

#36.80

2/26/70

Memorandum 70-24

Subject: Study 36.80 - Condemnation (Procedural Aspects Generally)

You will recall that the Commission asked the staff to send out the outline of the study on the procedural aspects of condemnation law to our special distribution list (500 persons approximately). We were to request comments as to matters that should be given priority and as to matters that were not included in the outline but should be.

We attach the comments received to date. We plan to forward these to the consultant to take into account in preparing the study. Are there any matters mentioned in the comments that the Commission wishes to be given priority? If not, we will ask our consultant to give priority to those matters he considers most in need of immediate attention. He will, of course, be able to make this determination only after he has reviewed the scope of the study generally.

Respectfully submitted,

John H. DeMouly
Executive Secretary

COMMITTEE ON GOVERNMENTAL LIABILITY AND CONDEMNATION

MINUTES FOR MEETING OF JANUARY 10, 1970

SOUTHERN SECTION

A meeting of the above committee was held at 10:00 a.m., January 10, 1970, at the offices of Musick, Peeler and Garrett, One Wilshire Building, Los Angeles, California.

MEMBERS PRESENT: George C. Madley, Chairman; John J. Endicott; Carl K. Newton; John N. McLaurin; Thomas M. Dankert; Jerrold A. Fadem and Paul Overton.

ABSENT: Richard L. Franck.

The preliminary outline of study to be conducted by Professor James Hogan, University of California at Davis Law School, Research Consultant to the California Research Commission, with respect to the procedural aspects of condemnation law was discussed.

Consideration was given to additional matters that properly could be included in the procedural study outline.

II. PROCEDURE PRIOR TO COMMENCEMENT OF PROCEEDINGS

2. Settlement Negotiations

B. Necessity of Attempt to Purchase

a. As an element of an eminent domain complaint.

b. If because of inability of condemnor to accomplish an attempt to purchase before the complaint is filed; then, "attempt to purchase" as a condition precedent to the requirement that an answer be filed.

c. The effect, if any, of an offer to purchase as a value determination either

(i) independent evidence of value;
or

(ii) an admission or statement of value by plaintiff condemnor.

In general, it was believed that an offer to purchase should be a condition precedent to the institution of an eminent domain proceeding. Although various methods could be employed to accomplish such a purpose, study should be given to requiring that an offer be a requisite element of an eminent domain complaint. Where, because of unusual time circumstances, it is effectively impossible for the condemnor to make an offer to purchase before suit is filed, the defendants should not be required to file an answer or any other pleading until a reasonable time after such an offer is made. In any event, the defendants should not be required to file a verified pleading containing statements of valuation and damages when the acquiring entity as yet has no opinion of value, or has not communicated the same.

III. COMMENCEMENT OF PROCEEDING AND RELATED MATTERS

B. Practice

An additional matter in the category of "Practice" was considered desirable. In this area it is believed that the bifurcation of jury and non-jury issues should be made available as a matter of law to each of the parties in non-jury issues such as: What constitutes the larger parcel for valuation, severance damage, and for special benefit purposes; whether or not there exists an impairment of access; and, other matters subject to Court determination before they are submitted to the jury as trier of fact should be capable of easy separation and trial, preferably in advance of completion of the final appraisal reports. The committee members generally felt that provisions for the interlocutory appeal of decisions by the Court on such non-jury issues should be considered in such a study.

4. Pleadings and Process

A. Pleadings

a. Complaint

It was the consensus of the committee members that insofar as practicable, it is most efficient for the Superior Court files to be limited to only one fee ownership per complaint. C.C.P. §1244(5) seems to permit a plaintiff condemnor the sole discretion to include or not in one case all parcels of land required in the same County so long as it is for the same public use. The experience of several members of the committee strongly suggests that practices under Section 1244 is confusing not only to the property owner involved when a case name is different than the owner's, but also poses problems for the Court and various Court personnel handling various trials in multi-ownership and multi-parcel cases. Understandably, what is involved is a matter of "line drawing"; nevertheless, a limit on the number of ownerships to be included in one eminent domain complaint should be established; and, that limit should not be the boundary lines of any particular County.

Add new paragraph (7) To include in the study both the desirability and the necessity of requiring the plaintiff to make a statement or allegation of value, damages and/or benefits as essential elements in a complaint in eminent domain.

Add new paragraph (8) To study whether there should be a requirement that the complaint be verified by an officer, agent, or responsible employee of the plaintiff.

b. Answer

With respect to C.C.P. §1246 and §1248, the following matters should be considered and studied:

(i) Verification - What purpose is served when most condemnations are by public agencies who neither make valuation statements nor verify pleadings?

(ii) Study to consider whether the procedure should require merely the use of an appearance pleading which does not require a verified valuation statement within ten (10) days after service of a complaint. The experience of the members present generally did not suggest that verified valuation statements in the typical condemnation answer produced any case settlements. Where the condemnor is not required to make any statements of valuation, why should an owner be required to make "unenlightened" statements of value as the elements of an answer which statutorily is non-responsive to the necessary elements of a complaint for condemnation.

Add new paragraph e. Subordinate Interests

Answers of other than the fee owner:

(i) Plaintiff condemnor should be required to serve on all appearing defendants copies of answers filed by all defendants appearing in any parcel the plaintiff seeks to bring to trial.

This could be handled by requiring the plaintiff fifteen (15) days before filing an At Issue Memorandum to serve on as each appearing defendant a copy of all other pleadings or answers which had been filed and which relate to the matter claimed by plaintiff to be at issue. For any other pleadings or answers received thereafter by plaintiff, the same should be served on all appearing parties after receipt of same by plaintiff.

(ii) Requirements of answers of defendant not a fee owner should be studied. For example, Section 1246 requires each defendant to set forth the estate of interest claimed; Section 1248 does not require a holder of a subordinate interest to set forth a valuation of that interest. Experience of the members present

demonstrated that where there is no requirement to notify an owner of other pleadings claiming an interest in the property, or a share of the award, there seems to be something lacking in this general area of the field, and should therefore be studied.

(iii) Study should be given to the subject of whether or not a statement of the issues involved between all defendants in a second phase C.C.P. §1246.1 trial should be made requisite elements of a pleading by defendants in response to the complaint served by plaintiff.

(iv) Additional matters to be considered with respect to an optional non-physical attendance by a subordinate interest in the first phase of the eminent domain proceeding under Section 1246.1.

IV. TRIAL PROBLEMS OTHER THAN VALUATION TESTIMONY

2. General Rules for Conduct of Trial.

It is believed that a proper matter of study to develop a complete set of rules governing the appearance, pleadings, service of copies of pleadings, physical attendance, and disposition of interests of claimants which are subordinate to those of the fee owner. The rules and requirements of pleadings and physical attendance at all Court hearings should be different in the case of a defendant whose interest is claimed for possessory than in the case of a defendant claiming a non-possessory interest such as taxes, a bond holder, a judgment creditor, a lienholder, trustees of a deed of trust, beneficiaries of a trust deed and their assignees, mortgagors, mortgagees, etc.

There being no further business before the committee, it was agreed that we adjourn until our next scheduled meeting on February 14, 1970.

PAUL EUGENE OVERTON,
Secretary pro tem

STANLEY J. GALE
LAWRENCE H. GOLDSTEIN

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ADDRESS ALL REPLIES TO MAIN OFFICE

December 19, 1969

OUR FILE NO. _____

JOHN H. DEMOULLY
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Study of Condemnation
Law and Procedure

Dear Mr. DeMouilly:

Thank you for your letter of December 9, 1969. There are several areas of study that require revision and which are not covered by your outline.

First, and not necessarily in order of importance, is the study of impact upon property caused by a preliminary routing determination or intent to improve. As you probably know, the Highway Commission and other public agencies, engage in preliminary studies to determine area highway routings and improvement areas long prior to the time that actual acquisition commences. In the meantime, the proposed routes become a matter of public record and prospective development or sale of the property is impaired or drastically curtailed. Recently, a client of ours had a prospective buyer who was willing to purchase his property. My client, for reasons of health and finances, was greatly interested in disposing of the property. Just prior to the sale, the prospective purchaser was approached by a representative of the Department of Public Works and informed that the property was in the route of a prospective freeway development and would probably be acquired by the State at a future date. Naturally, the prospective purchaser withdrew and my client is burdened with the property and unable to sell same. This is not an unusual situation and should be the subject matter of study to find some equitable solution.

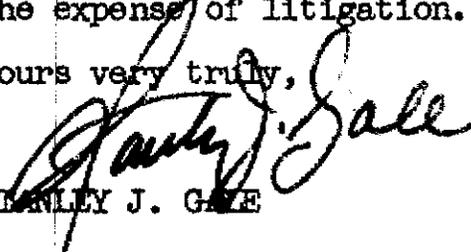
Next, as a procedural matter, the valuation reports and appraisal studies of the condemnor should be a matter of public record and available for inspection and study by the property owner. Although the condemnor is required to pay the

JOHN H. DeMOULLY
December 19, 1969
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fair market value for the property acquired, it is doubtful that they do so unless litigation or legal representation forces them to do so. In my experience, the condemnors try to acquire at the lowest possible price. In many cases, the bargaining capacities of the condemnor and the condemnee are unequal and the condemnor is unable to afford the cost of valuation and litigation. A disclosure of the appraisal study would eliminate this practice.

Finally, some study should be devoted to the problem of recovery of costs, including appraisal fees and expert testimony and attorneys' fees by the condemnee. I recognize that it has been said that the payment of attorneys' fees to the condemnee would promote litigation. On the other hand, it is also an undoubted fact that condemnees are forced to accept less than the fair market value of their property because they are unable to undergo the expense of litigation.

Yours very truly,


STANLEY J. GABE

SJG:mbp

STEPHEN W. HACKETT
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614 BROWN STREET
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Memorandum 70-24
EXHIBIT III

office of county counsel

COUNTY OF NAPA
TELEPHONE 255-1004
AREA CODE 707

December 18, 1969

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

Attn: John H. DeMouilly
Executive Secretary

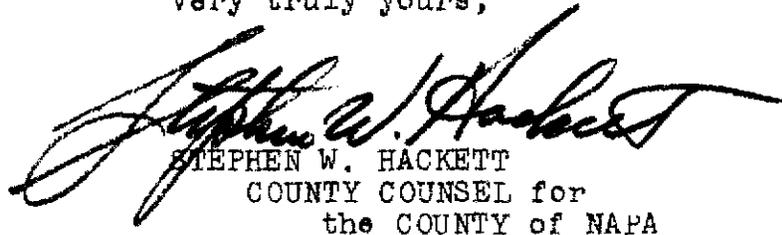
Dear Mr. DeMouilly:

I have your letter of transmittal dated December 9th and concerning the Commission's comprehensive study on the procedural aspects of condemnation law. I appreciate your advising me of this program and would further appreciate that you keep my name on your mailing list for future communication dealing with this subject.

I have reviewed the "Outline of Study" accompanying your letter and feel that it is very well conceived. A few possible additions did come to mind and I am enclosing a short resume' of suggested additional areas for possible consideration.

Thank you again for your courtesies.

Very truly yours,


STEPHEN W. HACKETT
COUNTY COUNSEL for
the COUNTY of NAPA

SWH/les

Enc.

*2 SWH
as private person*

REVIEW OF PROPOSED "OUTLINE OF STUDY
PROCEDURAL ASPECTS OF CALIFORNIA
CONDEMNATION LAW."

Suggested additional areas for consideration in the background study authorized by the California Law Revision Commission. (Reference is made to the letter of transmittal dated December 9, 1969 from John H. DeMouilly.)

1. Suggest addition to II "Procedure Prior to Commencement of Proceedings;" under subparagraph 2 "Settlement Negotiations": I would suggest some consideration be given to the question of what shall constitute the basis for the negotiating activities of the condemning authority; is it incumbent upon the negotiating authority to obtain a formal staff or independent fee type appraisal and if so to what extent is such appraisal to be disclosed to the property owner, at the time of such negotiations?

2. Reference II "Procedure Prior to Commencement of Proceedings" possibly some coverage should be given to the rights of the condemnor to enter upon the property in question for purposes of taking tests and making surveys.

3. Re III-4-A-a "Complaint"; suggest coverage of the situation where condemnation is anticipated in relation to property already devoted to some other public use; pleadings required to establish "a more necessary public use."

4. Reference IV subparagraph 6 "Function of Court"; I believe some coverage should be given to a process of preliminary proceeding before the court, alone, for the determination of necessary legal issues that would bear upon the appraisal process. I have in mind the many instances where legal questions are presented the answer to which could vitally affect the analysis of the appraiser in his estimation of value. The leaving of the determination of these questions to the outset of the trial has many

disadvantages, not the least of which is the fact that the court's determination on certain legal questions could render some or even all appraisals inapplicable or even inadmissible, and neither party should be forced to proceed under those circumstances.

5. Reference IV "Trial Problems other than Valuation Testimony," it might be advisable to include a further paragraph relating to the permissible scope of final argument. Not infrequently heated controversy can develop at this stage relative to what constitutes legitimate final argument.

COUNTY OF SAN MATEO

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December 15, 1969

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

Re: Condemnation Law and Procedure

Dear Mr. DeMouilly:

With reference to your letter of December 9, 1969, this office has the following suggestions to make arising out of eminent domain litigation that has been handled in this office.

First, there should be no requirement that the condemning authority negotiate or otherwise contact the prospective condemnee prior to filing suit, at least in those cases where to do so will cause acts by the condemnee to enhance the value of his property strictly for the purpose of acquiring more money from the public agency than the property is worth. We recently had a situation where as the result of the contacting of the landowners by our right-of-way agent prior to commencement of suit, the landowners successfully divided their property into several parcels as a result of that contact and were able to obtain twice the amount of moneys which would have been obtained if we had filed suit first and contacted the landowners afterwards.

Second, there should be no authority for a change of venue to another county merely because one of the owners of the property sought to be condemned is a non-resident if at least one of the owners of such property is a resident of the county where the action is brought.

Third, the question of whether or not there is public necessity for the taking of the property should remain conclusive so long as there is a four-fifths vote finding that such necessity exists.

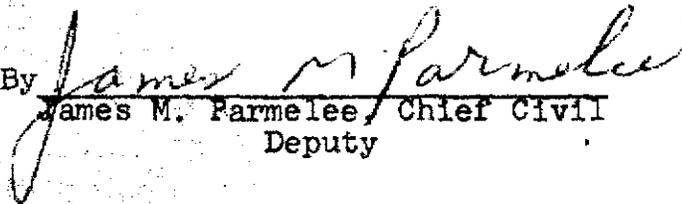
Mr. John H. DeMouilly
December 15, 1969
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Fourth, the right to trial by jury, or to a court trial in the event that neither party desires a jury trial, should remain; and neither referees nor arbitration should be substituted therefor.

Fifth, where an appeal is taken, it should be clearly established that on reversal and the holding of a new trial, the prior verdict or judgment establishes no limitation whatsoever on the new verdict or judgment, and that the prevailing party on appeal recover his costs of suit.

Yours truly,

KEITH C. SORENSON
DISTRICT ATTORNEY

By 
James M. Parmelee, Chief Civil
Deputy

JMP:mc

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11 December 1969

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

Gentlemen:

In response to your inquiry regarding condemnation law, I believe the present methods of determining compensation to be antiquated and most unfair to the property owner, particularly in the following:

1. Costs - I have yet to discover a sound reason why the property owner should not receive appraisal fees and attorney's fees. Every matter which I have observed has commenced with a below market offer by the condemning agency. The agency plays percentages since in most instances the property owner is unsophisticated, trusting and a little frightened. Most properties are purchased at the first figure. Even the more sophisticated often succumb to the argument that after appraisers and attorney's fees are paid they will not benefit. I would recommend the condemning agency be required to pay a reasonable appraisal fee and reasonable attorney's fee and a statewide schedule be adopted through collective negotiation with the State and the Bar Associations and Appraisers Groups.
2. The property owner operating a business on the premises inevitably loses a valuable property right (its use) without any compensation whatsoever. This is one of the most unfair and unrealistic aspects of condemnation law. Compensation should be allowed for loss of the business.

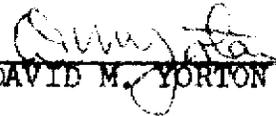
3. Procedurally, all rules of evidence seem to be devised and, in fact, are devised to limit the property owner. I believe that all of the factors which bear upon the ordinary market sale should be taken into account by an appraiser, without restriction. The validity should go to the weight, not admissibility.
4. In the field of comparable sales, the judges are substituting their own personal opinion for that of qualified experts. I believe other than a limitation as to number of sales, any sale should be admissible. If it is outside the community, this should be revealed well in advance to permit discovery.

These are my principal, practical suggestions.

Very truly yours,

LANCASTER & YORTON

By



DAVID M. YORTON

DMY:lh

Memorandum 70-24

EXHIBIT VI
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July 8, 1969

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

Dear Mr. DeMouilly:

I have just had the opportunity to re-read some suggestions of Dick Huxtable relative to a panel of three judges/arbitrators/commissioners.

Mr. Huxtable's disappointment with single judge trials and general satisfaction with jury trials parallels my own experience and feelings.

While I know the Commission has not been enthusiastic about Mr. Huxtable's suggestion of the expert panel of three, the more I think about it, the more it appeals to me as an avenue worthy of experimentation. I cannot be sure that it will work but with the burgeoning case load in eminent domain, it is something which I believe ought to be tried.

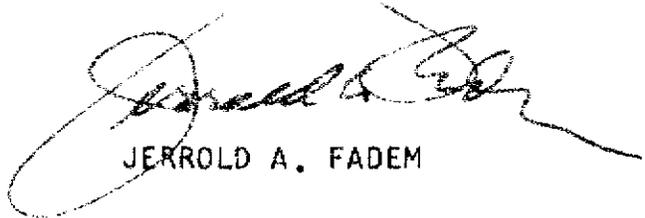
CCP §1248 recognizes that a referee may be used to determine value. I believe that a development of this concept might provide a means of expeditiously disposing of some of this litigation, particularly in cases involving modest "spread" between the compensation sought and offered. I believe men of qualifications equal to the judiciary could be obtained for such activity, particularly if there were adequate compensation for them.

Mr. John H. DeMouilly
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As I am sure you are aware that the federal courts do use commissioners for this purpose, and that New York has a specialized court somewhat similar to what Mr. Huxtable is suggesting.

I hope Mr. Huxtable's views will be kept in mind.

Sincerely yours,



JERROLD A. FADEM

JAF:pc

cc: Richard L. Huxtable, Esq.
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