

July 11, 1975

Time

Place

July 17 - 7:00 p.m. - 10:00 p.m.
July 18 - 9:00 a.m. - 4:30 p.m.

State Bar Building
601 McAllister Street
San Francisco 94102

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

July 17-18, 1975

1. Minutes of June 26-27, 1975, Meeting (enclosed)
2. Administrative Matters
 - 1975 Legislative Program
 - Oral Report
3. Study 36 - Eminent Domain
 - 36.300 - Eminent Domain (Fair Market Value--Church Property)
 - Memorandum 75-54 (enclosed)
 - 36.60 - Relocation Assistance (Private Condemnors)
 - Memorandum 75-55 (enclosed)
 - Staff Draft of Tentative Recommendation (attached to Memorandum)
 - Discussion of Reaction of Subcommittee on Eminent Domain
 - Material prepared by Staff for Subcommittee (enclosed)
 - Additional material to be handed out at meeting
4. Study 81 - Transfer of Out-of-State Trusts to California
 - Memorandum 75-50 (enclosed)
 - Staff Draft of Tentative Recommendation (attached to Memorandum)
5. Study 39.90 - Claim and Delivery
 - Memorandum 75-51 (sent 7/7/75)
 - Tentative Recommendation (attached to Memorandum)
6. Study 39 - Prejudgment Attachment
 - Memorandum 75-53 (enclosed)

July 11, 1975

7. Study 39.120 - Enforcement of Judgments

Not Available { Memorandum 75-26 (sent 6/5/75)
Memorandum 74-25 (Third-Party Claims; originally attached to
Memorandum 75-7; another copy sent 6/5/75)
Draft of Title 9 - Enforcement of Judgments (originally attached
to Memorandum 75-7; another copy sent 6/5/75)
First Supplement to Memorandum 75-7 (sent 6/5/75)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JULY 17 AND 18, 1975

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on July 17 and 18, 1975.

Present: Marc Sandstrom, Chairman, July 18
John N. McLaurin, Vice Chairman
Thomas E. Stanton, Jr.
Howard R. Williams

Absent: Robert S. Stevens, Member of Senate
Alister McAlister, Member of Assembly
John J. Balluff
John D. Miller
George H. Murphy, ex officio

Members of Staff Present:

John H. DeMouilly Nathaniel Sterling
Stan G. Ulrich Jo Anne Friedenthal
Robert J. Murphy III

The following persons were present as observers on days indicated:

July 17

Norval Fairman, Department of Transportation, San Francisco

July 18

Carl Olsen, California State Sheriff's Association, San Francisco

ADMINISTRATIVE MATTERS

Approval of Minutes

The Minutes for the June 26 and 27, 1975, meeting were approved as submitted.

Legislative Program

The Executive Secretary reported on the progress of the 1975 legislative program, summarized below as of June 26, 1975:

1975 LEGISLATIVE PROGRAM

CALIFORNIA LAW REVISION COMMISSION

ENACTED

- AB 74 (Ch. 7, Statutes of 1975) - Modification of Contracts--Commercial Code Revision
- AB 192 (Ch. 25, Statutes of 1975) - Escheat--Travelers Checks and Money Orders
- AB 919 (Ch. 200, Statutes of 1975) - Defers attachment law for one year
- ACR 17 (Res. Ch. 15, Statutes of 1975) - Authority to study topics

SENT TO FLOOR "DO PASS"--SECOND HOUSE

- SB 294 - Out-of-Court Views by Judge or Jury
- SB 607 - Payment of Judgments in Installments
- AB 73 - Good Cause Exception to Physician-Patient Privilege

SENT TO FINANCE COMMITTEE "DO PASS"--SECOND HOUSE

- ACR 39 - Authorizes Commission study of marketable title act

PASSED FIRST HOUSE

- AB 11 - General Eminent Domain Statute
- AB 90 - Wage Garnishment Exemptions
- AB 124 - Conforming changes - eminent domain
- AB 125 - Conforming changes - eminent domain
- AB 126 - Conforming changes - eminent domain
- AB 127 - Conforming changes - eminent domain
- AB 128 - Conforming changes - eminent domain
- AB 129 - Conforming changes - eminent domain
- AB 130 - Conforming changes - eminent domain
- AB 131 - Conforming changes - eminent domain
- AB 266 - State Agency Condemnation
- AB 278 - Conforming Changes - codified provisions - eminent domain

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TO BE SET FOR HEARING JANUARY 1976

AB 1671 - Partition of Real and Personal Property

NOT YET INTRODUCED

Liquidated Damages

Wage Garnishment Procedure - Senate Preprint Bill No. 3

DEAD

AB 75 - Oral Modification of Contracts--General Provisions

AB 974 - Admissibility of Copies of Business Records in Evidence (possibly
will be referred for interim study)

Future Meetings

The September meeting was cancelled.

The next meeting of the Commission will be held on October 9, 10, and 11,
1975 at Stanford. Future meetings will be scheduled later.

Contract With Garrett H. Elmore

The Executive Secretary reported that considerable additional research would be required on the partition study to determine the ramifications of partition proceedings where community property, partnership property, or homesteaded property is involved. The Executive Secretary recommended that our consultant on partition, Mr. Garrett H. Elmore, be retained to perform research and make recommendations to the Commission and its staff concerning these matters. A motion was unanimously adopted that Mr. Elmore be retained for this research, that the compensation be \$500, and that the Executive Secretary be authorized and directed to execute the contract on behalf of the Commission.

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STUDY 36.60 - EMINENT DOMAIN (RELOCATION
ASSISTANCE--PRIVATE CONDEMNORS)

The Commission considered Memorandum 75-55 and the attached staff draft of a tentative recommendation relating to relocation assistance by private condemners. The Commission approved the tentative recommendation for distribution for comment after revising the recommendation to read:

7276. A person (~~other than a public entity or public utility~~) acquiring real property by eminent domain shall provide relocation advisory assistance and shall make any of the payments required of public entities by this chapter. This section does not apply to public utilities governed by Public Utilities Code Section 600 or public entities governed by Sections 7260-7275.

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STUDY 36.300 - EMINENT DOMAIN (AB 11 AND RELATED CHANGES)

The Commission considered Memorandum 75-54, the material prepared by the staff for the Senate Subcommittee on Eminent Domain, and the proposed amendments to AB 11 and AB 278 (distributed at the meeting and attached hereto), relating to changes in the eminent domain bills. The Commission determined to make the amendments as proposed, with the following exceptions:

§ 1230.065. Operative date

The operative date references in subdivision (b) should conform to subdivision (a).

§ 1240.050. Extraterritorial condemnation

Subdivision (b) of this section should be made into a separate section.

§ 1245.235. Notice and reasonable opportunity to be heard before resolution of necessity adopted by local public entity

The last sentence of subdivision (b) was revised to read:

The governingbody need not give an opportunity to appear and be heard to any person who fails to ~~respond to the notice~~ file a request for hearing on the matters referred to in Section 1240.030 within 15 days after ~~it~~ the notice is mailed.

§ 1255.230. Objections to withdrawal

The Comment to this section should note that the section implements the Constitutional mandate that the deposit be available for withdrawal by the property owner before possession is taken.

§ 1263.320. Fair market value

The Commission rejected the proposal contained in Memorandum 75-54 to adopt the Uniform Eminent Domain Code provision on fair market value. The

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Commission instructed the Executive Secretary to write to the Legislative Counsel for the California Catholic Conference indicating its decision and the reasons therefor. The staff was also directed to review the Comment to this section for accuracy.

§ 1263.510. Compensation for loss of goodwill

Subdivision (c) of this section should be revised in essence to provide that compensation for loss of goodwill must be claimed in the answer; that a claim for such a loss waives the confidentiality of the state tax records of the business insofar as relevant to the loss of goodwill; and that the tax and other records and documents may be obtained only through normal discovery procedures. The provision enabling the plaintiff to require court trial of the issue of compensation for loss of goodwill was deleted.

AMENDMENTS TO ASSEMBLY BILL 11

(1975-1976 Reg. Sess.)

968/617

Code Civ. Proc. § 1230.065. Operative date

1230.065. (a) This title becomes operative July 1, ~~1977~~ 1976 .

(b) This title does not apply to an eminent domain proceeding commenced prior to January 1, 1977. Subject to subdivisions (c) and (d), in the case of an eminent domain proceeding which is commenced on or after January 1, 1977, but prior to the operative date, this title upon the operative date applies to the proceeding to the fullest extent practicable with respect to issues to be tried or retried.

(c) Chapter 3 (commencing with Section 1240.010), Chapter 4 (commencing with Section 1245.010), and Chapter 5 (commencing with Section 1250.010) do not apply to a proceeding commenced prior to the operative date.

(d) If, on the operative date, an appeal, motion to modify or vacate the verdict or judgment, or motion for new trial is pending, the law applicable thereto prior to the operative date governs the determination of the appeal or motion.

Comment. Subdivision (a) of Section 1230.065 delays the operative date of this title until July 1, ~~1977~~ 1976 , to allow sufficient time for interested persons to become familiar with the new law.

Subdivision (b) adopts the policy that this title is to apply to the fullest extent practicable to pending proceedings except those commenced more than six months before the operative date. In most proceedings commenced within six months before the operative date, except perhaps those in trial or awaiting imminent trial, the immediate application of this title would not delay the parties or court in proceeding to judgment. Immediate application moreover, would prevent inconsistencies of result as between proceedings commenced shortly prior to the operative date and those commenced shortly thereafter. The phrase "to the fullest extent practicable" is intended to give the court discretionary power to adapt the application of the title to the circumstances of individual cases, thereby reducing the possibility that immediate application of these provisions to pending litigation might in special cases cause injustice.

Subdivision (c) excludes from application to pending proceedings provisions dealing with the right to take, precondemnation activities, and pleadings.

Subdivision (d) provides, in the interest of fairness, that any decision of a posttrial motion or appeal pending on the operative date should be based upon the law that was applicable when the action was tried. It would be unfair to hold litigants to a different rule of law

in the determination of claimed error than the law which governed at the time the claimed error was committed. If the motion or appeal results in a new trial, however, this title would govern the further proceedings in the action under subdivision (b).

NOTE: The Law Revision Commission has determined to make the foregoing amendment.

968/618

Code Civ. Proc. § 1240.050. Extraterritorial condemnation

1240.050. (a) A local public entity may acquire by eminent domain only property within its territorial limits except where the power to acquire by eminent domain property outside its limits is expressly granted by statute or necessarily implied as an incident of one of its other statutory powers.

(b) Unless the power to acquire by eminent domain property outside its territorial limits is expressly limited by statute, a local public entity may acquire by eminent domain property outside its limits for water, gas, or electric supply, or for drainage or sewer purposes.

Comment. Subdivision (a) of Section 1240.050 codifies prior law.

Although

express statutory authority generally is required, extraterritorial condemnation also is permitted where this power is necessarily implied as an incident to the existence of other powers expressly granted. See *City of No. Sacramento v. Citizens Util. Co.*, 192 Cal. App.2d 482, 13 Cal. Rptr. 538 (1961) (implied authority); *City of Hawthorne v. Peebles*, 166 Cal. App.2d 758, 333 P.2d 442 (1959) (statutory authority); *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.*, 72 Cal. App.2d 638, 165 P.2d 741 (1946) (statutory authority). See also *Harden v. Superior Court*, 44 Cal.2d 630, 284 P.2d 9 (1955); *City of Carlsbad v. Wight*, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963). Cf. *Mulville v. City of San Diego*, 183 Cal. 734, 737, 192 P. 702, 703 (1920); *McBean v. City of Fresno*, 112 Cal. 159, 44 P. 358 (1896). ~~Furnishing~~

Subdivision (b) constitutes an express statutory authorization of extraterritorial condemnation authority. It in effect codifies case law that furnishing sewage

facilities and supplying water are services for which the power of extraterritorial condemnation may be implied exercised. City of

Pasadena v. Stimson, 91 Cal. 238, 27 P. 604 (1891) (sewage) (dictum); *City of No. Sacramento v. Citizens Util. Co.*, *supra* (water). Cf. *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 718, 329 P.2d 289, 291 (1958). Compare *City of Carlsbad v. Wight*, *supra*. It should be noted that the extraterritorial condemnation authority granted in subdivision (b) may be limited by statutes restricting the condemnation authority of a particular local public entity to its boundaries or by statutes requiring the consent of the governing body of the jurisdiction in which the property to be taken is located. See, e.g., Harb. & Nav. Code § 7147 (small craft harbor district may acquire extraterritorial property only with consent of governing body); Pub. Util. Code § 30503 (Southern California Rapid Transit District may acquire property only within its boundaries).

There are a number of statutes that expressly authorize extraterritorial condemnation. *E.g.*, GOVT. CODE § 61610; HARB. & NAV. CODE § 7147; HEALTH & SAF. CODE §§ 6514, 13852(c); PUB. RES. CODE § 5540. Such statutes are constitutional. *City of Hawthorne v. Peebles*, *supra*; *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.*, *supra*.

A significant limitation on the exercise of extraterritorial condemnation is that the resolution of necessity of a local public entity is not conclusive where the property to be taken is outside its boundaries. Section 1243.250(b). See *City of Hawthorne v. Peebles*, *supra*; *City of Los Angeles v. Keck*, 14 Cal. App.3d 920, 92 Cal. Rptr. 599 (1971). See also *Orange County Water Dist. v. Bennett*, 156 Cal. App.2d 745, 750, 320 P.2d 536, 539 (1958); *Los Angeles County Flood Control Dist. v. Jan*, 154 Cal. App.2d 389, 394, 316 P.2d 25, 28 (1957). The "necessity" required to justify extraterritorial condemnation is only a reasonable necessity under all the circumstances of the case and not an absolute or imperative necessity. *City of Hawthorne v. Peebles*, *supra*. While economic considerations alone may not be sufficient to justify extraterritorial condemnation, considerations of economy may be taken into account in determining necessity. *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.*, *supra*. Compare *City of Carlsbad v. Wight*, *supra*.

NOTE: This change is the result of a suggestion of the Subcommittee on Eminent Domain of the Senate Judiciary Committee.

968/624

Code Civ. Proc. § 1240.640. Use by state more necessary than other uses

1240.640. (a) Where property has been appropriated to public use by any person other than the state, the use thereof by the state for the same use or any other public use is presumed to be a more necessary use than the use to which such

property has already been appropriated.

(b) Where property has been appropriated to public use by the state, the use thereof by the state is presumed to be a more necessary use than any use to which such property might be put by any other person.

(c) The presumptions established by this section are presumptions affecting the burden of proof.

Comment. Section 1240.640 broadens somewhat supersedes the general

rule stated under former Code of Civil Procedure Section 1240(3) and former Government Code Section 15856 (Property Acquisition Law). Section 1240(3) provided a state priority over private ownership and Section 15856 provided an absolute priority for all acquisitions under that statute. See, *e.g.*, *State v. City of Los Angeles*, 256 Cal. App.2d 930, 64 Cal. Rptr. 476 (1967). Section 1240.640 not only embraces state acquisitions under the Property Acquisition Law but also under any other authority, most notably by the Department of Water Resources and the Department of Transportation. See also WATER CODE § 252 (authority of the Department of Water Resources to take park lands). However, unlike prior law, the presumptions of this section are made rebuttable rather than absolute.

Specific exemptions or qualifications to the rule of state supremacy may be stated elsewhere. *E.g.*, Section 1240.680 (park use presumed "more necessary" than highway use); STS. & HWYS. CODE §§ 155 (Department of Transportation may not take for memorials without county consent); 103.5, 210.1 (Department of Transportation may condemn parks but shall avoid doing so wherever possible). Also, property appropriated to public use by the state may be taken for common use where compatible pursuant to Section 1240.510 *et seq.* and the prior user may, under appropriate circumstances, be permitted under Section 1240.630 to continue his use jointly with the more necessary state use.

NOTE: This change is at the direction of the Subcommittee on Eminent Domain of the Senate Judiciary Committee.

968/625,043/188

Code Civ. Proc. § 1240.660. Property appropriated to the public use of local public entities (new)

1240.660. Where property has been appropriated to public use by a local public entity, the use thereof by the local public entity is presumed to be a more necessary use than any use to which such property

might be put by any other local public entity. The presumption established by this section is a presumption affecting the burden of proof.

Comment. Section 1240.660 supersedes former Sections 1240(3) and 1241(3) of the Code of Civil Procedure. Section 1240.660, like its predecessors, protects property appropriated to a public use by or to the use of one local public entity from displacement by any other local public entity. However, unlike its predecessors, Section 1240.660 creates a rebuttable, rather than a conclusive, presumption. It should be noted that this presumption is only for purposes of displacement of one user by another. Any local public entity may take property of any other local public entity for joint use where compatible under Section 1240.510. See, e.g., City of San Diego v. Cuyamaca Water Co., 209 Cal. 152, 287 P. 496 (1930), and Turlock Irr. Dist. v. Sierra etc. Power Co., 69 Cal. App. 150, 230 P. 671 (1924).

Section 1240.660 expands the number of local public entities given the presumption. Former Section 1241(3) listed a greater number of entities than former Section 1240(3); however, the discrepancy appears to have been unintentional, and the sections were apparently regarded as interchangeable. See City of Beaumont v. Beaumont Irr. Dist., 63 Cal.2d 291, 405 P.2d 377, 46 Cal. Rptr. 465 (1965); County of Marin v. Superior Court, 53 Cal.2d 633, 349 P.2d 526, 2 Cal. Rptr. 758 (1960).

The term "appropriated to public use" is defined by Section 1235.180. See Section 1235.180 and Comment thereto. Former Sections 1240(3) and 1241(3) prohibited takings "while such property is so appropriated and used for the public purposes for which it has been so appropriated." (Emphasis added.) This language implied that the property must not only be appropriated but also actually used for a public purpose. However, the cases did not so construe the section. See East Bay Mun. Util. Dist. v. City of Lodi, 120 Cal. App. 740, 750, 8 P.2d 532, 536 (1932) ("'used' does not mean actual physical use . . . but . . . property reasonably necessary for use" which will be used within a reasonable time). The term "used" has accordingly been eliminated from Section 1240.660 to conform with the actual construction. Similarly, both sections referred to takings of "private" property appropriated to the use of the respective entities. It was clear, however, that the sec-

tions were not limited to private property devoted to public use but included property owned by public entities as well as by private individuals or corporations. See City of Beaumont v. Beaumont Irr. Dist., supra (city may not condemn property appropriated to use by irrigation district); County of Marin v. Superior Court, supra (county road may not be condemned by municipal water district); Mono Power Co. v. City of Los Angeles, 284 F. 784 (9th Cir. 1922) (city may not condemn property appropriated to use of other governmental entities by private corporation). The modifying word "private" has, therefore, been omitted.

NOTE: This section is added at the direction of the Subcommittee on Eminent Domain of the Senate Judiciary Committee.

043/196

Code Civ. Proc. § 1245.235. Notice and reasonable opportunity to be heard before resolution of necessity adopted by local public entity

1245.235. (a) The governing body of a local public entity may adopt a resolution of necessity only after the governing body has held a hearing at which persons given each person whose property is to be acquired by eminent domain have had notice and a reasonable opportunity to appear and be heard.

(b) Notice of the hearing shall be sent by first-class mail to each person whose property is to be acquired by eminent domain if the name and address of the person appears on the last equalized county assessment roll (including the roll of state-assessed property). The notice shall state the time, place, and subject of the hearing and shall be mailed at least 15 days prior to the date of the hearing intent of the governing body to adopt the resolution and the right of each such person to appear and be heard . The governing body need not give an opportunity to appear and be heard to any person who fails to respond to the notice within 15 days after it is mailed.

(c) Nothing in this section precludes the governing body of a local public entity from satisfying the requirements of this section through any other procedure that has given each person whose property is to be acquired by eminent domain notice and a reasonable opportunity to appear and be heard on the matters referred to in Section 1240.030.

Comment. Section 1245.235, which requires local public entities to give notice to persons whose property is to be acquired and a reasonable opportunity to appear and be heard, imposes a new requirement in eminent domain proceedings.

Subdivision (a) makes clear that the notice and opportunity to appear and be heard must precede the adoption of the resolution of necessity. However, under subdivision (c), this requirement may be satisfied by any adequate procedure followed by the local public entity, for example, through hearings under a local improvement act.

Subdivision (b) permits the local public entity to require the property owner to make an affirmative and a prompt request to appear and be heard before it is obligated to give a hearing.

NOTE: The foregoing changes are in response to suggestions by the Subcommittee on Eminent Domain of the Senate Judiciary Committee.

043/197

Code Civ. Proc. § 1245.255. Collateral attack on conclusiveness of resolution

1245.255. A resolution of necessity does not have the effect prescribed in Section 1245.250 to the extent that its adoption or contents were influenced or affected by gross abuse of discretion or arbitrary or capricious action by the governing body. Nothing in this section precludes a public entity from rescinding a resolution of necessity and adopting a new resolution as to the same property subject to the same consequences as a conditional dismissal of the proceeding under Section 1260.120.

Comment. Section 1245.255 is new. It permits a collateral attack on the conclusive effect of the resolution of necessity, on the same grounds that the validity of the resolution may be directly attacked under the administrative mandamus statute. See Section 1094.5 ("abuse of discretion") and cases thereunder ("arbitrary or capricious action"). Section 1245.255 overrules the case of *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959), insofar as that case precluded a collateral attack on the conclusive effect of the resolution of necessity.

In addition to the collateral attack on the conclusive effect of the resolution permitted by Section 1245.255, the validity of the resolution may be subject to direct attack by administrative mandamus (Section 1094.5) and, in the case of a conflict of interest, under the Political Reform Act of 1974 (Govt. Code § 91003(b)). See also Section 1245.270 (resolution adopted as a result of bribery).

Because Section 1245.255 permits collateral attack on the conclusiveness of the resolution, the standard for attack is a stricter standard than under the administrative mandamus statute. Compare Section 1245.255 ("gross abuse of discretion") with Section 1094.5 ("abuse

of discretion") and cases thereunder ("arbitrary or capricious action"). Moreover, the scope of the court's review is limited to a determination of whether the resolution is supported by substantial evidence. Contrast Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal.3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974) (court must exercise its independent judgment on the evidence in finding an abuse of discretion under Section 1094.5).

It should be noted that an attack on the resolution under Section 1245.255 must be pleaded promptly (Section 1250.345), must recite the specific facts upon which it is based (Section 1250.350), and must be certified by the property owner's attorney (Section 1250.330).

NOTE: The foregoing change is at the direction of the Subcommittee on Eminent Domain of the Senate Judiciary Committee.

968/610

Code Civ. Proc. § 1245.257. Effect of resolution in redevelopment takings

~~1245.257. Notwithstanding any other provision of law, a resolution of necessity does not have the effect prescribed in Section 1245.250 if all or a portion of the parcel of property sought to be taken by eminent domain is being taken with a view to selling, leasing or otherwise transferring it to a private person and the public entity adopting the resolution plans to retain in public possession less than 51 percent of the total area of such parcel; and more than 51 percent of the gross receipts that will be generated from such parcel and any improvements thereon will come from that portion of the parcel which is to be sold, leased or otherwise transferred to the private person.~~

All in
strikeout

NOTE: This provision is to be deleted at the direction of the Subcommittee on Eminent Domain of the Senate Judiciary Committee.

043/189

Code Civ. Proc. §§ 1245.310-1245.390 (Article heading)

Article 3. Resolution Authorising Consenting to
Eminent Domain Proceeding by Quasi-Public
Entity to Commence Eminent Domain Proceeding

NOTE: The Law Revision Commission has determined to make the foregoing change.

043/192

Code Civ. Proc. § 1245.310. "Legislative body" defined

1245.310. As used in this article, "legislative body" means +
(a) ~~The the~~ legislative body of ~~the~~ each city if within whose boundaries
the property sought to be taken by the quasi-public entity by eminent
domain is located ~~entirely within the boundaries of a city.~~ (b)
~~The and the~~ legislative body of ~~the~~ each county if within whose bound-
aries the property sought to be taken by the quasi-public entity by
eminent domain is ~~not~~ located (if the property is not located entirely
within the city boundaries) of a city .

NOTE: The Law Revision Commission has determined to make the fore-
going change. There is no existing Comment for this section.

043/193

Code Civ. Proc. § 1245.330. Resolution required

1245.330. A quasi-public entity may not commence an eminent domain
proceeding to acquire any property until the legislative body has adopted
a resolution that ~~authorizes the quasi/public entity to acquire such~~
~~property by eminent domain~~ consenting to the acquisition .

NOTE: The Law Revision Commission has determined to make the fore-
going change. There is no existing Comment for this section.

043/194

Code Civ. Proc. § 1245.350. Procedure for adoption of resolution

1245.350. (a) The legislative body may refuse to consent to the
acquisition with or without a hearing, but it may adopt the resolution
required by this article only after the legislative body has held a
hearing at which persons whose property is to be acquired by eminent
domain have had a reasonable opportunity to appear and be heard.

(b) Notice of the hearing shall be sent by first-class mail to each person whose property is to be acquired by eminent domain if the name and address of the person appears on the last equalized county assessment roll (including the roll of state-assessed property). The notice shall state the time, place, and subject of the hearing and shall be mailed at least 15 days prior to the date of the hearing.

NOTE: The Law Revision Commission has determined to make the foregoing change. There is no existing Comment for this section.

043/195

Code Civ. Proc. § 1245.370. Costs of legislative body

1245.370. The legislative body may require that the quasi-public entity pay all of the costs reasonably incurred by the legislative body under this article. The legislative body may require that such costs be paid secured by payment or deposit or other satisfactory security in advance of any action by the legislative body under this article.

NOTE: The Law Revision Commission has determined to make the foregoing change. There is no existing Comment for this section.

968/619

Code Civ. Proc. § 1250.360. Grounds for objection to right to take where resolution conclusive

1250.360. Grounds for objection to the right to take, regardless of whether the plaintiff has adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4, include:

(a) The plaintiff is not authorized by statute to exercise the power of eminent domain for the purpose stated in the complaint.

(b) The stated purpose is not a public use.

(c) The plaintiff does not intend to devote the property described in the complaint to the stated purpose.

(d) There is no reasonable probability that the plaintiff will devote the described property to the stated purpose within (1) seven years, or (2) 10 years where the property is taken pursuant to the Federal Aid Highway Act of 1973, or (3) such longer period as is reasonable.

(e) The described property is not subject to acquisition by the power of eminent domain for the stated purpose.

(f) The described property is sought to be acquired pursuant to Section ~~1240.540 (substitute condemnation)~~, 1240.410 (excess condemnation), 1240.510 (condemnation for compatible use), or 1240.610 (condemnation for more necessary public use), but the acquisition does not satisfy the requirements of those provisions.

(g) The described property is sought to be acquired pursuant to Section 1240.610 (condemnation for more necessary public use), but the defendant has the right under Section 1240.630 to continue the public use to which the property is appropriated as a joint use.

(h) Any other ground provided by law.

NOTE: The foregoing is a technical, conforming change.

968/620

Code Civ. Proc. 1250.410. Pretrial settlement offers

1250.410. (a) At least 30 days prior to the date of trial, the plaintiff shall file with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant shall file and serve on the plaintiff his final demand for compensation in the proceeding. Service shall be in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(b) If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the

costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses. In determining the amount of such litigation expenses, the court shall consider any written revised or superseded offers and demands filed and served prior to or during trial.

Comment. Section 1250.410 continues the substance of former Section 1249.3, making clear that the offer and demand are to cover all of the compensation in the proceeding, including injury to the remainder, if any, and not merely the value of the

part taken. Section 1250.410 also requires the court to consider the evidence produced at trial in making its determination whether the offer of the plaintiff was reasonable and the demand of the defendant was unreasonable. For the definition of "litigation expenses," see Section 1235.140.

NOTE: The Law Revision Commission has determined to make the foregoing amendment.

Opposition to this section:

Code of Civil Procedure Section 1249.3 was enacted at the 1974 legislative session to require the condemnor to make a final settlement offer 30 days before trial and to require that the property owner be awarded his litigation expenses where--viewed in the light of the compensation finally awarded--the settlement offer proves to be unreasonable and the demand of the property owner reasonable. This provision was opposed by many public entities.

Section 1250.410 continues the substance of Section 1249.3. Many public entities continue to oppose the provision. The Law Revision Commission proposes one amendment to Section 1250.410 that will be advantageous to public entities: The reasonableness of the offer and demand should be viewed in the light of the evidence admitted at trial, as well as the compensation finally awarded.

043/198

Code Civ. Proc. § 1255.420. Stay of order for hardship

1255.420. Not later than 30 days after service of an order authorizing the plaintiff to take possession of property under Section 1255.410, any defendant or occupant of the property may move for relief from the order if the hardship to him of having possession taken at the time specified in the order is substantial. If the court determines that the hardship to the defendant or occupant is substantial, the court may stay the order until a date

certain or

impose terms and conditions limiting its operation unless, upon considering all relevant facts (including the schedule or plan of operation for execution of the public improvement and the situation of the property with respect to such schedule or plan), the court further determines (a) that the plaintiff needs possession of the property within the time specified in the order for possession and (b) that the hardship the plaintiff would suffer as a result of a stay or limitation of the order would be substantial.

NOTE: The foregoing change is at the direction of the Subcommittee on Eminent Domain of the Senate Judiciary Committee.

Code Civ. Proc. § 1263.205. Improvements pertaining to the realty

1263.205. As used in this article, "improvements pertaining to the realty" include any ~~facilities~~, machinery, or equipment installed for use on property taken by eminent domain, or on the remainder if such property is part of a larger parcel, that cannot be removed without a substantial economic loss or without substantial damage to the property on which it is installed, regardless of the method of installation.

Comment. The definition of improvements pertaining to the realty in Section 1263.205 is not inclusive; it makes clear that ~~certain facilities~~, machinery, and equipment are deemed improvements but does not affect buildings, structures, and other fixtures which may also be improvements pertaining to the realty for the purposes of this article.

Section 1263.205 supersedes the provisions of former Section 1248b which applied only to equipment designed for manufacturing or industrial purposes. Section 1263.205 applies to machinery and "facilities" as well as to equipment and applies whether or not they are used for manufacturing or industrial purposes. Equipment includes, for example, but is not limited to, furniture of a motel or restaurant.

In determining whether particular property can be removed "without a substantial economic loss" within the meaning of Section 1263.205, the value of the property in place as part of the realty should be compared with its value to be removed and sold.

One effect of classification of property as improvements pertaining to the realty is that such property, if located on the property taken, must also be taken and paid for by the condemnor of the realty. As a consequence, the condemnor acquires title to the improvements rather than merely paying for loss of value on removal and has the right to realize any salvage value the improvements may have and must bear the resultant burden. Where such improvements are located on the remainder, they may receive severance damages. See, *e.g.*, *City of Los Angeles v. Sibatasso*, 3 Cal. App.3d 973, 83 Cal. Rptr. 898 (1970).

Losses on personal property that is not an improvement pertaining to the realty may be recoverable under the relocation assistance provisions of the Government Code. See, *e.g.*, GOV. CODE § 7262.

Code Civ. Proc. § 1263.510. Compensation for loss of goodwill

1263.510. (a) The owner of a business conducted on the property taken, or on the remainder if such property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves all of the following:

(1) The loss is caused by the taking of the property or the injury to the remainder.

(2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill.

(3) Compensation for the loss will not be included in payments under Section 7262 of the Government Code.

(4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.

(b) Within the meaning of this section, "goodwill" consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.

(c) The plaintiff may, upon motion, elect to have the court determine the amount of compensation under this section. In such a case, the court shall order, upon such terms and conditions as will preserve their confidentiality, that the owner of the business make available to the court and to the plaintiff the tax records, accounting records, and financial statements of the business for audit for confidential use solely for the purpose of determining the amount of compensation under this section. Nothing in this subdivision affects any right a party may otherwise have to discovery or to require the production of documents, papers, books, and accounts.

(d) Nothing in this section authorizes the award of damages for temporary interference with or interruption of business.

Comment. Section 1263.510, which is the same in substance as ~~Section 1016 of the Uniform Eminent Domain Code~~, 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); but see *Community Redevelopment Agency v. Abrams*, (hearing granted by Supreme Court 1974). Section 1263.510 provides compensation for loss of goodwill in both a whole or a partial taking. 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.

The determination of loss of goodwill is governed by the rules of evidence generally applicable to such a determination and not

by the special rules relating to valuation in eminent domain contained in Article 2 (commencing with Section 810) of Chapter 1 of Division 7 of the Evidence Code. See EVID. CODE § 811 and Comment thereto. Thus, the provisions of Evidence Code Sections 817 and 819 that restrict admissibility of income from a business for the determination of value, damage, and benefit in no way limit admissibility of income from a business for the determination of loss of goodwill. Notwithstanding Section 1260.210, the burden of proof is on the property owner under this section.

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 also Sections 1263.010 (no double recovery), 1263.410 (offset against benefits to remainder).

Subdivisions (a) and (b) are the same in substance as Section 1016 of the Uniform Eminent Domain Code.

Subdivision (c) supplements normal discovery procedures (Sections 2016-2036) in cases of court trial of the issue of loss of goodwill.

Subdivision (d) makes clear that Section 1263.510 is not intended to affect the rules relating to compensation for temporary business losses. This matter is left to continuing case development.

968/621

Code Civ. Proc. § 1265.310. Unexercised options

~~1265.310. Unless the option expressly provides otherwise, an unexercised option to acquire an interest in property taken by eminent domain is terminated as to that property, and the option holder is entitled to compensation for its value, if any, as of the time of the filing of the complaint in the eminent domain proceeding.~~

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NOTE: The Law Revision Commission has determined to delete this section. The following clarifying language should be added to the Comment to Section 1265.010 (scope of chapter):

Comment. Section 1265.010 makes clear that this chapter is intended to deal only with particular aspects of compensation for divided interests and is not intended to deal with the subject in a comprehensive manner. The law generally applicable to compensation for particular interests under California Constitution, Article I, Section 19 and Section 1263.010 (owner of property entitled to compensation) remains unaffected absent a specific provision in this chapter giving greater rights. Thus, for example, compensation for such interests in property as easements and restrictive covenants remains unaffected by this

chapter. See, e.g., *Southern Cal. Edison Co. v. Bourgerie*, 9 Cal.3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973) (restrictive covenants).

Likewise, the right to compensation for unexercised options to purchase property is unaffected by this chapter. See, e.g., County of San Diego v. Miller, 13 Cal.3d 684, 532 P.2d 139, 119 Cal. Rptr. 491 (1975).

968/622

Code Civ. Proc. § 1265.410. Compensation for contingent future interests

Article 5- 4. Future Interests

1265.410. (a) Where the acquisition of property for public use violates a use restriction coupled with a contingent future interest granting a right to possession of the property upon violation of the use restriction:

(1) If violation of the use restriction was otherwise reasonably imminent, the owner of the contingent future interest is entitled to compensation for its value, if any.

(2) If violation of the use restriction was not otherwise reasonably imminent but the benefit of the use restriction was appurtenant to other property, the owner of the contingent future interest is entitled to compensation to the extent that the failure to comply with the use restriction damages the dominant premises to which the restriction was appurtenant and of which he was the owner.

(b) Where the acquisition of property for public use violates a use restriction coupled with a contingent future interest granting a right to possession of the property upon violation of the use restriction but the contingent future interest is not compensable under subdivision (a), if the use restriction is that the property be devoted to a particular charitable or public use, the compensation for the property shall be devoted to the same or similar use coupled with the same contingent future interest.

NOTE: The foregoing change is technical.

Opposition to Section 1265.410:

Section 1265.410 makes clear that the owner of a contingent future interest in condemned property may be entitled to compensation if the removal of the contingency was reasonably imminent or if the purpose of the contingency was to enforce a use restriction that benefited appurtenant property. Existing case law contains implications that such property interests are not compensable.

Some public agencies have objected to the inclusion of Section 1265.410 in the Eminent Domain Law.

Code Civ. Proc. § 1268.620. Damages caused by dispossession

1268.620. If, after the defendant moves from property in compliance with an order or agreement for possession or in reasonable contemplation of its taking by the plaintiff, the proceeding is dismissed with regard to that property for any reason or there is a final judgment that the plaintiff cannot acquire that property, the court shall:

(a) Order the plaintiff to deliver possession of the property to the persons entitled to it; and

(b) Make such provision as shall be just for the payment of all damages proximately caused by the proceeding and its ~~abandonment~~ dismissal as to that property.

NOTE: The foregoing change is technical; no change in the Comment is necessary.

Opposition to subdivision (b):

Where the condemnor takes possession of property to be condemned and subsequently abandons the condemnation action, the condemnor must redeliver possession of the property and pay damages arising out of its taking and use of the property, along with damages for any loss or impairment of value suffered by the land and improvements.

Subdivision (b) of Section 1268.620 requires the condemnor in such a situation to pay "all damages proximately caused by the proceeding and its abandonment." This provision in effect would require additional compensation not now required for such damages as temporary interference with the operation of a business.

The Department of Transportation opposes this change.

AMENDMENTS TO ASSEMBLY BILL 278
(1975-1976 Reg. Sess.)

968/615

Code Civ. Proc. § 1238.8. Open space condemnation

~~1238.8. Subject to the provisions of this title, the power of eminent domain may be exercised by any city or county or city and county for the acquisition of any right or interest in any privately owned open space land designated in an open space element adopted pursuant to Article 10.5 (commencing with Section 65560) of Chapter 3 of Title 7 of the Government Code; provided, however, that the conclusive nature of evidence established by subdivision 2 of Section 1241 shall not apply in any action under this section.~~

Comment. The first portion of Section 1238.8 is continued in Section 65574(b). The proviso is continued in Section 65574(d).

NOTE: Section 1238.8 is proposed to be added to the Code of Civil Procedure by Senate Bill 576. The Law Revision Commission has determined to make the foregoing change.

968/616

Govt. Code §§ 6950-6956. Acquisition of property by county or city for open space

~~CHAPTER 12. ACQUISITION OF PROPERTY FOR OPEN SPACE~~

~~6950. It is the intent of the Legislature in enacting this chapter to provide a means whereby any county or city may acquire, by purchase, gift, grant, bequest, devise, lease, condemnation or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment.~~

~~6952. The Legislature hereby declares that it is necessary for sound and proper urban and metropolitan development, and in the public interest of the people of this state for any county or city to expend or advance public funds for, or to accept by, purchase, gift, grant, bequest, devise, lease, condemnation or otherwise, the fee or any lesser interest or right in real property to acquire, maintain, improve, protect, limit the future use of or otherwise conserve open spaces and areas within their respective jurisdictions.~~

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~~6953. (a) The Legislature further declares that the acquisition of interests or rights in real property for the preservation of open spaces and areas constitutes a public purpose for which public funds may be expended or advanced.~~

~~(b) Any county or city may acquire, by purchase, gift, grant, bequest, devise, lease, condemnation or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve the purposes of this chapter. Notwithstanding Section 1245.250 of the Code of Civil Procedure, where property is sought to be acquired under this section by condemnation, the resolution of necessity adopted pursuant to Section 1245.220 of the Code of Civil Procedure is not conclusive on the matters referred to in Section 1240.030 of the Code of Civil Procedure.~~

~~(c) Any county or city may also acquire the fee to any property for the purpose of conveying or leasing said property back to its original owner or other person under such covenants or other contractual arrangements as will limit the future use of the property in accordance with the purposes of this chapter.~~

~~6955. Property may be acquired under this chapter only if its acquisition is consistent with the local open space plan adopted by the city or county pursuant to Section 65563.~~

~~6956. (a) A city or county may divert property from use as open space or open area only after it has obtained replacement property for the property to be diverted. Any replacement property, whether substituted or received in exchange, shall be substantially equivalent in usefulness and location for permanent open space or open area as the property it replaces and must be held subject to all the provisions of this chapter. Money received for property diverted from use as open space or open area shall be used to acquire the replacement property or shall be held in a trust fund to be used only to acquire other open space or open area subject to the provisions of this chapter.~~

~~(b) This section applies only to property acquired under this chapter after July 1, 1977.~~

~~(c) This section does not apply where property or a right or interest therein is conveyed or otherwise subjected to uses that are compatible with its character as open space or open area and that do not significantly adversely affect such character.~~

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All in
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NOTE: The Law Revision Commission has determined to delete the foregoing sections and to substitute Government Code Section 65574.

Govt. Code § 65573. Open space land

65573. "Open-space land" means any parcel or area of land or water upon which buildings are not located, which meets the definition of open space established in Section 65560 ~~and~~ ~~provided~~, however, only such interest less than a fee which is necessary to preserve the existing open space character of land defined in paragraph (3) of subdivision (b) of Section 65560 may be acquired pursuant to Section 1484.8 of the Code of Civil Procedure.

Comment. The proviso formerly found in Section 65573 is continued in Section 65574(b).

NOTE: Section 65573 is proposed to be added to the Government Code by Senate Bill 576. The Law Revision Commission has determined to make the foregoing change.

Govt. Code § 65574. Open space condemnation

~~65574. In any proceeding by a city or county to acquire by condemnation any right or interest in any privately owned open-space land pursuant to this article, the governing body of such city or county shall by resolution find that the open-space lands to be acquired are necessary for the long-term benefit of the public.~~ } All in
strikeout

Comment. Section 65574 is continued in Section 65574(c).

NOTE: Section 65574 is proposed to be added to the Government Code by Senate Bill 576. The Law Revision Commission has determined to make the foregoing change.

Govt. Code § 65574. Open space condemnation (new)

65574. (a) Subject to the limitations of this article, a city or county may acquire by eminent domain the fee or any lesser right or interest in any privately owned open space land designated in an open space element adopted pursuant to Article 10.5 (commencing with Section 65560).

(b) Where the property to be acquired is open space land defined in paragraph (1) of subdivision (b) of Section 65560, only such interest less than a fee which is necessary to preserve the existing open space character of land may be acquired pursuant to this section.

(c) Where property is sought to be acquired pursuant to this section:

(1) The complaint and the resolution of necessity shall refer specifically to this section.

(2) The resolution of necessity, in addition to the requirements imposed by Section 1245.230 of the Code of Civil Procedure, shall include a finding that the open space lands to be acquired are necessary for the long term benefit of the public.

(d) Notwithstanding Section 1245.250 of the Code of Civil Procedure, where property is sought to be acquired under this section, the resolution of necessity adopted pursuant to Section 1245.220 of the Code of Civil Procedure is not conclusive on the matters referred to in Section 1240.030 of the Code of Civil Procedure.

Comment. Section 65574 is new. Subdivision (a) continues the first portion of Code of Civil Procedure Section 1238.8 as enacted in the 1975 session. Subdivision (b) continues the proviso of Section 65573 as enacted in the 1975 session. Subdivision (c) continues Section 65574 as enacted in the 1975 session. Subdivision (d) continues the proviso of Code of Civil Procedure Section 1238.8 as enacted in the 1975 session.

NOTE: The Law Revision Commission has determined to make the foregoing changes. This new section is to take effect only if Senate Bill 576 is enacted.

Pub. Util. Code § 622. Condemnation for carrier terminal facilities

622. (a) As used in this section, "motor carrier" means:

(1) A highway common carrier as defined in Section 213.

(2) A passenger stage corporation as defined in Section 236.

(b) As used in this section "water carrier" means a common carrier operating upon any waterway in this state between fixed termini or over a regular route.

(c) A motor carrier or water carrier may condemn any property necessary for the construction and maintenance of terminal facilities for the receipt, transfer, or delivery of the passengers or property it carries or for other terminal facilities of any such carrier .

NOTE: This change restores wording of Code of Civil Procedure Section 1238(22) that was inadvertently omitted from Section 622.

OBJECTIONS TO ASSEMBLY BILL 11 NOT RESOLVED AT JULY 10, 1975,
HEARING OF SUBCOMMITTEE ON EMINENT DOMAIN OF SENATE
COMMITTEE ON JUDICIARY

(References to pages are to Assembly Bill 11
as amended in Assembly May 22, 1975)

§ 1245.240. Vote requirement for resolution of necessity (page 24)

Existing law imposes a vote requirement for adoption of a resolution of necessity of two-thirds on some public agencies and of a majority on other public agencies. Likewise, the resolution is given conclusive effect if adopted by a two-thirds vote of some public agencies and by a majority vote of other public agencies.

Section 1245.240 imposes a uniform two-thirds vote requirement on all public agencies both for adoption of and conclusive effect of a resolution of necessity.

This provision is opposed by some local public entities which would substitute a majority vote requirement.

§ 1255.020. Notice of deposit (page 37)

Under the scheme for pre-judgment possession of property in AB 11, the condemnor must first have an appraisal made of the property and make a deposit in court of the amount indicated by the appraisal to be the probable compensation for the property. The condemnor must then give notice of the making of the deposit to the property owner, along with a statement or summary of the basis for the appraisal on which the deposit is based.

The requirement that the condemnor supply the property owner with a statement or summary of the basis for the appraisal is opposed by several local entities, which would like to see this provision of Section 1255.020 deleted.

§§ 1263.140-1263.150. Date of valuation for new trial (page 59)

The date as of which property is valued in the condemnation trial is of great importance when property values are fluctuating rapidly. The general rule is that the date of valuation is the date of issuance

of summons unless the proceeding is brought to trial more than one year later through no fault of the property owner, in which case the date of valuation is the date of trial.

Where there is a mistrial and a new trial is held, or where a new trial is ordered by a trial or appellate court, the rule appears to be that the date of valuation is the same date used in the previous trial. Sections 1263.140-1263.150 change this rule by providing that, where the new trial or retrial are not held within one year of the commencement of the proceeding, the date of valuation is the date of the new trial or retrial unless the court, in the interest of justice, orders a different date of valuation. The Department of Transportation objects to this change.

§ 1263.250. Harvesting and marketing of crops (page 61)

Generally, where there are growing crops on condemned property and the property owner is precluded from harvesting and marketing the crops, he is awarded their value. Subdivision (b) of Section 1263.250 enables the condemnor to obtain an order precluding the property owner from planting crops after commencement of the eminent domain proceeding, thereby avoiding the growing crop problem. If the condemnor proceeds under this section, however, it must compensate the property owner for any loss caused by the limitation on his right to use the property. Several agencies have objected to this standard of compensation as being unduly vague.

§ 1263.270. Taking of whole structure (page 62)

Where a building or other structure will be severed by a condemnation, the condemnor may often be required to pay large amounts of severance damages unless it is able to take the whole structure under excess or remnant condemnation authority. In some cases, the property owner may not be able to use the partial structure and wishes the condemnor to take the entire structure. Section 1263.270 is a new provision designed to enable the condemnor to more easily take the whole, and to permit the property owner to require the taking of the whole, where the court determines that justice so requires.

Public agencies have objected to the facet of this section that permits the property owner to compel the condemmor to take the whole structure.

§ 1263.440. Discounting special benefits (page 64)

Existing law requires that, in the case of a partial taking of property, the damages and benefits to the remainder are assessed at trial as if the proposed project were already in place and functioning even though the benefits that may ultimately be realized from the project and that the property owner is being charged with are several years away.

Section 1263.440(a) provides that benefits (and damages) must be assessed taking into account any delay in the time when they will actually be realized. This provision in effect requires discounting of damages and benefits.

Several local public entities have objected to discounting the benefits.

404/792,404/793

Minutes
July 17 and 18, 1975

STUDY 39.70 - PREJUDGMENT ATTACHMENT

The Commission considered Memorandum 75-53 and the attached Legislative Counsel's opinion concerning the use of court commissioners in attachment. The Commission decided not to introduce a bill to designate the judicial duties under the Attachment Law as "subordinate judicial duties" suitable to be performed by court commissioners.

Minutes
July 17 and 18, 1975

STUDY 39.90 - CLAIM AND DELIVERY

The Commission considered Memorandum 75-51 and the attached staff draft of the Recommendation Relating to Turnover Orders Under the Claim and Delivery Law. The Commission approved the recommendation for printing as an appendix to the Annual Report.

Minutes
July 17 and 18, 1975

STUDY 39.120 - ENFORCEMENT OF JUDGMENTS

The Commission continued its consideration of the draft of Title 9 - Enforcement of Judgments (attached to Memorandum 75-26) and a memorandum (attached to the First Supplement to Memorandum 75-7) prepared by Professor Stefan A. Riesenfeld, the Commission's consultant on creditors' remedies. The Commission made the following decisions:

§ 703.020. Writ of execution; form; contents. The matter of whether the writ should be "subscribed" by the clerk should be left to the Judicial Council.

§ 704.060. Levy on deposit account or safe deposit box not wholly in name of judgment debtor. The staff should devote further study to the problem of levy on a deposit account or safe deposit box where the account or box stands in the name of a third person, alone or with the judgment debtor. The staff should study the due process aspects of permitting levy on such property of the debtor standing in another's name and then forcing the other person to make a third-party claim. In considering this subject, the staff should find out how the banks interpret Section 682a (the source of this section). In order to simplify and shorten this section, a provision should be added which defines "financial institution" (or other appropriate term) as "a bank, trust company, savings and loan association, or safe deposit corporation." Subdivision (a) should be checked to see that it continues the substance of Section 682a.

§ 704.070. Levy by notice to third person. In subdivision (c), the word "memorandum" should be substituted for "sworn statement." The staff

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should see if there are any cases interpreting the provision that a person served with notice who refuses to give a memorandum "may be required to pay the costs of any proceedings taken for the purpose of obtaining payment or possession of the judgment debtor's property or the information required by the statement."

§ 704.080. Sale of property levied upon; exceptions. Some concern was expressed about subdivision (b) which requires a court order before chattel paper, negotiable instruments, accounts receivable, choses in action, judgments, or other rights to payment may be sold. This provision may turn out to be too burdensome and expensive because it is overbroad, particularly in the case of some negotiable instruments such as government bonds. It was also said that almost all property sold on execution goes for substantially less than its full value so that the problem is not unique to the types of assets listed in subdivision (b). The Commission postponed decision on the policy expressed in subdivision (b) until Professor Riesenfeld's views could be heard.

§ 704.090. Duration and return of writ. The writ should be leviable for 90 days from the date of its issuance (rather than 60 days from its delivery to the levying officer). The writ should be returned within 15 days after the sale of property levied upon under the writ. It was also suggested that the writ be returned at the end of one year from issuance, which coincides with the normal duration of the lien of execution.

§ 704.100. Lien of execution. The relationship between the return provisions and subdivision (b) of this section providing that the lien of execution where levy is made upon an interest in personal property in the estate of a decedent continues until the decree distributing the property has become final should be clarified.

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§ 705.010. Sale on execution. If possible, the posting provisions should be made general for the purposes of this section. The provision in subdivision (c) providing that the judgment creditor shall provide the levying officer with information necessary to comply with the statute should be a general provision. A general provision should also be added which would specify the manner of mailing notice under Title 9. The staff should study the problem of how to improve the execution sale procedure so that the price obtained for the judgment debtor's property is likely to be higher; suggestions included requiring or permitting advertising in the classified section of a newspaper or elsewhere (and eliminating posting in the case of personal property) and using a professional actioneer. The staff should also consider further how interest holders of record might be notified of the sale.

§ 705.020. Sale without notice, defacing notice of sale. The penalty of \$100, payable by the levying officer to the judgment creditor, judgment debtor, and each person requesting notice of sale for selling property without giving notice, should be deleted. The staff should research the meaning of the "forfeiture" of \$500 for defacing a notice provided in Section 693 (the predecessor of subdivision (b)).

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July 17 and 18, 1975

STUDY 81 - TRANSFER OF OUT-OF-STATE TRUSTS TO CALIFORNIA

The Commission considered Memorandum 75-50 and the attached staff draft of the tentative recommendation. The Commission referred the matter to the staff with the request that the staff review the tentative recommendation before it is again considered by the Commission.

APPROVED

_____ Date

_____ Chairman

_____ Executive Secretary