36.300 3/7/75

First Supplement to Memorandum 75-21

Subject: Study 36.300 - Eminent Domain

Attached as Exhibit I is an opinion of the Legislative Counsel concerning AB 11, the Commission recommended comprehensive Eminent Domain Law.

Attached as Exhibit II is a letter from Tom P. Gilfoy, Southern California Edison Company, concerning AB 11 and AB 486. The letter supports the position that AB 11 and AB 278 (the Commission recommended bills) are superior to AB 486 (the Uniform Eminent Domain Act).

You may want to read this material prior to the meeting.

Respectfully submitted,

John H. DeMoully
Executive Secretary

STATE OF CALIFORNIA

OFFICE OF LEGISLATIVE COUNSEL

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Sacramento, California
March 5, 1975

Honorable John Stull
Senate Chamber

Eminent Domain- #1468

Dear Senator Stull:

You have asked a number of questions relating to eminent domain based on the assumption that Assembly Bill No. 11 as introduced[1] will be enacted into law.

QUESTION NO. 1

Does there exist any provision in A.B. 11 for reducing one's property tax liability when the land in question has been condemned[2] but not finally acquired by the Department of Transportation?

OPINION NO. 1

There exists no provision in A.B. 11 to reduce taxes on condemned property pending final acquisition by a state, county, or governmental agency.

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1 Hereinafter referred to as A.B. 11.

2 As we understand this question, the term "condemned" refers to a point in the proceeding prior to the time that title passes to the condemnor.

ANALYSIS NO. 1

Section 4986 of the Revenue and Taxation Code provides for proration of property taxes between the condemning agency and property owner and cancellation of property taxes where property is acquired by the state, county, or other public agency. The date for proration or cancellation of property taxes "... shall be at the time title was transferred to, or possession was taken by, the public entity, whichever time the court determines to have first occurred."

Section 4986 further provides that: "For the purpose of this subdivision the date of possession shall be the date after which the plaintiff may take possession as authorized by order of the court or as authorized by a declaration of taking."

Section 1268.030 of the Code of Civil Procedure[3] provides that title to the property shall vest in the state, county, or public agency when a certified copy of the final order is recorded in the county where the real property is located. The final order issues upon the application of any party if the court finds the judgment authorizing the taking of the property is a final judgement with respect to which all possibility of direct attack i.e. thereon by way of appeal, motion for a new trial, or motion to vacate the judgment has been exhausted (Sec. 1235.120, C.C.P.).

In City of Ontario v. Kelber, 35 C.A. 3d 751, the property owner contended he should not be responsible for taxes accruing on his property during the city's unsuccessful appeal on the issue of compensation for the property to be condemned. Applying Section 4986 of the Revenue and Taxation Code, Kelber argued that entry of judgment alone was sufficient to divest him of title since the practical effect of judgment was to preclude him from renting, selling, or developing his land.

Although the court agreed that condemnation proceedings did somewhat cloud title to Kelber's property, he nevertheless was entitled to all rents, issues, and profits from the land and until such time as the government agency recorded the final judgment, the property tax liability rested with the property owner (City of Ontario v. Kelber, supra, p. 755).

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[3] All references to sections of the Code of Civil Procedure are references to proposed sections contained in Assembly Bill No. 11, as introduced, unless otherwise noted.

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Section 402.1 of the Revenue and Taxation Code provides:

> "In the assessment of land, the assessor shall consider the effect upon value of any enforceable restrictions to which the use of land may be subjected. Restrictions shall include but are not necessarily limited to zoning restrictions limiting the use of land and any recorded contractual provisions limiting the use of lands entered into with a governmental agency pursuant to state laws on applicable local ordinances."

Ad valorem property taxes may, then, be assessed against the real property about to be condemned, and until such time as the state, county, or public agency actually takes possession, or records a final order of condemnation, the condemned property owner will be liable for any ad valorem tax and any unpaid tax may be satisfied from the condemnation award.

Although not specifically included with the provisions of Section 402.1 of the Revenue and Taxation Code, condemnation proceedings must be considered by the tax assessor in determining the assessed valuation of real property, since the assessor must consider all factors relating to the market value of property. However, if such condemnation has no effect on value, there are no provisions in law which will require the assessor to reduce a property owner's property tax liability simply because condemnation proceedings are pending against the property.

QUESTION NO. 2

If the condemnee refuses the condemnor's final offer of compensation and an eminent proceeding is instituted, does A.B. 11 provide a method whereby attorney's fees may be recovered?

OPINION NO. 2

A condemnee's attorney's fees would be recoverable in a condemantion proceeding under A.B. 11 as a part of the condemnee's recoverable litigation expenses if the court, on the motion of the condemnee after the entry of judgment,

determines that the final offer of compensation of the condemnor was unreasonable and that the final demand for compensation of the condemnee was reasonable in light of the compensation awarded in the proceeding.

ANALYSIS NO. 2

Section 1250.410 of the Code of Civil Procedure provides:

> "1250.410. (a) At least 30 days prior to the date of trial, the plaintiff shall file with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant shall file and serve on the plaintiff his final demand for compensation in the proceeding. Service shall be in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.
>
> "(b) If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses. In determining the amount of such litigation expenses, the court shall consider any written revised or superseded offers and demands filed and served prior to or during trial." (Emphasis added.)

Inasmuch as a condemnee's litigation expenses include reasonable attorney's fees (Sec. 1235.140, C.C.P.), Section 1250.410 would authorize the condemnee's recovery of his reasonable attorney's fees in an eminent domain proceeding if the court, upon the motion of the condemnee made within 30 days after entry of judgment, finds that the final offer of compensation of the condemnor was unreasonable and the final demand of the defendant for compensation was reasonable viewed in light of the compensation awarded in the proceeding.

QUESTION NO. 3

May the state be required to deposit the amount of the initial court award of compensation pending an appeal, even if actual acquisition of the property is not anticipated by the state for several years?

OPINION NO. 3

Under the terms of A.B. 11, the state may not be required to deposit the amount of the initial court award of compensation pending an appeal, regardless of the length of time required to have the appeal heard.

ANALYSIS NO. 3

There are no provisions in A.B. 11 compelling the state to deposit an amount equal to the initial court award pending an appeal questioning the compensation award to the condemnee.

Sections 1255.010, and 1268.110 provide, respectively, for funds to be deposited by the condemnor with the court at any time before entry of judgment in the amount of probable compensation (Sec. 1255.010) or at any time after entry of judgment in the amount of the actual initial award (Sec. 1268.110). In the former situation, the deposit may be made whether or not the condemnor applies or intends to apply for an order for possession prior to judgment (see Sec. 1255.410), but in both situations the deposit is a precondition to the court's authorizing the condemnor to take possession of the property (see Secs. 1255.410, 1268.210).

While the making of a deposit is a precondition to the condemnor's possession of property, both Section 1255.010 and 1268.110 make it clear that the making of a deposit is at the condemnor's election.[4]

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[4] It should also be mentioned that the condemnor's voluntary deposit of the probable compensation in the proceeding or of the actual initial award does not affect the condemnor's right to appeal from the judgment (see e.g. Secs. 1255.030, 1268.170 and 1268.240, C.C.P.).

In Pool v. Butler (1903), 141 Cal. 46, the court concluded that "... a plaintiff seeking to condemn land for a public use does not, by bringing the action to condemn, bind himself to take the land and pay the compensation fixed by the court or jury ... . Hence, a plaintiff in such action is conceded to have a right to abandon the proceeding and decline to take the land, the question then being, at what stage of the condemnation proceedings may he abandon the enterprise or decline to take the property? Pending the motion for a new trial, and later, pending the appeal, it is clear that plaintiffs were not bound to pay or deposit the damages assessed upon trial ... ." (Pool v. Butler, supra, p. 49) (Emphasis added.)

Even though this decision was rendered with regard to the provisions of then existing law, the provisions of A.B. 11, as discussed above, are such that the case would be equally determinative of the matter.

Therefore, we conclude that the state may not be required to deposit the amount of the initial court award of compensation in a condemnation proceeding pending appeal, regardless of the length of time required to have the appeal heard.

QUESTION NO. 4

May the state be required to purchase property immediately even if state development of the land in question is not anticipated for several years?

OPINION NO. 4

Assuming that a condemnation proceeding has been initiated in court and a summons has been served on the landowner, the state generally cannot be compelled to purchase the property subject to being condemned even if state development of the land is not anticipated for several years inasmuch the state is statutorily authorized to abandon the proceeding at any time before the expiration of 30 days after final judgment. However, both existing law and the provisions of A.B. 11 do permit an abandonment to be set aside. In such a situation, the effect would be to compel the purchase of property originally sought to be condemned.

ANALYSIS NO. 4

Condemnation proceedings are provided to assure proper valuation of the property to be acquired by the condemnor. However, initiation of proceedings by the condemnor does not bind the condemnor to eventually acquire the property, despite the outcome of the proceeding.

The general rule governing a condemnor's abandonment of an eminent domain proceeding, as stated by the California Supreme Court in Pool v. Butler, supra, at page 49, is as follows:

> ". . . a plaintiff seeking to condemn land for a public use does not, by bringing the action to condemn, bind himself to take the land and pay the compensation fixed by the court or jury. . . . Hence, a plaintiff in such action is conceded to have a right to abandon the proceeding and decline to take the land. . . . ."

Assuming, then, that condemnation proceedings have been initiated, to require the state, or any condemning entity, to purchase property immediately would defeat the right of the state or condemning entity to abandon.

In accord with the general rule, subdivision (a) of Section 1268.510 of the Code of Civil Procedure provides:

> "1268.510. (a) At any time after the filing of the complaint and before the expiration of 30 days after final judgment, the plaintiff may wholly or partially abandon the proceeding by serving on the defendant and filing in court a written notice of such abandonment. . . ."

Despite this general rule, however, subdivision (b) of Section 1268.510 does provide for an exception. Subdivision (b) provides that an abandonment may be set aside by the court, upon a motion made within 30 days of the filing of the notice of abandonment, if the court determines that the position of the condemnee has been substantially changed to his detriment in justifiable reliance upon the proceeding and that the condemnee cannot be restored to substantially the same position as if the proceeding had not been commenced.

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[5] See also subd.(b), similar provision in Sec. 1255a, C.C.P., of existing law.

Therefore, subject to the exception provided for setting aside an abandonment of an eminent domain proceeding sought by a condemnor, the condemnor (i.e., the state) may not be compelled to purchase property in advance of any anticipated use.

QUESTION NO. 5

Having once agreed to a purchase price, may the public entity seeking to acquire the property and the property owner renegotiate to increase the price if acquisition does not take place for several years, during which time property values have increased?

OPINION NO. 5

A voluntary renegotiation of the purchase price of property sought to be acquired to increase the purchase price would be invalid as a gift of public funds assuming the public entity seeking acquisition has an otherwise valid and enforceable contract and receives no further consideration for renegotiation.

ANALYSIS NO. 5

Voluntary renegotiation by the state of the contract price is lawful only if such renegotiation does not constitute a gift of public funds. Article XIII, Section 25 of the California Constitution provides:

> "The Legislature shall have no power to ... make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; ... ."

Section 1146 of the Civil Code defines a gift as "... a transfer of personal property, made voluntarily, and without consideration."

> "To be a gift, this voluntary transfer must be gratuitous, -- a handing over to the donee something for nothing." (Yosemite Stage and Turnpike Company v. Dunn, 83 Cal. Sup. Ct. 264, 265.)

"Consideration" is defined in Black's Law Dictionary, 4th Ed., p. 379, as: "The inducement to a contract. The cause, motive, price or impelling influence which induces a contracting party to enter a contract." Once the state, or any agency thereof, has entered into a valid, enforceable contract, it has acquired a property right. In order to divest itself of that right, the state must acquire something in exchange without violating the prohibitions of Article XIII, Section 25 of the California Constitution. Without a return of consideration to the state, a voluntary renegotiation of the price would constitute a gift.

Consequently, if a state agency has an otherwise valid, enforceable contract for the purchase of property to be condemned, and receives no further consideration for renegotiation, any voluntary renegotiation of the purchase price to increase it would be invalid as a "gift of public funds." There is nothing in A.B. 11 which purports to authorize such renegotiation.

QUESTION NO. 6

If the state has condemned property for highways, but does not actually acquire it for a period of years, may the owners utilize that property as they see fit until such time as the state actually purchases the land?

OPINION AND ANALYSIS NO. 6

Assuming the state has initiated condemnation proceedings against property for use as a highway, but as yet has not taken possession or given any consideration to the landowner, there are no provisions in law to preclude the use of real property in any manner desired by the owners.

The court in People v. Watkins, 175 Cal. App. 182, indicated in response to appellant's claim that a court order giving appellee immediate possession in advance of judgment immediately divested appellants of ownership, indicated:

> "We are aware of no authority in support of appellant's claim that under the circumstances here involved they cannot be ordered to abate the nuisance upon their land. Actually they own the land under condemnation until they are divested of title; they enjoy the fruits of its possession and are responsible for what they place on it." (People v. Watkins, supra, p. 188.) (Emphasis added.)

Since a court order giving a city the right to immediate possession of the landowner's property cannot be construed to actually divest the landowner of title, simple initiation of condemnation proceedings by the state will not in any way deprive the landowner of the "fruits of [his] possession."

Thus, absent conduct by the landowner giving rise to a right to equitable injunctive relief by the state which prohibits a use to which the landowner has made of the property or a court order precluding the landowner from use of the property after service of summons, no provision of A.B. 11 would preclude the use of real property in any manner desired by the landowner.

Specifically, as respects the inclusion or exclusion of improvements in the award of compensation, A.B. 11 provides that improvements shall not be taken into account in determining compensation if removed or destroyed before the earliest of the time the condemnor takes title to, or possession of, the property, the time specified in an order directing the condemnee's removal from the property, or 24 hours after the condemnor receives notice from the condemnee of the latter's removal from the property in compliance with an order for possession (subd. (a), Sec. 1263.230). Where improvements are removed or destroyed by the condemnee at any time, they are not to be considered in determining compensation; however, the damage to the property occasioned by the destruction or the removal of improvements is to be considered in determining compensation to the extent the damage reduces the remaining property's value (subd. (b), Sec. 1263.230).

In addition, A.B. 11 permits the condemnor to obtain a court order precluding the condemnee from planting crops after service of summons, in which case the compensation awarded for the property taken is required to include an amount sufficient to compensate for loss caused by the limitation on the condemnee's right to use the property (subd. (b), Sec. 1263.250).

Finally, A.B. 11 permits the consideration, in determining compensation, of improvements made subsequent to the date of service of summons where the improvement is one required to be made by a public utility to its utility system, the improvements are made with the written consent of the condemnor, or the improvement is one authorized to be made by a court order (Sec. 1263.240).[6]

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[6] See Secs. 1249, 1249.1, C.C.P. re the exclusion of improvements from the award of compensation under existing law.

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Thus, subject to certain limitations, the owners of property may utilize the property as they see fit until such time as the state, as the condemnor, actually acquires the land. In compensating the owners for the acquisition, improvements pertaining to the property will be considered in determining compensation in accordance with the aforementioned provisions.

Very truly yours,

George H. Murphy
Legislative Counsel

By
James A. Marsala
Deputy Legislative Counsel

JAM:gdl

Two copies to the Honorable Alister McAlister pursuant to Joint Rule 34.

EXHIBIT II

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March 4, 1975

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford School of Law
Stanford, California 94305

Re: AB 11 and AB 278 v. AB 486

Dear Mr. DeMoully:

I am pleased to see that the Commission intends to consider AB 11 and AB 486 together at its March meeting. Receipt of the comparable provision material sent out with the February mailing is appreciated and has been most helpful in comparing the different treatment of the same subject matter by the two bills. Overall, there is no question but what the Commission-sponsored legislation is much more thoughtful and thorough than AB 486. My review of this material has, however, prompted the following comments which may be useful in supporting AB 11 and AB 278 over AB 486.

There is still much confusion remaining about AB 486. This is compounded by the Legislative Counsel's Digest in the bill which contains some misleading and inaccurate information. For example, one need go no further than point (1) on page 1 of AB 486 to find a statement to the effect that "existing law contains no provisions establishing pre-condemnation property acquisition policies for a condemnor". Apparently, Legislative Counsel have overlooked the extensive procedures contained in the Relocation Assistance Act. Nothing but chaos will result if the sections dealing with this subject (Sections 1231.01 et seq.) are enacted without an attempt to reconcile them with the provisions of the Relocation Assistance Act.

Also, AB 486 contains provisions which apparently are intended to extend a right of early possession to condemnors but in fact do not. That is, as you know, Chapter 6 of AB 11 contains three distinct articles dealing respectively with

Deposit of Probable Compensation, Withdrawal of Deposit and Possession Prior to Judgment. AB 486's comparable chapter, on the other hand, (Chapter 7) only contains proceedings relative to making the deposit. In other words, although there is an implication from AB 486's Chapter 7 that a right of early possession is being extended to condemnors under certain circumstances of making a deposit, etc., there is no specific provision [illegible] Article 3 which in fact establishes a procedure for possession prior to judgment.

It also appears that AB 486 would treat in one bill not only the matters recommended by the Commission in the form of AB 11 but also the Commission's procedural and "legal issue" recommendations as set forth in AB 278. For this reason, it would seem to be difficult for the Commission to consider AB 486 and AB 11 at its March 15 meeting without also discussing AB 278. In this regard, AB 486 does have, in my judgment, some pluses over AB 278 that it may be useful for the Commission to consider.

First, AB 486 will not repeal CC §1001 (which extends a general right to condemn so long as the condemnation is for a public purpose) as would AB 278. This seems to me to be preferable because of the difficulty encountered in any attempt to enumerate every specific public use for which a condemnor may condemn. That is, while I can appreciate the Commission's concern with Linggi v. Gavioloti type situations, it is questionable whether or not any one person or commission is farsighted enough to be able to specifically enumerate all of the various public purposes or uses for which the Legislature may wish to authorize a condemnation.

As you know, Article 7 of AB 278 is an attempt to do just that, but already matters are developing that may cause the specific enumeration to fall short of what, in the public interest, the right to condemn ought to be extended to include. For example, Section [illegible] Article 7 provides that "an electrical corporation may condemn any property necessary for the construction and maintenance of its electric plant." It is at least questionable whether this section, even when read with Sections 217 and 218, extends the right to condemn for a new fuel source should it be developed from an unexpected and now unforeseen source. Yet such a condemnation could, depending on how matters develop in the future, be generally acknowledged to be in the public interest. The point is, of course, that if AB 278 is enacted in its present form, a public utility would have difficulty in stating a prima facie case for such purpose in its Complaint, let alone presenting the question of public

use to a trial court to decide. For this reason, it is respectfully suggested that AB 278 either be so amended as to eliminate that part which would repeal CC §1001 or that a new omnibus paragraph be added that would generally extend the right to condemn to governmental or public utility type condemnors for any purpose or use it can in fact prove is public and necessary.

AB 486 gives more favorable treatment than does AB 278 to the effect in condemnation actions of a public body's approval of a project. I refer to Section 1232.11 of AB 486 which states that any project "authorized by a legislative or administrative body of a public entity which is to review the matter" conclusively establishes the need for the taking. This gets back to a matter about which I have previously written; i.e., the question of what effect a court should give to an order of the California Public Utilities Commission approving a project. AB 278 would, as now drafted, give no effect to such an order whereas the above language in AB 486 would give the order the same effect as a resolution of necessity adopted in a public agency condemnation proceedings. The failure of AB 278 to give an order this same conclusive effect is bound to be a future source of hopeless dilemmas for trial courts. For example, an order of the Public Utilities Commission (such as an order issuing a certificate of public convenience and necessity for a project) is appealable only to the California Supreme Court. This being the case, what happens if the PUC determines the necessity for a project and orders it constructed and later the same issue is raised in a condemnation action. Does the trial court have jurisdiction to retry an issue the PUC has already decided. If it undertakes to do so, isn't this in effect a collateral attack on an order that can only be directly appealed to the Supreme Court?

Aside from this consideration, however, it seems reasonable and proper for a certificate from the PUC to have at least the same effect as a resolution adopted by a public agency. While a quasi-public entity probably should have more of a burden to establish the necessity than a completely public entity, isn't this additional burden satisfied by the review and authorization proceedings conducted by a public body such as the Public Utilities Commission? Such a hearing in fact provides more of an opportunity to oppose a proposed project than what is available to a property owner opposed to a public project for which a public condemnor need only adopt a resolution of necessity.

Thank you for the opportunity to provide these comments.

Very truly yours,

Tom P. Gilfoy

TPG:bjs