

3/29/71

Memorandum 71-18

Subject: Priorities to Be Given Topics on Agenda

The staff believes that this is a good time to review the various topics on our agenda and to determine the priorities that are to be given to topics on the agenda.

The staff believes that it is desirable to submit some recommendations to each session of the Legislature. At the same time, the staff believes that it would be desirable to select condemnation law and procedure as a priority item.

Accordingly, we recommend that the Commission plan to submit the earnings protection law bill and the custody bill to the 1972 Legislature. We would devote the time necessary to complete work on these two topics for 1972. The remaining time should, we believe, be devoted primarily to condemnation law and procedure. The overlap of condemnation and inverse condemnation will require us to give some consideration to inverse condemnation (as, for example, to compensation in inverse condemnation for highway proximity damages), but we suggest that work on such areas as water damage, and the like be deferred. In this connection, the Commission may desire to review the water damage tentative recommendation and to make a decision as to what, if anything, should be done with respect to this problem within the next year or so. This might be desirable in view of the legislative concern about liability in this area. Also, this would provide the Commission with an opportunity to review the recent Holtz decision.

We urge you to read the three exhibits attached to this memorandum. They will give you valuable information concerning the status of our work on our three major topics, the background material we have available on each topic, the major areas of study involved in each topic, and the work in progress on each topic.

The following is a listing of the topics on our agenda.

#### Topics Under Active Consideration

1. Condemnation law and procedure. See Exhibit I.
2. Inverse condemnation. See Exhibit II.
3. Attachment, garnishment, exemptions from execution. See Exhibit III.
4. Rights of parties with respect to lessee's property when lease abandoned or terminated.

We are negotiating a contract with Professor Friedenthal to prepare a background research study on this topic.

5. Right of nonresident aliens to inherit.

We have a research consultant on this topic. We do not know whether the consultant plans to prepare the study needed nor when we will receive the study. We have written to the consultant several times and have recently again written to the consultant.

6. Governmental liability.

We plan to consider this topic in connection with inverse condemnation and condemnation law and procedure. We have no specific plans for recommending changes nor any particular areas of governmental liability under active consideration.

7. Custody proceedings.

We have a research study on hand. It will soon be published in the Stanford Law Review. We will be presenting a tentative recommendation designed to carry out the consultant's recommendations (which were approved some time ago by the Commission). This would be a recommendation to the 1972 Legislature.

8. Arbitration.

We have a research consultant on this topic, but it appears that the consultant will not produce the needed background study.

9. Liquidated damages.

We have a research consultant on this topic. He is now working on a draft of the study and we should have it by the end of May 1971.

Other Topics Authorized for Study

The following topics have been authorized for study. We do not have a consultant on these topics.

1. Nonprofit corporations.
2. Oral modification of a written contract.
3. Partition procedures.
4. Parol evidence rule (if resolution adopted by 1971 Legislature).
5. Prejudgment interest (if resolution adopted by 1971 Legislature).

Topics Continued on Calendar for Further Study

On the following topics, studies and recommendations relating to the topic, or one or more aspects of the topic, have been made. The topics are continued on the Commission's Calendar for further study of recommendations not enacted or for the study of additional aspects of the topic or new developments. We kept these topics on the agenda primarily so we can submit legislation to correct defects that are found in the legislation that was enacted on our recommendation.

1. Counterclaims and cross-complaints.
2. Joinder of causes of action.
3. Escheat; unclaimed property.

4. Quasi-community property.
5. Powers of Appointment.
6. Evidence.
7. Unincorporated associations.
8. Fictitious business names.

Respectfully submitted,

John H. DeMouly  
Executive Secretary

EXHIBIT I

STUDY 36

MAJOR AREAS OF STUDY--CONDEMNATION LAW AND PROCEDURE

PRELIMINARY PROVISIONS AND DEFINITIONS

Substantial progress has been made in drafting these sections of the comprehensive statute. Revisions and additions will be made as the need arises when additional areas of the statute are considered.

THE RIGHT TO TAKE

Most of the Commission's efforts during the past several years have been devoted to the right to take. This area of the law involves considerable work. Much of the work is codification or clarification. Nevertheless, important problems are involved that present difficult policy questions. The general content of this area is indicated below.

1. Condemnation permitted only where authorized by statute

A major aspect of the right to take is the extent to which public entities, public utilities, and private persons or corporations have the right to condemn property. Considerable progress has been made. The right to take of local public entities--special districts, school districts, cities, and counties--has been considered and the general policies established. Much clean-up work remains. The condemnation authority of public utilities has been considered and right to take provisions tentatively approved. Nevertheless, the provisions relating to public utilities in the eminent domain title need to be considered and either eliminated or codified in some other appropriate place--probably the Public Utilities Code. The right of certain private persons--nonprofit hospitals, mutual water companies, certain higher educational institutions--has been considered. We will prepare a memorandum on the extent to which other private persons should have the right to take. The problem of condemnation for state purposes remains to be considered.

2. Disposition of right to take provisions of eminent domain title

A substantial amount of time has been devoted to disposing of the obsolete, overlapping, and ambiguous right to take provisions of the eminent domain title. A major problem is presented by Code of Civil Procedure Section 1238 which purports to specify the public uses for which property may be acquired. Some of the most difficult portions of this section remain to be considered. The staff will prepare background information and memoranda. Also, other provisions, such as Code of Civil Procedure Sections 1238.1-1238.7, need to be disposed of.

3. Disposition of overlapping and inconsistent provisions of special district statutes and other statutes in other codes

A great number of codified and uncodified statutes will need to be amended or repealed to eliminate overlapping and inconsistent provisions. This will primarily be a staff job, but it will need to be reviewed by the Commission with some care. Repeal of these provisions will make the general provisions of the comprehensive statute applicable to all condemnors.

4. Resolution of necessity

The Commission has concluded that for local public entities the resolution of necessity should be conclusive. The Commission has not yet determined whether fraud or bad faith should be an exception to the conclusive effect of the resolution of necessity.

The Commission needs to provide general provisions covering the effect of the resolution of necessity. A staff memorandum will be prepared.

5. Property interests that may be acquired by condemnation

The Commission has concluded that a public entity should be permitted to acquire whatever interest it determines that it needs for a public use and that the resolution of necessity should have the same effect on the interest acquired as it has on necessity generally. Work remains in this area. For example, Code of Civil Procedure Sections 1239, 1239.2, 1239.3, 1239.4 need to be disposed of, and some of these sections have not yet been considered.

6. More necessary public use

The Commission has considered and tentatively approved sections relating to this problem. Some additional work remains and we will prepare memoranda.

7. Property interests subject to condemnation

What property can be condemned? This has not yet been considered except to the extent that taking of property already devoted to a public use has been considered. Code of Civil Procedure Section 1240 deals with this. Memoranda will be prepared.

8. Excess condemnation

Statutory provisions have been tentatively approved. Comments on tentatively approved sections have not been considered. Memorandum will be prepared to present comments received on tentatively approved sections.

9. Condemnation for future use

Statutory provisions tentatively approved.

10. Byroads

Statutory provisions tentatively approved.

11. Extraterritorial condemnation

Statutory provision tentatively approved.

12. Substitute condemnation

Statutory provisions tentatively approved.

13. Preliminary location, exploration, and survey

Recommended legislation enacted; incorporated into tentative statute.

14. Abandonment of use for which property condemned--change in public use  
(owner's right to return)

Staff study prepared. Will be presented for Commission consideration.

15. Joint powers agreements

Statutory provision tentatively approved.

16. Condemnation for consistent use

Statutory provision **drafted**.

17. Protective condemnation; open space condemnation

These important aspects of the right to take will be considered in staff memoranda to be prepared.

18. Condemnation of franchises

Special provisions in the eminent domain title deal with the condemnation of franchises. Whether these provisions are needed and, if so, how they should be revised will be considered in a staff study to be prepared.

19. Exemptions from condemnation

Whether exemptions, such as the one for cemetery property, should be retained will be considered in a staff study to be prepared.

20. Right to take temporary occupancy

Staff study will be prepared.

21. Taking personal property and other interests

Staff study will be prepared.

## 22. Procedural aspects of the right to take

Procedural aspects of the right to take--such as how the right to take issue is to be raised, procedure for determining, consequences of defeating acquisition, etc.--will be considered in a study to be prepared.

## JUST COMPENSATION AND MEASURE OF DAMAGES

The Commission has not yet considered this aspect of condemnation law. Significant matters to be considered include the following:

1. "Fair market value" defined (rule as to partial takes)
2. Effect of imminence of condemnation; delay in bringing condemnation action
3. Date of valuation
4. The larger parcel
5. Machinery, equipment, and fixtures (part of property taken?)
6. Churches and other property devoted to unique or special uses
7. Harvesting and marketing of crops
8. Relocation assistance
9. Refinancing costs
10. Goodwill
11. Net rental loss
12. Expense of plans rendered unusable
13. Proration of taxes
14. Delay compensation (interest)
15. Litigation expenses

## APPORTIONMENT AND ALLOCATION OF AWARD

1. Persons entitled to share in award
2. Apportionment and allocation of award
3. Award of more than market value as unit

POSSESSION PRIOR TO JUDGMENT

A tentative recommendation, revised and codified in the tentative comprehensive statute, has been considered by the Commission. The comments need to be considered.

PROCEDURE

Our research consultant is preparing a study, the first installment of which should be on hand early in May.

EXCHANGE OF VALUATION DATA

To be considered in procedure study

ARBITRATION

To be considered in procedure study

RELATED MATTER

Van Alstyne has submitted to the Commission studies on highway proximity damage and required dedication of land as condition of subdivision approval.

EXHIBIT II

STUDY 65 - INVERSE CONDEMNATION

The following are the major aspects of this topic.

RIGHT TO ENTER, SURVEY, AND EXAMINE PROPERTY

Recommended legislation enacted.

INSURANCE COVERAGE

Recommended legislation submitted for enactment.

WATER DAMAGE: INTERFERENCE WITH LAND STABILITY

A tentative recommendation was prepared and distributed to persons regularly attending meetings for comment. Work was discontinued after comments were considered. Since then, the Holtz case was decided.

NOISE DAMAGE FROM OPERATION OF AIRCRAFT

Considered but action deferred pending review of superior court decisions.

LOSSES CAUSED BY HIGHWAY AND STREET IMPROVEMENTS

Consideration deferred.

DELIBERATELY INFLICTED PHYSICAL DESTRUCTION OR DAMAGE

Matters discussed include denial destruction, summary seizure or requisitioning of private property, destruction of menaces to health and safety, confiscation and destruction as sanctions in the enforcement of regulatory policies, and destruction of private buildings as a means of enforcing building and safety regulations. Considered and action deferred.

TAKING OR DAMAGING BY EXERCISE OF POLICE POWER

The chapter is directed primarily to three broad categories of recurring situations in which claims of unconstitutional takings or damaging of private property, as a result of regulatory measures, have been repeatedly

asserted: (1) cases in which economic loss has been caused by newly imposed regulations of personal activity or by changing an existing pattern of regulatory conditions affecting personal activity; (2) cases in which economic loss has been caused by regulation of the use of privately owned real property; and (3) cases in which economic loss has been caused by the compelled use of private property to serve governmental ends or by compelled contributions, exactions, or expenditures in relation to property. This portion of the study has not been considered by the Commission.

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EXHIBIT III

STUDY 39 - ATTACHMENT, GARNISHMENT, EXEMPTIONS

There are four aspects of this study.

DISCHARGE BECAUSE OF WAGE GARNISHMENT

Recommendation submitted to 1971 Legislature.

EARNINGS PROTECTION LAW

Provides effective procedure for wage garnishment and revises law relating to checking accounts, retirement funds, wage assignments, and other related matters. Now under study with view to submitting to 1972 Legislature.

ATTACHMENT PROVISIONS

Consideration of extent to which attachment (prior to judgment) is constitutionally permitted; when attachment should be permitted; procedure; and the like. Consultant now making study of court records.

TECHNICAL CHANGES IN ATTACHMENT AND EXECUTION LAW

Consultant will submit reports as they are prepared. Court study he is now making will delay submission of reports.