36 3/3/75

Memorandum 75-21

Subject Study 36 - Eminent Domain

We have sent you a copy of each of the bills introduced to effectuate the Commission's eminent domain recommendations and also a copy of the Uniform Eminent Domain Act, as introduced in California in Assembly Bill 486. You also have received a copy of the printed recommendation proposing the Eminent Domain Law.

At the March meeting with the State Bar Committee, the staff proposes that the Commission proceed as follows:

(1) Discuss generally what recommendation should be made with respect to Assembly Bill 486. The staff believes that the Commission's bill (AB 11) is the best vehicle to use in an effort to reform California eminent domain law. We are hopeful that the State Bar and other groups will share this view and that they will advise the Assembly Judiciary Committee that Assembly Bill 11 is the bill that should be taken seriously and will suggest that any features of AB 486 that they believe are desirable be incorporated into AB 11.

(2) The staff next suggests that the Commission go through the various objections raised to AB 11 on a section-by-section basis. You have already received the objections of the State Department of Transportation (Memorandum 75-1). Attached to this memorandum is material presenting the objections of the State Bar Committee. You already are familiar with almost all of this material. It is a composit of the objections of the State Bar Committee previously studied, the text of the relevant section as printed in our recommendation, the Law Revision Commission response (from the letter the Commission sent to the State Bar Board of Governors), and a small amount of material received today from the State Bar consisting of responses to the Law Revision Commission response. You can identify this new material because it is designated "State Bar Response."

(3) Finally, the staff is hopeful that the interested persons and organizations that attend our meeting can give some thought to the best

method of presenting Assembly Bill 11 to the Assembly Judiciary Committee and the best method of getting a reading of the reaction of the committee to the various objections to the bill and how any amendments the committee determines should be made can be drafted and reviewed by all interested persons.

The hearing on Assembly Bill 11 and the remaining eminent domain bills is scheduled for April 17. We would hope to amend the bills to incorporate any revisions made at the March meeting before the April 17 hearing.

Respectfully submitted,

John H. DeMoully
Executive Secretary

DIFFERENCES BETWEEN COMMISSION AND STATE BAR

Repeal of Civil Code § 1001

State Bar Objection

Newton moved to recommend retention of §1001.

Keagy seconded.

Unanimously passed.

Reason - The section was felt to serve a utilitarian purpose and in the collective experience of the Committee membership had not been subjected to abuse.

§ 1001. Acquisition of property by exercise of eminent domain. Any person may, without further legislative action, acquire private property for any use specified in section twelve hundred and thirty-eight of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of title seven, part three, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title is "an agent of the state," or a "person in charge of such use," within the meaning of those terms as used in such title. This section shall be in force from and after the fourth day of April, eighteen hundred and seventy-two. [1872.] *Cal Jur 2d Corp § 9, Em D §§ 229, 230, 232, 234; Witkin Summary p 2027.*

Law Revision Commission Response

Civil Code Section 1001 authorizes a "person" to condemn for a public use specified in Section 1238 of the Code of Civil Procedure if the person is "in charge" of that use. Section 1238 is to be repealed.

An important objective of the revision of eminent domain law is to restrict condemnation authority to those persons who are authorized to exercise it by statute and to provide clear statements of such statutory authority. A careful study has been made to assure that the repeal of Sections 1001 and 1238 will not take away from any public entity any existing condemnation authority.

It is believed that the objection of the State Bar Committee goes to the possible restriction of the right of private persons to condemn property that might be granted by Sections 1001 and 1238. Condemnation by private persons is of dubious constitutionality since condemnation may only be for a "public use." The Commission has found that, in nearly every case in which private condemnation was attempted, the courts have found the attempt violative of the Constitution. The only exception is the case of Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955), relating to condemnation by a private person for a sewer easement.

The Commission believes that condemnation of property is a right that should not be freely granted to all individuals because of its potentially severe impact upon the rights of citizens to full ownership of their property. One major means of controlling condemnation is to limit its exercise to public entities (which are responsive to the public good) and to those few private persons which are quasi-public in character (i.e., regulated public utilities, nonprofit educational institutions of collegiate grade, nonprofit hospitals, limited dividend housing corporations, and mutual water companies). This is the approach the Law Revision Commission has adopted in its recommendation.

The Commission recognizes that repeal of Civil Code Section 1001 may create a problem in the sewer easement area, which has public health implications. To remedy this problem, the Commission has also proposed the addition to the Health and Safety Code of a provision enabling a private person to initiate a sewerage extension proposal, which request may not be denied without a public hearing.

The other possible area where private condemnation might constitutionally be permitted is the acquisition of "byroads" to provide access to landlocked property. The Commission knows of no instance where private condemnation for a byroad was permitted in California. However, a number of bills have been introduced in Sacramento to authorize the exercise of the power of eminent domain for this purpose and the Legislature has disapproved the bills. It would be undesirable to include such a controversial grant of eminent domain authority in the bills proposed by the Commission. The Commission's decision not to propose such a grant of condemnation authority was made after a staff background study was prepared and a tentative recommendation was distributed to approximately 500 persons for review and comment.

If there are any areas where the State Bar believes that private persons should be authorized to exercise the power of eminent domain, the Commission suggests that narrowly drawn bills to grant such authority be proposed by the State Bar for legislative consideration.

State Bar Objection

Newton moved to recommend disapproval.

Baggot seconded.

Unanimously passed.

Reason - This was felt to be a taking not for a public use and several committee members had experienced abuse of the power of eminent domain being used in takings "for reservations as to future use".

§ 1240.120. Right to acquire property to make effective the principal use

1240.120. (a) Subject to any other statute relating to the acquisition of property, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire property necessary to carry out and make effective the principal purpose involved including but not limited to property to be used for the protection or preservation of the attractiveness, safety, and usefulness of the project.

(b) Subject to any applicable procedures governing the disposition of property, a person may acquire property under subdivision (a) with the intent to sell, lease, exchange, or otherwise dispose of the property, or an interest therein, subject to such reservations or restrictions as are necessary to protect or preserve the attractiveness, safety, and usefulness of the project.

Comment. Subdivision (a) of Section 1240.120 codifies the rule that, absent any express limitation imposed by the Legislature, the power to condemn property for a particular purpose includes the power to condemn property necessary to carry out and make effective the principal purpose involved. See *City of Santa Barbara v. Cloer,* 216 Cal. App.2d 127, 30 Cal. Rptr. 743 (1963). See also *University of So. Cal. v. Robbins,* 1 Cal. App.2d 523, 37 P.2d 163 (1934). *Cf. Flood Control & Water Conservation Dist. v. Hughes,* 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962).

Section 1240.120 permits a condemnor to protect the attractiveness, safety, or usefulness of a public work or improvement from deleterious conditions or uses by condemning a fee or any lesser interest necessary for protective purposes. See Section 1235.170 (defining "property" to include any interest). A taking for this purpose is a public use. *E.g.,*

People v. Lagiss, 223 Cal. App.2d 23, 35 Cal. Rptr. 554 (1963); *Flood Control & Water Conservation Dist. v. Hughes, supra.* See also *United States v. Bowman*, 367 F.2d 768, 770 (1966). See Capron, *Excess Condemnation in California—A Further Expansion of the Right to Take*, 20 HASTINGS L.J. 571, 589–591 (1969).

Where it is necessary to protect a public work or improvement from detrimental uses on adjoining property, the condemnor has the option either (1) to acquire an easement-like interest in the adjoining property that will preclude the detrimental use or (2) to acquire the fee or some other interest and then—if the condemnor desires—lease, sell, exchange, or otherwise dispose of the property to some other public entity or a private person subject to carefully specified permitted uses.

If a condemnor has the power of eminent domain to condemn property for a particular improvement, Section 1240.120 is sufficient authority to condemn such additional property as is necessary to preserve or protect the attractiveness, safety, and usefulness of the improvement. No additional statutory authority is required, and some of the former specific grants of protective condemnation authority have been repealed as unnecessary. *E.g.*, former CODE CIV. PROC. § 1238(18) (trees along highways). Not all such specific authorizations have been repealed. *E.g.*, STS. & HWYS. CODE § 104(f) (trees along highways), (g) (highway drainage), (h) (maintenance of unobstructed view along highway). Except to the extent that these specific authorizations contain restrictions on protective condemnation for particular types of projects (see GOVT. CODE §§ 7000–7001), they do not limit the general protective condemnation authority granted by Section 1240.120.

In the case of a public entity, the resolution of necessity is conclusive on the necessity of taking the property or interest therein for protective purposes. See Section 1245.250 and Comment thereto. However, the resolution does not preclude the condemnee from raising the question whether the condemnor actually intends to use the property for protective purposes. If the property is claimed to be needed for protective purposes but is not actually to be used for that purpose, the taking can be defeated on that ground. See Section 1250.360 and Comment thereto. See *People v. Lagiss*, 223 Cal. App.2d 23, 33–44, 35 Cal. Rptr. 554, 560–567 (1963).

Section 1240.120 is derived from and supersedes former Government Code Sections 190–196, Streets and Highways Code Section 104.3, and Water Code Section 256.

Law Revision Commission Response

This section, which supersedes a number of statutes that apply to various public entities, enables condemnation, for example, for extra property along a highway right of way for sight or drainage purposes, or near a reservoir for prevention of erosion, subsidence, and the like. In addition, it permits condemnation for necessary adjuncts to public projects, e.g., a parking lot adjacent to a courthouse, or a right of way for access to a park.

The courts have time and again held that condemnation to acquire property to make the principal use effective is for a public use. Such authority is essential to the proper construction, maintenance, and use of public projects. Should the property owner whose land is sought to be taken under Section 1240.120 suspect abuse of the power, he may challenge the necessity for the acquisition if the condemnor is a public utility or other nonpublic entity condemnor. In the case of a public entity condemnor, he must show that the property will not be devoted to the public use for which it is sought to be taken.

State Bar Response

6(e) [1240.120] This section is not necessary since agencies have authority to take all property necessary for a public use, including land required for parking, prevention of erosion, subsidence, drainage and the like. Members of the Committee have experienced abuses which might be sanctioned by Section 1240.120 if it is utilized for takings in order to reserve property for future uses.

§ 1240.340. Substitute condemnation where owner of necessary property lacks power to condemn property

State Bar Objection

Newton moved to recommend disapproval of the Commission proposal except where there was consent of the owner of the substitute property.

Sullivan seconded.

Mr. Jackson joined the meeting.

Passed 9 votes to 1.

Reason - The owner of the substitute property would have his property taken by eminent domain for a use which was not a public use under the Constitution. This was felt impermissible except with the owner's consent.

§ 1240.340. Substitute condemnation where owner of necessary property lacks power to condemn property

1240.340. (a) Any public entity authorized to exercise the power of eminent domain to acquire property for a particular use may exercise the power of eminent domain to acquire for that use substitute property if all of the following are established:

(1) The owner of the necessary property has agreed in writing to the exchange and, under the circumstances of the particular case, justice requires that he be compensated in whole or in part by substitute property rather than by money.

(2) The substitute property is in the vicinity of the public improvement for which the necessary property is taken.

(3) Taking into account the relative hardship to both owners, it is not unjust to the owner of the substitute property that his property be taken so that the owner of the necessary property may be compensated by such property rather than by money.

(b) Where property is sought to be acquired pursuant to this section, the resolution of necessity and the complaint filed pursuant to such resolution shall specifically refer to this section.

(c) If the defendant objects to a taking under this section, the court in its discretion, upon motion of the owner of the substitute property, the owner of the necessary property, or the plaintiff, may order that the owner of the necessary property be joined as a party plaintiff. At the hearing of the objection, the plaintiff has the burden of proof as to the facts that justify the taking of the property.

Comment. Section 1240.340 authorizes substitute condemnation where the requirements of Section 1240.320, 1240.330, or 1240.350 cannot be satisfied but, under the circumstances, justice demands that the owner of the necessary property be compensated in land rather than money. Under former law, only certain condemnors were explicitly authorized to condemn for exchange purposes generally. See, *e.g.*, STS. & HWYS. CODE § 104(b) (Department of Transportation); WATER CODE § 253(b) (Department of Water Resources). However, the right to exercise the power of eminent domain for exchange purposes probably would have been implied from the right to take property for the improvement itself in the circumstances contemplated. See *Brown v. United States*, 263 U.S. 78 (1923) (property acquired to relocate town displaced by reservoir); *Pitznogle v. Western Md. R.R.*, 119 Md. 673, 87 A. 917 (1913) (property needed to relocate private road). One of the more common examples of such substitute condemnation is a taking to provide utility service to or access to a public road from property cut off from access by the condemnor's original acquisition. This situation is provided for specifically by Section 1240.350. See Section 1240.350 and the Comment thereto. Similar situations may arise where private activities—such as a nonpublic utility, railroad serving a mining, quarrying, or logging operation or belt conveyors, or canals and ditches—are displaced by a public improvement. However, the authority granted by Section 1240.340 is reserved for only these and similarly extraordinary situations. Paragraph (3) of subdivision (a) requires the court to consider the relative hardship to both owners and to permit condemnation only where both owners can be treated fairly.

Section 1240.340 contains special procedural provisions to help insure complete fairness for the owner of the substitute property. The defendant will receive notice that the condemnor is relying on the authority conferred by Section 1240.340 because the section requires that the condemnation complaint specifically refer to the section. In contrast to the procedure under Sections 1240.320 and 1240.330, the resolution authorizing the taking under Section 1240.340 is never conclusive, the necessity for the taking is justiciable, and the condemnor has the burden of proof of showing that the facts justify the taking of the substitute property. Under subdivision (c) of Section 1240.340, the court may order the person who is to receive the substitute property joined as a party to the action, thereby securing complete representation of all positions. Finally, the owner of the substitute property may recover litigation expenses connected with the taking of the property to be exchanged where the condemnor is unable to justify such taking. See Section 1268.610. The risk of incurring this additional burden should aid in limiting the exercise of this power to those situations where its exercise is appropriate.

Law Revision Commission Response

The Committee on Condemnation objects that substitute condemnation is not for a public use. The Commission drew this section from existing statutes, which have stood for many years, and have never been held unconstitutional. See, e.g., Sts. & Hwys. Code § 104(b)(Department of Transportation) and Water Code § 253(b)(Department of Water Resources). See also cases cited in Comment to Section 1240.340.

The Commission believes that the section as drawn may not be used in an arbitrary manner, and that it is a desirable provision to avoid extensive hardship and promote equity in a number of situations.

State Bar Response

6(f) [1240.340] The Committee does not oppose Section 1240.340 in its entirety, but only to the extent that it is not clearly limited to public uses. The staff of the Commission has not responded directly to the Committee's earlier comment expressing concern about a taking of property for the private purposes of the owner of the necessary property. In projects requiring relocation of owners, it is conceivable that a domino effect can be created displacing owner after owner after owner in order to accommodate each preceding condemnee. In addition, the protection afforded by a fee recovery is available only if the right to take is defeated.

§ 1245.250. Effect of resolution

State Bar Objection

Fadem moved that resolutions of necessity be subject to the same judicial review for fraud or collusion as any other governmental action.

Baggot seconded.

Passed 7 to 3.

Reason - Our most fundamental concept of government calls for no governmental action being free of the check and balance of review by the judiciary. The Committee recommends reviewability of resolutions of necessity only in the narrow, but not infrequent, situations where resolutions of necessity have been tainted by fraud or collusion.

Grave miscarriages of justive have occurred because of the conclusive nature of necessity. Recent events prove that no branch of government is free from misconduct and no governmental activity should be free of judicial review.

§ 1245.250. Effect of resolution

1245.250. (a) Except as otherwise provided by statute, a resolution of necessity adopted by the governing body of the public entity pursuant to this article conclusively establishes the matters referred to in Section 1240.030.

(b) If the taking is by a local public entity and the property described in the resolution is not located entirely within the boundaries of the local public entity, the resolution of necessity creates a presumption that the matters referred to in Section 1240.030 are true. This presumption is a presumption affecting the burden of producing evidence.

(c) For the purposes of subdivision (b), a taking by the State Reclamation Board for the Sacramento and San Joaquin Drainage District is not a taking by a local public entity.

Comment. Section 1245.250 provides a uniform rule governing the effect to be given to a resolution of necessity. It continues the conclusive effect given to the resolution in state takings. See, *e.g.,* former GOVT. CODE § 15855. It supersedes numerous sections of various codes that afforded disparate treatment to the resolution of necessity of various types of local public entities and generalizes the conclusive effect given the resolution of certain local public entities by former Section 1241(2).

Subdivision (a). A valid resolution of necessity conclusively establishes the matters of public necessity specified in Section 1240.030 (1) in all takings by local public entities where the property taken is entirely within the boundaries of the condemning entity and (2) in all takings by state entities regardless of the location of the property taken. Giving a

conclusive effect to the resolution of necessity has been held constitutionally permissible. *Rindge Co. v. County of Los Angeles,* 262 U.S. 700 (1923), *aff'g County of Los Angeles v. Rindge Co.,* 53 Cal. App. 166, 200 P. 27 (1921); *City of Oakland v. Parker,* 70 Cal. App. 295, 233 P. 68 (1924). Among the matters encompassed in the conclusive resolution are the extent of and interest in necessary property. See Section 1245.230 and Comment thereto.

A valid resolution precludes judicial review of the matters specified in Section 1240.030 even where it is alleged that such matters were determined by "fraud, bad faith, or abuse of discretion." See *People v. Chevalier,* 52 Cal.2d 299, 340 P.2d 598 (1959). However, the resolution is conclusive *only* on the matters specified in Section 1240.030; it does not affect in any way the right of a condemnee to challenge a taking on the ground that the project is not an authorized public use or on the ground that the condemnor does not intend to put the property to its declared public purpose. See Sections 1240.010 and 1250.360 and Comments thereto. Likewise, the resolution does not affect the right of a defendant to contest the right to take his property on specific statutory grounds provided in the Eminent Domain Law. See Sections 1240.230 (taking for future use), 1240.340 (condemnation for exchange purposes), 1240.420 (excess condemnation), 1240.520 (taking for compatible use), and 1240.620 (taking for more necessary public use). *Cf.* Section 1240.050 (extraterritorial condemnation). Likewise, the condemnor must demonstrate its compliance with any other requirements and regulations governing the institution of public projects. *Cf.* Comment to Section 1240.030.

The initial proviso of Section 1245.250 recognizes that there may be exceptions to the uniform conclusive effect given the resolution of necessity. One important exception is in subdivision (b) (extraterritorial acquisitions by local public entity). As to the effect of the resolution of necessity where the taking is by a city or county for open space, see Government Code Section 6953.

Subdivision (b). Subdivision (b) provides that a resolution of necessity of a local public entity creates a presumption affecting the burden of producing evidence with regard to public necessity if the property described in the resolution is not located entirely within the boundaries of the local public entity. See EVID. CODE § 604.

Subdivision (b) continues the portion of former Section 1241(2) that denied conclusive effect of a resolution to property lying outside the territorial limits of certain local public entities. Under that provision, necessity and proper location were justiciable questions in the condemnation proceeding. See *City of Hawthorne v. Peebles,* 166 Cal. App.2d 758, 333 P.2d 442 (1959); *City of Carlsbad v. Wight,* 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963); *City of Los Angeles v. Keck,* 14 Cal. App.3d 920, 92 Cal. Rptr. 599 (1971). Subdivision (b) extends this limitation on the effect of the resolution of necessity to all local public entities condemning property outside their territorial jurisdiction and also makes the question whether the proposed project is necessary a justiciable question in such a condemnation proceeding.

Subdivision (c). The limitation contained in subdivision (b) is not applicable to acquisitions for the Sacramento and San Joaquin Drainage District. Acquisitions for this district are undertaken by the State Reclamation Board. See WATER CODE § 8590 and Section 1245.210 and Comment thereto. The conclusive effect given resolutions of the board by former Water Code Section 8595 is continued under subdivisions (a) and (c).

Law Revision Commission Response

This section, providing the resolution of necessity conclusive effect, codifies existing law under People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959). The Committee on Condemnation would change existing law to permit an exception for "fraud or collusion."

The Commission has considered recommending such a change on many occasions, but has consistently refused to do so. The Commission believes that the decision whether to undertake a project, where to place the project, and what property is necessary for the project, is basically a legislative and planning decision. It lies entirely within the sound discretion of the public entity which has been entrusted with the responsibility of making precisely this sort of decision. To allow a judge to substitute his own wisdom for that of the public body, which has made its decision after public hearings and taking into account the needs of the whole community (including environment, budget, recreation, and the like), is to destroy the fundamental separation of legislative and judicial functions.

Moreover, as a practical matter, the Commission has determined that allowing judicial review of such decisions will unnecessarily clog the courts. Extensive Commission review of decisions in California and other states in which "fraud or collusion" was alleged has revealed few if any cases in which fraud or collusion were actually established. Opening the resolution of necessity to attack will provide the recalcitrant landowner with a weapon for delay, with little corresponding benefit.

The Commission has provided a more effective means of overseeing legislative decisions by providing for challenge of the taking in those areas where abuse of the right of eminent domain is commonly alleged--condemnation outside the territorial limits of the public entity, condemnation by private condemnors such as public utilities, condemnation for

future use, substitute condemnation, excess condemnation, and condemnation of property already appropriated to public use. By setting clear grounds and standards for challenges to the right to take, the Commission has assured the property owner with a legitimate complaint the ability to establish his claim without the need to rely on the vagaries of and difficulty of proving "fraud or collusion."

State Bar Response

6(g) [1245.250] Resolutions of necessity ought to be subject to some judicial review for fraud or collusion as any other governmental action.

Our most fundamental support of government calls for no governmental action being free of the check and balance of review by the judiciary. The Committee recommends reviewability of resolutions of necessity only in the narrow, but not unknown, situations where resolutions of necessity have been tainted by fraud or collusion.

Grave miscarriages of justice have occurred because of the conclusive nature of necessity. Recent events prove that no branch of government is free from misconduct and no governmental activity should be free of judicial review.

The final paragraph of Law Revision Commission response is a non-sequitur. The areas described there are a distinct minority of takings. If the Law Revision Commission version of Section 1245.250 were adopted, most taking would be not subject to challenge even if admittedly fraudulent or collusive.

§ 1255.410. Order for possession prior to judgment

State Bar Objection

Newton moved to amend to add to subparagraph (a) "Plaintiff must show an actual need as of the effective date of the requested order of possession."

Sullivan seconded.

Passed 6 to 4.

Reason - Possession should not be given without a showing of a need as of the time possession is being taken.

§ 1255.410. Order for possession prior to judgment

1255.410. (a) At the time of filing the complaint or at any time after filing the complaint and prior to entry of judgment, the plaintiff may apply ex parte to the court for an order for possession under this article, and the court shall make an order authorizing the plaintiff to take possession of the property if the plaintiff is entitled to take the property by eminent domain and has deposited pursuant to Article 1 (commencing with Section 1255.010) an amount that satisfies the requirements of that article.

(b) The order for possession shall describe the property of which the plaintiff is authorized to take possession, which description may be by reference to the complaint, and shall state the date after which the plaintiff is authorized to take possession of the property.

(c) Where the plaintiff has shown its urgent need for possession of unoccupied property, the court may, notwithstanding Section 1255.450, make an order for possession of such property on such notice as it deems appropriate under the circumstances of the case.

Comment. Section 1255.410 states the requirements for an order for possession of property prior to judgment and describes the content of the order. With respect to the relief available from an order for possession prior to judgment, see Sections 1255.420–1255.440.

Subdivision (a). Subdivision (a), like subdivision (a) of former Section 1243.5, provides an ex parte procedure for obtaining an order for possession prior to judgment.

Subdivision (a) states two prerequisites to issuance of an order for possession:

(1) The plaintiff must be entitled to take the property by eminent domain. This requirement is derived from subdivision (b) of former Section 1243.5. However, under former Section 1243.4, possession prior to judgment was permitted only if the taking was for right of way or reservoir purposes. This limitation is not continued. Likewise, the requirement found in subdivision (b) of former Section 1243.5 that the plaintiff was authorized to take possession prior to judgment is no longer continued since any person authorized to exercise the power of eminent domain may now take possession prior to judgment in any case in which he is entitled to take by eminent domain. Contrast former Section 1243.4 (right to early possession limited to certain public entities).

(2) The plaintiff must have made the deposit required by Article 1. This requirement is derived from subdivision (b) of former Section 1243.5.

The issue of the plaintiff's need for possession prior to judgment is a matter that is incorporated in the provisions of Section 1255.420. Section 1255.410 does not affect any other prerequisite that may exist for taking possession of property. *Cf. 815 Mission Corp. v. Superior Court,* 22 Cal. App.3d 604, 99 Cal. Rptr. 538 (1971) (provision of relocation assistance is not necessarily prerequisite to an order for possession).

It should be noted that the determination of the plaintiff's right to take the property by eminent domain is preliminary only. The granting of an order for possession does not prejudice the defendant's right to demur to the complaint or to contest the

taking. Conversely, the denial of an order for possession does not require a dismissal of the proceeding and does not prejudice the plaintiff's right to fully litigate the issue if raised by the defendant.

Under former statutes, judicial decisions held that an appeal may not be taken from an order authorizing or denying possession prior to judgment. Mandamus, prohibition, or certiorari was held to be the appropriate remedy. See *Central Contra Costa Sanitary Dist. v. Superior Court*, 34 Cal.2d 845, 215 P.2d 462 (1950); *Weiler v. Superior Court*, 188 Cal. 729, 207 P. 247 (1922); *State v. Superior Court*, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962); *City of Sierra Madre v. Superior Court*, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961). However, an order for possession following entry of judgment has been held to be an appealable order. *San Francisco Unified School Dist. v. Hong Mow*, 123 Cal. App.2d 668, 267 P.2d 349 (1954). No change is made in these rules as to orders made under Section 1255.410 or Article 3 (commencing with Section 1268.210) of Chapter 11.

Subdivision (b). Subdivision (b) describes the contents of an order for possession. The contents are substantially the same as those of subdivision (b) of former Section 1243.5. However, the requirement that the order state the amount of the deposit has been eliminated since Section 1255.020 requires that a notice of the making of a deposit be served on interested parties. The requirement that the order state the purpose of the condemnation has been omitted since possession prior to judgment is now authorized for any public use by an authorized condemnor. And, the requirement that the order describe the "estate or interest" sought to be acquired has been omitted as unnecessary since the term "property" includes interests therein. See Sections 1235.170 (defining "property") and 1235.125 (defining "interest" in property).

Subdivision (b) is limited by the requirement of a 30-day or 90-day period following service of the order before possession can be physically assumed. See Section 1255.450. Subdivision (c), however, permits possession of property that is unoccupied on lesser notice in cases where the plaintiff is able to make an adequate showing of need.

It should be noted that, under both subdivisions (b) and (c), the court may authorize possession of all, or any portion or interest, of the property sought to be taken by eminent domain.

Law Revision Commission Response

The Commission agrees with the Committee on Condemnation that a requirement of "need" should be incorporated in the immediate possession provisions. The only question is how it should be incorporated.

The Commission determined not to require a showing of need in this section for three reasons:

(1) Since the order for possession is made on an ex parte hearing, little or no showing would be required.

(2) A determination of need made by the court on ex parte hearing might be difficult subsequently to overturn since judges are not fond of reversing themselves once they have made a determination.

(3) Since in the usual case the property owner will not be contesting the taking of immediate possession, the requirement of a showing of need in every case will impose a needless burden on the condemnor.

Under the scheme recommended by the Commission, the condemnor obtains the order for possession as a matter of right on ex parte motion. Then, under Section 1255.420 (stay of order for hardship), if the defendant will suffer a hardship by early dispossession, the court may stay or delay the dispossession unless the condemnor makes a dual showing of need for early possession and substantial hardship if possession is delayed. The Commission believes that this scheme not only provides a more practical procedure than that proposed by the Committee on Condemnation, but it also more effectively protects the rights of the property owner, which is the end sought by the committee.

§ 1263.110. Date of valuation fixed by deposit

State Bar Objection

Fadem moved that the date of value is the date of trial or the date of deposit, whichever is sooner.

Baggot seconded.

Passed 9 to 1.

Reason - Tying value to a past time works against the owner in a market in California which has for a generation now been generally rising and which in the current picture is inflationary.

It is always difficult to find the latest sales, which tend to be the higher priced ones. This is a penalty in itself as to the owner, but unavoidable. But valuing the property at a time before it is taken is avoidable.

An Owner should have his property valued as close as possible to the time that the owner actually loses his property. Under the statutory scheme proposed by the Commission, the date of trial most closely approaches this, or where there has been an order of possession, the date that there has been a deposit which permits the owner to withdraw his compensation substitute for the property seemed to most closely approach the ideal.

§ 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 the time allowed under Section 1255.030, no deposit shall be deemed to have been made for the purpose of this section.

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, including subsequent retrial, mentioned in the following sections.

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).

20 3 180

Law Revision Commission Response

Existing law provides for the date of valuation basically to be the date of issuance of summons in the eminent domain proceeding, unless the proceeding is brought to trial more than one year after the issuance of summons, in which case the date of valuation is the date of trial except where the delay is caused by the defendant. The major change recommended by the Commission in the existing law is that the condemnor may establish a valuation date earlier than the date of trial by making a deposit of probable compensation.

The Committee on Condemnation agrees with this change but suggests the Commission go one step further and recommend that, absent a prejudgment deposit by the condemnor, the date of valuation in all cases is the date of trial. The Commission has rejected this approach for two basic reasons:

(1) The existing provision for valuation as of date of the issuance of summons is more convenient from a practical viewpoint since it is a fixed early date and enables the appraisers to formulate their opinions of value on the basis of comparable sales.

(2) The Commission was not convinced that any further change in existing law would be desirable.

State Bar Response

6(h) [1263.110] Tying value to a past time works against the owner in a market in California which has for a generation now been generally rising and which in the current picture is inflationary.

It is always difficult to find the latest sales, which tend to be the higher priced ones. This is a penalty in itself as to the owner, but unavoidable. But valuing the property at a time before it is taken is avoidable.

An owner should have his property valued as close as possible to the time that the owner actually loses his property. Under the statutory scheme proposed by the Commission, the date of trial most closely approaches this, or where there has been an order of possession, the date that there has been a deposit which permits the owner to withdraw his compensation substitute for the property, seemed to most closely approach the ideal.

The proposed Uniform Eminent Domain Code (AB 486) uses the date of trial or the date of taking possession as the general rule. This is the Committee recommendation. (§1239.03, Appendix 4, attached)

§ 1263.220. (now covered by Section 1263.205) Improvements pertaining to the realty

State Bar Objection

Sullivan moved to substitute "personal property designed for business purposes located" in place of "equipment designed for business purpose that is installed".

Jackson seconded.

Passed unanimously

Reason - "Equipment" was felt to be capable of being interpreted more narrowly than "personal property". "Installed" was felt to be capable of narrower interpretation than "located".

The Committee felt this salutary recommendation should be given full effect and as little opportunity as possible provided by language choice for narrowing its effectiveness.

§ 1263.205. Improvements pertaining to the realty

1263.205. As used in this article, "improvements pertaining to the realty" include any facility, 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.

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. Sabatasso,* 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.*, GOVT. CODE § 7262.

§ 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(1) (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 in value of equipment used in place on 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 Policies Act of 1970, 42 U.S.C. § 4652(b)(1) (1971), continues prior California law. See *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. 923 (1969). *Cf. City of Los Angeles v. Klinker,* 219 Cal. 198, 25 P.2d 826 (1933).

Law Revision Commission Response

The Commission has adopted the Committee on Condemnation's suggestion that the phrase "equipment designed for business purposes" be broadened to include other personal property. The provision recommended by the Commission now reads:

> As used in this article, "improvements pertaining to the realty" include any facility, 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.

The Commission believes that the language of "installation" is essential in this connection in order to preserve the "fixture" concept of the section and not to open the way to compensation for purely personal property that might happen to be situated on the premises.

State Bar Response

6(i) [1263.220] The Committee recommends that Section 1263.220 be amended to read as follows:

> Personal property ~~Equipment designed for business purposes that is installed~~ located 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.

The clause "Equipment designed for business purposes that is installed" is too narrow a provision to protect the owner. The proposed changes will eliminate the possibility of an unduly narrow interpretation of the kinds of property for which compensation should be payable.

Furniture in motels and junk in junkyards are examples of what in the Committee's view should be included for compensation which the Law Revision Commission language could exclude.

§ 1263.240. Improvements made after service of summons

State Bar Objection

Baggot moved to recommend disapproval unless all of (c) is deleted except for the first sentence.

Sullivan seconded.

Passed unanimously.

Reason - The Committee approves of a court being empowered to permit good faith improvements and feels that the limitation in the sentences recommended to be deleted should not be enacted as they limit the scope of the basic idea of the section.

§ 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 not be taken into account in determining compensation unless one of the following is established:

(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. 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 taken into account in valuing the property and specifies those instances in which subsequent improvements will be considered in valuing the property. It should be noted that, although subsequent improvements may be precluded from consideration in valuing the property under this section, if the improvements were necessary to protect the public from risk of injury, their cost may be recoverable as a separate item of compensation under Section 1263.620.

The introductory portion of Section 1263.240, which adopts 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.3d 506, 98 Cal. Rptr. 635 (1971). For exceptions to this rule, see subdivisions (a)-(c) and Section 1263.250 (harvesting and marketing of crops).

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

Subdivision (b), 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 that the condemnor has authority to make an agreement that will deal with the problem under the circumstances of the particular case.

Subdivision (c) 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. The subsequent improvements might be compensable under the balancing of hardships test, for example, where an improvement is near completion, the date of public use of the property is distant, and the additional work will permit profitable use of the property during the period prior to the time it is actually taken for public use.

Law Revision Commission Response

Subdivision (c) of this section is designed to aid the property owner by giving him something he does not now have--the right to make improvements after service of summons and be compensated based on the value of the property as improved. The property owner may take advantage of this provision by showing the court that the hardship to him of not being able to make the improvement is greater than the hardship to the condemnor of allowing the improvement.

Subdivision (c) is intended to cure the hardship case where the property owner is stuck with property badly in need of improvement. The pending eminent domain proceeding practically precludes the property owner from making necessary improvements on the property, yet he cannot move from the property because he has no money to move or to acquire replacement property. The hardship of this situation is eliminated, however, where the condemnor makes a deposit of probable compensation, for the property owner now has a fund which he may use to relocate. Consequently, the right to make improvements and receive compensation under subdivision (c) is limited to cases where no prejudgment deposit has been made.

State Bar Response

6(j) [1263.240] The Committee favored disapproval unless the final sentence of subdivision (c) was eliminated. That sentence proposes no compensation for a court-approved improvement, after service, if the condemnor deposited its estimate of just compensation.

The Committee approves of a court being empowered to permit good faith improvements. However, the limitation in the final sentence limits the scope of the basic idea of the section.

Deposit of compensation does not eliminate the potential hardship of not being compensated for an improvement which has obtained court approval.

Santa Barbara v. Petris (1971) 21 Cal.3d 506, is an example of the kind of hardship (c)'s final sentence would perpetuate.

§ 1263.310. Compensation for property taken

State Bar Objection

Jackson moved to insert "just" as the first word of the section and to insert "normal" as the second word of the second sentence of the proposed sentence.

Sullivan seconded.

Unanimously passed.

Reasons - The word "just" is felt to make clear the philosophy of justice to the owner whose property is taken.

The word "normal" is recommended because there are cases where market value is not available as a test. Particularly, this is true where a property is a unique one. There, recourse must be had to ancillary tests such as cost of reproduction.

§ 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).

Law Revision Commission Response

In drafting the Eminent Domain Law, the Commission has eschewed use of the phrase "just compensation," since "just compensation" is the term used in the state Constitution. The statute purports to provide more than the "just compensation" required by the state Constitution.

The fair market value of property is not "normally" the measure of compensation for the property taken; it is always the measure of compensation. As the Comment to Section 1263.310 makes clear, fair market value may be determined by a variety of valuation techniques, but it is always the standard of compensation whether the property be normal or "special."

§ 1263.320. Fair market value

State Bar Objection

Fadem moved that the definition of market value be retained in its present form with its reference to "the highest price".

Keagy seconded.

Passed unanimously.

Reason - The power of eminent domain is a drastic one generally contrary to our fundamental concept of the right of ownership of private property. Yet, we must recognize that the common good requires that property be taken under certain circumstances.

But where private property must be taken, it seems that the definition in use in California for nearly a century, that the owner receive the highest price that his property would have brought is most comformable with the spirit of the just compensation clause of the Constitution.

Additionally, an owner deprived of his property at an arbitrary date determined by the condemnor may well have irretreivably lost an expectancy of gain. There are many intangible losses when property is taken from an owner, such as the cost of acquiring a new property, and the application of entrepreneurial or personal time to the search for an adequate substitute property. These losses are uncompensated and are a further reason why the owner should receive the highest price his property would have brought on the date of value.

§ 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); *Buena Park School Dist. v. Metrim Corp.,* 176 Cal. App.2d 255, 263, 1 Cal. Rptr. 250, 255-256 (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.

The phrase "in the open market" has been deleted from the definition of fair market value because there may be no open market for some types of special purpose properties such as schools, churches, cemeteries, parks, utilities, and similar properties. No substantive change is intended by this deletion. All properties, special as well as general, are valued at their fair market value. Within the limits of Article 2 (commencing with Section 810) of Chapter 1 of Division 7 of the Evidence Code, fair market value may be determined by reference to (1) the market data (or comparable sales) approach, (2) the income (or capitalization) method, and (3) the cost analysis (or reproduction less depreciation) formula.

The standard provided in Section 1263.320 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.

Law Revision Commission Response

The Commission omitted the phrase "the highest price" from the definition of fair market value because it is misleading. The fair market value of property is the price that a knowledgeable buyer and seller would agree to on the open market; a buyer and seller would not agree to several, but only to one price. Moreover, fair market value is not the highest price that could be obtained under a peculiar set of circumstances or with a particular buyer (such as an adjoining owner); rather it is the open market price. The phrase "the highest price" is also misleading because it implies that, where there is a range of appraisal testimony, the trier of fact must accept the highest appraisal estimate, rather than the appraisal estimate that appears most closely to approximate fair market value.

While the phrase "the highest price" is merely inappropriate under existing law, it is harmful in the context of the Commission's recommendation to eliminate the burden of proof which existing law places on the property owner to establish fair market value. The Commission recommends that neither party have the burden of proof, a recommendation with which the State Bar Committee agrees. Retention of "highest price" language is based in part at least on the existence of a burden of proof on the property owner. Hence, the language should be eliminated if the burden of proof requirement is eliminated.

§ 1263.510. Compensation for loss of goodwill

State Bar Objection

Fadem moved that the Committee recommend that "going concern value" should be substituted for "goodwill".

Sullivan seconded.

Passed 7 to 3.

Reasons - "Goodwill" and "going concern value" are not synonomous. It is the "going concern value" which is lost and therefore should be the measure of compensation.

Article 6. Compensation for Loss of Goodwill

§ 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.

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).

Law Revision Commission Response

§ 1263.510. Loss of goodwill

The Commission's recommendation that a property owner be compensated for the loss of goodwill of his business is a major change from existing law which precludes such compensation. There is already substantial opposition to this change. The change can be justified partly on the basis that the term "goodwill" has a defined meaning, is litigated in other proceedings, and is limited in character.

"Going concern value" is a new and undefined term and could impose unknown liabilities on public agencies.

The Commission has changed slightly the wording of its draft section to compensate for loss of goodwill so that it duplicates the comparable language of the Uniform Eminent Domain Code of the National Conference of Commissioners on Uniform State Laws. The federal government most likely will pay compensation for loss of goodwill in federally-aided projects in states that have a provision equivalent to the Uniform Code provision. A change in concept to "going concern value" would seriously jeopardize any such possibility.

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

State Bar Objection

Sullivan moved to strike the word "other".

Newton seconded.

Passed unanimously.

Reason - It was felt that the salutary purpose of this section should be extended to the property itself, as well as to other property.

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

1263.620. (a) Where summons is served during construction of an improvement or installation of machinery or equipment on the property taken, or on the remainder if such property is part of a larger parcel, and the owner of the property ceases the construction or installation due to such service, the owner shall be compensated for his expenses reasonably incurred for work necessary for either of the following purposes:

(1) To protect against the risk of injury to persons or to other property created by the uncompleted improvement.

(2) To protect the partially installed machinery or equipment from damage, deterioration, or vandalism.

(b) The compensation provided in this section is recoverable only if the work was preceded by notice to the plaintiff except in the case of an emergency. The plaintiff may agree with the owner that the plaintiff will perform work necessary for the purposes of this section or the amount of compensation payable under this section.

Comment. Section 1263.620 provides compensation for expenses "reasonably incurred" for work necessary to protect the public or partially installed machinery or equipment from injury. It is available only if the work is preceded by notice to the plaintiff unless emergency conditions preclude prior notice. Should the plaintiff, upon receipt of notice, object to the necessity or reasonableness of the expenses to be incurred, this fact should be taken into consideration by the court in determining the amount of compensation to be awarded under this section. On the other hand, the failure of the plaintiff to object does not prejudice its right subsequently to show that the work was not necessary or that the expense was not reasonable.

The amount, if any, by which the work performed enhances the value of the property is not the measure of value and is not considered in determining compensation under Section 1263.620. If compensation is sought on the basis of the enhanced value of the property, the improvement must be one that may be taken into account under Section 1263.240.

Law Revision Commission Response

The Commission has adopted the Committee on Condemnation's suggestion in part by providing for expenses "To protect the partially installed machinery or equipment from damage, deterioration, or vandalism." As far as the need to protect the premises themselves goes, the property owner who will suffer a hardship may get a court order permitting compensation for improvements under Section 1263.240(c)(discussed above).

§ 1268.140. Withdrawal of deposit

State Bar Objection

Sullivan moved that the comment be augmented by adding that this is an alternative procedure where there was no right to an order of possession.

Jackson seconded.

Passed unanimously.

§ 1268.140. Withdrawal of deposit

1268.140. (a) After entry of judgment, any defendant who has an interest in the property for which a deposit has been made may apply for and obtain a court order that he be paid from the deposit the amount to which he is entitled upon his filing either of the following:

(1) A satisfaction of the judgment.

(2) A receipt for the money which shall constitute a waiver by operation of law of all claims and defenses except a claim for greater compensation.

(b) If the award has not been apportioned at the time the application is made, the applicant shall give notice of the application to all the other defendants who have appeared in the proceeding and who have an interest in the property. If the award has been apportioned at the time the application is made, the applicant shall give such notice to the other defendants as the court may require.

(c) Upon objection to the withdrawal made by any party to the proceeding, the court, in its discretion, may require the applicant to file an undertaking in the same manner and upon the conditions prescribed in Section 1255.240 for withdrawal of a deposit prior to entry of judgment.

(d) If the judgment is reversed, vacated, or set aside, a defendant may withdraw a deposit only pursuant to Article 2 (commencing with Section 1255.210) of Chapter 6.

Comment. Section 1268.140 is based on subdivision (f) of former Section 1254 but provides notice requirements to protect the other defendants where money is to be withdrawn. Section 1268.140 is the only provision for withdrawal of a deposit after entry of judgment regardless whether the deposit was made before or after judgment.

Former Section 1254 was construed to permit the defendant to withdraw any amount paid into court upon the judgment whether or not the plaintiff applied for or obtained an order for possession. See *People v. Gutierrez*, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962); *San Francisco Bay Area Rapid Transit Dist. v. Fremont Meadows, Inc.*, 20 Cal. App.3d 797, 97 Cal. Rptr. 898 (1971). That construction is continued in effect by Section 1268.140.

For purposes of withdrawal of deposits, a judgment that is reversed, vacated, or set aside has no effect; withdrawal may be made only under the procedures provided for withdrawing deposits prior to entry of judgment. This is made clear by subdivision (d).

Under Section 1268.140, the defendant may retain his right to appeal or to request a new trial upon the issue of compensation even though he withdraws the deposit. This may be accomplished by filing a receipt which constitutes a waiver of all claims and defenses except the claim to greater compensation. See subdivision (a). *Cf. People v. Gutierrez*, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

Law Revision Commission Response

The suggestion of the Committee on Condemnation that a sentence be added to the Comment to the effect that the section provides an alternate procedure for withdrawal is apparently based on a misunderstanding of the Commission's recommendation. While it is true that existing law does provide two alternate procedures for withdrawal, the Commission has recommended that they be replaced by one uniform postjudgment withdrawal procedure. The Commission has added a sentence to the Comment to this section to make this clear.

§ 1268.310. Date interest commences to accrue

State Bar Objection

Jackson moved to delete the word "legal".

Baggot seconded.

Passed 7 to 3.

Reason - The legal rate of interest of 7% does not represent just compensation at this time. This has been the situation since 1970, may continue for an indefinite period, and may occur in the future. Therefore the market interest rule adopted in In re Manhattan Civic Center Area 229 NYS 2d 675 and State of New Jersey v. Nordstrom, 253 Atl 2d 163 of using the market rate of interest where it exceeds the legal rate seems necessary to make compensation just.

§ 1268.310. Date interest commences to accrue

1268.310. The compensation awarded in the proceeding shall draw legal interest from the earliest of the following dates:

(a) The date of entry of judgment.

(b) The date the plaintiff takes possession of the property.

(c) The date after which the plaintiff is authorized to take possession of the property as stated in an order for possession.

Comment. Section 1268.310 is the same in substance as subdivision (a) of former Section 1255b except that the phrase "or damage [to the property] occurs" has been deleted from subdivision (2). The deleted phrase was inadvertently included in the 1961 revision of Section 1255b. See *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings*, 3 CAL. L. REVISION COMM'N REPORTS B-1, B-9, B-20 (1961). The 1961 revision was not intended to and has not been construed to require computation of interest on severance damages from a date prior to the earliest date stated in Section 1268.310. The deletion of this phrase is not intended to affect any rules relating to the time of accrual of interest on a cause of action based on inverse condemnation, whether raised in a separate action or by cross-complaint in the eminent domain proceeding. See, *e.g.*, *Youngblood v. Los Angeles County Flood Control Dist.*, 56 Cal.2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961); *Heimann v. City of Los Angeles*, 30 Cal.2d 746, 185 P.2d 597 (1947). For exceptions to the rules stated in Section 1268.310, see Sections 1255.040 and 1255.050 (deposit on notice of certain defendants).

Law Revision Commission Response

The Commission believes not only that the legal rate of interest on judgments--seven percent--is fair, but also that using a market rate is impractic. l. The market rate of interest can fluctuate rapidly; it may be at a different rate for different investments, different investors, and different security; and it may be to the detriment of property owners should it drop below seven percent.

§ 1268.320. Date interest ceases to accrue

State Bar Objection

Fadem moved to modify subsection (a) and (b) that deposit does not stop interest if there is a challenge to public use and no withdrawal occurs.

Sullivan seconded.

Passed unanimously.

Reasons - There are cases such as Morris v. Regents where there are legitimate questions of the right to take which are forced to be waived for the owner to withdraw the deposit. This in effect, either forces the owner to accept a year's long loss of return on his award, or give up his right to challenge the constitutionality of the taking.

Putting an owner to such an election is incompatible with the rights of the individual.

§ 1268.320. Date interest ceases to accrue

1268.320. The compensation awarded in the proceeding shall cease to draw interest at the earliest of the following dates:

(a) As to any amount deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 (deposit of probable compensation prior to judgment), the date such amount is withdrawn by the person entitled thereto.

(b) As to the amount deposited in accordance with Article 2 (commencing with Section 1268.110) (deposit of amount of award), the date of such deposit.

(c) As to any amount paid to the person entitled thereto, the date of such payment.

Comment. Section 1268.320 continues the substance of subdivision (c) of former Section 1255b. For an exception to the rule stated in subdivision (a), see Sections 1255.040 and 1255.050 (deposit on notice of certain defendants). Subdivision (b) of Section 1268.320 supersedes paragraphs (2) and (4) of subdivision (c) of former Section 1255b. Unlike the former law, there is now only one procedure for payments into court after entry of judgment. See Section 1268.110 and Comment thereto.

It should be noted that, if a prejudgment deposit is made and the deposit is not withdrawn, interest does not cease to accrue upon entry of judgment unless the amount of the deposit is in the full amount required by the judgment. See subdivision (b) and Section 1268.010(b)(2) (such a deposit deemed a postjudgment deposit on entry of judgment). Where the amount of the prejudgment deposit is not in the full amount required by the judgment, interest does not cease to accrue until an amount sufficient to bring it up to the full amount of the judgment is added. See subdivision (b) and Section 1268.110(a) (postjudgment deposit must be in full amount of judgment less amounts previously deposited).

Law Revision Commission Response

This section merely continues existing law. The Committee on Condemnation would have the Commission recommend a change in existing law to enable the property owner better to appeal right to take issues. The Commission has not recommended this change because the number of appeals on right to take issues are few and are seldom successful and because the Commission does not believe that the condemnor should be required to finance the property owner's appeal.

State Bar Response

6(k) [1268.320] The Committee wanted sub-sections (a) and (b) modified so that a deposit does not stop interest if there is a challenge of no public use and no withdrawal of the deposit occurs.

There are cases such as Regents v. Morris (1968) 266 Cal. App.2d 616, where there are legitimate questions of the right to take which are forced to be waived before the owner may withdraw the deposit. This in effect, either forces the owner to either accept a year's long loss of return on his award, or give us his right to challenge the constitutionality of the taking.

Putting an owner to such an election is incompatible with the rights of the individual.

The Law Revision Commission argument that the condemnor would be financing an appeal is invalid. No withdrawal would have been made under the Committee proposal.

That the occurrence of such cases is infrequent is a reason to favor the Committee recommendation, not oppose it, as Law Revision Commission has done.

The condemnor would still be getting interest on his deposit to offset the interest received by owner, if the challenge to the taking were unsuccessful.