36 4/28/69

Memorandum 69-66

Subject: Study 36 - Condemnation Law and Procedure (Litigation Expenses)

You will recall that the Commission previously considered the background research study prepared by Professor Ayer (copy attached) and his recommendation that the condemnee be reimbursed under some circumstances for his litigation expenses (primarily attorney's fees and expert witness fees) and be provided with an appraisal prepared by an "independent" appraiser.

At that time, the Commission concluded that an expression of views should be obtained from interested persons and organizations before additional consideration was given to this matter. The staff prepared a questionnaire which was distributed to the persons on our eminent domain list and we provided you with a copy of the questionnaire and the letter of transmittal last month. The questionnaire provided space for general comments, and these comments are reproduced in Exhibit I attached. A number of persons wrote us letters expanding on their responses to the questionnaire, and these letters are reproduced as Exhibits II-XVII attached. (All of these exhibits (except Exhibit XVII and XVIII) were attached to Memorandum 69-57 which was considered briefly at the last meeting.)

You should study the exhibits attached to this memorandum with care. We will not attempt to summarize them in this memorandum since such an attempt would merely provide you with that much more material to read prior to the meeting. However, you should note the reaction of the State Bar Committee (Exhibit XIII): "It was unanimously agreed that this issue

[litigation expenses in condemnation proceedings] is of such import that it merits further study, and this Committee takes this position without expressing, at this time, whether or not it is dissatisfied with existing law."

The staff's reaction to the response we received to the questionnaire is that the need for a litigation expense allowance exists primarily in small cases and that any scheme that provided for recovery of reasonable attorney's fees and expert witness fees would create more problems than it would solve. Further, the staff believes that it is essential that any scheme provided avoid the need to have reasonable attorney's fees fixed by the courts.

The staff recommends that consideration be given to the following possible solutions to the problem of the too-small offer by the condemnor in a small case:

1. Jurisdictional offer. Upon demand of the property owner who is willing to waive any right to contest the taking, the condemnor shall make a jurisdictional offer with 45 days after the demand. If the property owner recovers 10 percent in excess of the jurisdictional offer, he is entitled to a "litigation expense allowance" computed according to the following schedule:

Award	Litigation expense allowance	Amount
First $2,000	25 percent	$500
Next $3,000	20 percent	$600
Over $5,000	10 percent	

The maximum litigation expense allowance would be $5,000.

The condemnor would be authorized to offer the property owner an amount equal to its highest appraisal plus such amount as reflects the condemnor's conclusion as to the risk it will have to pay a litigation expense allowance.

The advantage of this system is that it is relatively inexpensive. No additional tribunals for hearing condemnation cases would be established. The system should result in more settled cases since the condemnor would be authorized to make a litigation avoidance payment. Considering the cost of establishing and maintaining Superior Courts and the fact that other civil matters are delayed because of criminal cases and priority eminent domain cases, the system should work out well in practice. The scheme would not require any court determination as to the reasonableness of expenses incurred by the condemnee.

It should be noted that the effect of the system would be to increase the amount paid in relatively small takings because the condemnor could pay an amount in excess of the highest appraisal. However, this is not considered to be an undesirable effect. The science of appraisal is not that exact. The property owner is usually an unwilling party to the action and would prefer to remain where he is. Moreover, if the condemnor's appraisal convinces the jury, the condemnor need pay nothing.

2. Compulsory arbitration upon demand of property owner. Mr. Huxtable suggests that approximately five three-man condemnation "small claims" tribunals should be established throughout the State of California, each having a jurisdictional territory similar to that of the Courts of Appeal. These tribunals would be equivalent to Superior Courts and would try cases without a jury upon request of the property owner where the amount involved would not exceed $40,000. The judges could sit on other civil Superior Court matters when not involved in condemnation cases. Mr. Hustable urges that his suggested solution is the only solution. See Exhibit XVIII attached.

The staff does not believe that Mr. Hustable's solution would be a desirable one. The expense of maintaining one Superior Court judge in operation was claimed to be $300,000 a year at a recent hearing on adding new

Superior Court judges considering the salary, office, courtroom, jury cost, supporting personnel, administrative costs, and the like. While this amount probably is far in excess of the actual cost, and conceding that the cost of the courts proposed by Mr. Huxtable would be less, it nevertheless would be substantial.

The staff suggests that the Judicial Council be authorized to adopt rules governing compulsory arbitration of eminent domain cases where the amount sought by the property owner is less than $50,000. The Chief Justice would appoint a panel of arbitrators who would be assigned to cases in rotation. Three arbitrators would hear each case. The expenses of the arbitration would be paid by the condemnor (or a portion of the expenses could be paid by the state since the need to try the cases in the Superior Court would be avoided). If the property owner demanded arbitration, he would waive any right to appeal from the decision of the arbitrators and would waive any issue other than just compensation. The condemnor would have no appeal from the decision of the arbitrator; the only option would be to abandon the condemnation within a specified time after the award.

We make these fairly modest suggestions as possible solutions to the problem of litigation expenses in condemnation cases because we believe that other changes that would involve significant additional costs to the public agencies are more important and essential than to provide for reimbursement for attorney's fees and expert witness fees. As the Oakland City Attorney's Office comments: "The interests of the average property owner would be better provided if moving costs were required to be paid by the condemnor." At the same time, many of the persons responding to the questionnaire (including some condemnors) recognize that the litigation expense problem is a serious one, primarily in the small case.

The staff believes that either of the suggestions made in this memorandum would do much to minimize the litigation expense problem in small cases and would do so at a relatively modest cost.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 69-66 EXHIBIT I

COMMENTS FROM QUESTIONNAIRES

LITIGATION EXPENSES IN CONDEMNATION PROCEEDINGS

1. Extract - Policy Statement on Government Acquisition of Private Property, California State Chamber of Commerce

> Consideration should be given to establish procedures to reimburse owners for appraisal costs, attorneys' fees and other expenses in condemnation actions.

2. Donald L. Benton - Condemnees and Condemnors

> In my opinion if a condemnee were permitted to select from a panel of court approved appraisers an independent appraiser, immediately after the case is at issue, with provisions for reimbursement to the condemnee by the condemnor immediately on demand, so the condemnee could pay the independent appraiser, further litigation would in most instances be avoided. The appraisal and report should be available to both sides. After receiving the appraisal, the condemnee is in a position to determine whether he wants to litigate further and whether incurring attorneys' fees is justified. In essence, I believe that the best way of assuring just compensation to the condemnee is to give him a free independent appraisal. He will incur minimal attorneys' fees prior to receiving the appraiser's report, and his subsequent conduct will not be on an uninformed basis.

3. Robert Owen Curran - Condemnees and Condemnors

> We simply have to return more discretion to our Judges. The greater discretion vested in a Federal Judge contrasted with the lack of discretion vested in a California Trial Judge clearly indicates what can be accomplished by having faith in the Judiciary. California Judges operate under uniformly high standards. We should permit them to work out our problems on a case to case basis. They should not be ham strung by mandatory restrictions imposed by the Legislature.

4. James G. Whyte - Judge (No Comment)

5. Ernest I. Johnston - Condemnees and Condemnors

It is my belief that the condemnee is entitled to reasonable attorney's and appraiser's fees. However, it is felt that any system employed would increase litigation. I favor the "two-way street" premise with the total difference between the best offers as a common denominator of a fraction.

6. Joseph A. Forest - Condemnors (No Comment)

7. Robert D. Raven - Condemnees (No Comment)

8. J. A. Withers - Condemnors (No Comment)

9. Samuel C. Palmer III - Condemnees

The real problem lies in assuring condemnees of the fair market value of property. Assuming an award, the condemnee always gets less than is guaranteed under the constitution by reason of litigation expense. Also, the condemnor has deeper pockets, normally, as opposed to the individual landowner's, and if the public interest requires an acquisition, then the public (as opposed to a private person) should pay for the property.

10. Gerald J. Thompson - Condemnors (No Comment)

11. Wendell R. Thompson - Condemnors (No Comment)

12. Daniel R. Mandelker - Law Professor (No Comment)

13. LeRoy A. Broun

As to attorney fees: I think they should be determined by contract between the parties' defendant.

As to appraisal fees: These are always necessary for the condemnee, who should be entitled to the expense for at least one appraisal by a qualified appraiser of his own choice. Note the new evidence code requirement re opinion necessary to establish value. One cannot even negotiate without incurring expense for at least some appraisal work.

14. Richard A. Del Guercio - Condemnees

I believe that presently many owners are precluded from intelligently and objectively determining the fairness of the condemnor because of the cost of independent appraisal services. As a result many cases are settled without the owner having the benefit of an impartial opinion of value.

If each side to a public acquisition were enabled to obtain objective appraisals there should be no significant increase in litigation UNLESS the public agency offers are to low. If they are fair the cases will settle.

In order to encourage objectivity in evaluation of the property and evaluation of the lawsuit, a provision which would award the owner his costs in obtaining the original appraisal in any event but would not award the costs incurred in preparing the appraisal report for pre-trial exchange or pre-trial preparation or trial itself unless justified by the actual result, would provide a fair program for public acquisitions.

15. William Festag - Condemnees and Condemnors

I tend to favor the concept of having the condemnor pay the attorneys and expert witness fees incurred by the condemnee because the majority of the condemnees are usually without the necessary resources to contest or even to check the public agencies' estimate of value.

The biggest fear I have of any allocation scheme is that it puts a premium on the "contingency-appraiser" and provides an added inducement, to the property owner, to employ the services of these appraisers.

16. Norman Tuttle II - Condemnees and Condemnors

This problem seems more theoretical than real. Certainly inflation today serves to make the contingent fee reasonably easy to count on, meaning a property owner is rarely charged anything for legal expenses. Where a contingent fee cannot be worked out, I have seldom found an owner balk at a percentage of the offer which is the same or less than a real estate brokerage commission.

It is not very hard to try a case to a "split" now. If attorneys fees were also available, the temptation to litigate would be too great.

17. Oakland City Attorney's Office - Condemnors

The interests of the average property owner would be better provided for if moving costs were required to be paid by the condemnor. Since the owner in condemnation receives cash and does not have to pay a broker, or closing costs, in most instances he already receives a "better deal" by having his property condemned rather than selling at a private sale.

18. Gerald B. Hansen - Condemnees

The so called "Independent Appraiser" does not exist. If he thinks he does, I wouldn't care for his opinion. No "independent appraiser" can do the work (often months of work on one case) that a partisan appraiser can do. Ninety-nine percent of utility of appraisers in a jury case is to give jury information. The figures of the appraisals are not in themselves factors in determination . Depth of work and information is the thing. An "independent appraiser" is still a useless buffoon in the middle with little knowledge to give.

19. John A. Van Ryn - Condemnors (No Comment)

20. Henry H. Kilpatrick - Condemnees and Condemnors

My personal preference is the jurisdictional offer. Perhaps the figure should be 25% instead of 10%.

21. Carlyle Miller - Condemnees

Fees and expenses, or even some type of sanction, should be imposed where condemnor obtains immediate possession based upon an unrealistic, or ridiculously low, appraisal for deposit purposes.

22. Richard L. Riemer - Condemnees and Condemnors (No Comment)

23. C. A. Carlson - Condemnors (No Comment)

24. Robert E. Capron - Condemnees and Condemnors

[Re "G 5"--Either party should be entitled to have the independent appraiser called as an impartial expert witness--which he answered "Yes"] : Assuming that the appraiser is truly independent and informed by both parties as to aspects, elements of value, and that the appraiser, where necessary, bases alternate valuations upon various contentions of the parties (e.g., change of zoning and impact on highest and best use) so that valuation evidence is available whichever way the court rules.

25. Thomas B. Adams - Condemnees

My experience has shown that in cases involving $25,000.00 or under are usually settled on or near the the condemnor's appraisal because of the cost of litigation excluding attorney's fees. If all costs including attorney's fees were paid by the condemnor, there is no question in my mind that the just compensation would be finally paid to the property owner.

26. Richard A. Clarke - Condemnees and Condemnors

The "expense allocation" scheme is unwieldy and fails to put sufficient burden on the initiator of condemnations--the condemnor. The "jurisdictional offer" is simpler and puts a greater burden on the agency to make a fair offer. This would have some of the same features of C.C.P. 997. A 10% betterment requirement might achieve greater fairness and take some incentive merely to litigate from the owner.

Something should be done for the owner.

27. Richard J. Kohlman - Condemnors

I don't think attorney fees should be recoverable in any case except abandonment. That problem is no greater in condemnation cases than it is in personal injury litigation.

28. Royal M. Sorensen - Condemnees and Condemnors (No Comment)

29. Paul E. Overton - Condemnees and Condemnors

I believe that both condemnors and condemnees should be required to make a "best offer" as a basis for the determination of the true range of differences of valuation and damages less benefits.

Most frequently the differences of a substantial nature depend upon concepts of best use and changes in use resulting from the taking and construction.

An overall dollar figure difference does not necessarily represent a "true" disparity of the differences between the parties.

30. John K. Hass.

I favor the system where there are court appointed appraisers (3) in all cases except emergency matters with a 30-day period for either side to accept or reject. Then a trial de novo and the appraisers may be called as witnesses by either side but original figures to be barred except on cross-examination as to facts considered--not the joint figure of all as that usually is a compromise.

The condemnor causes the lawsuit--not the condemnee--who should not be penalized by his attorney's fees and costs when the fair market value has been reached.

The three-appraiser system at the cost of the condemnor eliminates the selling ability of a negotiator with people who do not know their rights or values. It will not result in more cases to trial and probably less.

It puts local opinion as to value to work by the Independent Appraiser Method (appointed on petition by the court).

I dislike the California direct buying--the land-owner is at a direct and immediate disadvantage unless he is a well-informed person as to real estate values. By their action, if he has enough knowledge to do so, he is forced to incur appraisal and attorney fee costs even for negotiation. Some cannot afford it--some simply bow to the public might and some simply accept a representation that the original offer is an accurate and proper one.

I've handled too many where the State did not allow for the real impact purely because they become conditioned to discard or fail to observe items that a local person will place in a greater value category. I still subscribe to the theory that it's better to protect the weak than the strong.

31. Laurence W. Carr - Condemnees

My experience in condemnation matters leads me to believe that the present system works to the best advantage of the property owner. It is true that presently, in order to know what his rights are the property owner must pay for an appraisal. This is one of the responsibilities of owning and protecting one's property. Once this is done, the parties have their range of values and are in a position to explore the support for each appraisal, since the condemning agency is always able to come up with several, depending upon which one is the most favorable to them.

It is my view that juries generally understand the problem of the property owner and that the verdicts are affected by the knowledge that the property owner has to pay his attorney. It may work to the disadvantage of both property owner and the Bar, if the broad negotiating area that results from the present system is both confused and restricted by court control of the relationship between the property owner and his attorney on the one hand, and his control of his phase of the case on the other. I do not believe that it is reasonable or practical to attempt to deal with the subject of litigation expense in condemnation or in other litigation by imposing court control. The net result will be that most such arrangements will be made reciprocal and the party having the most resources will thereafter have the economic advantage in any [illegible] dealing. Certainly, the condemning agency always has the economic advantage in condemnation suits.

32. David E. Schricker - Condemnors

It appears that the question of allowing the foregoing expenses turns somewhat on whether one believes such expenses are used as leverage in negotiations. Given the premise that the condemnor negotiates in good faith, and that there may be honest differences in opinion as to value, it would seem logical that the present system of both parties bearing their own expenses should continue. The foregoing schemes, it seems to me, merely encourage the "sporting theory" of adversary proceedings in condemnation.

33. Jeffrey D. Polisner - Condemnors

It is my opinion that the complexity of these problems differ with the amount of money involved in the action. That is to say, in a small taking, an owner cannot afford to expend anything on a defense as even if he would prevail, the costs of trial would be prohibitive. On the other hand, a large sum of money would not deter an owner from litigation because attorney's fees would probably be on a contingency and the possibilities of a large award justify the risk.

(J. D. Polisner - cont.)

I feel that if all the owner's costs were guaranteed, it would be the rare case that would negotiate a settlement. The attorneys involved would be sure of a fee and would never settle short of then top-dollar demand.

I feel quite strongly that a combination of a jurisdictional offer and appraisal reimbursement would promote equity and settlement most effectively.

34. Ray T. Sullivan, Jr. - Condemnors

In general: Unquestionably, any arrangement whereby condemnee may be awarded attorney's fee will increase litigation and decrease proportion of settlement: It will make the condemnee reluctant to yield because of at least a chance of recovering all or part of his fee expense, and will induce some attorneys to hold out, for the same reason. Obviously it will increase the cost to the condemnors.

On B-2: In state-aided school site acquisitions, under State finance rules, no concession can be made if an offer equal to condemnor's highest appraisal is rejected, since this represents maximum apportionment.

On E and F: I am opposed to court fixing fees--amount varies as much as 100 to 200% between different judges. They have little knowledge of what is reasonable in a given case.

In general: It is our long and regular experience that condemnor has more and better appraisals, and that the experienced attorney for a condemnor tries to get a settlement that is fair to the owner without exceeding fair market value ascertained from his own qualified appraisers (frequently more than one) who are independently retained. I would favor some kind of sanction against the condemnor (through his attorney) who tries to negotiate a purchase below what his own people who are well-informed and competent have determined what fair market value should be. I think there are few cases where this kind of thing is attempted.

On G: The "independent appraiser" appointed by the court is apt to be just one more appraiser for the condemnee (or perhaps the only one). In most cases he will know or learn the opinions of the other appraiser, on both sides, and will reach a conclusion weighted by (or guessed at on the basis of) the others, and usually wind up as the "arbitrator" with a figure that somehow splits the difference.

Let's leave the law alone in this area! Justice for the owner is being well done now under present rules. I can't recall a case in 15 years that I have been involved in or have heard of in our courts where the property owner wasn't adequately treated by judge or jury--and many where I felt the condemnor had paid throught the nose!

35. David S. Kaplan - Condemnors

Impossible to comment on "Independent Appraisal" approach without discussion of the qualifications such an appraiser would be required to have and the method by which he would be selected.

36. Timothy L. Strader - Condemnors

Is the right to jury trial in such a highly technical area necessary? Use of a referee system where the trier of the market value issue is trained in appraisal and Law may be a better system. How many members of a lay jury really understand the concept of fair market value as defined by the courts? Rather than increase the complexity of this area--why not simplify it!

37. Oswald C. Ludwig - Condemnees

I settled out of court with the Condemnor's Attorney for $450 cash, when the prior offers were: First, $40, then after a hearing in court trying to settle, Second $200.00, for a piece of land taken for an easement for water mains that was 20 ft. wide and 330 feet long.

The appraiser for the condemnor appraised the acreage there at $400 or $500 per acre, whereas the Tax Assessor appraised the land at about $1,300 per acre, for tax purposes.

Some water districts are organized at the behest of some one landowner with a thousand acres, and all the lands around are forced in and taxed, assessed, etc., until the standby charge is $25 per year, and the tax against the land is $50 per year on 2 1/2 acre tracts, in addition to the other taxes, which total about $150 per year.

Yet the appraiser for the water district appraised the same land in the condemnation proceedings at but $400 or $500 per acre. In other words, the taxes on land supposed to be worth but $500 per acre, amounts to 10% of the total market value per year, almost.

Study the Oklahoma Statutes. The judge appoints 3 disinterested appraisers. If no one objects the matter of value is settled by them and the case ends.

38. William H. Hair - Condemnors and Condemnees (No Comment)

39. Glen E. Fuller - Condemnees

During the past 9 years I have handled 192 litigated condemnation cases, of which approximately 125-140 have gone through trial. The results have all been tabulated*--offer, judgment or verdict, incidental settlement items, etc. From this I think I can speak from practice and experience rather than from theory.

In dealing with condemnors, most of whom are large public bodies like the federal BPR, I find a consistent policy that "severance" damages are nearly always disregarded--thus forcing the condemnee to go to court in order to get anything in the vicinity of "just" compensation.

For years I have advocated an arrangement whereby the property owner should receive legal fees and appraisers fees, based on the condition that his ultimate award should exceed the "approved appraisal" or "best offer" of the condemnor by a figure of, say, 10%. Faced with this proposition, I am positive that condemnors and their appraisers would take a more realistic look at each case and that negotiated settlements would be much more frequent--considerably reducing the log jam that has developed in many of our courts (such as here in Utah) and saving many thousands of dollars in court expenses and other costs to all concerned.

There is not the slighest doubt in my mind that, of the cases I have handled which have gone through actual trials, a system of this type would have produced negotiated settlements in at least 60-70% of the cases.

*See attached Condemnation Cases.

40. Robert I. Behar - Work for a Condemnor

My answers were based on my feeling that a condemnee should be entitled to a portion of his expenses, to take some of the "sting" out of condemnation, which is usually involuntary on the part of the condemnee.

We frequently call in independent appraisers, to save time and avoid delays. We find the expense is merited--it actually saves us money.

41. George P. Kading - Condemnors (No Comment)

42. Henry F. Davis - Condemnors

The tendency of juries to arrive at a "split" between A's and D's values would generally cause any award of attorney's fees to increase the amount of verdicts and such fees should certainly not be applicable to appellate phases of litigation.

43. John M. Stanton - Condemnors

My own thoughts are that in certain respects you have missed the important problems. It has been my experience, both personal and from having read appellate cases that there generally is not much difference between the parties on value of the part taken and that most of the controversy revolves around severance which can be very large. This factor would make the litigation expense allocation scheme impractical for reasons more fully discussed below.

It has been my experience in talking with other agencies in this State that negotiations and offers are an integral part of the condemnation process and that no good purpose would be served by requiring a so called "jurisdictional offer".

The litigants know from the very beginning that if the case is tried the least the condemnee can get is amount testified to by the condemnor's appraiser (this figure is usually known long before trial by the condemnee). If the condemnee can lose nothing by going to trial the probabilities are that very few such cases would be settled because he knows that he can't get less than he has been offered and it isn't going to cost him anything for the trial except his time since his costs are going to be paid for by the condemnor.

The present system tends to keep such cases within the bounds of reason. Any system which tends to pay a premium for not settling litigation should be disposed of.

To get back to the first objection. In your example it would not be uncommon for the parties to agree that the value of the part taken was $25,000 and the remainder of the difference is attributable severance and your fractional difference therefore breakdown.

One possible variation would be to require a condemnor to make a so called "jurisdictional offer" upon an independent appraisers appraisal, the offer and appraisal not to be admissible for any purpose in subsequent proceedings. You might even add some requirement for random selection of appraisers and set a certain fee. This would at least have the merit being an offer based upon an independent experts opinion rather than an offer based upon an employee appraisal.

These are my thoughts on the subject and should not be taken to be the view of this office or of this county.

44. James G. Ford - Condemnors (No Comment)

45. Melvin R. Goldman (No Comment)

46. John R. Merget - Condemnors (No Comment)

47. John P. Horgan - Condemnors (No Comment)

48. L. Nelson Hayhurst - Condemnees (No Comment)

49. Vincent N. Tedesco - Condemnees (No Comment)

50. Norval C. Fairman - Condemnors (No Comment)

51. Mark C. Allen, Jr. - Condemnors (No Comment)

52. Havelock Fraser - Condemnees (No Comment)

53. T. L. Chamberlain - Condemnees

(See Exhibit II attached (yellow).)

54. James A. Cobey - Condemnees

(See Exhibit III attached (green).)

55. James E. Cox - Condemnees

G: Incredible Naivete--open door to a vicious practice and real injustice.

(See Exhibit IV attached (gold).)

56. G. J. Cummings

(See Exhibit V attached (blue).)

57. James P. McGowan, Jr. - Condemnors

(See Exhibit VI attached (buff).)

58. Richard L Huxtable - Condemnees

All property owners, particularly those with small equities--most in need of a just determination--are greatly coersed by the possibility of "back sliding" or "under cutting," i.e. the possibility of getting less to the point that they forego the constitution right of jury determination.

Some condemnors deliberately and consistently use only their low appraisal at time of trial. The higher appraisal never comes before the jury because it always relates to a date of value prior to the issuance of summons. Adding contingent cost or expense recovery would tend to enlarge the "margin of fear."

A better solution is one which would reduce expense to all parties. "Independent Appraisal" is dangerous if the condemnor is given a power of approval of the appraiser's selection.

I would favor 3-man condemnation "small claims" tribunals with jurisdictional territories similar to that of each of the Courts of Appeals. If the property owner will limit his maximum recovery to $40,000 exclusive of cost and interest, and waive a jury trial; his case would be heard under liberalized rules of evidence, quickly, and with a guarantee that his recovery would not be less than the best offer previously received. He could be represented by an attorney, present evidence, and/or cross-examine, etc. But with an experienced tribunal the attorney would not waste time with trivia. Such a trial would seldom take more than one day! Often the owner wants no more than an opportunity to cross-examin the condemner's appraiser.

(See Exhibit VII attached (white).)

59. Robert V. Blade - Condemnors and Condemnees

(See Exhibit VIII attached (pink).)

60. Richard Barry

(See Exhibit IX attached (yellow).)

61. Philip M. Jelley - Condemnees

(See Exhibit X attached (green).)

62. Jerrold A. Fadem - Condemnees

Justice is the goal. I estimate 90% of condemnation cases never reach a lawyer for advice because people know there is cost for consulting a lawyer.

The idea that the government might be less than fair never occurs to most people, nor do they know that awards generally exceed offers.

(See Exhibit XI attached (gold).)

63. Reginald M. Watt - Condemnees

I have left some questions unanswered, as I would prefer to hear more discussion before giving "off-the-cuff" answers.

I believe the basic decision should be made first before getting into an argument over which plan of allowance of attorney fees and expenses should be made. The decision should first be made whether to include these items as part of just compensation. The decision as to "whether" should not be tangled up in a fight as to "how."

64. David B. Walker - Condemnees and Condemnors

There is no justification for singling out condemnation actions from other litigation; the so-called independent appraisers would be cloaked with an undeserved prestige which would be most difficult for the advocates on either side to overcome.

65. Richard L. Franck - Condemnors

As attorney for a public agency we settle approximately 95.65% of all parcels acquired (Fiscal year 1967-68) without trial, thus leaving only 4.35% which go to trial. Adding the hope of a "free" attorney to any extent can only inevitably serve to alter these percentages by encouraging litigation. As can be seen from the above statistics, if it resulted in only one per cent fewer settlements and 5.35% therefore going to trial, the percentage increase in tried cases would be about 25%, a staggering increase in litigation.

66. Alvin G. Greenwald - Condemnees

A pretrial procedure to attempt to get an agreed appraiser or appraisal panel result (to be paid for by the condemnor) could aid solution if the parties stipulated to judgement of not more than condemnees demand nor less than condemnors offer with court to determine attorney fees guided by the variant between demand and offer and the stipulated judgement based on agreed appraisal.

Further--a distinction applicable to owner occupied small residences and farms to protect those incapable of protecting themselves should be considered.

67. Hodge L. Dolle, Hodge L. Dolle, Jr. - Condemnees (No Comment)

68. H. Gary Jeffries - Condemnors (No Comment)

EXHIBIT II

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March 6, 1969

John H. DeMoully, Esq.
Executive Secretary
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Dear Mr. DeMoully:

Enclosed herewith please find my answer to the questionnaire forwarded with your letter of February 27th.

Accompanying the questionnaire are additional comments, which I do not think you should take the time to read unless you or someone else would be interested in my experience in the trial of condemnation cases, which constitutes the basis of the opinion that I now have in reference to the subjects referred to in the questionnaire. If you are, then read on.

I was admitted to the bar of California in 1913 and have been in continuous practice at Auburn, in Placer County, since that time. I first started trying condemnation cases for the plaintiff Pacific Gas & Electric Company more than forty years ago, in association with Thomas Straub, who was then Chief Counsel for the Pacific Gas & Electric Company. After the company had acquired most of the rights it needed here in Placer County, and because of the experience I had gained in sitting in with Mr. Straub in these cases, I was requested to take on the defense of condemnation cases. This I have done in the Counties of Sierra, Nevada, Placer, ElDorado, Sacramento, San Joaquin and Fresno, in both state and federal courts. Of recent years most of the condemnation cases other than those instituted by the Nevada Irrigation District for the enlargement of its facilities, have been cases instituted by the Highway Commission for rights of way for freeways and expressways.

In 1959 at a Right of Way Seminar held in Sacramento I was introduced as the attorney who had handled more highway condemnation cases on behalf of property owners than any other attorney north of Tehachapi. However, I have no way of knowing whether or not this statement was correct, but at least it indicated that I had had more than the usual small town country lawyer's share of this type of litigation. I consider condemnation cases a highly specialized field, in which a lawyer who does not have enough of it to justify his keeping abreast of the ever increasing number of decisions by our higher courts in reference to condemnation actions just has no

business attempting to handle them at all.

I know that some attorneys who represent property owners in condemnation cases handle the matter so far as the property owner is concerned on a contingent fee basis, and as I have had the opportunity to discuss the matter of compensation with these attorneys I have suggested compensation on the following basis, which is the basis that we have used over a long period of years, namely, a fixed rate of com pensation for all time devoted to the matter, other than court time, a higher rate of compensation for all time spent in court, and this is adjusted depending on whether one or two members of our firm participate in the defense of the action. In most highway condemnation cases in which we represent the property owners the Highway people usually have two attorneys participating in the trial, plus several runners and observers, so that in most Highway cases two members of our firm participate in the trial of the action. Then the entire amount of attorneys' fees, plus appraisers' fees and other costs are added together and deducted from the amount of the compromise figure or the ultimate award. From the balance remaining out of the compromise figure or the ultimate award we then deduct the amount of the offer made by the condemnor prior to the time we were retained in the matter, and out of the balance, if any, we receive from one-fifth to one-fourth of the amount by which we figure our client has profited as a result of our efforts and the expense incurred. So far as I know, this method of handling the matter so far as the property owner is concerned as proved quite satisfactory.

As of the present time, with the amount of attorneys' fee with which the property owner now finds himself confronted and the amount of the so-called expert witness fees with which he finds himself confronted, we usually advise the property owner that unless there is a reasonable chance for him to recover at least $7500 more than the amount of the condemnor's offer, we cannot recommend that he incur the expense of preparing for and going to trial in the hope of recovering a sufficient sum so that he will actually have more money after incurring this expense and going through the trial than he would if he accepted the offer. I am satisfied that the condemnor, knowing that this is our recommendation - and I am sure other attorneys make a similar recommendation - deliberately hold down the amount of the initial offer to the property owner because of this rather staggering expense with which the property owner finds himself confronted if the offer is not accepted. It seems to me that a Court appointed

expert in the early stages of the proceeding would certainly cause me to recommend that the property owner at least go to that extent to see if the condemnor would not meet the Court appointed expert's figure, rather than go to trial.

I hope that this resume of my experience and suggestions herein made will be of assistance.

Very truly yours,

T. L. Chamberlain

TLC:hb
encl.

A. Basic Preference

Based on my experience in the trial of condemnation cases over a period of more than 40 years, in most of which I have represented the condemnee, it is my thinking that the condemnee cannot be made whole or recover the just compensation which the law originally contemplated he should have if out of the award he must pay all of the expenses which must be incurred today in the defense of these actions in excess of the very nominal amount which is recoverable as legal costs.

B. Effect on Litigation and Negotiations

1. Many property owners take the first offer that is made by the condemnor because they wish to avoid the expense, uncertainty and time which would be involved if the matter were litigated.

2.. The condemnors know the approximate cost to the property owner of defending a condemnation action, and in my opinion with this knowledge the condemnor frequently offers the property owner substantially less than the condemnor knows the property owner should receive as the reasonable value of the property taken and damage to the remainder by reason of the take and use in the manner proposed, and as indicated above, for the reasons therein stated, the property owner frequently takes this offered compromise figure.

C. Expense Allocation Scheme

I would favor this only if we were unable to secure an amendment to the law which would permit the condemnee to recover all the reasonable costs in the defense of a condemnation proceeding. In these actions as they are tried by the condemnor at the present time they come in with one or more engineers, always at least two valuation so-called experts, maps, photographs, both ordinary and aerial, and in some instances even models. The property owner in order to meet as best he can this presentation by the condemnor must employ his attorney, at least two valuation so-called experts, secure title reports on sales of similar property in the vicinity, if any have been made, in some instances engage his own engineer for further surveying and mapping. Being confronted with a situation of this kind, I do not think there should be an allocation against the property owner for all or a substantial portion of this expense

D. "Jurisdictional Offer"

In most cases where the condemnor wants early possession of the property, we now have something that is tantamount to the jurisdictional offer referred to. This is usually based on a valuation figure made by some employee of the condemnor, who is rarely ever called as a witness when the action goes to trial. The men who make these affidavits as to value are anxious to hold their jobs, and they know if the valuation is not low they will lose their jobs, and consequently the valuation figures as made by these people as the basis for Court order for immediate possession are consistently low and the trial judges who are then called upon to make the orders have frequently stated that they were behind the eight ball when the only information they had as to the valuation was that supplied by the affidavit filed by the condemnor. It is my recollection that as of this time there is a legal method by which the amount of the deposit can be increased on application of the property owner, but when this is done there is a substantial difference in the consequences of a draw-down when the amount exceeds the amount deposited in the first instance, and includes any portion of the additional deposit made pursuant to application of the condemnee. If evidence of this initial deposit could be brought before the jury I think the condemnors would be inclined to up the figure considerably in order to avoid having it brought out before the jury that they tried to get the property for an amount sub-

stantially less than the property owner should have had, and if this initial figure were upped somewhat it is my thinking that more of these cases would be settled than our settled at the present time, because I have found that many cases are settled when the condemnor makes an increased figure offer after the initial deposit in court was made, and that if the condemnee had been offered in the first instance the amount of the ultimate offer by the condemnor, the condemnee would not have employed an attorney in the first instance, but would have settled. If the jurisdictional offer is to be used as a basis of determining whether or not the condemnee is to recover costs, then I would think that the amount required to be recovered in excess of the jurisdictional offer should not exceed 10 percent.

E. Trial Court's Discretion

I think that regardless of how the matter of allowing condemnees to recover all or a part of their costs may be worked out, we are going to be subject to some extent to the discretion of the trial Court; otherwise I can see how designing property owners and attorneys could rig the matter to collect unreasonable sums as compensation for appraisers' fees and attorneys' fees and incur needless expense. On the other hand, I am not unmindful of the possible disastrous consequences to the condemnee of giving trial judges discretion in the matter of costs, because I have found that some trial judges, particularly in the smaller counties, think that the condemnor gets the worst of it all the time, while most of the attorneys whom I know who have had any considerable amount of experience in the defense of condemnation cases realize that with the cost that the condemnee must incur, and which he cannot recover, places the condemnee in a position where he simply does not have a chance to get what the law at least in theory considers the property owner should have.

F. Binding Court Determination of Attorney Fees

It seems to me that the condemnee and his attorney should be free to contract in any way they see fit so far as the attorneys' compensation is concerned, but that such a contract would not be binding on the trial Court so far as the amount of attorneys' fees which the condemnor would be called upon to pay as a part of the condemnee's expense.

G. "Independent Appraisal"

I favor this, and in many instances in representing the condemnee have made application to the Court for the appointment of a Court appointed appraiser at the expense of the condemnor, but rarely will a trial judge grant this order, particularly when it is opposed by the condemnor, as it is in most instances.

Memorandum 69-57

EXHIBIT III

Court of Appeal
State of California
State Building, Los Angeles

James A. Cobey
Associate Justice

March 5, 1969

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

Dear John:

Enclosed herewith filled out is your February 17 questionnaire on "Litigation Expenses in Condemnation Proceedings."

I believe that the inability of the condemnee to recover his litigation expenses as a part of the condemnation award in many situations makes the award less than the just compensation the Constitution demands. On the other hand a blanket assurance to the condemnee of his full litigation expenses, if reasonable, in all cases would undoubtedly encourage him to litigate because, generally, he would be risking nothing but time and such a policy would therefore increase the size of the negotiated settlements. Furthermore, if the condemnee were being completely unreasonable in his demands, he would not be penalized for such unreason.

So long as the condemnee's pretrial position on damages is within the limits of reason, generally speaking, he should at least have the chance of recovering part or all of his litigation expenses from the condemnor because the transaction involved, the sale, is involuntary as to the condemnee. It is the condemnor who wants the property for a public purpose. Generally, the condemnee would not sell if he were free not to do so.

Of the four solutions proposed, I would rate at the bottom leaving the question of the proportion of the condemnee's litigation expenses, if any, which he should recover up to the unguided discretion of the trial court. As I have suggested in my answer to the appropriate question, courts need guidelines if they are to do justice in difficult matters.

The mandatory independent appraiser's report at the expense of the condemnor does not seem to me to be a satisfactory substitute for the allowance of litigation expenses in whole or in part. Ideally, if the condemnor's choice of the appraiser were a completely disinterested one it would be an effective device in reducing litigation and obtaining a reasonable valuation of the property much faster. But I fear that it would not be used ideally. The appraisers chosen by the condemnors would tend to become like the defense panel of doctors in personal injury or workman's compensation cases or the forensic psychiatrists on both sides in criminal cases. Unlike the jurisdictional offer solution there would be no pressure imposed upon the condemnor to obtain an appraisal fair to the condemnee who, of course, would have no voice in the selection of the independent appraiser. On the other hand if this appraiser's selection were made a mutual matter between the condemnor and the condemnee this device would be apt to work more fairly. In any event I would limit it strictly to settlement purposes and therefore make both the appraiser and his report unavailable at the trial to both parties and to the court.

To me the jurisdictional offer has much to recommend it. Because the condemnee would recover his litigation expenses in the event the award exceeded the condemnor's jurisdictional offer by 10% or more, the offer would generally tend to be a fair and realistic one. This objective would be obtained to the extent that condemnors wish to avoid the expense and uncertainty of litigation. On this premise I also believe that this device would reduce litigation and tend to promote pretrial settlement.

The fourth suggestion is undoubtedly the most precisely just. If it is adopted I would recommend that it be in the form of your last alternative, namely, that "the total difference between the best offers . . . be used as the denominator of a fraction, and any amount awarded beyond the condemnor's best offer . . . be the numerator." Perhaps my preference for this version rests on nothing better than my extremely limited understanding of the black art of mathematics.

Thanks for letting me comment on this problem and best wishes to you, your staff and the Commission veterans.

Sincerely yours,

JAMES A. COBEY

JAC:ta

Enclosure

Memorandum 69-57

EXHIBIT IV

LAW OFFICES OF
COX & CUMMINS
COURT AND MELLUS STREETS
MARTINEZ, CALIFORNIA 94553

JAMES E. COX
BERNARD F. CUMMINS
GARY R. RINEHART
MARCHMONT J. SCHWARTZ
CLAYTON E. CLEMENT

TELEPHONE
415-228-7300

February 24, 1969

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

Gentlemen:

Enclosed find questionnaire. It seems to me the Law Revision Commission should be more concerned with correcting the fantastic injustice created by the so-called Symons Rule, and amending the New Evidence Code so that it is less of a polemic by the Division of Highways than it now appears to be to most people in this field. I realize acerbic comment is easy and perhaps not helpful.

The courts have decided the just compensation aspect of fees and costs years ago. I see no reason for tinkering with it. Whenever property is transferred, if people are using good judgment they are put to substantial expense in connection with the transfer. The fact that the condemnee receives cash instead of paper, which is the usual market transaction, is also a factor here. Frankly, this litigation really isn't that much different from any other civil litigation. It is now so burdened with artificial and unnecessary rules that you've priced qualified services out of the market for all small people in California. We take small cases around here as a public service, and as training for our young attorneys. Every engraftment of artificial rule that you place on the existing body of eminent domain law in my considered opinion will simply add to, rather than detract from, existing injustice.

Let me give you an example: You talk of the so-called independent appraiser coming in with the mantle of independence. There are no independent appraisers appearing for condemning agencies in California to the knowledge

of most of the attorneys who have been in this field for more than ten years. There has been a lot of comment on the vicious practice of some judges to appoint a condemnor oriented witness, a so-called independent, and he is going to come in with condemning agency figures or lose his relationship with his substantial clients. Frankly, I again say you ought to look at Symons, which just destroys totally the property rights of small people with proximity damage and correct that, as well as simplify unnecessarily artificial rules of evidence. We once had a law in California which said "anything informed people would look at in the market place and base an opinion of value thereon is admissible in a condemnation case," or words to that effect. I again say all of your engraftments make it that much tougher for the little person in this State, and what essentially is simple litigation is increasingly like something out of Dickens.

Gentlemen, my comments are based upon experience in the courts in a great number of condemnation matters, as well as other matters.

Yours respectfully,

JAMES E. COX

TEC/mjg

Memorandum 69-57

EXHIBIT V

G. J. CUMMINGS
PROFESSIONAL ENGINEER
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OAKLAND, CALIFORNIA 94610

PHONE AREA CODE (415) 832-4843

FEB. 24-69.

CAL. LAW REVISION COMMISSION,
SCHOOL OF LAW OF THE UNIVERSITY,
STANFORD, CALIFORNIA. 94305.

ATT: MR. J. H. DEMOULLY.

GENTLEMEN:

REGARDING THE QUESTIONAIRE "LITIGATION EXPENSES IN CONDEMNATION PROCEEDINGS", THE ORIGINAL APPLICATION OR CONCEPT OF THE POWER OF CONDEMNATION WAS WHEREBY PRIVATE PROPERTY WAS TAKEN FOR PUBLIC USE.

THE CONCEPT AND USE OF THIS POWER TODAY HAS CHANGED: WE OFTEN SEE THIS POWER USED TO CONDEMN PROPERTY AND THEN TURN THE LAND OVER FOR PRIVATE UTILIZATION.

CONDEMNATION CAN BE AND OFTEN IS PLAIN CONFISCATION, BECAUSE THE COSTS OF APPRAISAL STUDIES AND LEGAL EXPENSES EXCEED THE VALUE OF THE PROPERTY.

IF WE INVOKE THIS ACTION FOR PUBLIC USE THEN WE SHOULD PAY ALL THE LEGAL COSTS INVOLVED PLUS THE VALUE OF THE PROPERTY. THE LAW SHOULD BE SPECIFICALLY FOR PUBLIC USE ONLY.

SINCERELY YOURS

G. J. Cummings

Memorandum 69-57

EXHIBIT VI

THE CITY OF
SAN DIEGO OFFICE OF CITY ATTORNEY- CITY ADMINISTRATION BUILDING • SAN DIEGO, CALIFORNIA 92101
Telephone 236-6220

EDWARD T. BUTLER
CITY ATTORNEY

February 24, 1969

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

Dear Mr. DeMoully:

Litigation Expenses in
Condemnation Proceedings

I have been interested for some time in the problem of attorneys' fees as a part of just compensation to the property owner whose land is condemned. After examining the approaches outlined in your letter of February 17, 1969, I don't believe any of them would really adequately solve the problem as it presently exists to both the condemnor and condemnee.

What I would favor would be a statutory schedule similar to that used in ascertaining fees in probating an estate. This would mean that a certain percentage of each specified amount of the award could be added on to the total award as a fee for the attorney, or this amount could be deducted from the total. It would seem to me more logical under a theory of "just" compensation that the amount should be added on rather than deducted, in addition to reasonable costs of an appraisal. Such a system, it seems to me, would allow adequate financial planning by condemning agencies through careful estimating.

Very truly yours,

JOHN W. WITT, City Attorney

By James P. McGowan, Jr., Deputy

JPM:rb

Memorandum 69-51

EXHIBIT VII

LAW OFFICES OF
O'NEILL, HUXTABLE & COSKRAN
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FRANCIS H. O'NEILL
RICHARD L. HUXTABLE
WILLIAM G. COSKRAN

LESLIE R. TARR
OF COUNSEL

February 20, 1969

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

Attention: John H. DeMoully

Re: Condemnation Expense

Dear John:

I am returning herewith your questionnaire regarding litigation expenses in condemnation proceedings. On the last page, my comments become lengthy and this letter will probably be more legible.

Where fundamental constitutional rights are involved, the rectification of a small injustice is just as important as a big one. Often a small differential in gross value may constitute an enormous proportion of the owners equity which, in turn, may represent most of his lifes savings. Giving a "big" property owner who can afford to "underwrite" the expense of litigation and even to take the risk of not recovering those expenses, an opportunity to recover the expense if he wins a "big victory" still seems to leave the "little guy" without a remedy that he can afford.

There should be some procedure available through which the "little guy" can seek some impartial review of the valuation issue without being forced under rules of "mutuality" to spend thousands of dollars to comply with pre-trial orders. I do not mean to criticize rules of "mutuality" or the need for thorough preparation of a "big case." The problem seems to lie in the fact that, unlike other forms of litigation, all condemnation cases must be brought in the Superior Court, all most comply with the same standards of preparation and all must be resolved through the same long and laborious process. This long and laborious process is probably the best way to avoid a "big injustice" but is hardly a way to produce a "small justice."

I believe the best solution would be to establish approximately five, three man, condemnation "small claims"

tribunals throughout the state of California, each having a jurisdictional territory similar to that of the Court of Appeals. If the property owner will limit his maximum recovery, inclusive of all elements of compensation excepting interest and costs to a designated jurisdictional amount, and waive a jury trial, his case would be transferred to that tribunal for hearing. Since the power of eminent domain is derived from the State government, it would be within the power of the legislature to waive a jury trial for the condemning agencies, in such cases, by its legislative enactment. I would suggest a jurisdictional amount of approximately $40,000 which would be sufficient to cover almost all single family residence condemnations and cover both the value of the part taken and severance damage claim in almost all street widening cases.

The tribunal would be composed of three members, equal in stature to a Judge of the Superior Court who would, almost exclusively, hear this type of case. If their docket was not sufficiently full to demand all of their time, their services might be available by appointment of the judicial council to the Superior Courts of various counties during periods of extreme case load.

Since the Judges of the tribunal hear this type of case almost exclusively, a lot of time would be saved in jury selection, opening statement, qualifications, explanation of appraisal methods, cross-examination into trivia or issues of semantics, final argument, preparation and giving of jury instructions, waiting for verdict, polling the jury, and some post-trial procedures seeking a redetermination of the credibility of the evidence. It would further make it possible for an owner to defend an action for the sole purpose of cross examining the condemnors appraiser without having to pay out $1,000 or more to hire an appraiser to prepare an appraisal report to enable him to provide "mutuality" in the exchange of valuation data in pre-trial or other procedures. Since there are three Judges on the tribunal, no one of them can control its determinations and since the property owner has voluntarily brought himself before the tribunal there is no need for peremptory challenges.

I sincerely believe that if the members of such a tribunal are carefully and fairly chosen or appointed from differing groups already having familiarity with the problems

involved, twice as many citizens can ask for an impartial determination of compensation at a fraction of the present cost of the system.

Very truly yours,

RICHARD L. HUXTABLE

RLH:mc

Memorandum 69-57

EXHIBIT VIII

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ATTORNEYS AT LAW
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95965

ROBERT V. BLADE
PERRY M. FARMER
RAOUL J. LECLERC

TELEPHONE 533-5661
AREA CODE 916

February 21, 1969

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

Dear Mr. DeMoully:

I am returning herewith the pink questionnaire entitled Litigation Expenses In Condemnation Proceedings which I have completed to the best of my ability. Unfortunately, I do not concur in the several approaches which the questionnaire reflects nor do I concur in the rather elaborate procedure which a Stanford University Law Professor whose name escapes me at the moment, proposes, which proposal is the subject of a rather extensive questionnaire received and responded to by me some months ago.

Any complete and objective approach to the problem would probably require extensive study and time, neither of which is available to me. However, I will try to set forth my views with what I hope will prove to be reasonable conciseness. First, a word about my background and view point. A number of years ago I learned something about eminent domain while acting as United States Attorney in the Lands Division Office in the San Francisco area. Later I removed to this area where I have carried on various eminent domain proceedings wherein I have appeared for land owners both in State and Federal Courts. I was also City Attorney of Oroville for a period of six years and during that time and on some occasions since then I have carried on condemnation proceedings on its behalf as a condemnor. Consequently, I think that I have a reasonable grasp of the problems and the outlook of parties in both positions.

The outlook is vastly different depending upon the party. With some obvious exceptions, the economic and political power held by the condemnor is so vastly superior to that of the condemnee as to make any reciprocal or "two way street" approach to costs unreasonable. For the wealthy condemnee, such reciprocity would be of little moment. For

the impoverished condemnee, such a rule would be primarily coercive. The problem is accentuated by the fact that most people engaged primarily in acquisition for public agencies are honestly and sincerely trying to do an objective job. They are working within budget limitations. They are usually convinced of the fairness and justness of their position and therefore find it difficult to be tolerant of the land owner, the land owner's attorney and the land owner's appraisers who seem to differ substantially with them. The condemnor can and often does, in the case of State and Federal Agencies, spend sums of monies out of all proportion to the value of the case under specific consideration. This can be justified from the standpoint of the public purse. The condemnee cannot engage in any policy expenditure of money. The condemnation may often be the only brush with such a problem which the individual encounters in the course of a lifetime. He may, if he is quite unfortunate, encounter it several times. The psychology is adverse to settlement. The condemnor must have the property and tends to think that his offer is reasonable and the refusal therefore unreasonable. The condemnee does not want his property taken, resents it, and thinks that the offer is unreasonable and that he is being victimized, a feeling accentuated by the additional costs and expenses which he must assume or submit to the offer.

I have great reluctance in setting up a "sporting" method of awarding costs and fees, depending upon the outcome of the case. Again, such items are relevantly insignificant insofar as they might encourage a condemnor to be more liberal in making offers, whereas they well could become a crushing blow to a condemnee particularly in takings involving low value parcels.

The award of counsel fees and the determination of them by a trial judge, is in my opinion, too vague, uncertain, and unpredictable as to afford an acceptable solution to the land owner's problem.

I offer some alternative thoughts.

First, all persons who purport to be real estate appraisers should be licensed by the State, should have minimum training, educational and other requirements. These people claim to be members of a profession. They are currently completely unregulated and, in my opinion, this situation should be stopped. A state agency set up for this purpose should administer compensation. Every agency should pay a

fee to the agency, which is otherwise tax supported. It should supervise all appraisers and their compensation.

The condemnor knows about his project and his need for land long before the condemnee and certainly before the condemnee's attorney who comes into the picture at a later date. Usually the condemnor has made some preliminary surveys and has some general ideas what land acquisition cost will be which information is used for obtaining appropriations and other budgetary purposes. In the case of the Division of Highways, of course, they have a number of staff appraisers, right of way agents and other acquisition personnel. These people are well trained, have many resources available to them and tend to solidify their thinking in terms of acquisition and opposed to the condemnee outlook. I would suggest that any agency having a staff appraisal and desiring to negotiate with the land owner on the basis of the staff appraisal should disclose the same and all of the backup material without attempting to deal on an arms length basis which is the present practice. The suggestion that the condemnor pay a nominal amount for the condemnee to obtain the advice of an attorney is a good one and I think should be retained.

A review of a proposed settlement and an outline of the rights of a condemnee should not require a fee greater than $50.00 in the ordinary case. Any attempt to obtain more than that should be justified by the attorney, and passed upon by the appraisal agency.

If this does not result in settlement, and the individual desires to proceed in litigation, he should hire an attorney at his own expense thereafter and the agency should not be permitted to engage the services of the so called independent fee appraiser except subject to the provisions which are outlined below. If the agency does elect to obtain the services of an independent fee appraiser it should so advise the land owner's attorney and he should likewise be entitled to select an independent fee appraiser on behalf of the land owner. Such appraisers would, under my view, be licensed and qualified. All sales and market data developed by the acquiring agency or by any appraiser whether an independent fee appraiser or otherwise should be made available for the fee appraiser selected on behalf of the land owner. Indeed, I see no reason why all sales data

should not be available to all parties at all times.

If the matter proceeds to trial I would leave the costs and charges fixed in the same manner in which they are now except only that the costs of the fee appraiser selected on behalf of the land owner would be paid by the State as opposed to the condemning agency. The amount of the fees should be uniform and consistent with going rates and if necessary approved by the court. Obviously for similar time similar rates should apply to the appraiser for the State as well as the appraiser for the land owners. If the condemnor wants two appraisers, the land owner should be entitled to two.

Where a condemning agency does not have a staff of appraisers, and simply engages a fee appraiser at the beginning of its program, all of the information should be made available to the land owner upon the initial transaction. If the land owner wished an independent fee appraiser, in such instance, I think he should be compelled to pay the initial or a minimum amount, perhaps $250.00, perhaps $500.00. Charges over that should be paid by the appraisal agency. This might encourage several land owners to get together so as to reduce their individual charges. It should discourage the frivolous demand of expensive professional time for the appraisal of minimum value paracels. If after the appraiser is engaged and his appraisal disclosed, the parties can not get together, then I think they should proceed to trial generally in the manner first above outlined.

It is to be noted, that except for additional advice, the land owner pays his own attorney. This should be sufficient to encourage compromise settlement where the appraisers are independent and where their opinions are not substantially at variance. It they are, we have the same litigation approach as we now have and have had in the past.

The foregoing proposal may have many hidden problems but it represents an approach which I think might be given consideration.

Yours very truly,

BLADE & FARMER

Robert V. Blade

Robert V. Blade

RVB/mm
Enclosure

Memorandum 69-57

EXHIBIT IX

The Superior Court

111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012

RICHARD BARRY
COURT COMMISSIONER

February 27, 1969

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

Dear John:

At my first opportunity I shall attempt a more complete response to your request of February 20, 1969 with reference to awards of litigation expense. My preliminary reaction is that the cost and particularly the cost of judicial administration may be a consideration that outweighs the value or the legislative objective with respect to each of the alternate methods that are under consideration.

Sincerely,

Richard Barry

RB:gos

Memorandum 69-57

EXHIBIT X

FITZGERALD, ABBOTT & BEARDSLEY

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GERALD C. SMITH
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R. H. FITZGERALD 1858-1934
CARL H. ABBOTT 1867-1933
CHARLES A. BEARDSLEY 1882-1963

February 24, 1969

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

Re: Tentative Recommendations of Law Revision Commission Relating to Condemnation Law and Procedure - Litigation Expenses in Condemnation Proceedings

Dear Mr. DeMoully:

As you know, I have been following with interest the work of the Law Revision Commission with reference to this particular phase of legal practice. I have responded to earlier questionnaires and I am enclosing my completed questionnaire which was circulated with your letter of explanation on February 17, 1969.

There are several points which I wish to comment upon in greater detail.

(a) On the matter of the amount of legal fees being left to the trial court's discretion, and furthermore, the trial court making binding awards relating to fees between a client and his attorney, I feel this is impracticable. It is rare that you find a judge who has had extensive condemnation experience either in private practice or in previous legal cases. Accordingly, I feel that judges are unable to evaluate properly the amount of time, effort, imagination, ingenuity, expertise and sheer drudgery in a lawyer's preparation of a condemnation case. Some judges who disagree with the award made by the jury might take this opportunity to "even up" by reducing the amount of an ward to be made for the condemnee's attorneys' fees.

(b) I feel that the independent appraiser idea is a good one, particularly since I have discovered that in early stages of negotiations, the figures have been developed by the authorities themselves or a very hasty "windshield" appraisal. Of course, an attorney representing a condemnee who would like to have a little more but does not want to embark on a full scale course of litigation, is in much the same position. If an independent appraiser, acceptable to both parties, could be requested to make an appraisal, the result might be beneficial to all parties.

However, I do not feel that the appraisal should become a commitment by either party or available for a judge to impose on a case. I have been stunned by some of my appraisers and their approach to real property valuation, and I am sure that opposing counsel has been likewise. I do not feel that a condemnee's or condemnor's case should be left completely in the hands of an appraiser, because this would take away one of the important values in a jury trial. Either party should be able to call the appraiser if he desires, but he should be responsible for the appraiser as his witness. I do not feel that a judge should have the right to call an appraiser in a jury trial under any circumstances.

Sincerely yours,

Philip M. Jelley

PMJ:slw

Enclosure

Memorandum 69-57

EXHIBIT XI

FADEM AND KANNER
ATTORNEYS AT LAW
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JERROLD A. FADEM
GIDEON KANNER
IRWIN M. FRIEDMAN
RONALD H. TELANOFF
WILLIAM STOCKER

OF COUNSEL
ERNEST L. GRAVES
ROBERT S. FINCK

February 27, 1969

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

Re: Litigation Expense in condemnation proceedings

Dear Mr. DeMoully:

I have received your letter of February 17 and am enclosing my questionnaire in response thereto.

I commend you for bringing this matter to the fore. While it can be reasonably argued that there are other matters of equal or greater proportions such as access denial, moving expenses, stultification of property use years in advance of condemnation resulting from advance announcement, and non-compensability of noise, dust and fumes arising from operation of the public works upon another person's land, your subject of inquiry seems to me to be the more fundamental.

I hold to the view that litigation expenses are the more fundamental for two principal reasons:

1. Adequate advice and representation are indispensable for the protection of the owner's constitutional rights to just compensation. The fear of attorneys' fees, and the use of attorneys, would be greatly ameliorated. The use of proper counsel would be encouraged if reimbursement of litigation expenses were adopted.

2. Just compensation is the goal. Just compensation, less litigation expense, does not equal just

compensation.

While as my questionnaire indicates, I believe there might be some increase in litigation if expense reimbursement were adopted, I believe that it would not be overwhelming in magnitude. There are many reasons for my belief that the increase would not be great, but I shall mention only the delay, time and energy consumption, and dislike of litigation. Attorneys do not promote litigation. If there be any increase in litigation it would be more than justified by the enhanced likelihood that persons being involuntarily deprived of their property were receiving just compensation therefor.

As a lawyer who spends most of the days of the year in courtrooms trying condemnation cases before juries and who talks to as many people about their attitudes towards condemnation other than those likewise engaged, I can tell you that state-wide we lose as many as a half dozen jurors off a panel because they express the conviction that eminent domain is unfair and unjust. In short, we presently have a system that in our opinion does not work in most cases and which to my observation a substantial portion of the public realizes.

I hope you will see fit to continue your investigation of this problem and will come forth with a plan which will gain legislative approval for expense reimbursement.

Let me again express my appreciation of the work that is done by the Commission.

Sincerely yours,

JERROLD A. FADEM
for
FADEM AND KANNER

JAF/ms

Memorandum 69-57

EXHIBIT XII

G. J. CUMMINGS
PROFESSIONAL ENGINEER
LICENSE NO. M. E. 2424
648 CARLSTON AVENUE
OAKLAND, CALIFORNIA 94610

PHONE AREA CODE (415) 832-4843

MARCH 10-69.

CALIF. LAW REVISION COMMISSION,
SCHOOL OF LAW, STANFORD UNIVERSITY,
STANFORD, CALIFORNIA. 94305.

ATT: MR. JOHN H. DEMOULLY.

DEAR MR. DEMOULLY:

IN A RECENT LAW-REVISION COMMENT I URGED THE SET-UP OF THE LAW BE REVISED SO THAT THE CONDEMNOR SHOULD BE LIABLE FOR ALL LEGAL COSTS.

THE ENCLOSED NEWS-CLIP IS A GOOD EXAMPLE OF THE COSTS INVOLVED AND, FOR A SMALL PROPERTY OWNER IT MIGHT BE JUST PLAIN CONFISCATION.

SINCERELY YOURS

Peralta Jr. College Land Action

Peralta Junior College District has withdrawn from condemnation proceedings on land selected for the Berkeley College site and will make no further attempt to obtain the waterfront property.

The district had been attempting to purchase a 77.86 acre site located between the Bay and Eastshore Freeway. George Murphy of Honolulu owns 47 acres of the land, and the balance is the property of Santa Fe Railroad.

Condemnation proceedings began Monday in Alameda County Superior Court on the Murphy property. Late yesterday, evidence was introduced to show a recent sale of comparable land at $56,000 per acre.

This figure was about twice what the district could pay, and the suit was withdrawn on advice of the county counsel.

Peralta Colleges will save an estimated $200,000 in court costs, by stopping action at this point. Costs could have risen as high as $500,000 if the case had proceeded.

Memorandum 69-57

EXHIBIT XIII

JOSEPH O. PEELER
JOHN M. ROBINSON
MELVIN D. WILSON
DAVID P. EVANS
JAMES E. LUDLAM
GERALD E. KELLY
JESSE W. MALLEY
BRUCE C. CLARK
MURRAY E. MARVIN
STUART C. PEELER
BRUCE A. REVAK, JR.
RALPH E. ERICKSON
CHARLES K. FORBES
THOMAS J. REILLY
RICHARD Y. APEL
GEORGE C. HADLEY
THOMAS M. COLLINS
PETER C. BRADFORD
DONALD J. DREW

RICHARD O. DEAR
LEONARD E. CASTRO
J. PATRICK WHALEY
MICHAEL W. CONLON
MICHAEL M. MURPHY
WILLIAM A. EMANUEL
EDWARD A. LANOTY
JOHN A. BROWNING
DONALD R. GAIL
C. ROBERT FERGUSON
LAUDER M. HODGES
JOSEPH A. SAUNDERS
RONALD G. STRAYHER
JEFFREY R. MATSEN
ROBERT E. THOMSON
ROGER B. RAYMILLER
FRANK H. SMITH, JR.
GALE C. GUTHRIE

ELVON MUSICK
1880-1958

LEROY A. GARRETT
1905-1963

MORTIMER A. KLINE
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CABLE "PEELGAR"

March 12, 1969

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

Attention: John H. DeMoully, Executive Secretary

Gentlemen:

At the regularly scheduled meeting of March 8, 1969, of the Committee on Governmental Liability and Condemnation, the Law Revision Commission's tentative recommendation No. 65 regarding "Inverse Condemnation, Privilege to Enter, Examine and Survey" was discussed and the following was unanimously agreed upon:

A. The proposed amendment to Code of Civil Procedure Section 1242.5, subdivision (a), was acceptable with a slight modification; to wit, substituting the following in lieu of the last two lines of the proposed section: ". . . reasonably related to the purpose for which the power may be exercised."

B. As to the provision in Section 1242.5, subdivisions (b) and (d) regarding attorney's fees, the Committee feels this is of such general import that the subject of attorney's fees should not be treated separately from the general problem and should, therefore, be deleted.

Discussion was held on your questionnaire entitled "Litigation Expenses in Condemnation Proceedings." It was unanimously agreed that this issue is of such import that it merits further study, and this Committee takes this position without expressing, at this time, whether or not it is dissatisfied with existing law. In this connection, it was agreed that the individual members of the Committee, as individuals, could, if they so desired, complete and return your questionnaire simply by way of expressing their personal views on the problem and not in

any sense reflecting thereby Committee action one way or another.

Very truly yours,

George C. Hadley
Chairman

GCH:mm

cc: The State Bar of California

Memorandum 69-57

EXHIBIT XIV

The Superior Court

111 NORTH HILL STREET

LOS ANGELES, CALIFORNIA 90012

RICHARD BARRY
COURT COMMISSIONER

March 12, 1969

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

Dear John:

This letter supplements my recent response to your request of February 20, 1969. I have reviewed your circularized letter of February 17, 1969 and also the questionnaire. In my opinion there may be no escape from the inherent complications in any scheme to defray professional litigation costs. Professional fees, as costs, invite controversy, particularly when the expense is incurred by a party who is unconcerned with the amount thereof.

Proposals to defray these expenses have frequently been debated by the Conference of Bar Delegates, and have been referred to Conference committees for further study, and such committees seem to find it difficult to recommend legislative solutions. Several Resolutions on the subject (including one that referred to condemnation procedures) were before the Conference in 1966. They were referred to a committee for study and for further study in 1967 and again in 1968. You are probably familiar with these studies. In 1969 the committee might report that the subject is being studied by the Law Revision Commission. The enthusiasm over the idea that someone other than the client will pay the attorney fee usually diminishes in the face of ethical, public policy and other questions. Also, there is the usual expression of fear that the long term effect might reduce fees so that minimums (if schedules are adopted) will soon become maximums.

In your circularized letter of February 17, 1969, you ask whether attorney fees in condemnation proceedings should be treated in the same manner as in domestic relations and in Workmen's Compensation cases. Assuming that attorneys are fully familiar with the manner in which fees are fixed in such cases, it may be that their answers will reveal the futility of attempting to resolve anything in this disputed area of fee allowances.

In Workmen's Compensation cases, as you know, attorney fees are not assessed against an opposing party. The only exception is that fees are assessed against a defendant who is neither insured

nor has qualified as a self-insured. The reason for the exception is the collection problem. The large volume of litigated cases actually represents a very small percentage of the total cases in which compensation is paid. Voluntary payments are the rule and therefore usually do not require legal services. In the litigated cases there is a determination as to the reasonableness of the attorney fees, but that is for the purpose of establishing the amount of the attorney's lien on the employee's award. During more than 50 years since our Workmen's Compensation laws were first enacted it has often been urged that injured employees are not fully compensated if they cannot defray the expense of their attorneys. Legislation to provide for legal expenses has never succeeded because it has generally been conceded that assessment of fees against defendants would increase the litigation in that area; to an extent that might change the entire system from one that is largely self-operational to a costly public monitoring system. Significantly, most employees' attorneys have not favored such legislation because it would subject the reasonableness of a fee to an adversarial proceeding. Presently the determination of "reasonableness" is within the attorney-client context. This is illustrated by Ethics Opinion No. 278 (1963) of the Los Angeles Bar Association which holds that if an attorney applies for an increased fee, he has the duty to advise his client that he may obtain other counsel and oppose the increase.

In 1949 workmen's compensation legislation was enacted to provide reimbursement of medical services incurred for the purpose of proving an employee's contested case. In 1959 the legislation was expanded so that this type of litigation expense is allowed regardless of whether the employee is successful in his litigation. As salutary as these provisions may be it has been difficult to contain the costs or the controversies over the reasonableness of charges for forensic medical services.

Using domestic relations cases as an analogy does not seem to offer very much assistance either. Attorney fees are very often agreed to by attorneys in property settlement agreements or by stipulation; or fixed by the court on default. In those cases where the court is called upon to fix a contested fee, then the financial circumstances (usually unpromising) is a consideration that seems to dominate the usual factors which would otherwise be considered in fixing fees. Another consideration is that until a divorce is final the source of funds is the equally owned community property, including income.

As we know, a reasonable fee depends on factors such as age, experience, ability, result achieved and time spent. We know this from reading our appellate decisions, although it has not been possible for them to tell us how much weight should be given to each factor. All material factors must be considered. For example, it may be that an inexperienced attorney has spent a great deal of time on a case and the only benefit to him is his experience, while in another case the experience and ability of the attorney may be such that he has earned a liberal fee for quickly concluding a case. If these factors are maintained within the attorney-client relationship they rarely become a disputed issue, nor do they materially affect the litigation volume. If a client does not have to pay, and being unconcerned with the amount someone else has to pay, then disputes over the amount of such fees are inevitable. Sometimes such disputes involve the search of a file that would otherwise be confidential and the calling of witnesses on such distasteful subjects as the ability (or lack thereof) of the attorney.

The difficulty with the offer and acceptance method of fixing attorney fees arises from the fact that the best offer of the condemnor may be reflected by the ability of the opposing attorney in the course of negotiations. Furthermore, the offer and acceptance, including the "jurisdictional offer" requirement, attempts to take into account the "result achieved" factor by isolating it from other factors which have always been of consideration in fixing fees. Some attorneys may feelthat it is inappropriate to have their fees fixed on that contingency and do not want either to have that kind of a financial interest in a lawsuit or have the opposing party or the court meddling, so to speak, in the fixing of their professional fees. At least, these have been some of the reactions considered by Conference Resolutions Committees.

You have asked that I express an opinion on whether the condemnee's litigation costs should be reimbursed, and I reluctantly conclude that more problems would be created than would be solved if reimbursement is allowed under any of the methods or circumstances under consideration. Also, the added cost of administering the disputes arising therefrom, although difficult to estimate, would seem to be of crucial importance. There is also a real possibility that instead of making cases more negotiable they would become less negotiable if the value of the attorney's services is to be a disputed item. Even if the item could be separated so that the dispute could be resolved without endangering the settlement of the principal issues, there would still be litigation and the additional expense

of administering disputes arising therefrom. A reluctance to agree on the value or extent of professional services, particularly when they must be paid from public funds, is not unlikely, as we know from our experience in cases on abandonment.

It is easy to agree that all unwilling sellers of real property should be afforded all necessary means to insure an economic venture. However, I believe we should avoid an increased expenditure of public funds for litigation for the purpose of ascertaining an "informed discretion" to permit us to allow other public funds to defray costs of litigation. I believe we must consider the actual costs of judicial administration and the fact that no more than a token portion thereof is ever assessed to a litigant. Any "litigation avoidance concession" by either party is largely unrelated to the enormous costs of maintaining our courts. In this respect I do not recommend any increased court costs to litigants, but I do feel that a realistic approach to any scheme for the allocation of expenses requires some consideration of all of the economics that are involved.

Any considerations such as moving costs, if they deter litigation by means of more attractive offers, probably reduce ultimate expenditures. In the same category would be bonus payments over market value where values have been depressed by a public use, as in the case of airport runways designed for jet aircraft. Granted the authority to make payments of this kind, a condemnor should be able to head off a lot of litigation which otherwise tends to become vexatious and expensive for all concerned.

My attempt to evaluate the suggestion that the condemnee be permitted to demand an "independent appraisal" is somewhat tentative because I do not fully understand the procedures that might be contemplated in order to achieve a practical result. There would have to be a knowledgeable agreement on the impartiality of the appraiser. Otherwise, there would be another dispute which could not be resolved without coming before the court. The court probably could not resolve the question unless a large panel of impartial appraisers were made available on a regular basis. Also, there might be a tendency to suspend all negotiations to await the independent appraisal, and then negotiations might become frozen upon receipt of the independent's opinion if the opinion is unacceptable to one side. A completely honest and impartial appraiser might end a lawsuit, but he also might end up in court in place of the appraiser who will have been discarded by one side. In particular cases an independent appraisal can be a useful tool and a means for avoiding trials. However, if the idea is to have such an appraisal, or the right to have one in the case of each public purchase of land, then I am of

the opinion that it would not be practical and would not have an overall economic justification.

To sum it up I think we must take into account the increasing demands on our courts. The criminal cases have been increasing so significantly that available facilities for the adjudication of civil disputes have been decreasing at an alarming rate. Here we are dealing with civil cases that have priority over all other civil cases. Anything we attempt to accomplish by way of additional judicial determination of eminent domain matters will have a direct effect on the balance of all civil trial calendars--which are already backed up with an ever-increasing amount of delay. At least that is the way it is here. Other urban areas must have the same problem. For these reasons and because I believe it is economically sound from the public standpoint, I hope you will duly consider any substantive or procedural changes that will bring about any balance that may be needed to achieve negotiated settlements in the nature of the open market transactions they are supposed to simulate. In other words, if the laws of the market place need changing to keep these real estate transactions where they rightfully belong, then any needed changes should be considered. There will always be litigation in this area but it should not be the framework for the solution of all problems. I hope you will defer consideration of any procedures that seems to promise either additional judicial determinations of secondary disputes or the possibility of more litigation.

With best regards,

Sincerely,

Richard Barry

RB:les

EXHIBIT XV

OFFICE OF CITY ATTORNEY

CITY OF BURBANK

CALIFORNIA

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849-1231

SAMUEL GORLICK
CITY ATTORNEY

ELDON V. SOPER
RICHARD L. SIEG, JR.
VINCENT STEFANO, JR.
ASSISTANTS

MYLES M. MATTENSON
DEPUTY

March 13, 1969

California Law Revision Commission
School of Law
Stanford University
Stanford, California 93405

Subject: Litigation expenses in condemnation proceedings

Gentlemen:

Reference is made to your memorandum of February 17, 1969, subject as above.

We have reviewed your transmittal in the light of considerable experience in the field of eminent domain and we are emphatically opposed to any scheme which would permit a condemnee to recover attorneys' fees in a condemnation proceeding. A large and growing percentage of the time of the courts is spent in the trial of proceedings in eminent domain, and in the event condemnees could recover their attorneys' fees it would become virtually impossible to settle these cases on a reasonable basis and much more court time would be occupied in trying them.

With respect to the matter of recovery by defendants of their appraisal costs a more plausible case can be made. Any such provision would have to be carefully worded so as to prevent mulcting of the fisc.

Several years ago the writer tried one condemnation proceeding in which two well known appraisers, acting for clients of very substantial means, worked over a period of months to appraise two parcels of property, and on cross examination it was developed that their work included the making of a survey in which one of the appraisers operated the transit and the other was his chain man. The appraisers who appraised the same properties for the condemning body did their work, and it was thorough, in a small part of the time allegedly spent

by the appraisers for the property owners.

If appraisal fees are allowed to defendants in these cases we may confidently expect that the work of the property owners' appraisers will be incredibly thorough and time consuming and appraisal services for both condemnors and condemnees will become more costly.

We are therefore opposed to any allowance either of attorneys' fees or of appraisal fees to defendants in condemnation proceedings.

Very truly yours,

SAMUEL GORLICK
City Attorney

By Eldon V. Soper
Eldon V. Soper
Assistant City Attorney

EVS:lh

MORANDUM 69-57

EXHIBIT XVI

Law Offices of

WATT AND LEVERENZ

REGINALD M. WATT
CARL B. LEVERENZ

118 WEST SECOND STREET
CHICO, CALIFORNIA 95926
TELEPHONE (916) 343-7982

March 14, 1969

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

Dear Mr. DeMoully:

Re: Litigation expenses in condemnation proceedings

I appreciate your forwarding me the memorandum and Questionnaire concerning litigation expense in condemnation proceedings.

I have enclosed my response which, as you will note, is only partially answered. On the third page I stated why I have left some of the questions unanswered at this point, but would be glad to participate in any round-table discussions looking toward a reasonable approach to determining the amount of attorneys' fees or expenses, or a basis for determining them, if they are to be awarded to the condemnee.

It was a pleasure to meet you in San Francisco and I do hope I can attend more of the Commission meetings.

Very sincerely,

Reg Watt

Reginald M. Watt

RMW:eje
Enclosure

Memo 69-66

EXHIBIT XVII

Pacific Lighting Service Company

P. DENNIS KEENAN
ATTORNEY

April 22, 1969

California Law Revision Commission
School Of Law
Stanford University
Stanford, California 94304.

Re: Possible Revisions In The Condemnation Law

Gentlemen:

The Pacific Lighting System is again appreciative of the Commission's solicitation of its views concerning possible revisions in the condemnation law. We have completed the enclosed questionaire which you directed to us, and we accept the Commission's invitation to provide further definition to our views on the subject of reimbursement for expenses incurred in condemnation litigation.

The very fact of the Commission's inquiry into this field suggests some discomfort with the law's present failure to provide for reimbursement of litigation expenses and the probable feeling that this failure violates the constitutional concept of "just compensation" to the condemnee. No one can deny the existence of these litigation expenses, nor can it be refuted that in many cases these expenses constitute a significant sum. Yet, this phenomenon of nonrecovery of litigation expenses is not unique to the condemnation field. The law also promises the personal injury victim, or the party whose contract has been breached, "full and fair" compensation for the wrongs done to him. Yet, as soon as that litigant retains an attorney to pursue his claim, it is probable that his recovery will be reduced anywhere from 25 to 40%, and this diminution is clearly not recoverable. Thus, in these fields as well, the law's mandate of "full compensation" is somehow transformed into "60 to 75% of full compensation."

These analogies to other fields are not cited merely in an effort to preserve symmetry; rather, these examples simply illustrate that the almost-uniform policy of the law

requiring a party to bear his own costs of litigation must rest upon some firm basis. However, we would not subscribe to the Commission's explanation that ". . .the expenses incurred in connection with condemnation proceedings are a reciprocal consideration and that leaving each party to bear his own expenses is 'fair'." It is difficult to perceive how the concept of "fairness" is served when a party is obliged to incur substantial costs in pursuing his claim simply because the responsible party is incurring similar litigation costs. Rather, the rule of nonrecovery of litigation expenses reflects the law's awareness that disputed issues or facts are an intangible commodity until they have been determined by the judge or jury. Prior to that time the parties in dispute have their own opinions and conclusions concerning the appropriate law and critical facts involved in the case. As might be expected, each parties' evaluation is influenced and shaped by his own interest, and thus the parties' positions are often widely seperated. The fact that there is a significant disparity between the conclusions reached by the litigating parties does not mean that these opinions lack conviction. On the contrary, each of the disputing parties is firmly convinced that his position is correct, and that his adversary's conclusion is in error. This illusion is not corrected until the "true facts" are finalized in the jury's verdict or the court's decision.

When seen from this perspective, it becomes clear that the present rules directing nonrecovery of litigation expenses serve a useful purpose in the law. If each party realizes that the expense of establishing his version of the "truth" will be nonrecoverable, then each party must moderate his position in recognition of the fact that "the game might not be worth the candle." Thus, the present rules barring recovery of attorney's fees in most types of litigation merely implement the valid public policy of promoting compromise.

The critics of the present rules state only half of the case when they urge that condemnors compel land owners to discount the fair value of their property by the cost of anticipated litigation expenses. This argument assumes that the true value of the property is a single amount which is easily recognizable to both parties from the outset. This simplistic approach fails to recognize that opinions of a property's value may vary considerably, even among experts. While the condemnee may be obliged to revise his evaluation in light of a "litigation avoidance consession", the condemnor similarly must increase his judgment concerning the property's value in order to reflect his anticipated expenses of litigation.

As a result, compromise becomes possible. If the rules were changed to permit recovery of such expenses by either party, a valuable incentive for compromise would be lost. If the rules were altered to permit recovery of litigation expenses by condemnees only, the bargaining position of condemnor's would be seriously impaired.

For these reasons, the Pacific Lighting System urges the Commission to withhold any recommendation for change of the present rules for nonrecovery of litigation expenses.

Very truly yours,

P. Dennis Keenan

PDK:sa

Memo 69-66

EXHIBIT XVIII

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TELEPHONE (213) 627-5017

FRANCIS H. O'NEILL
RICHARD L. HUXTABLE
WILLIAM G. COSKRAN

LESLIE R. TARR
OF COUNSEL

April 18, 1969

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

Attention: John H. DeMoully, Executive Secretary

Re: Recommendation for Arbitration of Just Compensation in Condemnation Proceedings

Gentlemen:

I have received and reviewed your Recommendation No. 2 as revised March 26, 1969.

Although there is much to be said in favor of having the arbitration procedure available in determination of just compensation, I very sincerely doubt that it will be used in cases where both sides are represented by experienced attorneys and I fear that over zealous representatives of public agencies will use the agreement to arbitrate as a device to discourage unrepresented property owners from employing either an attorney or an appraiser, to waive their right to a jury trial, to consent an apportionment of costs which otherwise could only be imposed on the condemning agency.

I am further dismayed by the language in proposed Section 1273.05 that, "The effect and enforceability of an agreement authorized by this chapter is not defeated or impaired by contention or proof by any party to the agreement that the person acquiring the property pursuant to the agreement lacks the power or capacity to take the property by eminent domain proceedings."

I firmly believe that this law, if enacted will require most condemnation lawyers to become experts in actions brought to rescind agreements to sell and arbitrate on the grounds that such were fraudulantly obtained by over zealous right-of-way agents or were contracts of adhesion signed by property owners who thought they were only agreeing to an alternative procedure without forfeiture of legal rights in judicial proceedings.

I do not believe that any provision authorizing agreement to arbitrate should, as a matter of public policy, allow the acquiring agency to solicit the agreement of the property owner that the property owner would share in the cost of arbitration or which would preclude a property owner who subsequently employes an attorney from being released from the effect of that agreement prior to determination by the arbitrator.

One reason why I believe that experienced condemnation attorneys would not allow their clients to consent to arbitration is a method by which arbitrators are appointed under Section 1281.6 of the Code of Civil Procedure. I do not feel it appropriate in a condemnation case, that the judge would be permitted to nominate arbitrators from a list compiled by a governmental agency. Secondly, I do not feel it appropriate that the parties should have no opportunity to object to one or more of the nominees. If the arbitration act becomes applicable to condemnation cases, I believe that Section 1281.6 should be amended so as to preclude the court's nomination of arbitrators from lists compiled by governmental agencies; and, in single arbitrator situations, to permit each side to file objections to as many as two of the five names nominated by the court. In cases where the agreement calls for more than one abritrator, the number of names to be nominated by the court would be enlarged so the total number of names is at least six greater than the number of arbitrators to be appointed and each side would have the rights to object to as many as three of the persons nominated by the court.

I feel that the objection procedure is necessary since I observe that many persons are convinced that there is a commitment to concepts of value on the part of others in the field, whether those other persons be attorneys, appraisers, or judges. It would be very regreatable if an attorney advising a client as to whether or not he should sign an agreement to arbitrate, were unable to give him any absolute assurance that the deck could not be "stacked against him."

In practice, I have observed that certain public agencies will never waive a jury trial until they are absolutely certain of who the judge will be. I assume this is true, because there may be some judges who are not completely impartial as a result of some past experience with the public agency in question. This is one of the reasons why I believe

the agreement to arbitrate will not be used by condemning agencies unless there is a substantial benefit to be gained over and above the mere avoidance of jury fees or the "uncertainty" of jury verdicts.

I am also critical of the arbitration concept in that it would seem to perfer the single arbitrator mode of determination under Code of Civil Procedure Section 1282(a). In condemnation cases in particular, I believe in decision by pragmatic discussion after the advocate's arguments have been heard. There are many elements indicating the presence or lack of value, or the reality or speculative character of damages, that seem far-fetched to one judge yet quite real to another. I believe there should be at least three arbitrators so that the case is tested by discussion in the determinative process itself.

On February 20, 1969 I wrote to you a letter relating to your condemnation expense study. In that letter I made a suggestion relating to a three judge tribunal procedure which would be applicable in cases where the property owner was willing to limit his maximum recovery and would waive a jury trial. I believe that such a procedure would fulfill many of the purposes intended by your arbitration proposal, would not be dependent upon the agreement of both parties, and would provide a remedy for many small claimants who do not now get a chance for a judicial review of the condemning agency's appraisal.

Very truly yours,

RICHARD L. HUXTABLE

RLH:mc

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California Law Revision Commission
School of Law
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Attention: John H. DeMoully, Executive Secretary

Re: Recommendation for Arbitration of Just Compensation in Condemnation Proceedings

Dear John:

Thank you for your letter of April 23, 1969. I believe the economics you suggest is a compelling argument in favor of my belief that a substantial portion of the condemnation case load could be more efficiently disposed of by a specializing tribunal. At any given time you can find the time of at least five trial departments being consumed by condemnation cases in Los Angeles County alone. At least two such cases are on the jury trial calendar in Department 1 every day. I believe that a specializing tribunal could handle at least one-third of this case load and a similar proportion of case load of at least two or three other counties and still have enough time left over to hear numerous cases where the property owner, under present procedures, are economically squeezed out of the remedy to which the constitution says they are entitled.

My plan offers the additional incentive that it does not require constitutional amendment and is still not dependent upon both parties voluntarily accepting the procedure.

My primary objection to the arbitration suggestion is that if a single arbiter is not to be suspected of being bias, he will most likely be inexperienced. In such circumstances it will still cost just as much money and take just as much time to prepare for trial, educate the arbiter, and persuade him. Worst of all, if the arbiter's determination

favors either one of the parties, the other will suspect that he was denied a fair trial, and, if the determination is an obvious compromise, both will suspect that the arbiter abdicated his duty.

I have on several occasions, for one reason or another, waived a jury in a condemnation case and tried the issue of fair market value to a single judge. In only one such case where I was able to establish that the basic premise upon which the other side's witnesses had based their opinions was absolutely false, was the verdict one where all parties felt a just result was reached. In all other such cases the verdict was identified by one party or the other as a "gift of public funds" or a "confiscation of private property."

I have also represented many property owners who received compensation which was substantially less than that that they had hoped to recover. Where the determination was one of the multiple intellect of the jury, most have felt that, at least, they had had a fair trial.

In short, I feel that although we should strive to do justice, it is equally important that the people whose rights are adjudicated should believe that justice was fairly administered.

I also believe that you have completely failed to appreciate the probable cost of arbitration procedures. I have sat as an arbitrator for the American Arbitration Association, without compensation. I can only do so because the type of case they have asked me to hear are those that can be disposed of in one-half day or one day at a maximum. If I were asked to sit as an arbitrator in a case which would take five, or six or ten days to hear, I would be required to charge a substantial fee for those services. The arbitration association, through the levy of its fees and charges would have to recover its cost of administrative staff, and provision of hearing rooms and other facilities. It is my understanding that the fee charged for the filing of a petition for arbitration is already substantially higher than the fee charged for filing an action in the Superior Court.

Perhaps the obvious solution to the above is to assume that inexperienced, and perhaps unqualified arbitrators will be used and that the hearings will be heard in improvised surroundings.

All things considered, I can only conclude that a determination of fair market value that will be regarded as fair and just by all parties will have to be made by experienced and qualified persons in a dignified proceeding and that the only effective way to save money is to cut down the time that it will take for the case to be heard.

Very truly yours,

RICHARD L. HUXTABLE

RLH:mc