municipal Improvement Act of 1913. We know of no entity which uses or has used this Act for many, many years.

Vehicle Parking District Law of 1943:

The Vehicle Parking District Law of 1943 should also be repealed. Although it has occasionally been used, it is no more than a cumbersome duplication of that which can be done more effectively under the Improvement Act of 1911 or the Municipal Improvement Act of 1913.

Parking District Law of 1951:

The Parking District Law of 1951 (Sts. & Hwys. Code § 35100 et seq.) poses another problem. The Act provides for an ad valorem assessment procedure rather than a direct lien assessment. For this reason, the Act does provide a useful tool to public agencies not available under the Improvement Act of 1911 or the Municipal Improvement Act of 1913.

The Act provides that all properties necessary to be acquired for the contemplated improvements be acquired either by negotiation or judgment in a condemnation action prior to the issuance and sale of the bonds to pay the costs of the acquisitions and improvements. (There is an alternative procedure whereby bonds may be issued when less than all of the properties have been acquired, but this does not dispense with the necessity of the condemnee waiting a long time prior to being paid the money owed him for the acquisition, whether acquired by negotiation or condemnation, inasmuch as the amount is payable from the proceeds of the bonds.)

We feel that the Parking District Law of 1951 could be amended to provide for the acquisition of property pursuant to the Code of Civil Procedure and to permit the sale of bonds on an estimate of the cost of the acquisitions and improvements much as the Municipal Improvement Act of 1913 provides. We feel that the main reason the Parking District Law of 1951, as it is presently written, requires the contracting for or a judgment in condemnation for all of the properties necessary to be acquired so that the public agencies and the property owners will know that the costs of the project will fall within the present limit of 75¢ per $100 of assessed valuation for the ad valorem assessments. If the procedure is changed to eliminate the delay between the contracting for or a judgment in condemnation for the properties necessary to be acquired and payment therefor pending issuance of the bonds, we would recommend that the ad valorem tax rate be eliminated since, were a judgment in condemnation made subsequent to the issuance of the bonds so high as to require the issuance of additional bonds, the debt service might necessarily exceed the 75¢ limit causing the project to fail or the entity to be answerable in damages should the eminent domain action

be abandoned due to the unavailability of funds to pay the higher judgments. Should the 75¢ limit not be eliminated and should judgments in condemnation be high, it might very well be that the sale of bonds and the incurring of a debt would have occurred for nothing inasmuch as the project might be abandoned as not financeable within the existing 75¢ limit. Any provision in the bonds for immediate call, delay in receipt of the proceeds or delivery of the bonds would cause price fluctuations not desirable in attempting to obtain money at the best interest rate.

It is true, of course, that under the Parking District Law of 1951, pledges of meter revenues, both on-street and off-street, may be made for the payment of the bonds which, together with the 75¢ limit, would constitute the source of the funds necessary for the payment of the bonds. However, either meter revenues have been taken into account in the initial stages of the project in order to determine the feasibility thereof or, due to the competition offered by other areas in the City which provide free parking, it has been determined that there would be no on-street or off-street parking meters installed and consequently no revenues produced and only the ad valorem assessment collected within the above limit could be depended upon for the payment of the bonds.

It should be noted that by § 35112 the proceedings under this Act are exempt from the Special Assessment Investigation, Limitation and Majority Protest Act of 1931 (Division 4, § 2800 et seq. of the Sts. & Hwys. Code) and that the petition required by § 35250 must be signed by owners of real property owning real property of an assessed value of not less than 51% of the total assessed value of all taxable real property in the District, and owning taxable land in the proposed district constituting not less than 51% of the total area of all taxable land in the District.

We believe that it would be preferable to make the proceedings subject to the Majority Protest Act of 1931 by repealing § 35250 through § 35256 inclusive and adapting § 35257 and § 35258 to provide for the initiation of a project by the City. (The necessity of taking the proceedings under the Majority Protest Act of 1931 could be obviated by the petition as provided by § 2804 thereof.)

In adapting the procedure to provide for initiation by the City, § 35258 should be amended to exclude any reference to a tax limit and should include provision for the establishment of zones of benefit thereby protecting the taxable real property which is in less proximity to any improvement to be constructed from paying the same tax per $100 of assessed value as the taxable real property located more adjacent to the improvement.

The safeguard of a majority protest under § 35264 under a City-initiated proceeding will remain to protect the owners of taxable land since § 35264 provides that if protests are made by the owners of taxable real property having an assessed value of more than one-half of the assessed value of all taxable real property, the proceedings shall be terminated.

We would therefore recommend repealing and/or amending Sections 35112; 35250 through 35258 inclusive; 35400; 35401.5; 35402 and 35402.1 of the Parking District Law of 1951.

The Parking District Law of 1951 sets forth a procedure whereby ad valorem assessment bonds previously issued and which are payable primarily from revenues from parking places or meters, or both, may be refunded by direct lien assessments if the legislative body determines that charges for parking should be eliminated (Chapter 3.5, § 35450 et seq.). The procedure incorporates the provisions for levying an assessment as contained in the Street Opening Act of 1903 which we have recommended be repealed. We see no reason why the reference cannot be made to the Improvement Act of 1911 or the Municipal Improvement Act of 1913 for the method of making and confirming assessments in this situation.

Improvement Act of 1911:

Part 4 of Division 7 of the Streets and Highways Code, the change of grade procedure within the Improvement Act of 1911, serves no useful purpose in present day proceedings. The basic 1911 Act proceeding includes the right to establish or change grades of any improvement (Sts. & Hwys. Code Part 3, Chapter 4) and Part 4 is rarely, if ever, used. For this reason, we would recommend that Part 4 of Division 7 of the Streets and Highways Code be repealed, thereby eliminating all references to specialized or unique condemnation procedures in the Improvement Act of 1911. (If repealed, the reference to the change of grade procedure in § 5150.5 should be eliminated.)

As a practical matter, and based upon our experience in this field of law, we feel that the acquisition of property for any public project can be accomplished pursuant to the procedures set out in the Code of Civil Procedure and we heartily endorse the elimination of any specialized or unique condemnation procedures. The vehicle by which a public improvement is to be constructed and financed should not restrict or modify the rights of owners of property to be acquired therefor to receive payment.

If the Commission has some specific drafts or amendments to accomplish the above, we would be pleased to review them and offer

our suggestions. We would also be pleased, if requested, to prepare drafts of such amendments.

Finally, we have made no cross-check to assure ourselves that there are not outstanding references in other laws to those acts which we recommend be repealed. We would recommend that if there are such references in other laws, that such laws be corrected at the time of repeal of those acts which we have recommended be repealed.

Respectfully submitted,

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Memo 73-33

EXHIBIT III

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December 7, 1972

John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law - Standord University
Standord, Ca. 94305

Re: Condemnation Law and Improvement Acts.

Dear Mr. DeMoully:

Thank you for your invitation to participate in the Commission's review of existing condemnation law and procedures, in connection with improvement acts.

Our office has worked with a number of the improvement acts, in connection with the condemnation of real property. It is my feeling that the public interest would best be served by having any acquisition of property pursuant to eminent domain law. In order to accomplish this it would seem most appropriate to eliminate all references to eminent domain in all of the improvement acts, similar to the situation in the Improvement Acts of 1911 and 1913.

Though I have not completely reviewed the purposes for which eminent domain may be exercised under the general eminent domain law, it is my belief that it would cover all acquisition required for any improvement act. If not, certainly any gaps could be filled in.

In conjunction with this revision, I further believe that the idea of developing a single comprehensive procedure, to supplement the Improvement Acts of 1911, 1913 and the Improvement Bond Act of 1915, deserves serious consideration.

ATCHISON, HAILE & HAIGHT

I will be very pleased to offer to the Commission any assistance which they might feel would be helpful. In addition, Mr. Robert Haight in our office, who handles most of our assessment proceedings, would be willing to offer his assistance should the Commission find it helpful.

Very truly yours,

RODNEY R. ATCHISON

RRA:rc