#36.300

3/31/75

First Supplement to Memorandum 75-3

Subject: Study 36.300 - Eminent Domain (AB 11 and Related Bills)

Attached are letters we received today concerning the Eminent Domain Law. Exhibit I is a letter from the Los Angeles County Counsel, raising basic questions concerning a few selected portions of the Eminent Domain Law; this letter should be read with care. Exhibit II is a letter from Professor Kanner, explaining that he is not opposed to the lack of the word 'just' in the phrase 'just compensation" but that he is opposed to stating the owner is entitled to compensation "as provided in this chapter." Exhibit III is a letter from the County of Sacramento, supporting AB 278 (conforming changes), while Exhibit IV is a letter from the County of San Bernardino opposing AB 278 (the grounds of opposition are not clear--the staff needs to get together with the representatives of the county to find out precisely what the problems are).

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT I

JOHN H. LARSON
COUNTY COUNSEL
DONALD K. BYRNE
CHIEF DEPUTY

(213) 974-1876

OFFICE OF THE COUNTY COUNSEL
648 HALL OF ADMINISTRATION
LOS ANGELES, CALIFORNIA 90012

March 26, 1975

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Certain Areas of Assembly Bill 11

Gentlemen:

My understanding from your March 15, 1975, meeting was that you would meet at least once more in order to consider recommendations re Assembly Bill 11 before public hearings commence on the bill before the State Legislature.

Please let me take the liberty of pointing out to you a few items for your consideration.

Goodwill: Section 1263.510

I, along with all other public agencies that I know of, have objected to your provisions for goodwill (my letter to you of August 16, 1974, on page two stated the objection of the County of Los Angeles). We are extremely concerned about this section, and we feel it can be easily abused and that the government is at a distinct disadvantage in a dispute with the owner-entrepreneur who claims he has lost "goodwill".

One of our fears expressed in our August 16, 1974, letter was whether we (public entity) could examine the income tax records of the individual claiming a "goodwill" damage. In California, it appears the law does not permit use of Federal and State income tax returns as evidence. See Witkin, California Evidence, Section 870, Privileged Matter. The 1974 Witkin Evidence Supplement discloses that Business and Professions Code Section 17530.5 prohibits a person who assists in preparation of tax returns from disclosing any information.

Suffice it to say, tax return information which might be extremely beneficial to the public entity on the issue of "goodwill" appears to be unavailable to the public entity in civil litigation cases. Therefore, we feel it should be a requirement of Section 1263.510 that the public entity <u>is</u>

entitled to obtain copies of the Federal and State tax returns and any other tax information reported by the property owner for at least a five-year period prior to the date of value and any returns filed up to the date of trial. If the returns are not made available to the public entity within so many days of the public entity's request, the owner should not be permitted to be compensated for goodwill or to testify as to a loss of goodwill.

It should be a provision of 1263.510 that the public entity or its authorized agents or contractors be permitted to examine the books and records of the owner by filing a request for inspection with the court. If inspection of the books and records is denied to the public entity, the owner should not be permitted to be compensated for goodwill.

The above are concepts I believe the Commission should consider. I am not an expert on the subject of "goodwill" and I do not believe any member of the Commission professes to have any skill, knowledge or training on that particular subject matter and that is why I respectfully requested of you in my earlier letter that the subject of "goodwill" be studied separately before it is submitted to juries as a matter for which a property owner is entitled to receive compensation in eminent domain cases. It is my belief that if goodwill is to be permitted, the guidelines and procedures should be carefully drawn.

Divided Interests: Section 1260.220

Below we quote Section 1260.220 and we have underlined the portion of 1260.220 we are concerned with; the quote is as follows:

> "(a) Except as provided in subdivision (b), where there are divided interests in property acquired by eminent domain, the value of each interest and the injury, if any, to the remainder of such interest shall be separately assessed and compensation awarded therefor.
>
> (b) The plaintiff may require that the amount of compensation be first determined as between plaintiff and all defendants claiming an interest in the property. Thereafter, in the same proceeding, the trier of fact shall determine the respective rights of the defendants in and to the

> amount of compensation awarded and shall apportion the award accordingly. Nothing in this subdivision limits the right of a defendant to present during the first stage of the proceeding evidence of the value of, or injury to, his interest in the property; and the right of a defendant to present evidence during the second stage of the proceeding is not affected by his failure to exercise his right to present evidence during the first stage of the proceeding."

The last sentence of Paragraph (b) permitting a defendant to present evidence during the first stage of the proceeding "of the value of, or injury to, his interest in the property" permits the "stacking" or "pyramiding" of separate interests in the total fee and makes the public entity's election to have the property valued "as between plaintiff and all defendants" a nullity. This concept is contrary to existing Code of Civil Procedure Section 1246.1 as construed by People v. Lynbar, 253 Cal.App.2d 870. What Lynbar required under 1246.1 of the CCP is that in the first phase of the trial, there is a "valuation of the fee as a whole, but not a valuation of that fee in an undivided state." (Page 879 of 253 Cal.App.2d). The property is valued as a whole considering the fact that all of the various interests (leases, etc.) are present. Each interest is not separately evaluated in the first phase. The value of the whole in the first phase will be enhanced by the fact that there are several interests on the property and that factor must be considered in a valuation of the whole under CCP 1246.1. Lynbar points out at page 878:

> "This division of this type of condemnation trial into two parts, at the election of the condemnor, which we think is almost invariably exercised, not only expedites both the settlement and the trial of these cases, but also prevents the total sum awarded against the condemnor from being pyramided by multiple jury verdicts arrived at independently and without reference to each other, or by expert valuation witnesses for the various owners accomplishing the same end by valuing only the separate interests of those who have employed them without regard to the valuation of the entire property and without regard to the valuations of the estates or interests of the other owners of that property."

I submit that the last sentence of Section 1260.220(b) is irreconcilable with the plaintiff's election under the first sentence of (b) wherein the public entity elects to first have the amount of compensation determined as to "all defendants". We therefore suggest that the last sentence of Section 1260.220(b) be deleted in order to continue and allow the condemning agencies to have the "value of the whole" determined in the first phase of the trial as is currently provided in CCP 1246.1 as sanctioned and modified by the Lynbar decision quoted above.

Leases: Section 1265.130

We believe that this section will not create a problem as long as there is a proviso that the termination of the lease by the court cannot be considered, or alluded to, by any of the parties at the valuation phase of the trial. The question of damage to the leasehold interest should be entirely a question for the trier of fact alone without any consideration of the court's decision to terminate the lease.

Condemnation for More Necessary Public Use: Section 1240.640

This section makes the State's public use of property a more necessary public use over any other public agency. We believe the question of "more necessary public use" of property should be subject to judicial determination as between the State and other public entities. Certainly a Flood Control District, or a school district, could in a given situation have a substantial "more necessary public use" than the existing (or proposed) public use of property made by the State. The Commission has felt on almost every other issue that the courts can determine and settle the issues. Why cannot a court settle this one? How can the State be hurt? If its public use is found by the court to be "a more necessary public use", then it may keep its property and continue on as before.

Thank you for your consideration of the concepts and problems expressed above.

Very truly yours,

JOHN H. LARSON
County Counsel

By S. Robert Ambrose

S. Robert Ambrose
Principal Deputy County Counsel

SRA:jd

cc: State of California
Joseph A. Montoya
Milton B. Kane
County of San Diego
William C. George
County of Santa Clara
Gerald J. Thompson
County of Orange
Arthur Wahlstedt
County Supervisors Association of California
William J. Berry, Jr.
City of Los Angeles
Norman L. Roberts

EXHIBIT II

LOYOLA UNIVERSITY SCHOOL OF LAW

1440 WEST NINTH STREET • LOS ANGELES, CALIFORNIA 90015 • PHONE: (213) 776-4870

March 28, 1975

California Law Revision Commission
School of Law
Stanford, California 94305

Re: Memorandum 75-3

Gentlemen:

The language at page 7 of the above Memorandum appears to impute to me a position which I did not espouse. I was opposed to codification of any language of the kind now enshrined in §1263.010 because of my belief that such language does nothing useful. The owner of any expropriated property is entitled to just compensation as provided in the Constitution whose interpretation is and always has been a judicial function.

If the legislature wishes to add to the minimal constitutional requirements it has every right to do so. But it is counterproductive to declare that the owner is entitled to compensation "...as provided in this chapter". And it was the quoted language that I objected to, not the use of the word "just". Such language accomplishes nothing (since individual items of legislative liberalization of constitutional "just compensation" must do their job on their own individual merits), and provides an invitation to unsophisticated or condemnor-biased judges to refuse to entertain constitutionally based arguments on the grounds that the legislature limited compensation to what is spelled out in the Code. Thus, the quoted language simply sets the stage for constitutional controversies a la Luber v. Milwaukee County, and otherwise accomplishes nothing.

Sincerely yours,

Gideon Kanner

Gideon Kanner
Acting Associate Professor of Law

First Supplement to Memorandum 75-3

EXHIBIT III

COUNTY OF SACRAMENTO

LEGISLATIVE OFFICE
Room 252 - Eleventh and L Building
Phone: 446-6318

February 10, 1975

Assemblyman Alister McAlister
State Capitol
Sacramento, California 95814

Dear Assemblyman McAlister:

I am pleased to report that the Sacramento County Board of Supervisors reviewed your AB 278 and have unanimously voted to support it.

I will be contacting your office to see if I can be of any practical help in accomplishing its passage and signature.

Sincerely,

Frank Mesple'

Frank Mesple'
Legislative Representative

FM/r

ES	
AES	
AC	
AA	

First Supplement to Memorandum 75-3 EXHIBIT IV

LEGISLATIVE ADVOCATE

STEVE FRANKS
Suite 233, Eleventh & "L" Building
Sacramento, California 95803
Telephone: (916) 441-1333

COUNTY OF SAN BERNARDINO

March 27, 1975

The Honorable Alister McAlister
Assemblyman, 25th District
California State Assembly
State Capitol, Room 3112
Sacramento, California 95814

Re: Assembly Bill 278

Dear Assemblyman McAlister:

The San Bernardino Board of Supervisors on March 24, 1975, considered the provisions of your bill relating to the Law of Eminent Domain, and regrets that it cannot support the bill in its present form.

In the view of our County Counsel, concurred in by the Board, certain sections provide for a method of condemning property for the purpose of exchanging with other public entities. This does not appear to be necessary in the bill as provisions in another bill, AB 11, should suffice in this area. One section has provided for construction of certain improvements such as fences, driveways, sidewalks, for an owner in connection with the opening or widening of a county highway, in order to reduce damages. This section has never been relied upon since the matter can be accomodated via the determination of damages in the "Cost to Cure" formula.

Another section, which would be repealed, now permits the county to acquire an entire parcel in a partial take situation when the remainder has little value to its owner, or if the take would give rise to claims or litigation concerning severance or other damages. The net effect of the repeal would be the loss of condemnation power and is therefore opposed by the County Counsel.

For these reasons, the Board regrets that it cannot support the bill in its present form, and we do request that you consider revisions in your bill to take care of these objections.

Sincerely,

Steve Franks
Legislative Advocate

SF/mmc
cc: Assemblyman John J. Miller, Chairman
Assembly Committee on Judiciary
cc: Assembly Legislative Delegation