Subject: Study 36 - Condemnation (Compensation)

This memorandum reviews the comments of the State Bar Committee on Governmental Liability and Condemnation relating to the compensation chapter of the Eminent Domain Law. A copy of this chapter (Chapter 9) is attached. This chapter should be approved for printing at the September meeting. While we have not yet received the official minutes of the Bar Committee, we have attended the meeting at which the comments were made. This memorandum is based on our interpretation of the committee proceedings. We will send the minutes when they are received.

General comments. The State Bar Committee is concerned that the rules for compensation in eminent domain proceedings will be applied to inverse condemnation to deny compensation in some instances where it is presently allowed. The committee recommends that an express disclaimer be incorporated in the beginning of the Eminent Domain Law to make clear that its provisions are not applicable in inverse condemnation proceedings.

The staff agrees with this suggestion since it has been the Commission's expressed intent not to deal with inverse condemnation problems in the present statute. While the Bar Committee's proposal would apply Chapter 7 (discovery) to inverse condemnation proceedings, that chapter as presently drawn would not really be applicable. Hence, the staff recommends the complete exclusion proposed in Exhibit I.

§ 1263.010. Right to compensation. The committee recommends deletion of the sentence prohibiting double compensation for the same loss. The reasons supporting this recommendation are that it has limited application only to the provision relating to business loss and hence should be taken care of by a

specific rather than a general rule. Moreover, the sentence is subject to the misinterpretation that, where supplemental recovery is provided for such items as rental loss and relocation assistance, they duplicate fair market value for the taking of property and thus should be deducted from the compensation.

The staff is not wholly persuaded that this concern is justified. Perhaps the fears of the committee can be allayed by the addition of the following paragraph to the Comment:

> The second sentence of subdivision (b), prohibiting double recovery for the same loss, applies only to statutes that purport to compensate for the same elements of damage. See, e.g., Section 1263.510 and Comment thereto (loss of goodwill). This prohibition on double recovery in no way limits compensation under different statutes for different losses such as the fair market value of property taken, injury to the remainder, rental losses, moving expense, court costs, and the like.

§ 1263.020. Accrual of right to compensation. The Bar Committee recommends that this section be revised to read:

> 1263.020. Except as otherwise provided by law, the right to compensation shall be deemed to have accrued at the date of filing the complaint.

This rewording will make it clear that the section relates only to the time fixing the right of defendants to participate in the award, and not to any "date of condition" of the property for valuation purposes. Also, the portion of the Comment illustrating exceptions to the rule stated in this section should be expanded to refer to interests partially dissipated (such as by the running of a lease):

> Thus, for example, if an interest in existence at the time of filing the complaint (such as a lease) is extinguished or partially dissipated before entry of judgment (such as by the running of the term of the lease), the owner of the interest may not have a right to compensation to the extent of such extinction or dissipation.

The staff agrees with both of these changes.

§§ 1263.110-1263.150. Date of valuation. The Bar Committee would replace the Commission's proposed date of valuation scheme with one that would basically make the date of valuation the date of trial, but would allow the plaintiff to establish an earlier date of valuation by making a deposit. Either party could get an early valuation date by having the cause set for trial; where the early trial date is successfully postponed by the opposing party, the moving party would have the option to select any of several possible trial dates.

The advantages of such a scheme are that it will use the date of trial as the date of valuation in the ordinary case which will frequently be most equitable; in cases of a falling market, it will enable the defendant to establish a relatively early trial date, and in cases of a rising market it will enable the plaintiff to establish a relatively early trial date.

A staff draft of this basic scheme is attached as Exhibit II.

§ 1263.220. Business equipment. The State Bar Committee is of the view that any personal property that is unique to the realty either because of its installation in a fixed location or because it cannot be removed without substantial loss in value should be taken and compensated at its in-place value. This recommendation, which goes well beyond the Commission's limited proposal for business equipment installed on the property, would read as follows:

> 1263.220. Personal property that is installed for use in a fixed location or that cannot be removed without a substantial loss in value shall be deemed to be an improvement pertaining to the realty for the purposes of compensation regardless of the method of installation.

The staff notes that the Commission has previously considered and rejected such a recommendation, but the Commission may wish to reconsider its previous action in light of the support given it by the State Bar Committee. The practical effect of the recommendation is to require the condemnor to pay for the value of the property rather than for the cost of moving the property.

§ 1263.230. Improvements removed or destroyed. The Bar Committee recommends deletion of subdivision (c) relating to removal and storage of improvements where there is a dispute whether they constitute improvements pertaining to the realty. The basis of this recommendation is that, if Section 1263.220 is expanded to include all personal property as proposed by the committee, the number of disputes over classification will be insignificant and not worth preserving this complicated subdivision for.

§ 1263.240. Improvements made after service of summons. Subdivision (c) of Section 1263.240 provides for compensation for improvements made after service of summons upon court order permitting the improvements. The State Bar Committee recommends deletion of the portion of subdivision (c) that prevents such a court order after a deposit of probable compensation has been made. The reason given by the committee for this recommendation is that, if the defendant is able to show the hardship necessary to permit the improvement, that hardship will remain regardless of the existence of a deposit; this, the committee believes, is particularly true of partially completed improvements with an outstanding construction contract.

§ 1263.250. Harvesting and marketing of crops. Although subdivision (c) of Section 1263.250 permits recovery of "the costs reasonably incurred in connection with the crops" where the plaintiff takes possession before crops can be harvested, the State Bar Committee believes that this standard should be clarified. The committee suggests that the defendant recover "the reasonable value of his material and labor," thereby avoiding the implication that he may recover only is out-of-pocket expenses. The staff agrees that this clarification is desirable.

§ 1263.320. Fair market value. The committee would replace the definition of fair market value developed by the Commission with the BAJI instruction (11.73) attached as Exhibit III.

The staff notes that, in addition to spelling out in detail the concepts that are inherent in the Commission's shorter draft, the BAJI instruction includes several items that the Commission has purposely deleted as confusing:

(1) Reference to the "highest price" rather than the "price" the property would bring.

(2) Estimation of price "in terms of money."

(3) Inclusion of the phrase "in the open market."

§ 1263.430. Benefit to remainder. The State Bar Committee recommends that, as to benefits, (1) benefits should be coextensive with damages, and (2) benefits should be separately assessed. For a draft of these recommendations, see Exhibit IV.

The Commission has previously considered both these points. The Commission made affirmative decisions (1) not to codify a rule limiting damages or benefits that are recoverable, but to leave the matter to court development, and (2) to delete the separate assessment of benefits and damages requirements of the existing statute on the ground that it is unnecessary and any problems can be handled through instructions and requests for special interrogatories.

§ 1263.440. Computing damage and benefit to remainder. The State Bar Committee believes that subdivision (b) is poorly worded and suggests the following revision:

> (b) The value of the remainder in the before condition for purposes of determining damages and benefit shall be determined based on its value on the date of valuation excluding prior changes in value as provided in Section 1263.330.

While the staff agrees that subdivision (b) as it stands is not as clear as it could be, the concept embodied in the subdivision is not an easy one to express, and it seems to the staff that the State Bar draft makes no improvement in it.

The staff suggests the following revision:

> (b) The value of the remainder on the date of valuation, excluding prior changes in value as prescribed in Section 1263.330, shall serve as the basis from which the amount of any damage and the amount of any benefit to the remainder shall be determined.

§ 1263.510. Loss of goodwill. The Bar Committee recommends three changes in the business loss section. First, the phrase "or on the remainder if such property is part of a larger parcel" should be set off by commas in order to avoid the implication that the only time business losses are recoverable is when there is a partial taking. The staff agrees that this change would be helpful.

Second, the committee recommends that the compensable loss be "business value" rather than "goodwill." As used in this sense, the "business value" would essentially be the sale value of the business, in which goodwill would be included. What else may be included is not clear; probably equipment and stock; possibly accounts receivable. The staff simply notes that the Commission selected goodwill as the compensable loss because (1) it was limited in nature, (2) it had a clearly defined meaning and was commonly used, and (3) it presented fewer collateral issues.

The third recommendation of the State Bar Committee with relation to this section is that subdivision (b) be revised to read:

> (b) This section shall not be applied to permit recovery of compensation for losses already compensated or compensable under other provisions of law.

Such a provision might be necessary if the "business value" test is adopted in order to prevent overlap in such areas as compensation for fixtures.

§ 1263.610. Performance of work to reduce compensation. The Bar Committee suggests that a note be added to the Comment to the effect that failure of the parties to agree to the performance of work provided in this

section should not be mentioned in the eminent domain trial. The staff concurs with this suggestion and proposes that the following sentence be added to the Comment:

> The fact that negotiations under this section were commenced and that the parties failed to reach an agreement is not admissible in evidence in a trial of the issue of compensation. Cf. Evid. Code § 1152 (offer to compromise and the like).

§ 1263.620. Partially completed improvements; performance of work to protect public from injury. The State Bar Committee would expand this section to permit compensation for expenses incurred to protect against the risk of injury to persons or other property, or to the subject property. The Commission purposely omitted the subject property from its draft on the theory that to allow this would be to allow compensation in nearly every case. If the property owner can make a sufficient argument to the court that the property needs protection pending the eminent domain proceeding, he can get a court order to permit continued improvements pursuant to Section 1263.240 (improvements made after service of summons).

Respectfully submitted,

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Staff Counsel

§ 1230.080. Title not applicable to inverse condemnation proceedings

1230.080. Nothing in this title affects any inverse condemnation proceeding under Section 14 of Article I of the State Constitution to recover for private property taken or damaged without just compensation.

Comment. Section 1230.080 makes clear that the provisions of the Eminent Domain Law, substantive as well as procedural, apply only to direct condemnation proceedings and do not affect inverse condemnation actions commenced under Article I, Section 14, of the California Constitution; the Eminent Domain Law is thus intended neither to expand nor contract the constitutional law of inverse condemnation. It should be noted, however, that a statutory inverse condemnation action based not on the Constitution but on Section 1245.260 (failure to initiate eminent domain proceeding within six months from adoption of resolution) is authorized by the Eminent Domain Law.

Article 2. Date of Valuation

Comment. Article 2 (commencing with Section 1263.110) supersedes those portions of former Section 1249 that specified two alternative dates of valuation. Article 2 provides a date of valuation for all eminent domain proceedings other than certain proceedings by political subdivisions to take property of public utilities; cf. Citizen's Util. Co. v. Superior Court, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963), and Marin Municipal Water Dist. v. Marin Water & Power Co., 178 Cal. 308, 173 P. 469 (1918).

§ 1263.110. Date of valuation is date of trial

1263.110. Except as provided in this article, the date of valuation is the date of the commencement of the trial.

Comment. Section 1263.110 establishes the date of valuation in all cases except where the plaintiff makes a deposit of probable compensation (Section 1263.120), where a party is given an option to select a valuation date (Section 1263.130), or where there is a new trial ordered by a trial or appellate court (Section 1263.140). In case a mistrial is declared and the case is again tried, the date of valuation is determined by the rules set forth in this chapter as if there had been no previous trial. Cf. 4 B. Witkin, California Procedure Trial § 130 (2d ed. 1971).

§ 1263.120. Alternate date of valuation fixed by deposit

1263.120. (a) In any case where no alternate date of valuation has been established pursuant to Section 1263.130, if at least 40 days prior to the date of the commencement of the trial the plaintiff deposits the probable compensation pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6, the plaintiff may elect, by written notice filed and served on the defendant within 20 days after service of the notice of the deposit, to have the date of valuation be the date of the deposit rather than the date of the commencement of the trial.

(b) If the plaintiff makes the election provided in subdivision (a) and if the amount of compensation determined in the eminent domain proceeding exceeds the amount deposited, the plaintiff is liable for interest on the excess from the date of the deposit until the date the amount of the excess is paid pursuant to Section 1268.010. Nothing in this subdivision affects any other provision of this title relating to interest in eminent domain proceedings.

(c) Regardless whether the plaintiff has taken possession of the property or obtained an order for possession, if the court determines pursuant to Section 1255.030 that the probable amount of compensation exceeds the amount previously deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 and the amount on deposit is not increased accordingly within 30 days from the date of the court's order, no deposit shall be deemed to have been made for the purpose of this section.

Comment. Section 1263.120 permits the plaintiff, by making a deposit, to establish the date of valuation no later than the date the deposit is made. The rule under the language contained in former 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 election provided in this section is valid only if there is no valuation date established under the provisions of Section 1263.130 (alternate date of valuation where date of trial postponed) and if the plaintiff makes the election within the time limits specified in subdivision (a).

The plaintiff, by making the election provided in this section, obligates itself to pay interest on any amount recovered by the defendant that is in excess of the amount deposited. This obligation does not affect the other provisions relating to the running of interest in case of possession of the property by the plaintiff prior to judgment. See Section 1268.310 et seq.

Although the making of a deposit prior to judgment establishes the date of valuation, subdivision (c) denies that effect if the amount deposited is determined by the court to be inadequate and is not increased in keeping

with the determination. Cf. Section 1255.030(b)(when failure to increase deposit may result in abandonment).

§ 1263.130. Alternate date of valuation where date of trial postponed

1263.130. In any case where no date of valuation has been established pursuant to Section 1263.120, if a party obtains a ruling opposed by the adverse party that (1) denies a motion for special setting for trial, (2) sets a trial date more than 120 days after trial setting conference, or (3) continues a trial date originally set, the adverse party may elect, by written notice filed and served on the party that obtained the ruling within 20 days after such ruling, to have the date of valuation be either of the following dates rather than the date of the commencement of the trial:

(a) The date of the commencement of the proceeding.

(b) The date of the ruling.

Comment. Section 1263.130 provides an exception to the general rule specified in Section 1263.110 that the date of the commencement of trial is the date of valuation. Where one party has the date of commencement postponed, the adverse party may elect to have the date of valuation be the date of the ruling postponing the trial or the date of the commencement of the proceeding. See Section 1250.110 (complaint commences proceeding).

§ 1263.140. New trial

1263.140. (a) If a new trial is ordered by the trial or appellate court, the date of valuation is the date of the commencement of such new trial.

(b) Notwithstanding subdivision (a), the plaintiff may elect in the manner provided in Section 1263.120 to have the date of valuation in the new trial be the same date as the date of valuation in the previous trial if either of the following is shown:

(1) The plaintiff deposited the amount of the judgment in accordance with Section 1268.110 within 30 days after the entry of judgment.

(2) A motion for new trial or to vacate or set aside the judgment was made and the plaintiff deposited the probable compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 6 within 30 days after disposition of such motion.

Comment. Section 1263.140 deals with the date of valuation where a new trial is ordered. Generally, 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 30 days after disposition of such motion. If the deposit is made thereafter but prior to the commencement of the new trial, the plaintiff may elect to have the date of valuation be the date of deposit. See Section 1263.120. Section 1263.140 does not apply where an earlier date or valuation has been established by a deposit prior to judgment. See Section 1263.120.

Under the language contained in former Section 1249, the question 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, 357 P.2d 833, 9 Cal. Rptr. 601 (1960). To avoid injustice to the condemnee in a typical rising market, Section 1263.140 changes the result of that decision unless the date of valuation has been established by the deposit of the amount of the judgment in accordance with Section 1268.110. The section 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 for the trial under the rules of Sections 1263.110-1263.130 as if no trial had previously been commenced.

BAJI 11.73

"Fair market value" is defined as the highest price, in terms of money, for which the subject property would have sold on the open market on the date of valuation; the seller having a reasonable time within which to sell, and being willing but not forced to do so; the buyer being ready, willing and able to buy but not forced to do so, and having a reasonable time and full opportunity to investigate the property in question and to determine its condition, suitability for use, and all of the things about the property that would naturally and reasonably affect its market value.

The property must be valued with reference to all the uses and purposes for which it is adaptable and available, including its highest and best use. This definition of fair market value presupposes that both parties are familiar with the property and all of its present adaptabilities and uses, and those uses which would be reasonably probable in the near future.

§ 1263.430. Benefit to remainder

1263.430. (a) Subject to subdivision (b), benefit to the remainder is the benefit, if any, caused by the construction and use of the project in the manner proposed by the plaintiff, whether or not the benefit is caused by a portion of the project located on the part taken.

(b) Nothing shall be deemed a benefit to the remainder for the purpose of this article unless it is of such a character that, if it were taken or damaged for public use, its loss would constitute a proper basis for compensation.

(c) Insofar as is practicable, the benefit to the remainder shall be determined separately from the other elements of compensation.

Comment. Section 1263.430 supersedes former Section 1248(3). While Section 1263.430 leaves the identification of specific benefits that may be offset against damages to the continued development of case law, subdivision (b) imposes the limitation that benefits must be coextensive with damages. This limitation may change the rule with respect to such benefits as increased traffic. Compare People v. Giumarra Farms, Inc., 22 Cal. App.3d 98, 99 Cal. Rptr. 272 (1971), and City of Hayward v. Unger, 194 Cal. App.2d 516, 15 Cal. Rptr. 301 (1961), with People v. Ayon, 54 Cal.2d 217, ___ P.2d ____, 5 Cal. Rptr. 151 (1960).

As with damage to the remainder (Section 1263.420 and Comment thereto), benefits created by the construction and use of the project need not be derived from the portion of the project located on property from which the remainder was severed. This continues existing law. See People v. Hurd, 205 Cal. App.2d 16, 23 Cal. Rptr. 67 (1962).

Subdivision (c), requiring separate assessment of benefits, continues existing law. See former Section 1248(3).

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CHAPTER 9. COMPENSATION

Article 1. General Provisions

§ 1263.010. Right to compensation

1263.010. (a) The owner of property acquired by eminent domain is entitled to compensation as provided in this chapter.

(b) Nothing in this chapter affects any rights the owner of property acquired by eminent domain may have under any other statute. In any case where two or more statutes provide compensation for the same loss, the person entitled to compensation may recover only once for that loss.

Comment. This chapter, relating to compensation, supersedes various provisions formerly found in the eminent domain title of the Code of Civil Procedure. The elements of compensation provided in this chapter include compensation for property taken (Section 1263.310), injury to the remainder (Section 1263.410), and loss of goodwill (Section 1263.510). In connection with compensation, see also Chapter 10 (commencing with Section 1265.010) (divided interests), Section 1268.610 (litigation costs). See also Section 1235.170 (defining "property" to include any right or interest in property). For related provisions, see Article 1 (commencing with Section 1245.010) of Chapter 4 (damages from preliminary location, survey, and tests) and Section 1268.620 (damages caused by possession when proceeding dismissed or right to take defeated).

Subdivision (b) of Section 1263.010 makes clear that this chapter does not affect any statute providing for additional compensation such as compensation for relocation of public utility facilities. See discussion in A Study Relating to Sovereign Immunity, 5 Cal. L. Revision Comm'n Reports 1, 78-96 (1963). See also Govt. Code § 7260 et seq. (relocation assistance).

Likewise, this chapter in no way limits additional amounts that may be required by Article I, Section 14, the "just compensation" clause of the California Constitution. On the other hand, the fact that the "just compensation" clause may not require payments as great as those provided in this chapter does not limit the compensation required by this chapter.

§ 1263.020. Accrual of right to compensation

1263.020. Except as otherwise provided by law, for the purpose of assessing compensation, the right thereto shall be deemed to have accrued at the date of filing the complaint.

Comment. Section 1263.020 continues the substance of a portion of former Section 1249, but the date of filing the complaint rather than the date of issuance of summons is used to determine the accrual of the right to compensation since the filing of the complaint is the factor that establishes the jurisdiction of the court over the property. See Section 1250.110 and Comment thereto (complaint commences proceeding).

The rule stated in Section 1263.020 is subject to exceptions created by law. See Section 1235.140 (defining "law"). Thus, for example, if an interest in existence at the time of filing the complaint is extinguished before entry of judgment, the owner of the interest may not have a right to compensation. See, e.g., People v. Hartley, 214 Cal. App.2d 378, 29 Cal. Rptr. 502 (1963). And, the right of the owner of an interest may accrue even if a complaint is never filed. See, e.g., Concrete Service Co. v. State, 274 Cal. App.2d 142, 78 Cal. Rptr. 923 (1969)(lessee entitled to compensation for fixtures where public entity acquired lessor's interest and terminated lease). See also Redevelopment Agency v. Diamond Properties, 271 Cal. App.2d 315, 76 Cal. Rptr. 269 (1969).

Article 2. Date of Valuation

Comment. Article 2 (commencing with Section 1245.110) supersedes those portions of former Section 1249 that specified two alternative dates of valuation. Article 2 provides a date of valuation for all eminent domain proceedings other than certain proceedings by political subdivisions to take property of public utilities. See Pub. Util. Code § 1411 (date of valuation is date of filing petition); cf. Citizen's Util. Co. v. Superior Court, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963), and Marin Municipal Water Dist. v. Marin Water & Power Co., 178 Cal. 308, 173 P. 469 (1918).

§ 1263.110. Date of valuation fixed by deposit

1263.110. (a) Unless an earlier date of valuation is applicable under this article, if the plaintiff deposits the probable compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 6, the date of valuation is the date on which the deposit is made.

(b) Whether or not the plaintiff has taken possession of the property or obtained an order for possession, if the court determines pursuant to Section 1255.030 that the probable amount of compensation exceeds the amount previously deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 and the amount on deposit is not increased accordingly within 30 days from the date of the court's order, no deposit shall be deemed to have been made for the purpose of this section.

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Comment. Section 1263.110 permits the plaintiff, by making a deposit, to establish the date of valuation no later than the date the deposit is made. The rule under the language contained in former 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 (see Section 1263.120), and subsequent events may cause such an earlier date of valuation to shift to the date of deposit (see Section 1263.130). But a date of valuation established by a deposit cannot be shifted to a later date by any of the circumstances mentioned in the following sections, including subsequent retrial.

Although the making of a deposit prior to judgment establishes the date of valuation unless an earlier date is applicable, subdivision (b) denies that effect if the amount deposited is determined by the court to be inadequate and is not increased in keeping with the determination. Cf. Section 1255.030(b) (when failure to increase deposit may result in abandonment).

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§ 1263.120. Trial within one year

1263.120. If the issue of compensation is brought to trial within one year after commencement of the proceeding, the date of valuation is the date of commencement of the proceeding.

Comment. Section 1263.120 continues the substance of the rule provided in former Section 1249, but the date of commencement of the proceeding--rather than the date of the issuance of summons--is used in determining the date of valuation. See Sections 411.10 and 1250.110 (filing of complaint commences proceeding). Ordinarily, the dates are the same, but this is not always the case. See Harrington v. Superior Court, 194 Cal. 185, 228 P. 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 commencement of the proceeding is a more appropriate date.

§ 1263.130. Trial not within one year

1263.130. If the issue of compensation is not brought to trial within one year after commencement of the proceeding, 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 commencement of the proceeding.

Comment. Section 1263.130 establishes the date of valuation where that date is not established by an earlier deposit (Section 1263.110) or by the commencement of the proceeding (Section 1263.120). See Sections 411.10 and 1250.110 (filing of complaint commences proceeding). Section 1263.130, which continues in effect a proviso contained in former Section 1249, retains the date specified in Section 1263.120 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 Section 1263.140 or Section 1263.150 rather than Section 1263.130. However, if the new trial or retrial is commenced within one year after commencement of the proceeding, the date of valuation is determined by Section 1263.120.

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§ 1963.140. New trial

1263.140. (a) If a new trial is ordered by the trial or appellate court and the new trial is not commenced within one year after the commencement of the proceeding, the date of valuation is the date of the commencement of such new trial.

(b) Notwithstanding subdivision (a), the date of valuation in the new trial is the same date as the date of valuation in the previous trial if either of the following is shown:

(1) The plaintiff deposited the amount of the judgment in accordance with Section 1268.110 within 30 days after the entry of judgment.

(2) A motion for new trial or to vacate or set aside the judgment was made and the plaintiff deposited the probable compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 6 within 30 days after disposition of such motion.

Comment. Section 1263.140 deals with the date of valuation where a new trial is ordered. Generally, 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 10 days after dispositon 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. See Section 1263.110. Section

1263.140 does not apply where an earlier date of valuation has been established by a deposit prior to judgment. See Section 1263.110.

Under the language contained in former Section 1249, the question 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, 357 P.2d 833, 9 Cal. Rptr. 601 (1960). To avoid injustice to the condemnee in a typical rising market, Section 1263.140 changes the result of that decision unless the date of valuation has been established by the deposit of the amount of the judgment in accordance with Section 1268.110. The section 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 Section 1263.150 rather than under Section 1263.140.

§ 1263.150. Mistrial

1263.150. (a) If a mistrial is declared and the retrial is not commenced within one year after the commencement of the proceeding, the date of valuation is the date of the commencement of the retrial of the case.

(b) Notwithstanding subdivision (a), the date of valuation in the retrial is the same date as the date of valuation in the trial in which the mistrial was declared if the plaintiff deposits the probable just compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 6 within 30 days after the declaration of mistrial.

Comment. Section 1263.150 deals with the date of valuation where a mistrial is declared. Under the language contained in former Section 1249, the effect, if any, of a mistrial upon the date of valuation was uncertain. Section 1263.150 clarifies the law by adopting the principle established by Section 1263.140 which governs the date of valuation when a new trial is ordered. For the distinction between a retrial following a mistrial and a new trial following an appeal or a motion for new trial granted under Code of Civil Procedure Section 657, see 3 B. Witkin, California Procedure Attack on Judgment in Trial Court § 24 at 2072 (1954).

Article 3. Compensation for Improvements

§ 1263.210. Compensation for improvements pertaining to the realty

1263.210. (a) Except as otherwise provided by statute, all improvements pertaining to the realty shall be taken into account in determining compensation.

(b) Subdivision (a) applies notwithstanding the right or obligation of a tenant, as against the owner of any other interest in real property, to remove such improvement at the expiration of his term.

Comment. Section 1263.210 continues the substance of portions of former Sections 1248 (compensation shall be awarded for the property taken "and all improvements thereon pertaining to the realty") and 1249.1 ("All improvements pertaining to the realty that are on the property at the time of the service of summons and which affect its value shall be considered in the assessment of compensation . . . ."). For exceptions to the rule provided in Section 1263.210, see Sections 1263.230 (improvements removed or destroyed) and 1263.240 (improvements made after service of summons). Cf. Section 1263.250 (growing crops).

Subdivision (a) requires that the property taken by eminent domain be valued as it stands improved. If the improvements serve to enhance the value of the property over its unimproved condition, the property receives the enhanced value; if the improvements serve to decrease the value of the property below its unimproved condition, the property suffers the decreased value.

See, e.g., City of Los Angeles v. Sabatasso, 3 Cal. App.3d 973, 83 Cal. Rptr. 898 (1970)(lessee may recover severance damages for reduction of value of his equipment used in place of remainder).

Subdivision (b) of Section 1263.210, which adopts the language of Section 302(b)(1) of the Uniform Relocation Assistance and Real Property Acquisition Act of 1970, continues prior California law. People v. Klopstock, 24 Cal.2d 897, 151 P.2d 641 (1944); Concrete Service Co. v. State, 274 Cal. App.2d 142, 78 Cal. Rptr. 124 (1969). Cf. City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826 (1933).

§ 1263.220. Business equipment

1263.220. Equipment designed for business purposes that is installed for use on the property taken or damaged and cannot be removed without a substantial loss in value shall be deemed to be an improvement pertaining to the realty for the purposes of compensation regardless of the method of installation.

Comment. Section 1263.220 requires that business equipment installed for use on the particular property be taken into account in determining compensation. See Section 1263.210.

Section 1263.220 supersedes the provisions of former Section 1248b which applied only to equipment designed for manufacturing or industrial purposes. Section 1263.220 applies to equipment designed for "business purposes" in its most general sense and thus applies to commercial as well as to manufacturing and industrial enterprises.

The basic test under Section 1263.220 of whether business equipment installed for use on the property taken or damaged must be taken into account for purposes of determining compensation is whether the equipment can be removed without a substantial loss in value. If the equipment can be easily removed without impairment of its value, it is not deemed to be an improvement pertaining to the realty under this section. If the equipment can easily be removed without impairment of its value but removal will damage the structure in which it is installed, the classification of the equipment under this section is not altered; it should be noted, however,

that, in this situation, the structure is valued in its undamaged state for purposes of compensation for the property taken.

The effect of classification of equipment as an improvement pertaining to the realty is that the equipment must be taken and paid for by the condemnor of the realty. As a consequence, the condemnor acquires title to the equipment rather than merely paying for loss of value on removal and has the right and the burden to realize any salvage value the equipment may have.

Losses on personal property used in a discontinued business may be recovered under Government Code Section 7262.

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§ 1263.230. Improvements removed or destroyed

1263.230. (a) Improvements pertaining to the realty shall not be taken into account in determining compensation to the extent that they are removed or destroyed before the earliest of the following times:

(1) The time the plaintiff takes title to the property.

(2) The time the plaintiff takes possession of the property.

(3) The time the defendant moves from the property in compliance with an order for possession.

(b) Where improvements pertaining to the realty are removed or destroyed by the defendant at any time, such improvements shall not be taken into account in determining compensation.

(c) If there is a dispute between plaintiff and defendant whether particular improvements are improvements pertaining to the realty, the defendant may serve on the plaintiff written notice that he claims such improvements are improvements pertaining to the realty and that he intends to remove and store such improvements pending determination of the issue. If, within 30 days after such service, the plaintiff serves on the defendant notice of refusal to allow removal for storage, the defendant may not remove and store the improvements and the plaintiff's refusal shall be deemed an admission that the improvements are improvements pertaining to the realty. If the plaintiff does not serve such notice on the defendant within the time specified, the defendant may remove and store the improvements; upon a subsequent determination that the improvements are improvements pertaining to the realty,

the defendant shall promptly restore the improvements to the plaintiff, and such improvements pertaining to the realty shall be taken into account in determining compensation as if they had not been removed.

Comment. Subdivision (a) of Section 1263.230 continues the substance of former Section 1249.1. See also Redevelopment Agency v. Maxwell, 193 Cal. App.2d 414, 14 Cal. Rptr. 170 (1961). See also Section 1268.030 (title to property acquired by eminent domain passes upon the date that a certified copy of the final order of condemnation is recorded). Cf. Klopping v. City of Whittier, 8 Cal.3d 39, 46, ___ P.2d ___, ___, ___ Cal. Rptr. ___, ___ (1972)(dictum)(risk of loss in inverse condemnation). As to the authority of the State Department of Public Works to secure fire insurance, see Government Code Section 11007.1.

The removal or destruction of improvements at the times indicated in Section 1263.230 has the effect of requiring valuation of the realty to which they pertained in its unimproved state. If removal or destruction serves to decrease the value of the property below its improved condition, the property suffers the decreased value; if removal or destruction serves to increase the value of the property over its improved condition, the property receives the increased value.

Subdivision (b) makes clear that, where the defendant removes or destroys improvements even after the time the risk of loss shifts to the plaintiff, compensation is not awarded for the improvements. Subdivision (b) does not preclude the plaintiff from bringing an independent action against the

defendant for conversion where such removal or destruction occurs after valuation of the property.

Subdivision (c) provides a method whereby the defendant can protect property from damage in a situation where it is not clear whether the property must be taken by the plaintiff as part of the realty or salvaged by the defendant as part of his personalty. Subdivision (c) permits the defendant, upon following the prescribed procedures, to remove and store the property; and, if it subsequently appears that the property is an improvement pertaining to the realty, have the property taken into account in determining compensation as if it had not been removed.

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§ 1263.240. Improvements made after service of summons

1263.240. Improvements pertaining to the realty made subsequent to the date of service of summons shall be taken into account in determining compensation only in the following cases:

(a) The improvement is one required to be made by a public utility to its utility system.

(b) The improvement is one made with the written consent of the plaintiff.

(c) The improvement is one authorized to be made by a court order issued after a noticed hearing and upon a finding by the court that the hardship to the defendant of not permitting the improvement outweighs the hardship to the plaintiff of permitting the improvement. No order may be issued under this subdivision after the plaintiff has deposited the amount of probable compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 6 unless the work authorized by the order is necessary to protect persons or other property against the risk of injury created by a partially completed improvement. A deposit of probable compensation subsequent to issuance of an order under this subdivision shall operate neither to preclude the defendant from completing the authorized improvement nor to deny compensation based thereon.

Comment. Section 1263.240 in no way limits the right of the property owner to make improvements on his property following service of summons; it simply states the general rule that the subsequent improvements will not be

compensated and specifies those instances in which subsequent improvements will be compensated. If a property owner discontinues work on a partially completed improvement following service of summons, the losses he suffers as a result of the discontinuance may be compensable upon abandonment by the plaintiff or upon defeat of the right to take. See Section 1270.040.

Subdivision (a) which continues the substance of the last sentence of former Section 1249, requires that, as a general rule, subsequent improvements be uncompensated regardless of whether they are made in good faith or bad. See City of Santa Barbara v. Petras, 21 Cal. App.2d 506, 98 Cal. Rptr. 635 (1971), and El Monte School Dist. v. Wilkins, 177 Cal. App.2d 47, 1 Cal. Rptr. 715 (1960). For exceptions to the rule stated in subdivision (a), see subdivision (b) and Section 1263.250 (harvesting and marketing of crops).

Subdivision (b)(1) codifies a judicially recognized exception to the general rule stated in subdivision (a). Citizen's Util. Co. v. Superior Court, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963).

Subdivision (b)(2), allowing compensation for subsequent improvements made with the consent of the plaintiff, is new. It permits the parties to work out a reasonable solution rather than forcing them into court and makes clear the condemnor has authority to make an agreement that will deal with the problem under the circumstances of the particular case.

Subdivision (b)(3) is intended to provide the defendant with the opportunity to make improvements that are demonstrably in good faith and not made to enhance the amount of compensation payable. Instances where subsequent improvements might be compensable under the balancing of hardships test include: (1) The work is necessary to protect persons or other property against the risk of injury created by a partially completed improvement. (See also Section 1263.820.) (2) The work is necessary to protect a partially completed improvement from being damaged by vandalism or by exposure to the elements. (3) An improvement is near completion and the date of public use of the property is distant, additional work enabling profitable use of the property pending dispossession.

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§ 1263.250. Harvesting and marketing of crops

1263.250. (a) Subject to subdivisions (b) and (c), the acquisition of property by eminent domain shall not prevent the defendant from harvesting and marketing crops planted before or after the service of summons.

(b) In the case of crops planted before service of summons, if the plaintiff takes possession of the property at a time that prevents the harvesting and marketing of the crops, the costs reasonably incurred in connection with the crops up to the date the plaintiff is authorized to take possession of the property shall be included in the compensation awarded for the property taken.

(c) In the case of crops planted after the service of summons, if the plaintiff takes possession of the property at a time that prevents the harvesting and marketing of the crops, the compensation specified in subdivision (b) is required only if the plaintiff has previously consented to the planting and harvesting.

Comment. Section 1263.250 supersedes former Section 1249.2. Despite the contrary implication of former Section 1249.2, subdivision (a) makes clear that the defendant has the right to grow and harvest crops and to retain the profit for his own benefit up to the time the property is actually taken. Where possession is taken and the defendant is prevented from realizing the value of his crops, he is entitled to his costs incurred for the crops up to

the date the plaintiff is authorized to take possession, provided they were planted prior to service of summons. Subdivision (b). The defendant is not entitled to compensation for unharvested crops planted after service of summons unless the plaintiff has agreed to planting and harvest. Failure of the plaintiff to agree, where there will be an unreasonable delay in acquisition, may subject the plaintiff to liability in inverse condemnation. See Klopping v. City of Whittier, 8 Cal.3d 39, ___ P.2d ___, ___ Cal. Rptr. ___ (1972).

§ 1263.260. Removal of improvements

1263.260. Notwithstanding Section 1263.210, the owner of improvements pertaining to the realty may elect to remove any or all such improvements by serving on the plaintiff within 60 days after service of summons written notice of such election. If the plaintiff fails within 30 days thereafter to serve on the owner written notice that the improvements are required for public use, the owner may remove such improvements and shall be compensated for their reasonable removal and relocation cost not to exceed the market value of the improvements.

Comment. Section 1263.260 is new. It provides a means whereby the defendant may convert realty to personalty and receive the moving cost for such personalty. Cf. Govt. Code § 7262 (moving expense of personal property). Where the owner of improvements pertaining to the realty makes the election provided in this section, compensation is not awarded for the property removed. Cf. Section 1263.230 (improvements removed or destroyed). For comparable provisions, see Pennsylvania Eminent Domain Code §§ 607-608.

Article 4. Measure of Compensation for Property Taken

§ 1263.310. Compensation for property taken

1263.310. Compensation shall be awarded for the property taken. The measure of this compensation is the fair market value of the property taken.

Comment. Section 1263.310 provides the basic rule that compensation for property taken by eminent domain is the fair market value of the property. Compensation for the property taken, however, is only one element of the damages to which a property owner may be entitled under this chapter. See Section 1263.010 and the Comment thereto (right to compensation). See also Section 1263.410 (injury to remainder) and Section 1263.510 (goodwill).

§ 1263.320. Fair market value

1263.320. The fair market value of the property taken 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, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

Comment. Section 1263.320 is new. It codifies the definition of fair market value that has developed through the case law. See, e.g., Sacramento etc. R.R. v. Heilbron, 156 Cal. 408, 409, 104 P. 979, 980 (1909), and Buena Park School Dist. v. Metrim Corp., 176 Cal. App.2d 255, 263, 1 Cal. Rptr. 250, ___ (1959). Although the phrase "the highest price estimated in terms of money" has been utilized in the case law definitions of fair market value, Section 1263.320 omits this phrase because it is confusing. No substantive change is intended by this omission. Likewise, the phrase "in the open market" has been omitted because it is misleading in that there may be no open market for some types of transactions; no substantive change in law is thereby intended.

The standard provided in Section 1245.320 is the usual standard normally applied to valuation of property whether for eminent domain or for any other purpose. The evidence admissible to prove fair market value is governed by the provisions of the Evidence Code. See especially Evid. Code § 810 et seq.

Where comparable sales are used to determine the fair market value of property, the terms and conditions of such sales may be shown in an appropriate case. See Evid. Code § 816.

For an adjustment to this basic fair market value standard in case of changes in value prior to the date of valuation, see Section 1263.330.

§ 1263.330. Changes in property value due to imminence of project

1263.330. The fair market value of the property taken shall not include any increase or decrease in the value of the property that is attributable to any of the following:

(a) The project for which the property is taken.

(b) The eminent domain proceeding in which the property is taken.

(c) Any preliminary actions of the plaintiff relating to the taking of the property.

Comment. Section 1263.330 is an adjustment to the basic definition of fair market value in Section 1263.320 and requires that the compensation for property taken by eminent domain be determined as if there had been no enhancement or diminution in the value of property due to the imminence of the eminent domain proceeding or the project for which the property is taken. The test provided in Section 1263.330 is similar to that applied by state and federal law to offers for voluntary acquisition of property (Govt. Code § 7267.2 and Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, § 301(3), ___ U.S.C. § ___ (19__)), except that Section 1263.330 lists several causes of value change that must be excluded from consideration rather than the general factor of the "public improvement" for which the property is acquired.

The first factor for which value changes must be excluded is the project for which the property is taken. Prior case law held that, in general, increases in the value of the property caused by the project as proposed may not be included in the compensation. Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971); cf. United States v. Miller, 317 U.S. 369 (1943). The effect of Section 1263.330(a) is to codify this rule. It should be noted that Merced Irr. Dist. v. Woolstenhulme stated an exception to the rule of exclusion of enhancement from market value where the property was not originally included within the scope of the project; this exception is discussed below under the "scope of the project" rule.

Prior case law was uncertain respecting the treatment of any decrease in value due to such factors as general knowledge of the pendency of the public project. Several decisions indicated that the rules respecting enhancement and diminution were not parallel and that value was to be determined as of the date of valuation notwithstanding that such value reflects a decrease due to general knowledge of the pendency of the public project. See City of Oakland v. Partridge, 214 Cal. App.2d 196, 29 Cal. Rptr. 388 (1963); People v. Lucas, 155 Cal. App.2d 1, 317 P.2d 104 (1957); and Atchison, T. & S.F. R.R. v. Southern Pac. Co., 13 Cal. App.2d 505, 57 P.2d 575 (1936). Seemingly to the contrary were People v. Lillard, 219 Cal. App.2d 368, 33 Cal. Rptr. 189 (1963), and Buena Park School Dist. v. Metrim Corp., 176 Cal. App.2d 255, 1 Cal. Rptr. 250 (1959). The Supreme Court case of Klopping v. City of Whittier, 8 Cal.3d 39, ___ P.2d ___, ___ Cal. Rptr. ___ (1972), cited the Lillard and Metrim

approach while disapproving the Partridge, Lucas, and Atchison approach in the inverse condemnation context. The Klopping case, however, does not make clear the approach the court would take in a direct condemnation case. 8 Cal.3d at 45 n.1; cf. Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d at 483 n.1. Section 1263.330(a) is intended to make the rules respecting appreciation and depreciation parallel by codifying the views expressed in the Lillard and Metrim decisions. See Anderson, Consequences of Anticipated Eminent Domain Proceedings--Is Loss of Value a Factor?, 5 Santa Clara Lawyer 35 (1964).

Subdivision (a) of Section 1263.330 is also intended to codify the proposition that any increase or decrease in value resulting from the use which the condemnor is to make of the property must be eliminated in determining compensable market value. See Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d at 490-491. If, however, the condemnor's proposed use is one of the highest and best uses of the property, the adaptability of the property for that purpose may be shown by the property owner. See San Diego Land & Town Co. v. Neale, 78 Cal. 63, 20 P. 372 (1888).

While Section 1263.330(a) provides that changes in value caused by the project for which the property is taken may not be included in the compensation, this exclusionary provision is not intended to apply to value changes that are beyond the scope of the "project." Thus, where changes in value are caused by a project other than the one for which the property is taken, even though the two projects may be related, the property owner may enjoy the benefit or suffer the detriment caused by the other project. See, e.g., People v. Cramer, 14 Cal. App.3d 513, 92 Cal. Rptr. 401 (1971). Likewise, if property

is affected by a project but is not to be taken for that project and subsequently the scope of the project is changed and the property is acquired for the changed project, the property should be valued as affected by the original project up to the change in scope. See, e.g., People v. Miller, 21 Cal. App.3d 467, 98 Cal. Rptr. 539 (1971), and Merced Irr. Dist. v. Woolstenhulme, supra ("Increases in value attributable to a project but reflecting a reasonable expectation that property will not be taken for the improvement, should properly be considered in determining 'just compensation.'" [4 Cal.3d at 495]); cf. United States v. Miller, supra, and Annot., 14 A.L.R. Fed. 806 (1973).

The second factor listed in Section 1263.330 requires that value changes caused by the fact that the property will be taken by eminent domain must be excluded from fair market value. Changes based on conjecture of a favorable or unfavorable award are not a proper element of compensation. See Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d at 491-492, 483 P.2d at ___, 93 Cal. Rptr. at ___.

The third factor listed in Section 1963.330 requires that preliminary actions on the part of the condemnor related to the taking of the property should not be allowed to affect the compensation. See Buena Park School Dist. v. Metrim Corp., supra.

Article 5. Compensation for Injury to Remainder

§ 1263.410. Compensation for injury to remainder

1263.410. (a) Where the property acquired is part of a larger parcel, in addition to the compensation awarded pursuant to Article 4 (commencing with Section 1263.310) for the part taken, compensation shall be awarded for the injury, if any, to the remainder.

(b) Compensation for injury to the remainder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder. If the amount of the benefit to the remainder equals or exceeds the amount of the damage to the remainder, no compensation shall be awarded under this article. If the amount of the benefit to the remainder exceeds the amout of damage to the remainder, such excess shall not be deducted from the compensation required to be awarded for the property taken or from the other compensation required by this chapter.

Comment. Section 1263.410 provides the measure of damages in a partial taking. It supersedes subdivisions 2 and 3 of former Section 1248. The phrase "damage to the remainder" is defined in Section 1263.420; "benefit to the remainder" is defined in Section 1263.430.

§ 1263.420. Damage to remainder

1263.420. Damage to the remainder is the damage, if any, caused to the remainder by either or both of the following:

(a) The severance of the remainder from the part taken.

(b) The construction and use of the project in the manner proposed by the plaintiff, whether or not the damage is caused by a portion of the project located on the part taken.

Comment. Section 1263.420 continues prior law as to the damage to the remainder compensable in an eminent domain proceeding. See former Section 1248(2). Section 1263.420 does not abrogate any court-developed rules relating to the compensability of specific elements of damage, nor does it impair the ability of the courts to continue to develop the law in this area. See Eachus v. Los Angeles Consol. Elec. Ry., 103 Cal. 614, 37 P. 750 (1894)(damage that causes "mere inconvenience" not compensable);

City of Berkeley v. Von Adelung, 214 Cal. App.2d 791, 29 Cal. Rptr. 802 (1963)("general" damage not compensable); People v. Volunteers of America, 21 Cal. App.3d 111, 98 Cal. Rptr. 423 (1971)(test of compensability is whether the condemnee is obligated to bear more than his "fair share" of the burden of the public improvement).

Prior law was not clear whether damage to the remainder caused by the construction and use of the project were recoverable if the damage-causing portion of the project was not located on the property from which the remainder

was severed. Compare People v. Symons, 54 Cal.2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960), and People v. Elsmore, 229 Cal. App.2d 809, 40 Cal. Rptr. 613 (1964), with People v. Ramos, 1 Cal.3d 261, 460 P.2d 992, 81 Cal. Rptr. 792 (1969), and People v. Volunteers of America, 21 Cal. App.3d 111, 98 Cal. Rptr. 423 (1971). Subdivision (b) abrogates the rule in Symons by allowing recovery for damages to the remainder caused by the project regardless of the precise location of the damage-causing portion of the project if the damages are otherwise compensable.

§ 1263.430. Benefit to remainder

1263.430. Benefit to the remainder is the benefit, if any, caused by the construction and use of the project in the manner proposed by the plaintiff, whether or not the benefit is caused by a portion of the project located on the part taken.

Comment. Section 1263.430 codifies prior law by defining the benefit to the remainder that may be offset against damage to the remainder in an eminent domain proceeding. See former Section 1248(3). Section 1263.430 does not abrogate any court-developed rules relating to the offset of benefits nor does it impair the ability of the courts to continue to develope the law in this area. See Beveridge v. Lewis, 137 Cal. 619, 70 P. 1083 (1902)(only "special" benefits may be offset); People v. Giumarra Farms, Inc., 22 Cal. App.3d 98, 99 Cal. Rptr. 272 (1971)(concentration and funneling of traffic a special benefit); but see People v. Ayon, 54 Cal.2d 217, 5 Cal. Rptr. 151 (1960)(increased or decreased traffic not a proper item of damage).

As with damage to the remainder (Section 1263.420 and Comment thereto), benefits created by the construction and use of the project need not be derived from the portion of the project located on property from which the remainder was severed. This continues existing law. See People v. Hurd, 205 Cal. App.2d 16, 23 Cal. Rptr. 67 (1962).

§ 1263.440. Computing damage and benefit to remainder

1263.440. The amount of any damage to the remainder and any benefit to the remainder shall:

(a) 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; and

(b) Be determined based on the value of the remainder on the date of valuation excluding prior changes in value as provided in Section 1263.330.

Comment. Section 1263.440 embodies two rules for computing the damage and benefit to the remainder that represent departures from prior law. It has been held that damage and benefit must be based on the assumption that the improvement is completed. See, e.g., People v. Schultz Co., 123 Cal. App.2d 925, 268 P.2d 117 (1954). Subdivision (a) alters this rule and requires that compensation for damage to the remainder (and the amount of benefit offset) be computed in a manner that will take into account any delay in the accrual of the damage and benefit under the project as proposed. If there is a subsequent change in plans so that the damage and benefit do not occur as the plaintiff proposed, the property owner may recover any additional damage in a subsequent action. See, e.g., People v. Schultz Co., supra.

Whether changes in the value of the remainder caused by imminence of the project prior to the date of valuation should be included in the computation of damage and benefit to the remainder was unclear under prior law. Subdivision (b)

adopts the position that it is the value of the remainder in the before condition unaffected by any enhancement or blight that is to be used as the basis in computing damages and benefits that will be caused by the project. See Section 1263.330 and the Comment thereto.

§ 1263.450. Compensation to reflect project as proposed

1263.450. Compensation for injury to the remainder shall be based on the project as proposed. Any features of the project which mitigate the damage or provide benefit to the remainder, including but not limited to easements, farm or private crossings, underpasses, access roads, fencing, and cattle guards, shall be taken into account in determining the compensation for injury to the remainder.

Comment. Section 1263.450 makes clear that any "physical solutions" provided by the plaintiff to mitigate damages are to be considered in the assessment of damages.

Section 1263.450 supersedes former Section 1248(5), relating to the cost of fencing, cattle guards, and crossings. The cost of fencing, cattle guards, and crossings is an element of damage only if lack of fencing, cattle guards, or crossings would damage the remainder; if the fencing, cattle guards, or crossings are to be supplied by the plaintiff as part of its project as designed, this fact should be taken into consideration in determining the damage, if any, to the remainder. Cf. former Section 1251 (plaintiff may elect to build fencing, cattle guards, and crossings in lieu of payment of damages).

If the plaintiff has no specific proposal for the manner of construction and use of the project, damages will be assessed on the basis of the most injurious lawful use. People v. Schultz Co., 123 Cal. App.2d 925, 268 P.2d 117 (1954).

Article 6. Loss of Goodwill

§ 1263.510. Loss of goodwill

1263.510. (a) The owner of a business conducted on property acquired by eminent domain or on the remainder if such property is part of a larger parcel shall be compensated for the loss of goodwill to the extent that such loss is caused by the acquisition of the property or the injury to the remainder and cannot reasonably be prevented by a relocation of the business and by taking those steps and adopting those procedures that a reasonably prudent person would take and adopt in preserving the goodwill.

(b) Compensation shall be allowed under this section only to the extent the loss is not compensated under Section 7262 of the Government Code.

Comment. Section 1263.510 is new to California eminent domain law. Under prior court decisions, compensation for business losses in eminent domain was not allowed. See, e.g., City of Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392, 153 P. 705 (1915). Section 1263.510 provides compensation for loss of goodwill in both a whole or a partial taking. See Bus. & Prof. Code § 14000 (goodwill is the expectation of continued public patronage). Goodwill loss is recoverable under Section 1263.510 only to the extent it cannot reasonably be prevented by relocation or other efforts by the owner to mitigate.

Subdivision (b) makes clear that Section 1263.510 compensates for goodwill loss only to the extent such loss is not compensated by Government Code

Section 7262 (moving expense and moving losses for relocated business or farm operations; in lieu payments for business or farm operation that cannot be relocated without a substantial loss of patronage). See Section 1263.010 (no double recovery).

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Article 7. Miscellaneous Provisions

§ 1263.610. Performance of work to reduce compensation

1263.610. A public entity and the owner of property to be acquired for public use may make an agreement that the public entity will:

(a) Relocate for the owner any structure if such relocation is likely to reduce the amount of compensation otherwise payable to the owner by an amount equal to or greater than the cost of such relocation.

(b) Carry out for the owner any work on property not taken, including work on any structure, if the performance of the work is likely to reduce the amount of compensation otherwise payable to the owner by an amount equal to or greater than the cost of the work.

Comment. Section 1263.610 is generalized from former Section 970 of the Streets and Highways Code, which related to certain types of work in connection with an acquisition for opening or widening a county highway. As to the authority of the Department of Public Works to contract for relocation of structures outside the State Control Act, see Streets and Highways Code Sections 135 and 136.5.

The phrase "any work" is used without qualification so as to have the broadest possible meaning. It would include any physical or structural operation whatsoever. Thus, it would cover such things as screening off roads or canals or soundproofing buildings adjacent to highways as well as constructing rights of way, fences, driveways, sidewalks, retaining walls,

and drainage or utility connections, all of which latter operations were specifically listed in former Section 970.

Nothing in Section 1263.610 precludes the public entity from including features in the design of the public project that will have the effect of mitigating damages. See Section 1263.450.

§ 1263.620. Partially completed improvements; performance of work to protect public from injury

1263.620. (a) Where construction of an improvement is in progress on the property taken or damaged at the time of service of summons and the owner of such property ceases the construction due to such service and the uncompleted improvement creates a risk of injury to persons or to other property, the owner shall be compensated for any expenses reasonably incurred for work necessary to protect against such risk.

(b) The plaintiff may agree with the owner as to the amount of compensation payable under this section.

(c) The plaintiff may agree with the owner that the plaintiff will perform work necessary for the purposes of this section.

Comment. Section 1263.620 provides that the owner of property on which construction is interrupted by eminent domain may be compensated for work reasonably done to protect the public against injury without requirement of prior approval by the plaintiff or the court. Cf. Section 1263.240 (improvements made after service of summons). In addition, Section 1263.620 authorizes public entities to agree with the owner to construct the improvements or to reimburse the owner for such construction.