65.20 6/16/69

Memorandum 69-75

Subject: Study 65.20 - Inverse Condemnation (Right to Enter, Survey, and Examine Property)

In this memorandum, we review the comments received after distribution of the tentative recommendation relating to the right to enter, survey, and examine property. A copy of the recommendation, as well as copies of most of the comments received (Exhibits I-VII), are attached hereto.

At the June 26-28 meeting, we hope the Commission will be able to review these materials and make any necessary changes in the tentative recommendation in order that the recommendation may be printed during the summer for submission to the Legislature in the fall.

General reaction

The recommendation seems to have had a generally favorable, if not enthusiastic, reception. The County Counsels of both San Diego (Exhibit III) and Los Angeles Counties (Exhibit IV) approve the recommendation as drafted as a helpful and desirable clarification. (To the same effect is an unreproduced letter from G. J. Cummings, Professional Engineer.) With one minor change (discussed below), and a reservation concerning the award of attorney's fees, the State Bar Committee on Governmental Liability and Condemnation also extends its approval. Only the Department of Public Works (Exhibit I) is really critical of the recommendation and would apparently oppose it in its present form. The specific criticisms of the Department will be presented in order below.

Section 1242.

The State Bar Committee on Governmental Liability and Condemnation would revise subdivision (a) to provide:

(a) A person having the power of eminent domain may enter upon a property and conduct surveys, map-making, and examinations ~~to determine the suitability of the property for acquisition for a purpose for which the power may be exercised~~ reasonably related to the purpose for which the power may be exercised.

Substantively, the respective provisions are similar, if not identical. The Committee's proposal is possibly broader in scope or at least may permit such an interpretation, but actually there seems little to choose from between the two except the Committee's proposal does seem to read more smoothly. The staff recommends the change be accepted.

The Department of Public Works comments that it is satisfied with its authority under existing Section 1242 and has experienced very little trouble under this statute. The Department does not explain what happens when it does have trouble. An explanation would be helpful since the present statute, on its face, appears to grant a blanket authority to enter and survey. One suspects that this has been used on occasion to overcome even warranted opposition to an entry since only the most oppressed and determined landowner (e.g., Jacobsen) would attempt to take on the state in the present uncertain state of the law.

Section 1242.5

The tentative recommendation makes the procedure provided by Section 1242.5 available in all cases of entry and survey where substantial damage may occur. Moreover, where the public entity itself seeks the court order it must do so on a noticed motion. These two changes have focused attention on the provision of attorney's fees contained in the present statute and continued in the tentative recommendation. The Bar Committee comments that "the subject of attorney's fees is of such general import that it should not be treated separately from the general problem." Less restrained

is the Department of Public Works which foresees "harassment" by the owner of the public entity, unnecessary expense, an increase in litigation, and court delay. This sentiment is also reflected in Exhibits V and VI. There seems little that can be added to prior discussion in making a decision on this issue. Present law provides for attorney's fees, but it is limited in scope (it is restricted to takings for reservoir purposes) and permits a court order to be obtained by the entity ex parte. This combination of features has undoubtedly made it noncontroversial. The staff does not feel that the provision for attorney's fees is in any way wrong, but in view of the comments received the Commission may wish to take another look at this issue.

The Department of Public Works also comments unfavorably on subdivision (d). This subdivision permits the landowner to be compensated from the deposit posted for the damage shown to have occurred. The Department feels that this may lead to double compensation where the land surveyed is subsequently acquired by the condemnor. The Department further suggests that "an offset . . . be made by the court against the award of just compensation. This offset would be the amount previously paid for physical damages caused to the property by a previous entry where the owner had not cured such damage prior to the taking of the title or possession by the condemnor."

Some reflection on the possible situations that can occur suggest that the recommendation, as drafted, is sound and that the Department's proposal would actually penalize a landowner. Assuming that there has been an entry causing damage, two situations can occur: (1) The owner could be compensated for the damage and do nothing with the money to restore his property. In this event, the property, when (and if) taken, will be valued in its unrestored condition; its fair market value should, in theory,

be automatically reduced through the appraisal process by exactly the amount of compensation previously paid. The Department's apparent suggestion that a further offset be made in an amount equal to the compensation previously paid would result in a "double" deduction and the landowner would not be justly compensated. (2) The owner could be compensated for the damage and could then restore his property to its former condition. The condemnor would then be required to pay the fair market value of the property in its restored condition upon a subsequent taking. In a limited sense, the condemnor would have to pay twice for the same property. However, it must be noted that the improvements made after the date of taking will not be compensated for so the condemnor can, to some extent, eliminate the problem by prompt action in condemning the property it seeks. More inportantly, the landowner is entitled to have his property in its undamaged condition at all times and, if this property is subsequently acquired, he is entitled to receive the full fair market value of this property. The condemnor should not be permitted to damage the property and then force the landowner to a choice of what to do with his money that will be adversely affected by the uncertain action of the condemnor. To keep this issue in perspective, it might also be noted that the condemning agencies indicate that they seldom cause any damage and almost invariably obtain the voluntary consent of the owners to do what is necessary. (The foregoing discussion would also seem to cover point 3, in Exhibit VII.)

Finally, with respect to Section 1242.5, the suggestion is made (Exhibit II):

> that in the event an action in eminent domain is subsequently filed the claim for any damages by reason of previous entries should be assertable in the action by way of cross-complaint or affirmative defense. This would tend to eliminate multiplicity of actions and also greatly diminish the burdens upon the Court and the landowner. . . .

> [T]he damages ordinarily incurred by reason of the prior entries are usually very minor in relationship to the damages involved in the condemnation case itself; . . . it would not be economically feasible to initiate a suit, but it would be economically feasible to assert it by way of affirmative defense or cross-complaint.

There is some merit to the suggestion, but in part one's response depends on the decision regarding attorney's fees. Certainly the procedure contemplated under Section 1242.5 is simple, expeditious, and economical enough to enable the landowner to assert his claim for damages under that section without delay or expense. Especially is this true if the landowner recovers his attorney's fees. However, consideration might be given to authorizing (if authorization is necessary) a cross-complaint for damages for entry in a subsequent eminent domain action. Problems arise, however, with respect to the effect of such authorization on the basic claims statute and the statute of limitations.

It is also noted (Exhibit VII) that, "no provision is made for disposition to lien or deed of trust holders of any of the money paid into court." In view of the relatively minor damages anticipated, it is correctly assumed that the Commission's "intent is to permit those parties to intervene if they believe they are entitled to any of the money."

Section 815.8

The City Attorney for the City of Oakland (Exhibit VII) also points out that we have failed to incorporate the same phrases in Section 1242 and Section 815.8 relating to the activities of the entity on the property. In Section 1242 we refer to "surveys, map-making, and examinations"; in Section 815.8, this is broadened to include "surveys, map-making, explorations, examinations, tests, drillings, soundings, appraisals, or

related activities." The staff believes that the inconsistency was unintended and inadvertent and suggests that the sections be conformed both to read: ". . . make studies, surveys, tests, soundings, appraisals, or engage in related activities . . ."

Respectfully submitted,

Jack I. Horton
Associate Counsel

Memo 69-75 EXHIBIT I

STATE OF CALIFORNIA—TRANSPORTATION AGENCY RONALD REAGAN, Governor

DEPARTMENT OF PUBLIC WORKS
LEGAL DIVISION
1120 N STREET, SACRAMENTO 95814

April 3, 1969

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

Dear Mr. DeMoully:

Re: Tentative Recommendation Relating to Inverse Condemnation -- The Privilege to Enter, Survey and Examine Property.

The Department of Public Works has not officially commented upon this tentative recommendation, although its representatives have made various comments at the meetings of the Commission which considered this matter. At those meetings representatives of the department reiterated that the department was satisfied with its present statutory authority under C.C.P. §1242 to enter and survey for highway location, and had experienced very few problems under this statute. Because of this, the department does not see the need for the rather cumbersome proposed provisions of obtaining court orders to enter and survey with deposits of compensation to cover probable damage and reimbursement of attorneys fees to counsel representing property owners wishing to contest the proceedings. The department feels that such procedures will encourage those few landowners who will take any steps to harrass legitimate ends of a public agency in locating the public work. This is especially true if the cost to the owner of such harrassment is borne by the agency in reimbursing him for his attorneys fees.

In the Commission's comments to §1242.5 it states that where "... the entry and activities upon the property will involve no more than trivial injuries to the property and inconsequential interference with the owner's possession and use ... neither the owner's permission

nor the court order is required." While this may be true in a legal sense, as a practical matter it will probably not be true. In most instances where an agreement cannot be reached, the owner will claim that there is a likelihood of compensable damage even though the condemnor believes that there will not be such damage. Therefore whenever an agreement cannot be reached with an owner, §1242.5 will be followed. Under the provisions of §1242.5 there must be a noticed hearing and the property owner will be compensated for his attorney's fees. With a provision for the payment of attorney fees the property owner's attorney must, as a practical matter, at least attend the hearing to assure that no serious harm will befall his client. It will also be necessary to have the testimony of the engineers or surveyors as to what is proposed. Most hearings would therefore take a minimum of two hours of court time even where the result is that there is no more than a trivial injury to the property and an inconsequential interference with the owner's possession and use. In most cases where agreements cannot be reached with the owner the cost for the attorney's fees will exceed the actual damages and in addition there will be a great waste of court time.

The department, at various meetings of the Commission, expressed strong reservations about the affect of proposed §1242.5(d) in resulting in substantial double compensation to the property owner. That section provides that the court may, within six months after the date of authorized entry, award to the owner damages caused by the entry out of the money placed on deposit by the agency. As expressed to the Commission, in most highway takings, the land surveyed is eventually included in the land taken for construction of the public improvement. Where such land is taken, for practical purposes, it is customary to value it without regard to any physical damages which it may have suffered during the entry. If the value of the taking is determined as is customary, and the landowner has previously received compensation for physical damage caused during the entry, it cannot be quesioned that the owner has received what may be a substantial amount of double compensation when the two awards are considered jointly.

At a meeting of the Commission, a representative of the department discussed a possible cure to this danger of double compensation. This would provide an offset to be

made by the court against the award of just compensation. This offset would be the amount previously paid for physical damages caused to the property by a previous entry where the owner had not cured such damage prior to the taking of title or possession by the condemnor. For some reason, the Commission felt that this problem fell into the De minimis category and left the statute in its present proposed state with no provision or guide to the courts in preventing double compensation to the owner for physical damage caused during the course of survey when the property is eventually taken for the public project.

Again the Department expresses its appreciation for the opportunity afforded it by the Commission to comment on its proposals.

Very truly yours,

Robert F. Carlson

ROBERT F. CARLSON
Assistant Chief Counsel

Encls. 20 Copies

cc's to: Willard A. Shank, A.G.'s Office
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Memo 69-75 EXHIBIT II

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JOHN R. LEWIS, JR.

February 17, 1969

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

Re: Tentative Recommendation Relating to Inverse Condemnation - The Privilege to Enter, Survey and Examine Property

Gentlemen:

Please be advised that our office has considered and studied the above referenced tentative recommendation and find no quarrel with the conclusions expressed therein.

We do, however, strongly recommend and urge that the Commission consider additional recommendation that in the event that an action in eminent domain is subsequently filed the claim for any damages by reason of previous entries should be assertable in the action by way of cross-complaint or affirmative defense. This would tend to eliminate multiplicity of actions and also greatly diminish the burdens upon the Court and the landowner. An additional reason for this is that the damages ordinarily incurred by reason of the prior entries are usually very minor in relationship to the damages involved in the condemnation case itself.

As an experienced attorney in this field representing landowners, it has been my experience that in most cases involving the damages which you are considering, it would not be economically feasible to initiate a suit, but it would be economically feasible to assert it by way of affirmative defense or cross-complaint.

Yours very truly,

Richard F. Desmond

DESMOND, MILLER, DESMOND & WEST

RFD:bk

Memo 69-75 EXHIBIT III

BERTRAM MC LEES, JR.
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ARNE HANSEN

February 10, 1969

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

Dear Mr. DeMoully:

Re: Tentative Recommendations:
(a) Inverse Condemnation - Privilege to Enter, Survey and Examine Property
(c) Condemnation Law and Procedure - Right to Take Byroads

We have reviewed the tentative recommendations furnished by your office in the above referenced matters on which you have requested comments. We agree with the proposals as submitted to the Law Revision Commission.

Our office has been faced with the problem on the right of a condemning agency to survey and examine property, even after a complaint in eminent domain has been filed. Moreover, school districts do not have the right of prior possession in eminent domain proceedings and their right to enter and make surveys is not clear under existing law. The amendments to Sections 1242 and 1242.5 of the Code of Civil Procedure will clarify these issues.

This office also has had problems in specific cases where school districts have considered possible acquisition of additional property to provide access to property not taken. In the past we have advised school districts that they have no authority to acquire property for use other than school buildings and grounds unless otherwise specifically authorized. (See Education Code Section 15804 which authorizes acquisition of property by a school district for streets in front of property owned by the district when required for school purposes; and Section 15251 which authorizes a school district to acquire land for a "school approach" which is not more than one-half mile in length and is entirely outside the boundaries of any

city.) The proposed amendments will clarify this problem.

Very truly yours,

[redacted], County Counsel

By Donald L. Clark

DONALD CLARK, Deputy

DC:AM

cc: Terry C. Smith
Deputy County Counsel
648 Hall of Administration
Los Angeles, California

Memo 69-75

EXHIBIT IV

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February 7, 1969

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

Re: California Law Revision Commission
Inverse Condemnation
The Privilege to Enter, Survey, and Examine Property

Dear Mr. DeMoully:

This office wishes to express approval of your tentative recommendation to authorize all public agencies to enter, survey and examine property under the terms and conditions set forth in your proposal.

Very truly yours,

JOHN D. MAHARG
County Counsel

By Terry C. Smith
Terry C. Smith
Deputy County Counsel

TCS:jac

Memo 69-75

EXHIBIT V

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IN REPLY PLEASE REFER TO

January 27, 1969

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

Gentlemen:

Recently I received the Commission's "Tentative Recommendation Relating to Inverse Condemnation--The Privilege to Enter, Survey and Examine Property" and "Tentative Recommendations Relating to Condemnation Law and Procedure--The Right to Take (Byroads)". You requested my comments relating to these recommendations.

Our firm represents some 25 public agencies on the condemnor's side of condemnation cases. In addition, we represent a large number of property owners. We have no quarrel with your concept or proposals relating to the privilege to enter, survey and examine property, except wherein you propose that the court might require upon application by the condemnor that an order to enter property be conditioned upon a security deposit where that security deposit would include an amount to reimburse the owners of the property for costs and attorney's fees. Although I personally would be happy to see the entire law changed so that property owners are compensated for attorneys fees in all cases involving direct as well as inverse condemnation, your concept would certainly change the existing law. If attorney's fees are to be paid in order to secure the right to use property temporarily for surveys, why should they not be paid when we have a temporary easement, for example, for construction purposes? Why not when a permanent taking occurs? Just compensation has been held not to include attorneys fees to date. If your proposal were made I think that most attorneys for property owners would simply take the position in every case where a survey is sought that they would refuse entry. Thereafter, the public agency would apply for a court order and the property owner's attorney would come into court and claim that a security deposit be put up and also that he be awarded attorneys fees. It seems to me that this provision relating to attorneys fees should receive further consideration by the Commission.

Your second recommendation relating to byroads in our opinion adds to the flexibility of condemning agencies in that they would be able to acquire access roads onto otherwise landlocked parcels without the question of public use and necessity being raised. Unfortunately, however, the recommendations of the Commission purport to change the probable existing law that a private individual could condemn an access route so that a parcel of landlocked property could be developed. Your own study points out that this change is contemplated. As your study also points out on page 10: "Maximum utilization of land is important." You state on page 3 of your tentative recommendations relating to byroads that the "Commission has concluded that if there is any need for the acquisition of a byroad by condemnation, the appropriate legislative body rather than a private person should initiate the proceedings: by deleting the word "byroads" from § 1238 of the CCP and expressly providing that a public agency can acquire byroads and by statements such as the above it can be expected that courts in the state would hold that a private person could not condemn a byroad. Any court interpreting these new proposals is certain to consider the Law Revision Commission's recommendations as part of "legislative history", if nothing else. In our opinion this proposed change is an extremely undesirable change.

There are few if any legislative bodies or public entities who are willing to take on additional condemnation cases simply to expedite the development of property that may be landlocked. To be sure, if a contemplated condemnation action by a public entity is responsible for the landlocking of a parcel of land, the public entity should be expected to use your proposed sections, but in other events the property owner is likely only to find a deaf ear when he seeks that sort of help. If the Commission has any evidence to indicate that it is better to allow only public entities to acquire access roads to landlocked parcels, then I think the Commission should state what evidence it has that this result is desirable. Those of us who represent property owners in rapidly developing counties would certainly arrive at the opposite conclusion. If the Commission is not disposed to provide in the law that private individuals can condemn a so-called byroad when they are able to show strict necessity, then at least the Commission should not change what many of us believe is the existing law allowing such condemnations without substantial evidence that such change is necessary.

Sincerely,

Homer L. McCormick, Jr.

HLM:ehe

Memo 69-75 EXHIBIT VI

SMUD

SACRAMENTO MUNICIPAL UTILITY DISTRICT 6201 S Street, Box 15830, Sacramento, California 95813; (916) 452-3211

January 23, 1969

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

Dear Mr. DeMoully:

Thank you for your letter of January 15, 1969, clarifying the Law Revision Commission's tentative recommendation relating to Section 1242.5.

As you point out, the requirement of reimbursement of attorney's fees is already present under the existing Section 1242.5. However, under the existing section an entry order may be obtained without notice and upon deposit of security sufficient to compensate the landowner for damage only. The attorney fee provisions of the existing Section 1242.5 come into play only if the landowner takes the initiative and commences litigation. I would guess that the attorney fee provisions of the existing Section 1242.5 have rarely been used.

The proposed Section 1242.5 would require notice to landowners and would require the Court to set the initial deposit so as to include reasonable attorney's fees in every instance. I feel that there will be more litigation under the proposed Section 1242.5 than under the existing section and that the over-all effect will be a significant step toward the award of attorney's fees to property owners in condemnation proceedings.

One might also approach the question from a consideration of the proposed Section 815.8. Neither that proposed section nor the existing sections in Part 2 of the Government Code contemplate the award of attorney's fees in litigation against public agencies.

I do appreciate that it may be difficult to remove the attorney fee provisions in any expansion of Section 1242.5 in view of the fact that those provisions exist in the present section, but I think some consideration might be given to that possibility.

Very truly yours,

David S. Kaplan
Attorney

Memo 69-75

EXHIBIT VII

CITY OF OAKLAND

CALIFORNIA

ASSISTANT CITY ATTORNEY
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DEPUTY CITY ATTORNEY
WILBUR C. COLE, JR.
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EDWARD A. GOGGIN
CITY ATTORNEY

CITY HALL 94612
CRESTVIEW 3-3602

January 20, 1969

California Law Revision Commission
School of Law
Stanford, Cal. 94305

Attn: Mr. John H. De Moully

Re: Comments re Tentative Recommendation Relating to Inverse Condemnation -- The Privilege to Enter, Survey and Examine Property

Dear Mr. DeMoully:

In response to your request for comments on the Tentative Recommendation Relating to Inverse Condemnation -- The Privilege to Enter, Survey and Examine Property, we submit the following comments:

1. Section 1242.5 - no provision is made for disposition to lien or deed of trust holders of any of the money paid into court. We assume the intent is to permit those parties to intervene if they believe they are entitled to any of the money.

2. "Appraisals" are specifically mentioned in Section 815.8 of the Government Code, but not in Section 1242 of the Code of Civil Procedure. Whether this was done inadvertently or on purpose is not discussed in the comment. We question the need to make a public agency liable for conducting an appraisal of property.

3. Although no mention is made either in the proposed statues or in the comments, it is assumed that any permanent damage to the property caused by the condemning agency in its preliminary investigation of the property could be taken into consideration by the appraisers when they are valuing the property for purposes of condemnation unless the damage has been corrected.

Very truly yours,

EDWARD A. GOGGIN
City Attorney

By Ralph R. Kuchler
Ralph R. Kuchler
Deputy City Attorney

cc: League of
Cal. Cities
Berkeley, Cal.

RRK/lpb

65 Revised December 15, 1968

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

INVERSE CONDEMNATION

THE PRIVILEGE TO ENTER, SURVEY, AND

EXAMINE PROPERTY

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

65

Revised December 15, 1968

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

INVERSE CONDEMNATION

THE PRIVILEGE TO ENTER, SURVEY, AND

EXAMINE PROPERTY

BACKGROUND

Since adoption of the Code of Civil Procedure in 1872, Section 1242 has authorized any condemnor[1] to enter land it is contemplating acquiring and to "make examinations, surveys, and maps thereof." The obvious purpose of this longstanding privilege is to enable the acquiring agency to determine the suitability of the property for public use. Section 1242 does not require any formalities such as notice to the property owner or a preliminary court order. Although the question appears never to have reached the appellate courts, presumably the condemnor could invoke the superior court's aid by way of a writ of assistance or other appropriate process.

In early appellate court decisions, the privilege conferred by Section 1242 was justified as a means of obtaining the property descriptions and other data necessary for the condemnation proceeding[2] and of complying with the statutory admonition that any public improvement "be located

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1. Although Code of Civil Procedure Section 1242 refers only to "the State, or its agents," Civil Code Section 1001 provides that "any person seeking to acquire property for any of the uses mentioned in . . . [Code of Civil Procedure Section 1238] is an agent of the State. . . ."

2. See San Francisco & San Joaquin Valley R. Co. v. Gould, 122 Cal. 601, 55 Pac. 411 (1898).

in the manner which will be most compatible with the greatest public good and the least private injury."[3] These justifications, however, are insufficient in cases where the entry and activities would be considered a "taking" or "damaging" of property within the meaning of Section 14 of Article I of the California Constitution. Even though the condemnor may contemplate the total restoration of the property or the payment of damages, no condemnation proceeding has been commenced and compensation has not been "first made to or paid into court for the owner" as required by that section.

This problem was dealt with definitively in the leading case of Jacobsen v. Superior Court, 192 Cal. 319, 219 Pac. 986, 29 A.L.R. 1399 (1923). The entry in the Jacobsen case involved occupation of the owner's property for some two months by a municipal water district and the use of power machinery to make borings and other tests to determine its suitability for use as a reservoir. The court held that the entry should be enjoined and that the privilege conferred by Section 1242 extends only to "such innocuous entry and superficial examination as would suffice for the making of surveys or maps and as would not, in the nature of things, seriously impinge on or impair the rights of the owner to the use and enjoyment of his property."

The holding in the Jacobsen case has been partially overcome by a special statutory procedure, provided in 1959, by enactment of Section 1242.5 of the Code of Civil Procedure. Section 1242.5 is limited to public entities that have the power to condemn land "for reservoir purposes." The section is also limited to cases in which the public entity "desires to survey and explore certain property to determine its suitability for such purposes." In these cases, if the public agency

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3. See Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604 (1891).

cannot obtain the consent of the property owner, the agency may petition the superior court for an order permitting an exploratory survey. The order, however, must be conditioned upon deposit with the court of cash security, in an amount fixed by the court, sufficient to compensate the owner for damage resulting from the entry, survey, and exploration, plus costs and attorney's fees incurred by the owner. The section seems to authorize recovery by the property owner for "any damage caused by the [public entity] while engaged in survey and exploration on his property."[4]

In addition to Sections 1242 and 1242.5 of the Code of Civil Procedure, many California statutes authorize public officials to enter private property to conduct inspections, investigations, examinations, or similar activities. Most of these statutes have nothing to do with a proposed acquisition of the property for public use or the location or construction of public improvements. Moreover, most of them do not contemplate the kind of entry or type of investigatory activities that would, in any likelihood, cause appreciable damage to property or significant interference with the owner's use and possession. Typical provisions of this type are contained in the Agricultural Code, the Business and Professions Code, and the Health and Safety Code, and authorize the entry of public officers to inspect for health and safety menaces or for violations of regulatory legislation. These statutes were catalogued and considered by the Law Revision Commission in its

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4. The procedure authorized by Section 1242.5 appears to have been considered by the appellate courts in only one instance. In Los Angeles v. Schweitzer, 200 Cal. App.2d 448, 19 Cal. Rptr. 429 (1962), the court held the order authorizing entry, survey, and exploration to be nonappealable. The decision, however, discusses the application of the section and the right of the property owner to recover damages.

study of governmental tort liability.[5]

Other statutes appear to contemplate a substantial amount of activity upon the property to which entry is privileged. For example, special district laws, especially those creating or authorizing the creation of water districts, irrigation districts, and flood control districts, typically authorize the district ". . . to carry on technical and other investigations of all kinds, make measurements, collect data, and make analyses, studies, and inspections, and for such purposes to have the right of access through its authorized representatives to all properties within the district."[6] These district laws also typically repeat the authorization conferred by Code of Civil Procedure Section 1242 to enter, survey, and examine property being considered for acquisition.

The law applicable to any damages that may result from these official entries and investigatory activities was partially clarified by the governmental tort liability provisions added to the Government Code in 1963. Section 821.8 provides that:

> A public employee is not liable for an injury arising out of his entry upon any property where such entry is expressly or impliedly authorized by law.

That section, however, also states that:

> Nothing in this section exonerates a public employee from liability for an injury proximately caused by his own negligent or wrongful act or omission.

The public entity or agency itself gains a parallel immunity through Government Code Section 815.2(b), which provides that:

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5. See Van Alstyne, A Study Relating to Sovereign Immunity, 5 Cal. Law Revision Comm'n Reports 1, 110-119 (1963).

6. Most of the statutes are cited at page 11 of the study cited in note 5.

> Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

This statutory immunity of both the public officer and the public entity from tort liability, however, does not absolve the public entity from "inverse condemnation" liability for substantial damage. Statutes authorizing privileged trespasses on private property have been held valid,[7] but these holdings have been based upon the premise that the interference with property rights that they authorize ordinarily is slight in extent, temporary in duration, and de minimis as to the amount of actual damages.[8] Thus, under existing law, while it is clear that the entry itself under Section 1242 of the Code of Civil Procedure or one of the other statutes authorizing entry for investigatory purposes is privileged and therefore nontortious, it remains for the decisional law to declare the quantum of damage or interference that may result without giving rise to the right to injunctive relief or to recovery in an "inverse condemnation" proceeding.

There are many types of entries and investigations that can be made, and should be made, without any significant interference with the property or the owner's rights. In these cases, to require a preliminary court order or to provide a system for assuring and assessing compensation would be unduly burdensome as well as constitutionally unnecessary. Thus, in connection with Section 1242 of the Code of Civil Procedure, it seems reasonable to permit condemnors, without

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7. See Irvine v. Citrus Pest Dist. No. 2 of San Bernardino County, 62 Cal. App.2d 378, 144 P.2d 857 (1944); Annot., 29 A.L.R. 1409 (1924).

8. See Jacobsen v. Superior Court, 192 Cal. 319, 219 Pac. 986 (1923), approved in this connection in People ex rel. Dept. of Pub. Works v. Ayon, 54 Cal.2d 217, 352 P.2d 519, 5 Cal. Rptr. 151 (1960), and Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597 (1947).

formalities, to enter and survey property contemplated for public acquisition, so long as the entry involves no likelihood of significant damages to the property or interference with the rights of the owner. Representatives of public agencies have advised the Commission that those agencies seldom have difficulty in obtaining the consent of property owners for the great bulk of the routine survey work accomplished by them.[9]

In other cases, however, it may not be possible to obtain the owners consent through negotiation and the necessary exploration may involve activities that present the likelihood of compensable damage, including the digging of excavations, drilling of test holes or borings, cutting of trees, clearing of land areas, moving of earth, use of explosives, or employment of vehicles or mechanized equipment. Representatives of local public entities have suggested that the deposit-and-court-order system provided by Section 1242.5 be extended to all types of condemnors without limitation as to the purpose of the contemplated acquisition and that the section as thus broadened should be limited to situations in which there is a reasonable likelihood of compensable damage to the property or a compensable interference with the rights of the owner.

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9. Section 53069 was added to the Government Code by Chapter 491 of the statutes of 1968 to specify that any local public entity may agree to repair or pay for any damage incident to a right of entry or similar privilege obtained by the entity. For a suggestion that such a statute be enacted to facilitate the obtaining of property owners' consent to entries, surveys, and the like, see Van Alstyne, Exploratory Surveys and Investigations (unpublished study in inverse condemnation liability series prepared for the California Law Revision Commission, 1968).

The foregoing distinction between situations in which the condemnor would be permitted to enter property under the simple privilege conferred by Section 1242 and those in which resort must be had to the formal procedure of the revised Section 1242.5 suggests the need for a statutory statement of the rule of liability that governs the condemnor's entry and activities. The governmental liability provisions of the Government Code should be revised to recognize liability on the part of the public entity for actual damage to private property and substantial interference with its use or possession. Such a provision, which would codify the "rule of reason" formulated in judicial decisions (and particularly in the Jacobsen case), would provide an explicit statement of the condemnor's liability incident to an entry under either Section 1242 or 1242.5 and would permit as precise a distinction as seems possible between cases in which entry may be made under Section 1242 and those in which resort must be made to Section 1242.5

RECOMMENDATIONS

The Commission makes the following recommendations concerning Sections 1242 and 1242.5 of the Code of Civil Procedure and the problem of inverse condemnation liability in connection with privileged official entries upon private property:

1. Section 1242 should be revised to make clear that it does not immunize entries or activities that result in compensable damage to property or compensable interference with property rights, and should provide that any such entries or activities be made or conducted pursuant to a revised Section 1242.5. As to any damage that might arise from entry and activities under Section 1942, the revised section should provide that the liability of a public entity is governed by Section 815.8 of the Government Code (to be added) and that liability of any condemnor other than a public entity is the same as that of a public entity. The provision with regard to the location of the public improvement should be moved to another appropriate place in the Code.[10]

2. Section 1242.5 should be expanded to cover entries for any purpose for which land may be acquired by condemnation. The revised section, however, should apply only where the entry and investigation is likely to cause compensable damage. Also, the procedure provided

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10. This requirement of proper location, as stated in Section 1242, is now considered to be one of the elements of "public necessity" that must be shown in the condemnation proceeding or, more typically, by the condemnor's resolution to condemn. See Code of Civil Procedure Section 1241(2) and Sparrow, Public Use and Necessity, in California Condemnation Practice (Cal. Cont. Ed. Bar 1960) 133, 150. This fragment of Section 1242 should, therefore, be removed to paragraph 2 of Section 1241.

by the revised section should be available only where the owner's consent cannot be obtained. The order authorizing entry should be made only after such notice to the owner as the court deems appropriate. The court should fix a deposit in the amount of the estimated damage and the owner should be permitted to have the deposit increased where it appears that the deposit has become inadequate. Further, the court should be authorized to consider the techniques of exploration and survey that are contemplated and to impose appropriate limitations. The section should provide a summary procedure for disposing of the deposit and compensating the owner, but should not foreclose his resort to any other civil remedies available to him.

3. A new Section 815.8 should be added to the Government Code providing that, in connection with any entry upon private property to conduct surveys, explorations, or similar activities, a public entity is liable for "actual damage" to property or for "substantial interference" with the owner's use or possession. The section should provide that, where the entry and activities are authorized by law, there is no liability for (1) the entry itself or [illegible] examinations, testings, measurements, or markings of property that are superficial in nature, (2) trivial injuries or inconsequential damages such as superficial disturbance of grass or other vegetation, or the taking of minor samples, or the placing of markers as is done in connection with aerial surveys, or (3) slight, transient interference with the owner's use and possession of the property that is reasonable under the circumstances of the particular case.

RECOMMENDED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measures:

I

An act to amend Sections 1242 and 1242.5 of the Code of Civil Procedure, relating to eminent domain.

The people of the State of California do enact as follows:

Section 1242 (amended)

Section 1. Section 1242 of the Code of Civil Procedure is amended to read:

1242. ~~In all cases where land is required for public use, the State, or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of Section 1247. The State, or its agents in charge of such public use, may enter upon the land and make examinations, surveys, and maps thereof.~~

(a) A person having the power of eminent domain may enter upon a property and conduct surveys, map-making, and examinations to determine the suitability of the property for acquisition for a purpose for which the power may be exercised.

(b) The liability, if any, of a public entity for damages that arise from the entry and activities mentioned in subdivision (a) is determined by Section 815.8 of the Government Code.

(c) Any person that has the power of eminent domain, other than a public entity, is liable for damages that arise from the entry and activities mentioned in subdivision (a) to the same extent that a public entity is liable for such damages

under Section 815.8 of the Government Code.

(d) As used in this section, "public entity" means a public entity as defined in Section 811.2 of the Government Code.

Comment. Section 1242 has been amended to modernize its language and to make clear that the condemnor's liability for any damage that may result from an entry and activities under the privilege conferred by the section is governed by Section 815.8 of the Government Code.

As to the extent of the "examinations" authorized by Section 1242, see Jacobsen v. Superior Court, 192 Cal. 319, 219 Pac. 986, 29 A.L.R. 1399 (1923), holding that the privilege conferred by Section 1242 extends only to "such innocuous entry and superficial examinations as would suffice for the making of surveys or maps and as would not, in the nature of things, seriously impinge on or impair the rights of the owner to the use and enjoyment of his property." See also the discussion supra in this Recommendation. The statutory procedure for entries that will result in compensable damage (under Government Code Section 815.8) is provided by Section 1242.5.

The requirement of proper location, formerly stated in Section 1242, has been deleted and should be combined with paragraph 2 of Section 1241 in any revision of the eminent domain laws. This requirement is now considered to be one of the elements of "public necessity" that must be shown in the condemnation proceeding or, more typically, by the condemnor's resolution to condemn.

Section 1242.5 (amended)

Sec. 2. Section 1242.5 of the Code of Civil Procedure is amended to read:

1242.5. ~~In any case in which the State, a county, city, public district, or other public agency in this State has the power to condemn land for reservoir purposes, and desires to survey and explore certain property to determine its suitability for such purposes, and in the event such agency is unable by negotiations to obtain the consent of the owner to enter upon his land for such purposes, the agency may undertake such survey and exploration by complying with the requirements of this section. It shall petition the superior court for permission to undertake such survey and exploration. The court shall ascertain whether petitioner in good faith desires to enter the land for this purpose, and, if it determines this issue in the affirmative, shall require that petitioner deposit with the court cash security in an amount sufficient to compensate the landowner for any damage resulting from the entry, survey, and exploration. Upon deposit of such security, the court shall issue its order granting permission for such entry, survey, and exploration.~~

~~The court shall retain such cash security for a period of 90 days following the termination of the entry, survey, and exploration activities or until the end of any litigation commenced during that period relating to such entry, survey and exploration activities and shall award to the landowner out of the cash security on deposit an amount equal to that necessary to compensate him for any damage caused by the State, county, city, public district, or~~

~~other-public-agency-while-engaged-in-survey-and-exploration-on his-property-as-well-as-for-any-costs-of-court-and-reasonable attorney-fees,-to-be-fixed-by-the-court,-incurred-in-the-proceeding-before-the-court.--Any-suit-for-damages-by-a-landowner under-this-section-shall-be-governed-by-the-applicable-provisions of-Part-2-of-the-Code-of-Civil-Procedure.--Such-cash-security shall-be-held,-invested,-deposited,-and-disbursed-in-the-manner specified-in-Section-1254-of-the-Code-of-Civil-Procedure,-and interest-earned-or-other-increment-derived-from-its-investment shall-be-apportioned-and-disbursed-in-the-manner-specified-in that-section.~~

(a) In any case in which the entry and activities mentioned in subdivision (a) of Section 1242 will subject the person having the power of eminent domain to liability under Section 815.8 of the Government Code, before making such entry and undertaking such activities, the person shall secure:

(1) The written consent of the owner to enter upon his property and to undertake such activities; or

(2) An order for entry from the superior court in accordance with subdivision (b) of this section.

(b) Upon the petition of the person seeking to enter upon property, and upon such notice to the owner of the property as the court shall deem appropriate, the court shall determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use, as well as for any costs of court and

reasonable attorney fees incurred by the owner in the proceeding under this section. After such determination the court may issue its order permitting the entry. The order shall prescribe the purpose for the entry and the nature and scope of the activities to be undertaken and shall require the person seeking to enter to deposit with the court the probable amount of compensation.

(c) At any time after an order has been made pursuant to subdivision (b), either party may, upon noticed motion, request the court to determine whether the nature and scope of the activities reasonably necessary to accomplish the purpose of the entry should be modified or whether the amount deposited is the probable amount of compensation that will be awarded. If the court determines that the nature and scope of the activities to be undertaken or the amount of the deposit should be modified, the court shall make its order prescribing the necessary changes.

(d) The court shall retain the amount deposited under subdivisions (b) and (c) for a period of six months following the termination of the entry. At any time within such six months, the owner may, upon noticed motion, request the court to determine the amount necessary to compensate him for any damage which arises out of the entry upon his property as well as for costs of court and reasonable attorney fees incurred in the proceedings under this section. The court shall make such determination and shall award to the owner such amount out of the money on deposit.

(e) Any deposits made pursuant to this section shall be held, invested, deposited, and disbursed in accordance with Section 1254.

Comment. Section 1242.5 has been amended to make the procedure it provides available in all proposed acquisitions for public use, rather than only to acquisitions for reservoir purposes.

Subdivision (a) requires a person desiring to make an entry upon property to secure either the permission of the landowner or an order of the court before making an entry that would subject it to liability under Section 815.8 of the Government Code. In many cases the entry and activities upon the property will involve no more than trivial injuries to the property and inconsequential interference with the owner's possession and use. In such cases, neither the owner's permission nor the court order is required. However, where there is a likelihood of compensable damage, subdivision (a) is applicable.

Under subdivision (b), the court should examine the purpose of the entry and determine the nature and scope of the activities reasonably necessary to accomplish such purpose. Its order should provide suitable limitations by way of time, area, and type of activity to strike the best possible balance between the needs of the condemning agency and the interests of the property owner. The order also must require the condemning agency to deposit an amount sufficient to reimburse the owner for the probable damage to his property and interference with its use as well as his court costs and reasonable attorney fees incurred in connection with the proceeding under the section.

Under subdivision (c), if, after an entry has been made and activities commenced, it appears either that the activities must be extended to accomplish the purpose or curtailed to prevent unwarranted damage or interference or that greater or lesser damage to the property will occur, the owner or the entity may apply to the court for a redetermination and appropriate changes in the previous order.

Subdivision (d) provides a simplified procedure for determining the amount to which the owner is entitled. In the usual case, the deposit will be held for six months after the agency has finished its survey and investigation, during which time the owner, after notice to the agency, will apply to the court for the amount necessary to fully compensate him. This amount will include, in addition to damages for the entry, court costs and attorney fees incurred in the proceedings under this section. It is contemplated that the owner will be paid out of the amount on deposit, but this does not preclude an award greater than the deposit, if this is necessary to fully compensate him. An award under this section will, however, be finally determinative of the owner's right to compensation. It should be noted that the six-month period is in effect a statute of limitations for recovery utilizing the procedure provided by this section. However, the property owner is not forclosed, either before or after expiration of the six-month period, from pursuing any other civil remedy available to him.

Subdivision (e) continues the former requirement that deposits are to be held, invested, and disbursed in the same manner or as deposits made after judgment and pending appeal.

II

An act to add Section 815.8 to the Government Code, relating to the liability of public entities:

The people of the State of California do enact as follows:

Section 1. Section 815.8 is added to the Government Code, to read:

815.8. (a) Notwithstanding Section 821.8, a public entity is liable for actual damage to property or for substantial interference with the possession or use of property where such damage or interference arises from any entry upon the property by the public entity to conduct surveys, map-making, explorations, examinations, tests, drillings, soundings, appraisals, or related activities.

(b) Where the entry and activities mentioned in subdivision (a) are expressly or impliedly authorized by law, the public entity is not liable for:

(1) The entry upon the property or examinations, tests, measurements, or marking of the property that are superficial in nature.

(2) Trivial injuries to property or damages that are inconsequential in amount.

(3) Interference with the possession or use of the property that is slight in extent, temporary in duration, and reasonable and necessary under the circumstances of the case.

Comment. Section 815.8 is added to clarify the application of Division 3.6 (Sections 810-996.6) to claims for damages that may arise from privileged entries upon private property to conduct surveys, explorations, and similar activities. In general, this section codifies the decisional law that gives content, as to these entries and activities,

to the assurance of Section 14 of Article I of the California Constitution that compensation will be made for the "taking" or "damaging" of property. See Jacobsen v. Superior Court, 192 Cal. 319, 219 Pac. 986, 29 A.L.R. 1399 (1923).

This section does not authorize any entry upon property or the conducting of investigatory activities. Rather, the section provides a "rule of reason" to govern the liability of the public entity where such entries and activities are authorized by other statutory provisions. As to entries upon private property to determine its suitability for acquisition by eminent domain proceedings, see Sections 1242 and 1242.5 of the Code of Civil Procedure.

The section does not characterize the liability it imposes as being "in tort" or "for inverse condemnation," and leaves the maintenance of that dichotomy, as to any cases in which it may be significant, to the decisional law. Similarly, as to those cases in which a condemnation proceeding eventually is filed to take the property, or a portion of it, this section does not affect the question whether the damages mentioned in this section may be recovered by answer or cross-complaint in the condemnation proceeding or must be recovered by separate action. See People ex rel. Dept. of Pub. Wks. v. Clausen, 248 Cal. App.2d 770, 57 Cal. Rptr. 227 (1967).

In imposing liability for "actual" damage to property and for "substantial" interference with possession and use of the property, this section provides only a general standard that must be applied with common sense to the facts of the particular case. The term "actual damage" is commonly used in similar statutory provisions in other states. See, e.g., Kans. Stat. Ann. § 68-2005 (1964); Mass. Laws Ann. c. 81, § 7F (1964); Ohio Rev. Code Ann. § 163.03 (Supp. 1966); Okla. Stat. Ann. tit. 69 §§ 46.1, 46.2 (Supp. 1966); Pa. Stat. Ann. tit. 26 § 1-409 (Supp. 1966). Judicial decisions from other states have also given sensible applications to the phrase. See, e.g., Onorato Bros. v. Massachusetts Turnpike Authority, 336 Mass. 54, 142 N.E.2d 389 (1957); Wood v. Mississippi Power Co., 245 Miss. 103, 146 So.2d 546 (1962). A specific consequence of the use of the term "actual" is to preclude recovery of the purely "nominal" or

"constructive" damages that are presumed in tort law to flow from any intentional tort.

Use of the term "substantial interference" recognizes that any entry upon private property causes at least a minimal "interference" with the owner's use, possession, and enjoyment of that property. The very presence upon property of uninvited "guests" would be deemed by some property owners to be an interference with their property rights. The phrase "substantial," however, is intended to exclude liability for entries and activities that, to quote the leading California decision (Jacobsen v. Superior Court, supra), "would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property."

In subdivision (b), the three stated exclusions from liability merely clarify the terms "actual damage" and "substantial intereference" in subdivision (a). The first exclusion provides an immunity for the entry itself, which might otherwise be deemed an actionable "trespass." It also provides an immunity for "superficial" examinations of either real or personal property. The term "superficial," for use in this connection, was coined by the court in the Jacobsen decision. The "marking" of property is sometimes both reasonable and necessary as in the case of the setting of surveyor's flags or in the placement of markers in aid of aerial surveys.

The second exclusion is for "trivial" injuries and "inconsequential" damages. It is intended to be at least as broad as the decisional law rule of "de minimis" damages. The term "trivial" has been used by the courts of other states in applying comparable statutory provisions

(see Onorato Bros. v. Massachusetts Turnpike Authority, supra) and has been applied to such "injuries" as the setting of surveyor's stakes and the suppression of grass or other vegetation.

The third exclusion requires the court, in determining whether an interference with the owner's use or possession of his property is compensable, to take into account the extent or pervasiveness of the disturbance of those privileges, the temporal duration of the interference, and the reasonableness and necessity of the disturbance under the facts of the case. Although it is impossible to provide any exact standard that would govern all cases or any significantly large grouping of cases, the mentioned factors are those that have been emphasized by the courts in the absence of statute. See Jacobsen v. Superior Court, supra.