#36.300 7/16/74

Memorandum 74-38

Subject: Study 36.300 - Condemnation Law and Procedure (Comprehensive Statute Generally--Comments on Tentative Recommendation)

BACKGROUND

The Commission's printed tentative recommendations relating to condemnation law and procedure, dated January 1974, have been distributed to roughly 1,200 people since May 1974. We requested comments on the tentative recommendations by July 1, 1974. We have received so far the 19 comments attached as exhibits to this memorandum and anticipate receiving some additional comments throughout the summer; a handful of people have informed us that they are unable to comment fully at this time but will forward their detailed comments as soon as possible. In addition, we have received a few oral and written inquiries concerning the contents of the recommendations that we have been able to satisfy by direct response.

The staff believes that the most expedient way to proceed with the eminent domain project is to review the comments thus far received and, during the summer, make any necessary revisions and prepare the final recommendation for the printer with the knowledge that we may have to cover some of the same ground again in September after additional comments have been received and after we have a more precise idea from Professor Van Alstyne of just what will be in the Uniform Eminent Domain Code and in what ways it will differ from our proposed Eminent Domain Law.

ANALYSIS OF COMMENTS

General. While the comments thus far submitted have tended to focus on particular problems in sections, there have been a few general comments as to the whole of the Commission's product. The City of San Jose (Exhibit VIII--pink) compliments the Commission on a job well done and finds itself

in substantial agreement with the recommendations. The City of San Diego (Exhibit X--green) notes that many of the provisions appear to have been improved under the Commission's handiwork. Stanford Professor John H. Merryman (Exhibit XI--gold) refers to the tentative recommendation as very impressive. The Franchise Tax Board of the State of California (Exhibit XII--blue) states that the Commission's recommendation seemingly satisfies the need to revise an inconsistent and inexact area of the law and consequently has their approval. San Francisco attorney, Vernon L. Goodin (Exhibit XIV--white), thinks the Commission has done a great job. Both the Southern California Gas Company (Exhibit XV--pink) and Los Angeles attorney Albert J. Forn (Exhibit XIX--blue) are favorably impressed with the tentative recommendation.

Of peculiar interest is the essay submitted by Rev. John H. Howze of Los Angeles (Exhibit IV--gold) on The Philosophy of the Domain Concept, in which he evidently agrees with all of the Commission's recommendations, indicating that the Commission (apparently) is and shall be honored by all in the legal profession.

Relation of eminent domain to inverse condemnation. The Commission continues to receive pressure to make portions of the Eminent Domain Law applicable to inverse condemnation actions and to deal with inverse condemnation matters in the Eminent Domain Law. San Francisco attorney, Vernon L. Goodin (Exhibit XIV--white), for example, would make the discovery provisions applicable in inverse. He would also have us deal with the situation of planning blight where no property is taken. Mr. Howard Foulds of Downieville (Exhibit XIII--buff) would like to give a trial preference to inverse condemnation actions.

The Commission's position has been that it will deal with inverse condemnation in due course but that it must take one bite at a time or it will never finish the eminent domain project. Perhaps we can incorporate in the summary of the recommendations and in the beginning of the preliminary part a statement to that effect; at present such a statement is buried in footnote 2 on page 24 of the preliminary part.

Relation of Eminent Domain Law to relocation assistance provisions. Several commentators have demonstrated some confusion over the relation between the Eminent Domain Law, particularly the compensation provisions, and the relocation assistance provisions. Some have seen duplication where there is none; others have simply questioned whether the Commission is aware of its provisions. See, e.g., the City of San Diego (Exhibit X--green):

> As a final note, we wonder whether the Commission took into account Section 7260, et seq. of the Government Code in preparing its recommendations. This, in our opinion, warrants some consideration.

The staff suggests that we include in the preliminary part of the recommendation a segment that describes the relation of the Eminent Domain Law to the relocation assistance provisions, that indicates the different types of losses the Eminent Domain Law provides for, and that points out the prohibition against double recovery. This has already been done to a certain limited extent in the tentative recommendation, but a whole segment devoted to the subject under a separate heading might prove helpful.

§ 1235.170. "Property" defined. The City of San Diego (Exhibit X--green) comments that the definition of property is overly broad and would create inverse situations more readily. The staff notes that the Eminent Domain Law is not intended to apply to inverse condemnation actions. See discussion under "Relation of Eminent Domain to Inverse Condemnation," supra; see also Section 1235.110 (application of definitions).

§ 1240.010. Public use limitation. The City of San Diego (Exhibit X--green) is concerned that elimination of the "stated public uses" from Section 1238 and substitution of the general language in Section 1240.010 might eliminate some existing condemnation authority. The staff suggests that the following sentence be added to the end of the second paragraph of the Comment:

> Every public use formerly declared in Section 1238 is continued in a statute elsewhere in the California codes.

§§ 1240.030 and 1240.040. Public necessity and resolution of necessity required. Hollywood attorney, Peter D. Bogart (Exhibit V--blue), recommends the addition of a requirement that property cannot be taken by eminent domain unless the project cannot reasonably be constructed without the acquisition of the property. His recommendation would in effect change one of the elements of public necessity which presently requires that:

> The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

The staff believes that the present test is a good one and that Mr. Bogart's alternative, designed to prevent a public entity from locating a project with the sole object to minimize costs, is unworkable. For, under Mr. Bogart's test, property could not be taken if there were other property on which the project could be located; but the other property could not be taken if the project could be located on the first property. In essence, every property owner would have a defense against the taking: take someone else's property.

The City of San Diego (Exhibit X--green) suggests that the word "project" be defined. The Commission has in the past declined to provide a definition of project because it is a term that is more amenable to determination on

a case-by-case basis and because it is undergoing present judicial development in several contexts.

§ 1240.120. Right to acquire property to make effective the principal use. The State Bar Committee (Exhibit II--yellow--p.4) disapproves this provision to allow a condemnor to acquire property in order to protect a public improvement. The portion objected to appears to be the provision permitting the condemnor to sell, lease, or otherwise dispose of the property subject to reservations or restrictions designed to protect the project. The committee felt this to be a taking not for public use, and several committee members had experienced abuse of the power of eminent domain being used in takings "for reservations as to future use."

The staff believes that there is no doubt whatsoever that the authority granted in Section 1240.120 is a public use, and existing statutory and case law, as well as Article I, Section 14-1/2 of the California Constitution, permit protective condemnation. In the case of an abuse of the eminent domain power, as with condemnation for any other purpose, the property owner may challenge the taking if the property is not actually to be used for protective purposes. See Section 1250.360 and Comment thereto (grounds for objection to right to take where resolution conclusive).

§ 1240.220. Acquisitions for future use. Property may be taken for future use only if the use is to be within a reasonable period. The Commission has recommended that seven years is per se a reasonable period. The Department of Transportion (Exhibit I--pink--p.5), noting that the seven-year period is derived from the Federal Aid Highway Act of 1968, points out that that act has been amended to provide 10 years. The department also indicates that a 10-year period "is more realistic under current conditions," and suggests the Commission's recommendation be so changed.

The State Bar Committee (Exhibit II--yellow--p.2) has in the past favored a five-year period. It took no action with respect to the Commission's seven-year tentative recommendation at its most recent meeting.

The staff believes that the seven-year period is adequate, particularly since the Commission provides for such longer periods as may be reasonable (subject to proof of the reasonableness). If the Commission adopts a 10-year period, the staff recommends that the period be absolute with no opportunity to show that a longer period is reasonable.

§ 1240.230. Burden of proof of future use. The Department of Transportation (Exhibit I--pink--p. 4) suggests that, if the project for which the property is being acquired has been budgeted by the condemnor, there should be a conclusive presumption that the acquisition is not for a future use. Such a provision, in the department's opinion, will provide an adequate safeguard to protect against an irrational court decision that may jeopardize the timing of the project.

The staff believes that this recommendation is sound and would add the following language to Section 1240.230:

> (d) If the plaintiff proves that funds have been budgeted for construction of the project for which the property is taken, it shall be conclusively presumed that the taking satisfies the requirements of this article.

§ 1240.240. Acquisition for future use with consent of owner (new).

The Department of Transportation would add a provision such as the following:

> Notwithstanding any other provision of this Article, a public entity authorized to acquire property by eminent domain may acquire the property for future use by any means (including eminent domain) expressly consented to by the owner of the property.

The reason for such a provision is "to preserve the ability of the Department to acquire property for future use in order to relieve personal hardship which may be caused by planning or other preliminary activities."

If the department feels that such a provision is necessary, the staff sees no harm in adding it although it would appear to the staff that, if the condemnor and the property owner agree, there is little need for the statute.

§ 1240.340. Substitute condemnation where owner of necessary property lacks power to condemn property. This section provides for condemnation in order to compensate a person with other property rather than money where justice requires that he be so compensated and it would not be unjust to the person whose property is condemned. This provision is opposed by the State Bar Committee (Exhibit II--yellow--p. 2) on the ground that this is not a public use; this sort of condemnation is impermissible except with the owner's consent.

The staff notes that existing law authorizes such condemnation by some condemnors. See, e.g., Sts. & Hwys. Code § 104(b)(Department of Transportation) and Water Code § 253(b)(Department of Water Resources).

§ 1240.350. Substitute condemnation to provide utility service or access to public road. The State Bar Committee (Exhibit II--yellow--p.3) opposes this section to permit condemnation to provide access or utility service to landlocked property for the same reason it opposes substitute condemnation generally. See discussion under Section 1240.340, supra.

The staff notes that condemnation for this purpose would almost certainly be for a public use, that releasing landlocked property is a desirable social goal, and that the condemnation authorized by this section is strictly limited to rights of way. The staff also thinks it mighty peculiar that the State Bar Committee so greatly favors private condemnation (see discussion under Civil Code § 1001, infra), presumably for this very purpose, while it opposes condemnation by public entities with the built-in protections it entails.

§ 1240.410. Condemnation of remnants. The Commission's tentative recommendation permits condemnation of excess property in cases where the remainder will be left in such size, shape, or condition as to be of "little market value." Professor Merryman (Exhibit XI--gold) notes that this is a "rather substantial" change in the law that should be highlighted in the preliminary part of the recommendation.

At the time the Commission adopted the "little market value" test for excess condemnation, it was well aware that this was a change in the language of the law from "excessive damages" to the remainder. However, the Commission believed that the practical effect of this change was to substitute a more concrete and universal term which was more understandable yet which would give essentially the same results in nearly all cases. The Comment to Section 1240.410 points this out and supplies illustrations of the application of the little market value test. In the example used by Professor Merryman, where severance damages to the remainder are so great that it would cost less to buy the whole parcel, the remainder would ipso facto be of "little market value."

Nonetheless, it may be advisable, as Professor Merryman suggests, to point this out in the text of the recommendation. The staff is quite prepared to do so and also to make excess condemnation a separate category under public use and necessity if to do so will help public understanding of the Commission's recommendation.

Oroville attorney, Robert V. Blade (Exhibit XVII--green), on the other hand, has just the opposite reason for opposing the "little market value" test. He has represented both condemnors and property owners and believes that the power to acquire excess property is abused for recoupment purposes by the public entities. He feels that the ability of the private landowner to

convince a trial judge that a particular remnant is or is not of little value is questionable. He offers no specific test for excess takings. Presumably he would prefer to place the burden of proof that the remnant is of little market value on the condemnor. The staff simply notes that this is precisely where the Commission proposes to place the burden of proof. See discussion below under Section 1240.420.

Neither the Department of Transportation (Exhibit I--pink) nor the County of San Diego (Exhibit III--green) has problems with the Commission's proposed excess test; however, both are uncomfortable with subdivision (c) permitting the property owner to defeat the excess taking if he is able to prove that the public entity has a readily available means of preventing the remainder from becoming one of little market value. The Department of Transportation believes that the proposal (1) will lead to extensive litigation, (2) creates speculative issues, (3) will require proof of many facts not in issue, and (4) will add several days of trial time to an already overburdened judicial system.

The staff urges retention of subdivision (c). The staff believes that the provision is the only real protection for the property owner against abuse of the excess authority; the property owner will not lightly undertake to prove that there is a means of salvaging the remainder unless he is fairly confident of success.

The County of San Diego feels that, if subdivision (c) is retained, where a property owner attempts to show that there is a means of mitigating the severance damages, he should be precluded from putting on evidence of severance damages in excess of the cost to cure or the cost of the solution. While this approach has some surface attraction, the staff believes that it is basically unsound. The theory behind subdivision (c) is that, if the

property owner demonstrates there is a physical solution to the remnant problem, he may keep the remainder; then in court he will prove extensive severance damages; for this reason the condemnor will work out an agreement to perform the mitigating work. The Commission provides for this in Section 1263.610 (performance of work to reduce compensation). Alternatively, if the parties cannot agree, the condemnor will incorporate the mitigating features in its plans, and severance damages will be reduced accordingly. See Section 1263.450 (compensation to reflect project as proposed).

Under the scheme proposed by the County of San Diego, however, the property owner would have to prove the cost of mitigation. In some cases this will be impossible, as where mitigation is only within the power of the condemnor (e.g., an underpass under a freeway to provide access to the landlocked remainder). In other cases, limiting severance damages to the cost to cure will not be proper because there may be other causes of damage--loss of view, noise, dust, circuitous access, and the like. The cost to cure should not replace severance damages; rather, the possibility of cure should serve simply to mitigate severance damages.

§ 1240.420. Resolution of necessity and complaint. The Commission has tentatively proposed that the resolution of necessity create a presumption affecting the burden of producing evidence that a remnant sought to be taken is of little market value. The effect of this is that, where the property owner contests the taking and produces sufficient evidence to overcome the burden of going forward, the burden of proof shifts to the condemnor.

The Department of Transportation (Exhibit I--pink--p.5) would give the resolution of necessity a presumption affecting the burden of proof on excess. "Such a provision should discourage spurious issues from being raised by the condemnee yet allow full adjudication where a truly meritorious case exists."

The Commission's position on this point in the past has been that, in order to protect against abuse of the excess power, the condemnor should be able to prove to the court, when put to the test, that it is authorized to take the excess. This appears also to be the feeling of Mr. Blade (Exhibit XVII--green), discussed above under Section 1240.410.

§§ 1240.510-1240.630. Compatible and more necessary use. The Commission has felt very strongly that joint uses should be encouraged in the interests of maximum utilization of public property and minimum imposition on private ownership. To this end it has tentatively recommended a scheme whereby a condemnor may acquire for joint use property already appropriated to public use even though the preexisting use may be a more necessary use. Likewise, where a condemnor seeks to acquire property appropriated to public use for a more necessary public use, the Commission has proposed that a joint use be allowed if the two are compatible. The court is authorized to impose any necessary terms and conditions to facilitate such joint uses.

The Department of Transportation opposes this scheme. Pointing out some of its practical difficulties, the department indicates that the existing scheme of encroachment permits is quite satisfactory. The staff notes that the existing scheme of permits should be satisfactory to the department since the department is in charge of them and is a more necessary user. Also, the encroachment permit scheme applies to the Department of Transportation but not to myriads of other public users and condemnors.

§ 1240.650. Use by public entity more necessary than use by other persons. The State Bar Committee (Exhibit II--yellow--p.3) approves this section as drafted.

§ 1240.660. Property appropriated to the public use of cities, counties, or certain special districts. The Commission in its tentative recommendation particularly solicited comments whether this section, providing that property

appropriated to public use by certain local public entities may not be taken by other such entities, should be retained. The Commission received one comment on this point from Studio City attorney Wayne K. Lemieux (Exhibit VII--white). Mr. Lemieux seems to feel that the section should be retained, but that it should be amended to restrict the number of entities listed by, for example, referring to California water districts rather than to water districts generally. Mr. Lemieux also believes that property of the entities listed in the section should be immune to condemnation if it is simply owned by the public entities rather than used or held for use.

In view of the Commission's general policy to encourage joint use of property held by public entities wherever possible in order to avoid the need for taking private property, it is the staff's present belief that Section 1240.660 should be deleted in its entirety.

§ 1240.680. Property appropriated to park or similar uses. Mr. Horace A. Weller of San Francisco (Exhibit XVI--yellow) suggests that recreational purposes, hiking and riding trails, and access roads and paths to public places be included among the legislatively declared more necessary public uses. However, a close reading of Mr. Weller's letter indicates that he intends not so much to make those purposes more necessary uses but, rather, to make them public uses in behalf of which the power of eminent domain might be exercised.

Despite the staff's sympathy with Mr. Weller's proposal, we note that the Commission has followed a policy of neither expanding nor contracting the declared public uses for which eminent domain may be exercised. The reason for this policy is the belief that the decision what purposes are appropriate for condemnation is basically a political decision within the peculiar competence of the Legislature on which any recommendation of the Law Revision

Commission would not be particularly useful. We would point out, however, that certain of the purposes listed in Mr. Weller's letter are clearly public uses for which condemnation may be used, and careful research might well reveal that all of those listed are such public uses.

§ 1245.210. "Governing body" defined. The Department of Transportation (Exhibit I--pink) points out that the former Department of Aeronautics has been subsumed within it and recommends some conforming changes in the tentative recommendations. The staff agrees that these conforming changes are necessary and suggests the amendment of Section 1245.210 as proposed by the Department of Transportation to make the California Aeronautics Board the "governing body" in the case of a taking by the Department of Transportation for aeronautics purposes. The specific changes are set out in Exhibit I on pages 2-4. The staff notes that there will also have to be conforming changes in the preliminary parts of both the Eminent Domain Law pamphlet and the State Condemnation pamphlet.

§ 1245.240. Adoption of resolution. The City of Beverly Hills (Exhibit VI--buff) points out that Section 1245.240, requiring a majority vote of all the members of the governing body for adoption of a resolution of necessity, is ambiguous. The basis of this ambiguity is that the statute does not specifically refer to all members even though the Comment to the section does so. While the staff does not believe that the ambiguity is real, we are willing to insert the word "all" in the text of the statute to make its meaning clear. Section 1245.240 would then read:

> 1245.240. Except as otherwise provided by statute, the resolution shall be adopted by a vote of a majority of all the members of the governing body of the public entity.

The City of Beverly Hills is also concerned with the policy of requiring such an absolute majority. The concern is that, in practice, such a requirement may aid an unwilling minority to block a needed public project.

On this point we note that, if the project is really needed, a majority of all the members should be able to be managed. The reason for the absolute majority requirement is to assure that the public entity makes a considered decision of the need both for the property and the proposed project itself. See pages 38-39 of the tentative recommendation. Once the absolute majority is attained, the resolution will be given conclusive effect under the Commission's proposals. This should be contrasted with the present requirement that a two-thirds majority of all members of the governing body of a local public entity adopt a resolution before it is given conclusive effect. Code Civ. Proc. § 1241(2).

§ 1245.250. Effect of resolution. The Commission has proposed to continue and generalize the existing rule that the resolution of necessity be given conclusive effect in the eminent domain proceeding.

The State Bar Committee (Exhibit II--yellow) recommends that the resolution be subject to review for fraud or collusion on the ground that no governmental action should be free of the check and balance of judicial review particularly in the narrow "but not infrequent" area where the resolution has been tainted by fraud. Similarly, Hollywood attorney Peter D. Bogart (Exhibit V--blue) recommends that no resolution of necessity be given more than a rebuttable presumption that the matters to which it speaks are true. He states that the resolution is basically a political decision, is subject to abuse, and is normally based on "convenience" or "cost-saving" to the entity rather than on true "public necessity." The staff also notes that the conclusive resolution of necessity has been the subject of continuing attack in the legal periodicals, one of the more recent being The Justiciability of Necessity in California Eminent Domain Proceedings, 5 U.C.D. L. Rev. 330 (1972).

The reasons for the Commission's tentative decision to adhere to the conclusive resolution are summarized in the preliminary part on page 39:

> The Commission has weighed the need for court review of necessity questions against the economic and procedural burdens such review would entail and against the policy that entrusts to the legislative branch of government basic political and planning decisions concerning the need for and design and location of public projects. The Commission has concluded that the policy to provide conclusive effect to the resolution of necessity of a public entity is a sound one and should be continued. Where the condemnor is a public utility or other private entity, however, the issue of public necessity should always be subject to court determination.

§ 1250.125. Publication as to certain defendants (new). The Commission originally recommended the repeal of Section 1245.2 providing for an alias summons. In connection with the partition study, however, the Commission directed the staff to give consideration to reincorporation of such a provision. The staff believes that such a provision may serve a useful purpose in cases of publication involving complaints listing numerous properties since it will avoid the necessity of publishing the legal descriptions of all the properties except those in which the persons being served by publication are concerned.

Consequently, the staff proposes the addition of the following provision:

§ 1250.125. Publication as to certain defendants

1250.125. (a) Where summons is served by publication, the publication may:

(1) Name only the defendants to be served thereby.

(2) Describe only the property in which the defendants to be served thereby have or claim interests.

(b) Judgment based on failure to appear and answer following service under this section shall be conclusive against the defendants named in respect only to property described in the publication.

Comment. Section 1250.125 continues the substance of former Section 1245.2.

The Comment to Section 1245.2 would have to be adjusted accordingly.

§ 1250.310. Contents of complaint. The County of San Diego (Exhibit III--green--p.4) agrees with the Commission's recommendation that a map showing the relationship of the project to the property sought to be taken should be included in every case.

Mr. Foulds of Downieville (Exhibit XIII--buff) believes the map should also indicate whether the property sought is a part of a larger parcel. The Commission rejected this approach since the determination of the larger parcel is a legal issue to be resolved at a later point in the proceedings and may well not be known to the condemnor at the time of filing the complaint.

§ 1250.320. Contents of answer. The County of San Diego (Exhibit III--green--p.4) opposes deletion of the requirement that the property owner allege value and damages in his answer. The Commission determined to delete these allegations from the answer because they were premature. The property owner does not have sufficient knowledge at the time of the answer to plead these contentions intelligently. Discovery is the proper vehicle for making known such contentions.

§ 1250.330. Signing of pleadings by attorney. The staff proposes to delete the phrase "as sham and false" from the end of this section; it appears to serve no useful purpose.

§ 1250.340. Amendment of pleadings. The County of San Diego (Exhibit III--green--p.4) approves subdivision (b)(resolution of necessity) but believes the mandatory requirement for payment of compensation for partial abandonment is unsound (subdivision (c)). The county believes that some latitude should be allowed to the court to allow costs or not in order to stimulate negotiations between the parties.

The staff notes that damages for partial abandonment is a provision of existing law. The staff believes it is sound policy to require payment of

costs on abandonment where the costs have been incurred as a result of the condemnor's proposed acquisition which is thereafter abandoned.

§ 1255.010. Deposit of amount of appraised value of property. The scheme for making prejudgment deposits recommended by the Commission calls for the condemnor to have an appraisal made of the property, deposit the amount of the appraisal, and notify the property owner of the amount of the deposit and its basis. Thereafter the property owner may request the court that the amount of the deposit be increased. Mr. Howard Foulds of Downieville (Exhibit XIII--buff) believes that the requirement of the amount of the deposit based on an appraisal is a reform that was long overdue: "This takes it out of the lip service area."

On the other hand, the Department of Transportation (Exhibit I--pink--p.17) objects that the requirement that the condemnor prepare for the condemnee a statement of valuation data involves extensive administrative effort and expense and places a burden on the condemnor to provide detailed valuation data not normally available until very near trial. The staff believes that this objection is based on a misunderstanding of what Section 1255.010 requires. It does not require actual data to be used at trial; it requires only a copy of the appraiser's report, containing only the most basic valuation data. It is difficult to see how this will entail any inconvenience to the condemnor; for presumably the condemnor has a preliminary appraisal prepared as the basis for a prejudgment deposit in every case regardless of the Commission's present recommendations. And the relocation assistance provisions require the condemnor to have an appraisal and make an offer to the property owner based on the appraisal. See Govt. Code § 7267.2.

The County of San Diego (Exhibit III--green) has quite a different objection to the prejudgment deposit scheme, which is that it duplicates

provisions of the relocation assistance act. The staff is at a loss as to which provisions are involved unless it is Government Code Section 7267.2, requiring the condemnor to make an offer to the property owner to acquire the property at a price based on the condemnor's appraisal. This section is not a deposit section; hence,it cannot serve the same function as the Commission's prejudgment deposit provisions.

§ 1255.030. Increase or decrease in amount of deposit. While the initial deposit is made ex parte by the condemnor, Section 1255.030 permits the property owner to have the amount of the deposit increased. The Department of Transportation (Exhibit I--pink--pp.16-18) sees this as an open-ended invitation to property owners to challenge the sufficiency of the deposit, which will assuredly result in an increased burden on the courts. The department notes that, under the Commission's proposal, the property owner may make successive attempts to have the deposit increased; if an increase is not deposited within 30 days, it will be treated as an abandonment; upon withdrawal of any amount deposited, the court cannot redetermine probable compensation to be less than the amount withdrawn. "The net result of these proposals cannot help but greatly increase the amount of court time utilized in pretrial motions to increase the amount of probable just compensation deposited to secure necessary orders of possession as well as increase the administrative costs imposed on condemnors. . . ." Because of the workload increase on the courts, the deposits will be regularly increased beyond the eventual amount of just compensation finally determined in the case.

The County of San Diego (Exhibit III--green) also objects to the provision for review and change of the security deposit, stating simply that it "should be limited because of the potential for abuse."

The staff does not see the specter of abuse of the right to increase the deposit, with every property owner coming in automatically to request the increase. The burden of proof will be on the property owner; he will have to substantiate his contentions with appraisals, and he will not be looked on by the court with favor if he makes successive efforts to increase the deposit. The property owner in the condemnation action must bear the expenses of attorney and appraiser and will be reluctant to try to make a showing for an increased deposit unless he believes he has a legitimate case and a fair chance of success.

§ 1255.040. Deposit for relocation purposes on motion of certain defendants. The Commission has tentatively recommended that residential property owners be permitted to compel the condemnor to make a deposit in cases where the condemnor has not made one. The Department of Transportation (Exhibit I--pink--p.21) opposes this recommendation for the reason that the need for funds for relocation of the resident has disappeared with the enactment of the relocation assistance act. The County of San Diego (Exhibit III--green) makes the same point.

The staff agrees that the reason for the Commission's recommendation was to give aid for relocation in the hardship case and, if the act is serving its intended purpose, then there is no longer as great a need for Section 1255.040. It should be noted, however, that the relocation assistance act provides only limited amounts of money for moving and acquiring comparable property; the bulk of the cost of replacement property is borne by the property owner who will not receive compensation for the property from which he has been moved until he is paid the award following trial or unless a prejudgment deposit is made.

§ 1255.050. Deposit on motion of owner of rental property. The Commission has tentatively recommended that owners of rental property be permitted to compel the condemnor to make a deposit in cases where the condemnor has not made one. The reason for this recommendation is that pendency of a condemnation action will frequently cause an increased vacancy rate so the property owner should be permitted to relocate promptly. If the condemnor refuses to make the deposit, it is charged with the lessor's net rental losses that are attributable to the pending project.

The Department of Transportation (Exhibit I--pink--pp.21-22) opposes this provision on the ground that large lessors will seize upon it as "a method of seeking, by motions for increase of deposit before trial, to expose the agency unable to meet such high levels of deposits as an individual judge may determine to be appropriate (in the limited time and on the limited evidence available to him) to payment of the additional amounts provided in such proposal for failure to make such increased deposits."

§ 1255.230. Objections to withdrawal. The Department of Transportation (Exhibit I--pink--pp.18-19) believes that the Commission's recommendations with respect to withdrawal by the property owner of a prejudgment deposit substantially weaken the statutory protections against withdrawal of amounts in excess of those to which the property owner may be entitled.

The department objects to the omission from Section 1255.230 of the provision that prohibits withdrawal of funds by a defendant where the other defendants cannot be personally served with notice of the intended withdrawal. The staff believes that this objection is based on a misreading of the effect of the Commission's recommendation. Existing law provides an absolute bar against withdrawal where all parties cannot be personally served; the Commission recommends only that the absolute bar be lifted; the condemnor may still object to withdrawal where the parties have not been

personally served and, where the objection indicates a real problem, the court may limit or prevent withdrawal of the funds. Below is an excerpt from the Commission's tentative recommendation on this point:

> The existing absolute prohibition of withdrawal absent personal service on all parties should be eliminated. Quite often, "defendants" in eminent domain proceedings can easily be shown to have no compensable interest in the property. The courts can protect the rights of persons upon whom it is not possible to make service by requiring a bond or limiting the amount withdrawn in any case where it appears that the party not served actually has a compensable interest in the property.

The Department of Transportation is not wholly convinced by this argument, pointing out that it may not be so easy to determine that a defendant has no interest, that discretionary power to provide a bond or to limit withdrawal may provide no real protection in some cases, and that there is no concrete evidence of the need for this reform.

§ 1255.280. Repayment of amount of excess withdrawal. The Department of Transportation (Exhibit I--pink--p.19) objects to changes in the provision relating to repayment of excess amounts withdrawn. Present law requires repayment to the condemnor with interest on the excess; the Commission's recommendation requires repayment with interest on the excess only to the extent the excess was obtained on motion of the property owner. The Commission's recommendation also permits a stay of execution on the repayment to the plaintiff for a period not exceeding a year, interest to accrue during the stay.

The reason for these recommendations is that the property owner who withdraws the deposit normally needs the money to aid in relocation; he should not have to pay interest on amounts in excess of compensation that he withdrew in reliance on the accuracy of the condemnor's deposit, and he should be afforded some time to raise the repayment money that he has spent

in reliance on the deposit. The staff acknowledges that the force of this argument is diminished by the enactment of the relocation assistance act and that the changes recommended by the Commission are no longer as critical as they once were.

The basis of the Department of Transportation's opposition is that these changes enhance "the invitation extended to owners to both seek increased deposits of probable just compensation and to encourage withdrawal." It should also be noted that the County of San Diego (Exhibit III--green) believes that the interest recovery provisions "should be made clearer."

§ 1255.410. Order for possession prior to judgment. One of the major reforms recommended by the Commission is the extension of the right of immediate possession to all authorized condemnors. The need for this reform is questioned by the Department of Transportation (Exhibit I--pink--p.15), which suggests that the present limitation of immediate possession to rights of way and reservoir purposes is appropriate since these projects present unique problems of land assemblage.

Other condemnors do not agree with the position of the Department of Transportation. The Southern California Gas Company (Exhibit XV--pink), for example, feels a particular need for expansion of the right of immediate possession. "Such an approach would be of benefit to both condemnor, property owners and the general public. The growing energy shortage has made 'immediate possession' a necessity. Unnecessary, lengthy litigation should not be permitted to delay the flow of natural gas to the consuming public." The County of San Diego (Exhibit III--green) also believes that the right of immediate possession should be expanded.

The Department of Transportation indicates that the main basis of its opposition to expansion of immediate possession is not so much that it is

unnecessary, but that the protections for the property owner that accompany the expansion are unwarranted. The staff believes that the particular protections for the property owner must be viewed individually and not as tied to an expansion of the right of immediate possession. The staff believes that the protections afforded the property owner are desirable whether or not the right of immediate possession is expanded beyond its present scope.

In this connection, the State Bar Committee (Exhibit II--yellow--p.3) recommends that Section 1255.410, authorizing an ex parte order of immediate possession, be amended to require a showing by the plaintiff of "actual need as of the effective date of the requested order of possession." The Commission in the past has agreed that "need" should be a factor in authorizing immediate possession but has determined that the most effective way of incorporating the factor is to put the condemnor to the test only if the property owner is able to demonstrate to the court substantial hardship. See Section 1255.420. It should be noted, however, that the Department of Transportation has "strong objections" to this scheme (Exhibit I--pink--pp.19-20). The department indicates that allowing the property owner to show hardship and putting the condemnor to the need test before an unsympathetic trial judge would make it virtually impossible to plan for possession with any assurance. According to the department, under existing law, there is adequate review of hardship to the property owner in the process of issuance of a Writ of Assistance for dispossession.

If both property owners and condemnors so desire it, it would be possible to eliminate the hardship hearing in Section 1255.420 and incorporate a "need" test in Section 1255.410. The staff had originally proposed this system, but the Commission changed it on the basis that an ex parte hearing on need was no hearing at all, and the property owner would not thereafter be able to

successfully challenge the initial determination of need. A return to the ex parte "need" approach would also require deletion of the provision in Section 1230.050(b) that "The plaintiff is entitled to enforcement of an order for possession as a matter of right." This would restore the power of review by the court over issuance of writs of assistance as desired by the Department of Transportation.

§ 1255.450. Service of order. The Commission's tentative recommendation for the time for service of an order for possession deletes the provision in present law enabling the court, upon a showing of good cause, to shorten the time for possession to not less than three days. The reasons for this recommendation were that (1) the property acquisition guidelines in the Government Code require 90 days' notice prior to dispossession; (2) three days is an unconscionably short period of time in which to make a person move from his residence or relocate his business; (3) there were no conceivable situations in which the condemnor would require such haste for possession, absent an emergency; and (4) in the event of an emergency, a public entity could resort to use of its police power. See Section 1255.480 (police power not affected).

The Department of Transportation (Exhibit I--pink--pp.20-21) would continue the court's flexibility to order dispossession on short notice, stating that the provision is designed to "remedy unnecessary wastage of public funds." The reason is that the lack of ability to provide the contractor with the necessary property could expose taxpayers' funds to substantial wastage by way of contract claims, particularly in cases where immediate possession of unoccupied land, or even occupied land, will cause little if any hardship to the owner. The staff notes, on this point, that the Commission's recommendation requires 90 days' notice only as to property "lawfully occupied by a

person dwelling thereon or by a farm or business operation"; in all other cases, only 30 days' notice is required.

§ 1258.280. Limitations upon calling witnesses and testimony by witnesses. Both Los Angeles attorney Albert J. Forn (Exhibit XIX--blue) and the County of San Diego (Exhibit III--green--p.5) complain that judges on occasion permit witnesses to testify even though they have not complied with a demand for an exchange of valuation data. This is a complaint the Commission has heard many times in the past. The proposed legislation makes clear that the testimony may not be given unless the demand has been complied with; there is little the Commission can do to assure that the judge follows the law. The Commission has made clear, in Section 1258.290, that the judge who grants relief from the failure to comply with an exchange demand may impose such terms as a continuance of the trial for a reasonable period of time to counter the surprise and an award of costs and expenses incurred to meet the newly revealed evidence.

One suggestion the staff has to cure the problem of the owner testifying, raised by the County of San Diego, is to add the following sentence to the first paragraph of the Comment to Section 1258.280:

> The sanction for failure to exchange valuation data applies to all persons intended to be called as valuation witnesses, including the owner of the property. See Section 1258.250 and Comment thereto (persons for whom statements of valuation data must be exchanged).

§ 1260.210. Burden of proof. Existing law places the burden of proof on the issue of compensation on the defendant; the Commission proposes to eliminate the burden of proof of compensation. This proposal is criticized by the Department of Transportation (Exhibit I--pink--p.11), the County of San Diego (Exhibit III--green), and the City of San Jose (Exhibit VIII--pink). The Department of Transportation states that the proposal is "neither

practical or logical." The County of San Diego notes that, "In practice, juries do not appear to be cognizant of the burden. However, we do not wish to add to the real burden which is faced by all condemnors."

§ 1260.230. Separate assessment of elements of compensation. The Department of Transportation (Exhibit I--pink--pp.11-12) agrees with the Commission that the several elements of compensation, including goodwill loss, be separately assessed to assure the property owner gets no double recovery. The department also recommends that benefits be offset against goodwill loss; this matter is discussed under Section 1263.410 (compensation for injury to remainder), infra.

§ 1260.250. Compensation for appraisers, referees, commissioners, and others. The Department of Transportation (Exhibit I--pink--p.12) would delete this section, stating that it is "useless, unnecessary and seldom, if ever, utilized." The staff notes that the court's authority to appoint persons to aid in making any determination of fact is part of general law absent this section. The staff agrees that this section can be eliminated.

1263.010. Right to compensation. The Department of Transportation (Exhibit I--pink--p.12) believes the Comment to this section is unwarranted. Although it is not clear from the department's letter which portion of the Comment is offensive, the staff suspects it is the paragraph reading:

> Likewise, this chapter in no way limits additional amounts that may be required by Article I, Section 14, the "just compensation" clause of the California Constitution. On the other hand, the fact that the "just compensation" clause may not require payments as great as those provided in this chapter does not limit the compensation required by this chapter. This chapter is intended to provide rules of compensation for eminent domain proceedings; whether any of its provisions apply in inverse condemnation actions is a matter for court decision. See Section 1230.020 and Comment thereto (law governing exercise of eminent domain power).

The staff believes that the whole Comment, and particularly the foregoing paragraph, is essential to the proper understanding of the structure of the Eminent Domain Law and its relation to other statutes and the Constitution. It is a critical statement of legislative intent.

§ 1263.020. Accrual of right to compensation. The change in the accrual of the right to compensation from the date of issuance of summons to the date of filing the complaint, the City of San Diego believes is valid. (Exhibit X--green.)

§ 1263.110. Date of valuation fixed by deposit. The Commission's tentative recommendation with respect to the date of valuation is that the date be the date of commencement of the proceeding (Section 1263.120) unless trial is not within one year, in which case it is the date of trial (Section 1263.130); however, the plaintiff may make a prejudgment deposit, in which case the date of valuation is no later than the date of deposit (Section 1263.110). The County of San Diego (Exhibit III--green--p.2) finds this scheme "equitable to both owner and condemning agency."

The State Bar Committee (Exhibit II--yellow--p.7) would delete the provision that date of valuation be the date of commencement of the proceeding and would make the date of valuation be the date of trial or the date of a prejudgment deposit, whichever is earlier. The committee believes that an owner should have his property valued as close as possible to the time that he actually loses his property. Under this theory, the date of trial most closely approaches this; where there has been a deposit, the owner may withdraw his compensation substitute so the date of the deposit is likewise a close approximation of the ideal.

§ 1263.140. Date of valuation in case of new trial. Both the City of San Diego (Exhibit X--green) and the Department of Transportation (Exhibit I--pink--pp.12-13) object to this provision to make the date of valuation the

date of the new trial if the new trial is commenced more than a year after the original trial rather than the date of the original trial as under existing law. The Department of Transportation states that this provision rewards the wrongdoer who may have caused error, misconduct, or prejudice and who has obtained an unfair verdict which though excessive in terms of the original date of value may not be in terms of the new date of value.

The Commission's scheme enables the condemnor to preserve the earlier date of value by depositing the amount of the award. The Department of Transportation comments that this forces the condemnor to deposit a sum which the owner can withdraw and which may not be available when the condemnor secures the lower verdict and the condemnee is judgment proof.

§ 1263.150. Date of valuation in case of mistrial. The Commission's recommendation on this point is basically the same as for a new trial--the date of valuation is the date of retrial if the retrial is commenced more than one year after the original trial unless a deposit of probable compensation is made to preserve the original trial date. The Department of Transportation (Exhibit I--pink--p.13) has basically the same objection except that this provision permits more injustice because "the condemnee can cause a mistrial by his own misconduct if the trial is not going well, and retry it more than a year after suit is commenced and obtain the fruits of a higher market." The department would either restore prior law or amend the section to foreclose profiteering from one's own wrongdoing.

§ 1263.220. Business equipment. The Commission has tentatively recommended that equipment designed for business purposes and installed for use on the property should be deemed a part of the realty for purposes of compensation if it cannot be removed without a substantial loss in value. The Department of Transportation (Exhibit I--pink--p.7) regards this provision as overly

broad; the State Bar Committee (Exhibit II--yellow--pp.4-5) views it as too restrictive.

The department would limit the "business purposes" to which the statute applies, noting it could be construed to be applicable to furnishings in a motel or apartment. The staff notes that this was precisely the Commission's intent in drawing the statute.

The committee would substitute "personal property" for "equipment"; the staff believes that such a substitution would undermine the attempt to provide for fixtures by plainly labeling them personal property. The Commission's policy in this section was to avoid characterization by use of property terms. The committee would also substitute "located" for "installed for use." The Commission adopted an installation test to assure that only true fixtures were covered by the section.

§ 1263.240. Improvements made after service of summons. Subdivision (c) of this section permits compensation for improvements made after service of summons where the improvements are authorized by a court order upon a finding that the hardship of denying the improvement outweighs the hardship of permitting the improvement. The court could not make such an order following a prejudgment deposit of probable compensation.

The Department of Transportation (Exhibit I--pink--p.11) objects to the subdivision because it contains no criteria for the balancing of hardships and equities and because it invites the owner to apply for the remedy thereby creating further burdens on the courts in pretrial matters involving eminent domain.

The State Bar Committee (Exhibit II--yellow--pp.5-6) approves of a court being empowered to permit good faith improvements but objects to removal of

the court's power after a prejudgment deposit is made. The Commission incorporated this provision because,if a deposit is made, funds will be available to the owner to relocate, and there will not be the hardship of being stuck with a structure requiring improvement for a long period of time pending condemnation.

§ 1263.260. Removal of improvements pertaining to realty. The County of San Diego (Exhibit III--green--p.3) states that, where the owner removes improvements and the condemning agency pays for the removal and relocation, the property should not be valued as improved. The staff quite agrees and notes that Section 1263.230 (improvements removed, destroyed, or damaged) so provides.

§ 1263.310. Compensation for property taken. The State Bar Committee (Exhibit II--yellow--p.9) recommends amendment of this section to read:

> Just compensation shall be awarded for the property taken. The normal measure of this compensation is the fair market value of the property taken.

The committee would insert "just" to make clear the philosophy of justice to the owner whose property is taken. The Commission originally had the word "just" in this section but removed it because it was felt to create constitutional problems. The Constitution requires "just compensation"; whether or not this is synonymous with the compensation provided in the Eminent Domain Law is a matter for court interpretation; the Eminent Domain Law is simply the Legislature's provision for "compensation." See discussion under Section 1263.010, supra.

The committee would insert "normal" because there are cases of special purpose properties where market value is not available as a test. The staff disagrees with this analysis. The fair market value of the property is always the test--what a willing buyer and seller would agree to. In the

case of special purpose properties, it may not be possible to show what fair market value is by means of comparable sales, but fair market value can be shown by other means such as replacement or reproduction cost since that is the means a willing buyer and seller would use to arrive at a fair price for the property. See Section 1263.320 and Comment thereto (fair market value).

§ 1263.320. Fair market value. Existing case law defines fair market value as the "highest price" that would be agreed to by a buyer and seller. The Commission deleted the term "highest" in its recommended statutory definition because of the potential confusion it can create that the jury must take the highest opinion of value offered by an expert witness and because there is only one price the buyer and seller would agree to, not a range of prices including the "highest."

The State Bar Committee (Exhibit II--yellow--p.7) would restore the term "highest" because that is most conformable with the spirit of the just compensation clause of the Constitution. Also, the fact that a property owner suffers uncompensated losses justifies the owner receiving the highest price his property would have brought on the date of value.

§ 1263.330. Changes in property value due to imminence of project. The City of San Diego (Exhibit X--green) agrees that this section is a valid clarification. The Department of Transportation (Exhibit I--pink--p.8) likewise approves but would amend the language to read:

> In determining the fair market value of the property taken, there shall be disregarded any effect on the value of said property which is attributable to any of the following: [The remainder of the section as is.]

The reason for this proposed language change is to avoid a mathematical approach to discounting enhancement and blight.

The Commission has fussed with the language of this section at length. It omitted the existing phrase "without regard to" (and a similar objection

would apply to "disregarded") because it is ambiguous whether the enhancement and blight are to be included or excluded. Perhaps an adequate compromise rendering is a cross between the Commission's and the Department of Transportation's proposals:

> The fair market value of the property taken shall not include any effect on the value of the property that is attributable to any of the following: [Remainder of section as is.]

§ 1263.410. Compensation for injury to the remainder. The Commission's decision to retain the "damage and benefit" scheme despite the attractions of the "before and after" approach to valuing partial takings is approved by the County of San Diego (Exhibit III--green--p.2).

The Department of Transportation (Exhibit I--pink--p.8) objects to including any damages awarded for loss of goodwill as compensation against which benefits cannot be offset. This is a matter the Commission has not previously considered. The department notes that it is especially important that benefits be used to offset loss of goodwill if it is claimed in cases where the use is changed in the after condition, e.g., a mom-and-pop grocery store changed to a service station site.

The staff's initial reaction to this proposal is favorable, both because it will enhance the chances of general acceptance of the goodwill provision and because the staff at heart favors a "before and after" approach and believes that, if the property owner is left with a valuable remainder, he should not also be compensated for other losses to the extent of the added value. The staff would amend Section 1263.410(b) to read:

> (b) Compensation for injury to the remainder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder. If the amount of the benefit to the remainder equals or exceeds the amount of the damage to the remainder, no compensation shall be awarded under this article. If the amount of the benefit to the remainder exceeds the amount of damage to the remainder, such excess shall be deducted from the compensation provided in Section 1263.510, if any, but shall not be deducted from the compensation required to be awarded for the property taken or from the other compensation required by this chapter.

§ 1263.420. Damage to remainder. The Commission has tentatively recommended the repeal of the rule of People v. Symons, 54 Cal.2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960)(severance damages are limited to those caused by the portion of the project located on the part taken). This recommendation meets with the approval of Howard Foulds of Downieville (Exhibit XIII--buff) and the opposition of the Department of Transportation (Exhibit I--pink--pp.8-9). The department feels that this will encourage testimony of damage based on little more than speculation and conjecture and will permit the recovery of what are in effect general damages.

The department also opposes allowing damage caused by the "construction and use of the project" rather than by the "construction" of the project as provided in existing Section 1248. The staff believes that this is a quibble over language since case law under Section 1248 clearly permits damages to be based on the use of the project and the damage its proximity will cause. If the Commission adopts the position of the Department of Transportation on this point, we assume the Commission will also wish to review Section 1263.430 which permits the condemnor to offset benefits caused by "the construction and use" of the project. Such items as increased traffic might then not be deemed benefits. See discussion of Section 1263.430 for a letter to the Commission on this very point.

§ 1263.430. Benefit to remainder. Bakersfield attorney D. Bianco (Exhibit IX--yellow) writes to ask that the Commission recommend abrogation of the rule in People v. Giumarra Farms, Inc., 22 Cal. App.3d 98, 99 Cal. Rptr. 272 (1971)(increased traffic a special benefit). Mr. Bianco attached to his letter copies of briefs in support of his request, prepared for appellate litigation of the Giumarra Farms case, which we have not reproduced. The gist of his argument appears to be that increased traffic benefits the

surrounding area generally and is not a special benefit to any particular property owner, hence should not be chargeable against damages as a special benefit.

Apart from the merits of his argument, the staff notes that very early the Commission determined not to become involved in what constituted special damages and special benefits, indeed, not to even qualify the statutory language relating to damages and benefits with the word "special." The reason for this decision was that the case law was an inconsistent morass, that the issue is a peculiarly factual one, and that it is presently in the process of judicial evolution; hence it should be left to further case development.

§ 1263.440. Computing damage and benefit to remainder. Present law requires the assessment of damages and benefits to the remainder in a partial taking on the assumption that the project is in place and operating at the time of trial. Because the project is often not completed at the time of assessment of damages and benefits, the Commission has tentatively recommended that the damages and benefits be discounted based on any anticipated delay in the construction of the project. The reason for this recommendation is that the property owner may be compensated in benefits rather than money, and these benefits should be reduced to their present value.

The Department of Transportation (Exhibit I--pink--pp.9-10) opposes this change in the law because it injects in the trial the uncertainties of precisely when the project will be completed and because discounting the damages and benefits to present worth will be a complex and confusing task. "The Department considers that this section will invite speculation and create an added potentially confusing element in the assessment of just compensation."

§ 1263.510. Loss of goodwill. The Commission's proposal to compensate the owner of a business for goodwill loss caused by the condemnation meets with the approval of Mr. Foulds of Downieville (Exhibit XIII--buff), who states that this is a long overdue clarification of often a sizeable business loss. "Proving this in line with your comments should not be too difficult, where in fact it does exist, without putting the agency in the position of paying for a failing business."

The State Bar Committee (Exhibit II--yellow--p.8) would substitute "going concern value" for "goodwill." The committee states that it is the going concern value which is lost and therefore should be the measure of compensation. The reason the Commission selected "goodwill" is that it is statutorily defined and judicially developed with a limited and understandable content. The staff does not know precisely what "going concern value" means or what it may possibly encompass.

The City of San Jose (Exhibit VIII--pink) opposes the provision for payment of goodwill loss without supporting reasons. The County of San Diego (Exhibit III--pink--p.3) opposes the provision because it duplicates relocation assistance provisions, because it is not constitutionally compelled, and because the goodwill is not an interest acquired for public use. The county also notes that the method of valuing goodwill differs from the method of valuing the property; hence the trier of fact will be "confused" and the condemnor will be "prejudiced by admission of improper evidence insofar as valuation of the subject property."

The staff notes that the relocation assistance provisions relating to business loss are quite limited, and goodwill is compensated only to the extent not covered by the relocation assistance provisions. While the goodwill is not an interest "acquired for public use," it is a loss sustained because of

a taking for public use, hence is properly compensable. Finally, the staff is not overly concerned that the condemnor will be unable to prevent the trier of fact from becoming confused or the admission of improper evidence.

The Department of Transportation (Exhibit I--pink--pp.10-11) opposes the provision for payment of goodwill loss because the term is not defined in the section, because the relocation assistance provisions cover the loss or can be increased to cover the loss, because goodwill loss is overly speculative, because it gives rise to the opportunity for double recovery, and because the goodwill is not really taken. "The Department regards this provision for compensating for good will loss as unsound both in principle, and highly uncertain in measure of proof."

The staff notes that, under the Commission's proposal, the goodwill loss is limited to that loss "which cannot reasonably be prevented by a relocation of the business and by taking those steps and adopting those procedures that a reasonably prudent person would take and adopt in preserving the goodwill."

§ 1263.620. Partially completed improvements; performance of work to protect public from injury. Section 1263.620 is designed to permit the property owner to perform limited work on an uncompleted structure in order to protect persons and other property from injury and to recover in the action his actual expenses reasonably incurred to perform such necessary work.

The Department of Transportation (Exhibit I--pink--p.13) questions the need for this section since the property owner can seek a court order under Section 1263.240(c) to permit additional improvements.

The need for this section is that many times the improvements made by the property owner add nothing to the market value of the property and are not necessary to prevent hardship to the property owner as visualized by Section 1263.240. It fills the gap by permitting recovery of actual expenses

only in situations where there is no hardship to the owner, but there is potential liability to the public.

The State Bar Committee (Exhibit II--yellow--p.5) would expand the section to permit compensation for the cost of improvements made to protect the subject property from injury. The Commission previously rejected this approach since it would enable the property owner to construct improvements with the sole object to preserve the condition of the property so that it will look attractive to a jury at the time of trial. The Commission felt that, for this purpose, a court order under Section 1263.240, as suggested by the Department of Transportation, should be adequate.

§ 1265.130. Termination of lease in partial taking. The Department of Transportation (Exhibit I--pink--p.13) is concerned that, where there is a partial taking of property subject to a leasehold and the lease is terminated under this section, the section should make clear that the condemnor "is not liable for the payment of more than the full fee value of the property." The staff is not precisely certain what the department means by this. The best the staff can do is suggest an amendment that clarifies the Commission's intent in proposing the section:

> Upon such termination, compensation for the leasehold interests shall be determined as if there were a taking of the entire leasehold.

Under this provision, where the terminated leasehold interest was very valuable, compensation might well be great, perhaps even greater than the full fee value of the property taken. This may be the department's concern.

§ 1265.310. Unexercised options. The County of San Diego (Exhibit III--green--p.3) is strongly opposed to this section to compensate unexercised options; so is the Department of Transportation (Exhibit I--pink--pp.13-14). The county suggests that the option is not a property "interest," and that

it is not being "taken" for public use, hence should not be compensable. This position is demonstrably false, for an option has a market value; if it is destroyed, it should be compensable regardless whether the condemnor plans to "use" the option.

The department would prefer to see the option holder exercise the option and take the compensation for the property. The Commission considered this approach and rejected it since it places the property owner and the option holder in a difficult position. The property owner is reluctant to litigate compensation vigorously since he knows that, if he recovers any amount over the option price, the option holder will exercise the option and make an easy profit. But, if the property owner settles with the condemnor at the option price, the option holder is deprived of the value of his option. The Commission determined that the only practical way out of this dilemma is to have the condemnation action terminate the option and to compensate the option holder for the value of the option.

§ 1265.410. Contingent future interests. The Department of Transportation (Exhibit I--pink--p.14) believes that this section to compensate holders of rights of reentry and reversions is unnecessary and that the subject can be adequately handled by the courts on a case-by-case basis. The reason the Commission has proposed this section is that the cases are not adequate, denying compensation where compensation is due.

The County of San Diego (Exhibit III--green--p.3) opposes this section for the same reasons it opposes Section 1265.310 (options). Once again, the fact that an interest is future or contingent does not make it any less an interest in the property, and the interest may be of real value. Interests that are taken or damaged by a condemnor in the pursuit of its public project are entitled to compensation.

In this connection, the staff calls the Commission's attention to Comment, The Effect of Condemnation Proceedings By Eminent Domain Upon a Possibility of Reverter or Power of Termination, 19 Villanova L. Rev. 137 (1973), in which the author urges legislation along the lines of the Commission's recommendation to make these future interests compensable.

§ 1268.010. Payment of judgment. The Department of Transportation (Exhibit I--pink--p.22) questions the wisdom of the Commission's proposal to delete the provision allowing certain condemnors up to one year to pay the condemnation award. The reason for the Commission's proposal, as stated in the recommendation, is that, "a property owner suffers many hardships in the course of the planning and execution of a public project without the added hardship of a year's delay before he receives payment for his property."

The department responds that the wait of one year, with interest accruing at seven percent, is not all that onerous. Moreover, the deletion of the delay in payment provision may have the effect of precluding many worthy and needed public projects since it is "unlikely that local governments could reasonably prevail on their electorates to authorize bond issues high enough to cover the worst result that could possibly ensue from condemnation litigation which might be necessary to acquire the land."

§ 1268.140. Withdrawal of deposit. The State Bar Committee (Exhibit II--yellow--p.6) recommends that the Comment to this section "be augmented by adding that this is an alternative procedure where there was no right to an order of possession." The staff does not really understand the meaning of this recommendation. Section 1268.410 is the only section providing for withdrawal of money after judgment, regardless whether the money was deposited before or after judgment and regardless whether or not there was a right to an order of possession. The staff suggests that such a statement be added to the first paragraph of the Comment, rather than the language proposed by the State Bar Committee, if that will be helpful.

§ 1268.310. Date interest commences to accrue. The State Bar Committee (Exhibit II--yellow--p.10) would delete the word "legal" from the phrase "legal interest" in order to allow the property owner interest on the judgment at the prevailing market rate on the grounds that the legal rate of seven percent does not represent just compensation at this time.

The staff notes that the legal rate is of constitutional dimension, just as is the just compensation clause. Also, if the Commission adopts the State Bar Committee's proposal, how is the market rate to be determined--by what investments, by what type of institution; will the rate vary as the market changes from week to week?

§ 1268.320. Date interest ceases to accrue. Under existing law, which is continued in the Commission's tentative recommendation, interest on the award ceases to accrue when the full amount of the award has been deposited by the condemnor. The reason for this rule is that the award is then available to the property owner to invest and, thus, should no longer draw interest.

The State Bar Committee (Exhibit II--yellow--p.9) would allow interest to accrue after a deposit in cases where the property owner wishes to contest the right to take. The reason for this proposal is that withdrawal of the deposit waives any objections to the right to take so the property owner who wishes to raise the issue must leave the money in, possibly for long periods of time; the committee feels that at least he should get interest on the award during this period.

The Commission has considered this subject before, but not precisely this issue. The Commission has previously determined that the property owner should not be able to draw down the award and still appeal the right to take since, in essence, this would be financing the property owner's attack with the condemnor's funds.

§ 1268.610. Litigation expenses. The County of San Diego (Exhibit III--green--p.6) believes that payment of litigation expenses should not be mandatory where there is a dismissal due to a partial abandonment or an out of court settlement. They work "an inequitable result against the condemning agency. The courts should be allowed discretion to allow costs and fees as the case warrants." The staff notes that the course proposed by the county represents a change in existing law.

The Department of Transportation (Exhibit I--pink--pp.22-23) objects to the broad definition of "litigation expenses" in subdivision (a)(1). The staff notes that the provision objected to is nearly identical to present Section 1255a(c)(1) and has been in the law in that form for the past six years.

The Department of Transportation also opposes imposition of litigation expenses in cases of dismissal for failure to prosecute. The department points out that frequently the parties waive the Code of Civil Procedure time limits in order to work out unclear title or other legal or appraisal problems. The department believes that imposition of expenses as a matter of course in this situation will cause the property owner to no longer waive the time limits and will tempt him to "much game playing for the very purpose of creating a situation where an involuntary dismissal for delay in trial . . . so that the substantial financial awards stemming therefrom under the Commission's proposal may be realized."

§ 1268.620. Damages caused by possession. The Department of Transportation's objections to this section (Exhibit I--pink--pp.23-24) are basically the same as its objections to Section 1268.620. The department objects to the "open-ended" liability that could approach an "unconscionable" level. "The Commission should have its staff re-study and specify and limit the items for which the owner be recompensed under the situation sought to be covered by proposed Section 1268.620."

The staff notes once again that this provision is virtually identical to existing law. See Section 1255a(d). Moreover, the staff feels that, if the property owner is to be awarded damages anywhere, it should be here where he has actually been kicked off his property, and then the condemnor abandons, or the property owner defeats the right to take, or the proceeding is dismissed for some other reason. The staff sees no reason to place limitations on the recovery of any damages actually suffered by the property owner in this situation.

§ 1268.710. Court costs. The Commission has proposed to eliminate Section 1254(k) providing that, if a defendant obtains a new trial, he must bear the cost of the new trial if he is not successful in increasing the amount originally awarded. The Commission believed that this rule was unduly harsh and that a defendant should not be required to pay the cost of obtaining a proper and error-free trial.

The Department of Transportation (Exhibit I--pink--p.24) objects that the provision serves the proper function of imposing prudence on the property owner and his attorney in seeking judicial review.

§ 1268.720. Costs on appeal. The Department of Transportation (Exhibit I--pink--p.24), while recognizing the trend in the case law to award the defendant his costs on appeal in all cases, as codified in the Commission's proposal, believes that the discretion of the court to deny costs should be preserved. The department believes that particularly in the situation where the appeal involves only a title dispute among defendants should costs be denied. As a more general principle, the department feels that the legislative branch of government should not invade the judicial branch by eliminating the ability to apply discretion to apportion costs of appeal as justice in the particular case may warrant.

The staff notes that the Commission's proposal does vest authority in the Judicial Council to adopt rules to the contrary of the general provision that defendant recovers his costs.

Attorney's fees. The Commission has received repeated requests to recommend that recovery of attorney's fees by the property owner be permitted in certain circumstances. The latest among these requests is from Howard Foulds of Downieville (Exhibit XIII--buff) who states:

> I do not find any provision in the recommendations for consideration of defendants costs wherein the agency is proven to be materially incorrect in their appraisal offer, or the sum deposited as fair value. I think that the public is entitled to a section similar to the bill introduced by Senator Berryhill in 1973--SB 476, which in its final form as amended applied only to state agencies, and provided for a 10% leeway.

The Commission previously considered the bill referred to by Mr. Foulds, as well as the decision of the Supreme Court in Los Angeles v. Ortiz, 6 Cal.3d 141, 98 Cal. Rptr. 454 (1971)(denying recovery of attorney's fees), and rejected the proposal.

The staff notes that AB 3925 currently before the Legislature provides for recovery of attorney's fees and other expenses of litigation by the property owner if the court finds the condemnor's offer was unreasonable. This bill has passed the Assembly and is in the Senate. It was in relation to this bill that Assemblyman Warren (then Chairman of the Judiciary Committee) commented that the Commission has been studying this issue for 20 years and probably will not have a report for another 20 years.

Civil Code § 1001. The effect of the Commission's proposed repeal of Civil Code Section 1001, which authorizes "any person" to exercise the power of eminent domain, is to remove the condemnation authority of private persons, such as it may be. This matter has been a continuing source of concern for the State Bar Committee, which again unanimously recommends retention of

private condemnation (Exhibit II--yellow--p.4). The Bar Committee believes that private condemnation serves a useful purpose and, in the collective experience of the committee membership, has not been subjected to abuse.

The sentiment of the State Bar Committee is echoed by Oroville attorney Robert V. Blade (Exhibit XVII--green). Mr. Blade uses the example of land-locked parcels for which there is no other means of achieving access and utility service. He states that, at a minimum, the right of private persons to condemn should include "the right to condemn a roadway of proper width and location for ingress and egress and it should include the right to condemn for use by a public utility for the installation of water, sewer lines, power and telephone lines with proper safeguards to the properties over which such easements are condemned."

The controlling consideration for the Commission in the past has been the belief that, because the exercise of eminent domain involves the forced taking of private property, the exercise should be carefully controlled and should be permitted only under the auspices of a public entity or quasi-public entity such as a public utility or nonprofit hospital. For this reason, the Commission has recommended that, where the project of a public entity will landlock property, the public entity may exercise the power of eminent domain to acquire sufficient property to supply the landlocked property with access to a public road or utility service. See Section 1240.350 (substitute condemnation to provide utility service or access to public road). Likewise, the Commission has provided that a property owner who desires a sewer connection may initiate a sewer construction and extension proposal to the relevant local public entity, which request may not be denied without a public hearing. See Health & Saf. Code § 4967. Finally, the Commission's proposed clarifying changes in the condemnation authority of privately owned public utilities may

serve to remove some of the concern or reluctance of the utilities to use eminent domain to make necessary connections, noted in Mr. Blade's letter.

It should also be noted that Rev. Howze (Exhibit IV--gold--p.3) strongly supports the Commission's tentative recommendation on this point, stating among other things that, "To give Eminent Domain power to private persons is a bifurcation act of judicial abuse because of a deficiency within the professional malpractice concept. Eminent Domain power calls for biofeedback with proficiency."

Code of Civil Procedure § 426.70. The Commission has tentatively recommended that, where a public entity has brought a condemnation action against the property owner and the property owner has a claim for damages against the public entity arising out of the property that is the subject of the action, the property owner need not comply with the claims filing requirement. The reason for this recommendation is that property owners have been trapped out of their causes of action by the relatively short claims filing period, and the claims filing requirement serves no useful purpose where the public entity is already involved in litigation over the property.

The County of San Diego (Exhibit III--green--p.4) objects to relaxation of the claims filing requirement because it "would generate specious litigation." Moreover, the county states, the property owner who has a cause of action can file his claim promptly and commence suit--he need not wait for the eminent domain proceeding.

Code of Civil Procedure § 1036. Mr. Howard Foulds of Downieville (Exhibit XIII--buff) would amend this section relating to award of litigation expenses in inverse condemnation proceedings to make clear that the expenses include all expenses incurred in preparation therefor. The Commission has determined not to deal with inverse condemnation matters in this

recommendation (see discussion under Relation of Eminent Domain to Inverse Condemnation, supra); this section is involved only because it must be renumbered as part of the repeal of old Title 7 (eminent domain); otherwise, it is untouched.

Evidence Code § 813. The Commission has proposed to expand the provision permitting the owner to testify as to the value of his property to include an officer or employee designated by a corporation who is knowledgeable as to the character and use of the property owned by the corporation.

The County of San Diego (Exhibit III--green--p.6) objects to permitting a representative of a corporate defendant who is not otherwise qualified as an expert to give his opinion of value. The reason cited is the "potential for abuse"; the county notes that it is opposed to adoption of any provision allowing testimony by a lay witness and suggests that the reasons for permitting the owner be examined and codified as conditions precedent.

The reason for permitting the owner to testify is to permit the litigation of the small residential or business property case where hiring an appraiser would simply be uneconomical. The Commission felt that it was important to give the right to express an opinion to corporate defendants as well as individual defendants, but to prevent abuse the corporate spokesman should be limited to one who is knowledgeable as to the property much as the individual residence owner would be.

Evidence Code § 816. The County of San Diego (Exhibit III--green--p.6) opposes the Commission's proposal to amend Section 816 to permit an expert wide discretion in selecting comparable sales. The county states that the comparable sales provision is already liberally construed by the courts and broad latitude is permitted, resulting in "a plethora of sales with their adjustments causing confusion of the valuation issues in the minds of triers of fact."

Health & Safety Code § 1427. The California Hospital Association supports the Commission's tentative recommendation to expand the condemnation authority of nonprofit hospitals.

Public Utilities Code § 613. The Commission has attempted to clarify the condemnation authority of various public utilities. The Southern California Gas Company (Exhibit XV--pink) notes that the condemnation authority of a gas company for underground storage of natural gas, however, is not clear. The staff believes that such storage would necessarily be incidental to the other functions of the gas company and that express language to that effect is not essential. Should the Commission decide to add the express language, Public Utilities Code Section 221, as indicated in the letter on page 2, would be the appropriate place to do so.

Respectfully submitted,

Nathaniel Sterling
Staff Counsel

Memorandum 74-38 EXHIBIT I

STATE OF CALIFORNIA—BUSINESS AND TRANSPORTATION AGENCY RONALD REAGAN, Governor

DEPARTMENT OF TRANSPORTATION
LEGAL DIVISION
369 PINE STREET
SAN FRANCISCO 94104

July 1, 1974

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

Re: Tentative Recommendation relating to Condemnation Law and Procedure, January 1974

Gentlemen:

The State Department of Transportation is greatly interested in and concerned with the above proposals made by the Commission. During the past five or more years while the Commission has been engaged in studies in this field the Department has provided representatives from its legal division to provide advice and assistance to the Commission. Many of the following comments synthesize comments of those representatives made verbally at those past proceedings of the Commission. The Department appreciates the opportunity made available to it to assist the Commission in its study proceedings and to give ongoing advice to it as to the Department's position on various alternative proposals which were discussed as well as this opportunity to comment in writing relative to the Commission's tentative recommendation which has resulted from the study process. These comments on the above tentative recommendation are as follows:

THE RIGHT TO TAKE

The Commission has determined that the statutes granting condemnation authority to State agencies should be restricted to those agencies now actually engaged in the property acquisition function. As of July 1, 1973, the former Department of Aeronautics became a part of the newly-created Department of Transportation pursuant to Stats. 1972, Chap. 1253, which, among other things, consolidated in one department the activities of the former Department of Aeronautics and the Department of Public Works.

Please note that where the word "Department" appears in the State Aeronautics Act (Public Utilities Code Section 21001 et seq.), that term now means "the Department of Transportation." See Public Utilities Code Section 21007, as amended by Stats. 1972, Chap. 1253, Section 18.

The Legal Division of the Department of Transportation has now taken over all legal work for the Department's aeronautics functions and provides legal counsel tbe the California Aeronautics Board.

Consistent with the Commission's determination that the Department of Transportation should continue to be authorized by statute to condemn for its purposes (see tentative recommendation -- "The Eminent Domain Law," p. 29), it is recommended that the proposed legislation be amended to continue the authority of the Department of Transportation to condemn for aeronautics purposes. It is also recommended that the California Aeronautics Board be given the authority to adopt resolutions of necessity. This will correct the deficiency in existing law noted in the attachment to Study 36.65, Memorandum 71-45, entitled "The Power to Condemn for Airports and Related Facilities," where your staff observed at page 2:

> "The only remarkable feature of the department's power of condemnation appears to be the lack of any conclusive resolution of necessity applicable to its takings."

Specifically, we recommend the following changes to the Commission's proposed code sections and comments:

1. Amend subdivision (d) of proposed Code of Civil Procedure Section 1245.210 as follows:

   (d) In the case of a taking by the Department of Transportation (other than a taking pursuant to Section 30100 of the Streets and Highways Code or pursuant to Section 21633 of the Public Utilities Code), the California Highway Commission.

2. Add subdivision (h) to proposed Code of Civil Procedure Section 1245.210 as follows:

   (h) In the case of a taking by the Department of Transportation pursuant to Section 21633 of the Public Utilities Code, the California Aeronautics Board.

3. Add the following to the "Comment" to proposed Section 1245.210:

Subdivision (h). Takings for state aeronautics purposes are accomplished on behalf and in the name of the state by the Department of Transportation. PUBLIC UTILITIES CODE § 21633.

4. Amend proposed Public Utilities Code Section 21633 by eliminating the strike-through of the word "condemnation" in the second line thereof.

5. Amend the "Comment" to Public Utilities Code Section 21633 as follows:

Comment. Section 21633 as amended continues the authority of the Department of Aeronautics Transportation to acquire property for airport purposes. ~~but deletes the authority of the department to exercise the power of eminent domain.~~ Acquisitions by eminent domain are accomplished under the Property Acquisition Law through the Public Works Board. See GOVT. CODE §§ 15853-15855. The reference to Section 21658, which is substituted for the deleted portion of Section 21633, continues the authority of the department to acquire property (other than by eminent domain) for the elimination of airport hazards.

6. Amend the "Comment" to the repealer of Public Utilities Code Section 21635 as follows:

Comment. Section 21635 is not continued. ~~The Department of Aeronautics may not condemn property in the name of the state.~~ See Comment to Section 21633. The rules governing the conduct of eminent domain proceedings generally are prescribed in the Eminent Domain Law. See CODE CIV. PROC. § 1230.020 (law governing exercise of eminent domain power). Particular aspects of Section 21635 are dealt with in the sections of the Code of Civil Procedure indicated below.

Section 21635	New Provisions
Entry for survey and examination	§ 1245.010 et seq.
More necessary use requirement	§ 1240.610 et seq.
Right of common use	§ 1240.510 et seq.

7. Amend subsection (1) of the Comment to proposed Government Code Section 15855 as follows:

> (1) The Department of Transportation. See STS. & HWYS. CODE §§ 102 (state highway) and 30100 (toll bridges), and Public Utilities Code Section 21633 (aeronautics purposes).

8. Amend the "Comment" to Public Utilities Code Section 21653, third paragraph, page 350 of the tentative recommendation -- "The Eminent Domain Law," by referring to the "Department of Transportation" instead of the "Department of Aeronautics."

9. Amend the "Comment" to Code of Civil Procedure Section 1245.210, subdivision (c) by adding the words "aeronautics purposes," following the words "toll bridges," in the second line thereof.

Article 3. Future Use

In order to preserve the ability of the Department to acquire property for future use in order to relieve personal hardship which may be caused by planning or other preliminary activities of the Department, we believe the following provision should be added to Article 3, Future Use:

> "Notwithstanding any other provision of this Article a public entity may acquire property for future use by any means (including eminent domain) expressly consented to by the owner."

Although the basic concept expressed in Article 3 is sound, we believe that certain safeguards should be included in this proposed article in order to protect against an irrational court decision that may jeopardize the timing of a project. We believe that the addition of a provision that proof that the project for which the property is being acquired has been budgeted by the condemnor raises a conclusive presumption that the acquisition is not for a future use will create an adequate safeguard. The following proposed addition to Article 3 is submitted accordingly:

> "Notwithstanding any other provision of this Article, where the condemnor proves that funds have been budgeted by it for construction of the project for which the property is being acquired, such proof shall create a conclusive presumption that the acquisition is not for a future use."

Footnote 53 (p. 108) of the Commission's tentative recommendation makes it clear that the seven-year period set forth in proposed Section 1240.220 is based on the period provided in the Federal Aid Highway Act of 1968 within which actual construction must commence on right of way purchased with Federal funds. This period was extended to ten years by the Federal Aid Highway Act of 1973. A ten-year period is more realistic under current conditions and the Department suggests that the period of ten years be substituted for the seven-year period in proposed Section 1240.220.

Article 5. Excess Condemnation

Proposed Article 5 (Excess Condemnation) introduces a new concept in condemnation proceedings. Section 1240.410 allows the condemnee to defeat the condemnation of a "remnant" upon proving that the condemnor has a sound means to prevent the property from becoming a remnant.

Although this provision may appear to be relatively insignificant, it will undoubtedly lead to extensive litigation in those few cases where excess condemnation is proposed by the condemnor without the concurrence of the condemnee. The test provided by the proposed statute creates a virtual labyrinth of speculative inquiry regarding feasibility of a particular plan of mitigation. In order to determine feasibility of any such plan, it will be necessary to first determine damages that would otherwise occur if the remnant were not acquired. Any such inquiry will undoubtedly add several days of trial time to an already overburdened judicial system. The Department believes that the extent of judicial inquiry should be limited to the question of whether the remnant is of "little market value." Furthermore, it is our recommendation that the presumption created by proposed Section 1240.420 should be a presumption affecting the burden of proof. Such a provision should discourage spurious issues from being raised by the condemnee yet allow full adjudication where a truly meritorious case exists.

Section 1240.510 "Property Appropriated To Public Use" May Be Taken For Compatible Public Use"
Section 1240.530 "Terms and Conditions of Joint Use"
Section 1240.630 "Right of Prior User To Joint Use"

These proposed sections by the California Law Revision Commission may have great effect not only on highway rights of way but also on other State lands and rights of way such as tidelands and other publicly owned lands under the jurisdiction of the State Land Commission,

park lands, etc. The prior Code of Civil Procedure sections dealing with this subject were hardly models of clarity. As a result, a rather complex scheme of special statutory provisions and master agreements between various public users grew up to handle problems of joint use and related problems, such as removal when one use is expanded, equitable spreading of maintenance costs, etc. Specifically, State highways are covered by Sections 660-670 of the Streets and Highways Code which provide for permit provisions for encroachments by other users in State highways. These permits contained provisions for relocation of utilities, railroads, electric power, gas and water facilities so placed. In most cases the permit will not be issued where there is an inconsistency with either the present or future use of the highway or the safe use thereof by the public. The Commission's proposal has "clarified" the former law and specifically provides that matters of consistency and adjustment of terms and conditions of joint use are to be left to the courts. It seems to the Department that this cannot help but have an effect on prior statutory and contractual arrangements concerning these matters. Further, the criteria which the judiciary is to apply in determining these complex matters are not specified. It must be recognized that a right of way, where joint use issues may arise, may extend through several judicial jurisdictions. The criteria applied by one court may not be followed by another. Specifically in the area of future use, most large utilities and public entities, in the interest of judicious and economic future planning, acquire sufficient right of way to provide for future needs, even though at the time of actual acquisition it could be argued that the time and place of the actual application of such right of way to the public use is at best uncertain and at worst speculative. For many years it has been the sound policy of the California Highway Commission to acquire sufficient rights of way on freeway projects (generally located in the area of a center divider strip) to provide for addition of an additional lane in each direction when and if the need arises. No criteria for handling such a situation is set forth in the Commission's proposed statutory provisions as to consistent public use either as to whether a use claiming consistency should be allowed to utilize such area of right of way or, if so, as to which entity must pay the considerable cost of relocation in the event the future need lying behind the original acquisition materializes.

Legal representatives who attended the Commission's study on these proposed sections noted the lack of demonstration of any problems arising under the present statutes governing this area and the lack of input from many of the entities which will be affected by the Commission's proposal. For this reason the Department reserves its privilege of further comment on these proposals after such input is hopefully engendered by way of comments to these tentative recommendations or during the actual legislative process necessary to enact such provisions into final statutory form.

COMPENSATION

[including Procedures for Determining Compensation]

Compensation:

Section 1263.220 "Business Equipment"

The Department objects to the language of this section in its present form. The term "business purposes" is vague and obviously broader than "equipment designed for manufacturing or industrial purposes" contained in the present Section 1248(d). The Department foresees a major difficulty in interpretation of what constitutes "business purposes." Obviously the term is intended to cover commercial enterprises generally; however, any equipment used in a business, of whatever nature, could arguably be equipment designed for business purposes. Thus, the owner or operator of a motel or furnished apartment could be considered in a business and therefore could contend that his furnishings in the motel or apartment are so unique and have such a special in-place value as to be worthless elsewhere. The Department feels that this would unreasonably expand the business equipment concept and subject public entities to claims under a "constructive annexation" doctrine which has been urged upon but refuted by the courts. Hence, some further clarification of "business purposes" to avoid open-end liability would seem to be called for. In addition, since actual direct losses of personalty incurred as a result of moving or discontinuing any business operation are already compensable under Government Code Section 7262, there would appear to be no need to compensate for any and all "business purposes" equipment as the language of the section in its proposed form appears to envision.

Section 1263.330 "Changes In Property Value Due To Imminence Of The Project"

The Department considers that the rationale of this section is basically sound and that uniform treatment of increases or decreases in value attributable to a pending public improvement would appear to be desirable, within the limits of the Woolstenhulme decision. However, the Department considers that use of the language "any increase or decrease in value" is objectionable in that it may sanction a purely mathematical analysis of alleged beneficial or detrimental effects on property values. Thus, an appraiser in considering sales in a so-called blighted area may simply adjust mathematically for the sales using an arbitrary percentage such as 20 or 25 per cent and carry through his valuation of the subject property accordingly. To avoid any such mathematical approach, the Department suggests that the language of the section be amended as follows:

> "In determining the fair market value of the property taken, there shall be disregarded any effect on the value of said property which is attributable to any of the following:" [Continue with the language as presently proposed; that is, subitems a, b and c.]

Section 1263.410

The Department objects to including any damages awarded for loss of goodwill as compensation against which benefits cannot be offset. (See comment to proposed Section 1260.230.)

Section 1263.420 "Damage To Remainder"

This proposed section in abrogating the Symons rule will, of course, expand the public entities' liability for severance damage. The Department feels that without some clarification or limitation on damages emanating from that portion of the project off the part taken, the section is too broad. It will allow an open-end consideration of so-called proximity damage -- i.e., nuisance factors such as noise, dust, dirt, smoke and fumes, whether generated on or off the part taken. The impact of such factors on the remaining property could, under the Commission's proposal, be much less or, at least, the same as that on the general public. In highway taking cases, the landowners could try to prove proximity damages for alleged detriment hundreds

of feet, or even hundreds of yards, away from the part taken. This, the Department feels, will encourage testimony of damage based on little more than speculation and conjecture.

The Department also opposes an allowance of damages based on the use by the public of the improvement. Existing Section 1248, subsection 2, of course provides for damages accruing by reason of the severance and the construction of the public improvement in the manner proposed. Injurious effect caused by the public's use of an improvement -- i.e., such as a highway -- are shared by property owners in general whether or not a part of their property is taken and are not really special to an owner. It is recognized that the Court of Appeals in the Volunteers of America case (21 C.A.3d, 111) expressed strong policy reasons for allowing recovery of proximity damages "if established by proper proof." The Court did not elaborate on what would constitute proper proof. Proximity damage from sources off the part taken and considering the use of the facility will be an invitation to imaginative appraisers and property owners to claim high or large severance damages without a basis in fact or experience. If proximity damages are to be broadened, there should be some physical or geographic limitation to prevent open-ended speculation circumscribed only by the length and breadth of a project.

Section 1263.440 "Computing Damage And Benefit To Remainder"

The Department opposes adoption of this section. To many judges and triers of fact assessment of just compensation using the present three or four step process is involved enough. This provision is certain to introduce additional complexities, if not confusion, into the assessment of damages and benefits. If the time lapse in construction is to be considered, the appraiser must estimate the period of delay, which may be little more than guesswork, and then discount the future damages to present worth. A similar procedure would apply to the assessment of special benefits. It is more than likely that this phase of the valuation testimony will be difficult for the trier of fact to follow.

The Department opposes the section for the additional reason that the issue of when the public improvement will in fact be constructed would be injected into the case. The timing of construction of any public improvement depends on such variables as availability of funds, priority of the

project in relation to other public improvements, and other matters as to which a testifying engineer, acquisition agent or certainly an appraiser could give no more than a guess. Further, in this area the engineer or acquisition agent could not bind the condemning authority or legislative body, so that if the public improvement is not built at the estimated time the agency could be subject to additional claims for damages. The Department considers that this section will invite speculation and create an added potentially confusing element in the assessment of just compensation. The concept of the "instant public improvement" is easily understood, has been judicially approved in numerous cases, and works a substantial justice to both sides. The Department considers that it should be retained.

Section 1263.510 "Loss Of Good Will"

The Department is opposed to an allowance of good will damages as envisioned by this section for a number of reasons. Firstly, there is no definition of good will in the section, although the comment indicates that the definition in Business and Professions Code Section 14100 is presumably to be used. The Department considers that compensation for business losses already allowed under Government Code Section 7262 is adequate or, if not, it can be increased. Section 7262 provides a concrete measure of assessment -- i.e., based on net earnings during a period of time preceding the taxable year in which the business is relocated from the property "Or during such other period as the public entity determines to be more equitable for establishing such earnings." The proposed section, however, would provide for a loss of good will based on future losses which, it is submitted, will be very difficult to assess at the time of trial. The appraiser will have to estimate a diminution of future net profits. This will open wide the door to speculation. The estimated loss may well be based on increased cost and expenses of maintaining the good will of a business and these are the very expenditures which are theoretically to be made in mitigation of the loss of good will. Thus, the opportunity for double recovery, despite the limitations in the statute, is great.

The Department feels that this section is further objectionable in that good will, as commonly understood and defined, is not really taken in acquisitions by eminent domain. To the extent that good will comprises the skills, talents, experience and reputation of those engaged in a

business, the public agency does not take or interfere with these elements of a business enterprise. The agency extracts no covenant not to compete in connection with the taking. In addition, good will is not indispensibly an attribute of the location of a business. Continuation of good will, or future patronage, depends on a variety of nonphysical factors in addition to the personal factors mentioned above. Thus, continuance of good will will hinge on market demands, competition, quality control of the service or product offered and general economic conditions. The Department submits that the foregoing factors will be difficult for an appraiser, if not impossible, to segregate from the alleged loss caused by the agency's taking or the injurious effect of the taking on the remainder. The result will be that the condemnation award will inevitably reflect some noncondemnation elements, and the danger of double compensation is enhanced. The Department regards this provision for compensating for good will loss as unsound both in principle, and highly uncertain in measure of proof.

Section 1263.240 "Improvements Made After Service of Summons"

The Department regards Subsection (c) as objectionable in that it contains no criteria for the balancing of hardships and equities which the Court must undertake in applying said section. It is also an invitation for owners with resources to apply for this remedy and it will create further burdens on the Courts in pretrial matters involving eminent domain.

Procedures for Determining Compensation

Section 1260.210 "Order of Proof and Argument; Burden of Proof"

As the comment states this subsection changes prior law. The out-of-state cases relied on by the Commission represent a minority view in the U. S. In view of the BAJI instruction recently modified, it would appear that this proposal is a great departure from present procedural law, which now places the burden of persuasion on value and damages on the owner and special benefits on the condemnor. Present law is a practical solution. The commission's proposal is neither practical nor logical.

Section 1260.230. "Separate Assessment of Elements and Compensation"

While continuing the separate assessment concept of CCP 1248, the Commission adds the element of good will. This should

be separately assessed if it is to be allowed to make sure it is identified and to prevent double recovery if the owner claims a loss under Government Code 7260 (relocation assistance). However, in partial take cases benefits should be used to offset loss of good will if it is claimed, especially where the use is changed in the after condition, e.g., a mom-and-pop grocery store changed to a service station site.

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Section 1260.250 "Compensation for Appraisers, etc."

Present CCP Section 1266.2 is useless, unnecessary and seldom, if ever, utilized. Therefore, the Department would make the same observations as to proposed Section 1260.250. The owner can retain his own appraiser, or, if he desires, testify on his own behalf. The same right to testify is extended to corporate owner employees by a change of the Evidence Code.

Section 1263.010 "Right to Compensation"

The Department has no objection to the statute as drafted. However, the Department feels that the comment under the statute unduly obfuscates the salutary general principle stated in the proposed statute. It seems to the Department that the principle is simple and the courts should be left to their determination of how it should be applied in all of the myriad situations which may or may not confront the courts in future cases. The attempt by the Commission in its comment to direct the courts in this regard merely creates unnecessary ambiguity, fails to achieve the objective and constitutes an unnecessary, and slightly presumptuous, interference with the judicial process of solving such problems on a case-by-case basis.

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Section 1263.140 "New Trial"

For all practical purposes this section establishes the trial date of the new trial as the date of value, since it would be very unusual to try a case within a year after the granting of a new trial by the trial court, and impossible after appellate reversal. Therefore, unless plaintiff deposits the amount of the judgment or probable just compensation, he is faced with a new date of value. This

section rewards the wrongdoer who may have caused error, misconduct or prejudice and who has obtained an unfair verdict which though excessive in terms of the original date of value may not be in terms of the new date of value. See People v. Murata. The section forces the condemnor to deposit a sum which the owner can withdraw and which may not be available when the condemnor secures the lower verdict and the condemnee is judgment proof. This seems especially unfair to condemnors who do not need immediate possession of the property. Prior law under Murata has worked well and preserves for the condemnor his right to move for a new trial when the verict is unjust and his right to appeal when there is error. In a rising market, the condemnor would not have these rights under this section unless he made a deposit which could be dissipated by the owner.

Section 1263.150 "Mistrial"

This section permits more injustice than the previous section. Here, the condemnee can cause a mistrial by his own misconduct if the trial is not going well, and retry it more than a year after suit is commenced and obtain the fruits of a higher market. The section should be deleted in favor of prior law, or amended to foreclose profiteering from one's own wrongdoing.

Section 1263.620 "Work on Partially Completed Improvements"

Allows owner to protect other persons or property and to charge his expenses relating to an uncompleted improvement halted by service of summons to the condemnor. It would seem that if no emergency were involved he should at least obtain a court order as is required by Section 1263.240(c).

Section 1265.130 "Termination of Lease in Partial Taking"

This section should be amended to make clear that the condemnor is not liable for the payment of more than the full fee value of the property.

Section 1265.310 "Unexercised Options"

This section is vague and unclear. It seems to hold that the unexercised option is terminated when the property is taken but is valued as of the time of filing the complaint. This may conflict with other sections which fix the date of valuation of the property as the date of deposit or the date of a new or retrial. It does not seem that this section is

really necessary. The provision as to termination of the option upon filing of the complaint appears to be an artificial and contrived device for the purpose of providing a compensable right in the property by unnecessarily destroying the option on an arbitrary date. Under present law, an option holder has the right to protect himself after filing of an eminent domain proceeding by exercising the option if he determines that he can get more for the property than the option price. Present law does not provide an artificial, contrived "destruction" of the option right for the purpose creating a compensable interest in property. The Department sees no reason to change prior law as established in East Bay Municipal Utility Dist. v. Kieffer.

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Section 1265.410 "Contingent Future Interests"

This is a cumbersome section. There seems to be little need for this section. The subject matter therein could be adequately handled by the development of the common law on a case-by-case basis.

CONDEMNATION PROCEDURE

Possession and Deposits of Probable Just Compensation

The Department and other commentators on the Commission's proposals relating to deposit and withdrawal of probable compensation and possession prior to entry of judgment have in the past strongly questioned the need for any change whatsoever in the current law applicable thereto. The Department has not had called to its attention any shortcomings in the present law, except that certain entities not presently having the power of immediate possession have expressed interest in obtaining it. The present restriction of the right to immediate possession in Section 14 of Article I of the California Constitution to any right of way or lands to be used for reservoir purposes is based on a sound recognition of the unique problems of land assemblage for such projects. It is suggested that the same problems to the same extent have not proven extremely troublesome in dealing with other types of land acquisition for public use. Where problems have arisen, it is less chargeable to the Constitutional restriction of the right of immediate possession than to administrative lack of provision of sufficient lead time in which to acquire necessary parcels.

In any event, the Department's question as to the need for an expansion of the right of immediate possession stems not so much from outright opposition to such expansion, per se, than from the extreme difficulties presented by the remainder of the Commission's proposal which it apparently feels necessary to make such expansion palliative to property owners' interests. Conceptually, the Commission has stated this concession as follows on page 55 of its tentative recommendation:

> "From the property owner's point of view, if reasonable notice is given before dispossession and if prompt receipt of the probable compensation for the property is assured, possession prior to judgment frequently will be advantageous."

The Department feels it is utopian to believe that just compensation can be assured under the judicial system short of a full trial on the issue. Therefore the

Commission's proposed liberalization of the information given to the owner supporting the agency's deposit of probable just compensation (Section 1255.010(b) and 1255.020) as well as its "open-ended" invitation to condemnees to challenge the sufficiency of the deposit as amounting to just compensation (Section 1255.030) and the relaxations of former restrictions on the withdrawal of the deposit of probable just compensation which were provided to protect public funds (Sections 1255.210 through 1255.280) simply will fall short of accomplishing the utopian end intended that probable just compensation will equate to the final result reached after a trial of that issue in the courts. Rather, the results of these changes, in the Department's opinion, will result in an increased load of litigation for the court system, a non-productive wastage of public funds in the administrative processing necessitated to process deposits of just compensation where the condemnor desires to take immediate possession of the property, and the loss of public funds due to the lack of adequate safeguards for the return of withdrawn deposits, increased beyond the final result of just compensation as reached in the courts. It is the Department's position that if the right of immediate possession is expanded to other takings than right of way and reservoir takings, such expansion alone will create difficult problems of court administration as well as the magnification of problems dealing with administrative processing of such orders of possession and with the problem of recovery of deposits artificially increased beyond the levels of just compensation ultimately determined in the eminent domain litigation. Therefore, the Department feels that if the right of immediate possession is to be expanded, current procedures concerning deposit of probable just compensation to secure such orders and to protect public funds deposited to secure such orders must be retained, at least until the impact of such expansion of the right to other takings can be assessed. In this regard the Department respectfully calls the attention of the Commission to correspondence sent to them by Richard Barry, Court Commissioner for the Superior Courts in Los Angeles County, dated November 24, 1970, wherein Mr. Barry urged the Commission as follows: ". . .do not recommend legislation that will burden the courts. . . ." The combination of the provisions of proposed Sections 1255.010 through 1255.030 will assuredly result in an increased burden on the courts. Proposed Section 1255.010(b) requires that before a deposit is made the condemnor must have a qualified expert prepare

a statement of valuation data comporting to that required by Section 1258.260. The data required by Section 1258.260 was a list of data originally compiled to be appropriate for exchange by the parties to an eminent domain action 20 days before trial. Perhaps nowhere else does the utopian approach lying behind the statutory scheme adopted by the Commission appear as clearly as here. Since most condemnors apply for orders of immediate possession on or about the date of filing of the action in eminent domain, the Commission's proposal in effect requires such condemnors to be as prepared on the date of filing as to all the multitudinous issues involved in the ascertainment of just compensation as was previously required of them only 20 days before trial. Such a requirement is not made of the property owner. But the property owner is now provided the advantage of the complete administrative effort and expense called for in preparing such an extensive statement of valuation data as necessitated by the Commission's proposal as an inducement to accept the clear invitation set forth in proposed Section 1255.030 to move ("at any time") for increases in deposits of the probable amounts of just compensation.

Section 1255.030 then goes further by way of making this invitation even more attractive to make successive attempts to have deposits increased by providing that if the amount of such an increased deposit is not actually deposited within 30 days it will be treated as an abandonment entitling the defendant to litigation expenses and damages as provided in Sections 1268.610 and 1268.620. The complete one-sidedness of this entire scheme, in aid of the utopian search for arrival at just compensation before trial, appears in subsection (c) of proposed Section 1255.030 which encourages the owner who wishes to accept the Commission's attractive invitation to challenge the amount of just compensation deposited by the condemnor to immediately withdraw any such increased amount deposited. Upon such withdrawal the Commission's proposal precludes the court from redetermining the amount of probable just compensation to be less than the amount withdrawn (but of course no such balancing constraint is provided on the court to a determination that said amount is greater than the amount previously withdrawn by the owner).

The net result of these proposals cannot help but greatly increase the amount of court time utilized in pretrial motions to increase the amount of probable just

compensation deposited to secure necessary orders of possession as well as increase the administrative costs imposed on condemnors by the necessity in each and every case to prepare the extensive list of valuation data called for under proposed Section 1255.010(b). This result would be insured regardless of any expansion of the right of possession to takings other than for rights of way and reservoir purposes. Such expansion can be expected to result in a "population explosion" of such pretrial motions for increases in deposits to secure orders for immediate possession. As a result of such pretrial activities on the part of owners, in many cases the resultant amounts increased to reflect determinations by overworked courts, operating under severe evidentiary and time constraints, will eventually turn out to be greater than the amounts of just compensation determined after the deliberate and careful consideration of all the evidence pertinent provided at trial. Thus, in a significant number of cases, the property owner will have available to him for withdrawal amounts in excess of that to which he will ultimately be entitled. Such a result would seem to call for a strengthening rather than a weakening of previous statutory safeguards concerning protection of tax funds deposited to secure necessary orders of possession. But the recommendations appearing under Article 2 of the Commission's recommendations weaken rather than strengthen such safeguards.

The Department urges a continuation of the current provisions of Code of Civil Procedure Section 1243.7(e) to the effect that if personal service of an application to withdraw a deposit cannot be made on a party having an interest in the property, the plaintiff may object to the withdrawal on that basis. The deletion of this provision under the current recommendation of the Commission deprives the agency of all of its power to protect the public funds entrusted to it. Without the unserved party before the court, the "ease" which the Commission's tentative recommendation purports to find in demonstrating his lack of interest in the property is, in reality, of small protection for such funds. Any protection by way of the court's discretionary power to provide a bond or to limit the amount of withdrawal likewise may provide no real protection to these funds in the event such party later appears with substantial claims on the amount of just compensation. At the Commission's hearings, the Department's representatives took note of the lack of any concrete evidence that the presence of currently provided statutory

protections acted in any significant manner to obstruct or delay legitimate requests for withdrawal by owners. Indeed, the Department's experience has been that the very presence of such statutory protections has tended to limit property owners' demands for withdrawal to a reasonable basis, which in the great majority of cases can be handled by stipulation rather than necessitating the utilization of court time and resources.

The changes in present law proposed in Section 1255.280 to delete the requirement that a withdrawee pay interest on the excess of probable just compensation withdrawn over the final determination on this amount after trial, as well as to provide up to a year's stay on such return to the condemnor, simply enhances the invitation extended to owners to both seek increased deposits of probable just compensation and to encourage withdrawal. The Department objects to such changes in present statutory provisions, which provisions tend to restrict the utilization by owners of such procedures to a reasonable and prudent basis and level.

Aside from the Department's above-expressed reservations concerning the basic scheme inherent in the proposal inviting and encouraging challenges to the amount deposited as probable just compensation as well as withdrawal of same and deleting adequate safeguards to the public monies involved now provided by law, the Department further objects to those recommendations which may be seen by the Commission as dependent on the adoption of the above-referenced ill advised scheme. Thus, the provisions set forth in proposed Section 1255.460 allowing the condemnor to take possession after withdrawal by the owner of any portion of a deposit of probable just compensation made pursuant to proposed Section 1255.010, which deposit may, in turn, have an effect on the date of valuation under proposed Sections 1263.110, 1263.140 and 1263.150, are not seen by the Department as sufficient beneficial inducements to cause it to waive its objection to the more serious disadvantages presented, as set forth above, to the entire basic scheme underlying these recommendations as to deposit of probable just compensation before judgment.

In addition, the Department has strong objections to proposed Section 1255.420, which allows a trial court to stay an order of possession on the basis of substantial hardship to the owner unless the plaintiff "needs" possession of

the property as scheduled in the order of possession. This provision, in addition to the expansion of the time which must elapse between the service of an order for possession and the date of actual possession from 20 to 90 days (proposed Section 1255.450), all act in concert to make extremely unpredictable whether or not the real property necessary for construction will actually be available on the date required under the construction contract. If it is not, damages may be claimed by the contractor, resulting in a wastage of public funds. More often than not, such claims by the contractor are not ascertainable by the condemnor until near the end of the construction activity. Thus, evidence of the agency's "need" for possession of the property within the time specified in the order for possession may well not be available, in a form sufficiently satisfactory to the particular trial court involved, at the time the owner moves for a stay under proposed Section 1255.420. The Department's experience under present law has been that it provides both predictability as to when the property necessary for the construction of the project can be reasonably expected to be available to the contractor, as well as sufficient flexibility to take care of the rare and unusual hardship situation sought to be cured by the Commission's recommendation. Under current law an order of immediate possession is not self executing. To actually displace an owner from the property requires return to the court for a Writ of Assistance. It is the experience of the Department's counsel that at the hearing on application for this writ the trial court invariably explores any legitimate hardship being experienced by the reluctant owner and utilizes its judicial discretion in alleviating any such hardship to the maximum extent practicable under the situation presented to it. It seems unwise to the Department to attempt to alter the entire legal fabric relating to the power of courts to vacate orders of possession, with all of the advantages of predictability inherent therein, for the purpose of remedying the rare and unusual case of undue hardship to the property owner, especially where the Commission has before it no evidence that the present law cannot accommodate to such unique and unusual situations.

The lack of balance in the current tentative recommendation in this area becomes evident when proposed Section 1255.450 would delete that portion of present law provided to remedy unnecessary wastage of public funds in those cases

where the agency, on noticed motion, presents a cogent case for possession within as short a period as three days from service of the order for immediate possession. (Code of Civil Procedure Section 1243.5(c).) Certainly, in areas where complex land titles are involved and where immediate possession of unoccupied land, or even occupied land, will cause little if any hardship to the owner, the court should continue to have discretion to allow possession on less than 90 days' notice where the lack of ability to provide the contractor with the necessary property could expose taxpayers' funds to substantial wastage by way of contract claims.

Finally, as part of the package relating to deposit of probable just compensation and obtaining orders of possession before judgment, Sections 1255.040 and 1255.050 are proposed -- apparently on the theory that the legislative experiments of other states deserve a limited tryout in California (see first sentence under heading entitled Prejudgment Deposit on Demand of Property Owner appearing on pages 59-60 of "Tentative Recommendation"). The discussion in the tentative recommendation goes on to justify this recommended experiment on the basis that the classes of cases selected to be covered represent areas of legitimate hardship. The Department respectfully calls to the attention of the Commission that since the enactment of the Brathwaite bill, Government Code Sections 7260 to 7274, relating to relocation assistance, the incidence of litigation on the acquisition of such properties as covered by the classification written into proposed Section 1255.040 has diminished to a point of practically nil. This is because these provisions as to relocation assistance, as applied to such properties, have removed all the "hardship" aspects of such acquisitions. The lack of litigation as to acquisition of such properties demonstrates complete lack of justification for legislative action. Insofar as the small proprietor is concerned, a similar effect is evidenced in relation to the acquisition of property covered by the terms of proposed Section 1255.050. Insofar as such proposal covers more valuable proprietorships of rental property, these owners, with their large resources to support litigation, may be expected to seize on the terms of proposed Section 1255.050 as a method of seeking, by motions for increase of deposit before trial, to expose the agency unable to meet such high levels of deposits as an individual judge may determine to be appropriate (in the limited time and on the limited evidence available to

him) to payment of the additional amounts provided in such proposal for failure to make such increased deposits. In summary, the Department respectfully suggests that there is simply no demonstrated need on any "hardship" basis for the provisions currently forwarded in proposed Sections 1255.040 or 1255.050, allowing owners of these classes of property to demand high prejudgment deposits of probable just compensation from condemnors which are subject to severe penalties if such demands cannot be met.

Post Judgment Procedure

While not greatly affected thereby the Department questions the wisdom of the deletion by proposed Code of Civil Procedure Section 1268.010 of the current provision in Code of Civil Procedure Section 1251 which allows the State or public corporation condemnor a year to market bonds to enable it to pay judgment. Such deletion may threaten many needed public projects proposed to be funded by responsible local and State agencies which do not have immediately available to them unlimited funding. It is unlikely that local governments could reasonably prevail on their electorates to authorize bond issues high enough to cover the worst result that could possibly ensue from condemnation litigation which might be necessary to acquire the land for an otherwise worthy and needed local project. However, under the proposed deletion of the current statutory provision for bonding to cover an increase in estimated land costs after trial, this would seem to be the only protection such a condemnor would have against exposure to implied abandonment and the considerable penalties involved therein (see proposed Section 1268.610) following such a result. Since a judgment in condemnation draws interest at 7 per cent from date of entry, the plight of the owner having to wait as long as a year to actually receive the judgment amount plus 7 per cent interest appears not quite as onerous as represented in that portion of the Commission's recommendation which recommends deletion of the one-year period to sell bonds to cover the cost of an unanticipated high award (Tentative Recommendations, page 65).

The Department objects to proposed Section 1268.610 and specifically the broad definition of "litigation expenses" contained in portion (1) thereof. Portion (2) of this proposal delineates the traditional recoverable specific expenses in case of abandonment or other cases where more than pure legal costs are recoverable from the condemnor --

i.e., attorneys' fees, appraisal fees and fees for the services of other experts. The Commission's proposal would make recoverable, in addition to these specific ascertainable things, a broad, open-end category of "expenses" limited and defined only by the extent of the claimant's imagination and the liberality of the particular trial court called upon to determine what items the Legislature had in mind in enacting subsection (1) of proposed Section 1268.610. The Department particularly objects to that portion of proposed Section 1268.610 that makes such liberalized and expanded "litigation expenses" recoverable in the event of any involuntary dismissal of a condemnation action. Often, under present practice, where so-called "involuntary" dismissals do not carry with them the extreme penalties proposed in Section 1268.610, the "aging" of a case past the two-year period and other time constraints set forth in Code of Civil Procedure Section 583 is voluntarily assented to by both sides so that time is made available to work out unclear title or other legal or appraisal problems inherent in many eminent domain cases. It is not unusual that stipulations for extension of the five-year period provided for by Code of Civil Procedure Section 583(b) are deemed advantageous to both sides in an eminent domain proceeding. The Commission's proposal that any involuntary dismissal achieved by the owner under Code of Civil Procedure Section 583 carry with it substantial monetary awards by way of recovery of "litigation expenses" will undoubtedly cause a cessation of the above described salutary practice as well as create the temptation to engage in much game playing for the very purpose of creating a situation where an involuntary dismissal for delay in trial under the provision of some portion of Section 583 be created so that the substantial financial awards stemming therefrom under the Commission's proposal may be realized (in addition to the just compensation for the property which may well have to be condemned "again" by filing another action).

The Department objects to proposed Section 1268.260 as a total, unlimited, open-ended indemnity provision for owner recovery of damages caused by possession of the condemnor in the event a proceeding is either voluntarily or involuntarily dismissed for any reason or there is a final judgment that the plaintiff cannot acquire the property. All of the Department's comments concerning the policy disadvantages of such liberal recovery provisions being attached to "involuntary" dismissals above set forth in response to proposed Section 1268.610 apply in spades here.

The cumulative effect of the provisions in Sections 1268.610 and 1268.260 could approach an unconscionable level. Certainly it would not appear to be in the public interest to provide such a measure of compensation which could well exceed the amount of just compensation which would have been awarded the owner had the action proceeded under the complaint in eminent domain filed. The Commission should have its staff re-study and specify and limit the items for which the owner be recompensed under the situation sought to be covered by proposed Section 1268.620. Such a list would be a responsible approach to the problem and carry with it the advantage of predictability, allowing public agencies to make reasonable judgments as to the costs of various alternatives available to them, such as the voluntary abandonment of a proposed acquisition under the provisions of proposed Section 1268.010 or under present law as embodied in Code of Civil Procedure Section 1253.

The Department objects to that portion of 1268.710 which deletes the provision of present Section 1254(k), providing that where a defendant obtains a new trial and does not obtain a result greater than that originally awarded, the costs of the new trial may be taxed against him. Again, the basis of this objection is simply that it removes all constraint encouraging the exercise of prudence on behalf of the property owner and his attorney in seeking judicial remedy.

The Department objects to the complete removal of discretion from the appellate court in awarding costs on appeal as proposed in Section 1268.720, and particularly in the situation where the condemnation suit is utilized by claimants to the property to resolve a title dispute. The Department recommends that where the issue of title is involved on the appeal, the disputants should bear their own costs of obtaining a resolution of such an issue. While the Department agrees that in recent years the trend has been to award the property owner his costs on appeal, whether appellant or respondent, and whether he prevails or does not prevail in the appellate court, it feels that the legislative branch of government should not invade the province of the judicial branch by attempting to destroy the use of judicial discretion in individual cases to apportion appellate costs as justice in that particular case may warrant.

This concludes the comments of the Department of Transportation on the Law Revision Commission's Proposed Tentative

Recommendation dated January 1974. The Department continues to stand ready to render any assistance requested by the Commission in aid of its efforts to fulfill the legislative mandate that the Commission formulate any revisions to Condemnation Law and Procedure deemed by it as desirable and necessary to safeguard the rights of all parties to such proceedings.

Sincerely,

Harry S. Fenton

HARRY S. FENTON
Chief Counsel

Memorandum 74-38

EXHIBIT II

MINUTES OF THE STATE BAR COMMITTEE

ON GOVERNMENTAL LIABILITY AND CONDEMNATION

(June 15, 1974)

The statewide Committee meeting came to order on June 15, 1974, at 9:30 A.M., at the San Francisco State Bar Headquarters. There were in attendance:

JAMES E. JEFFERIS, Vice Chairman
JERROLD A. FADEM, Secretary
THOMAS G. BAGGOT
MAURY ENGEL
JOHN P. HORGAN
JESS S. JACKSON (9:40 A.M.)
ROSCOE D. KEAGY
JOSEPH A. MONTOYA
CARL K. NEWTON
GARY RINEHART
ROGER M. SULLIVAN

And there were absent:

THOMAS M. DANKERT, Chairman
ROBERT F. CARLSON
PETER W. DAVIS
RICHARD L. HUXTABLE

Pat Remmes, liaison with C.E.B. was not present.

The Committee approved the minutes of the previous meeting.

The Committee considered legislation proposed by the Law Revision Commission.

§1240.230. Burden of Proof (March 18, 1972, Minutes, p. 2)

The Commission recommends 7 years as the time for future use to justify a present taking. The Committee had favored 5 years.

No action was taken.

§1240.340. Substitute Condemnation (March 18, 1972, Minutes, p. 3)

Newton moved to recommend disapproval of the Commission proposal except where there was consent of the owner of the substitute property.

Sullivan seconded.

Mr. Jackson joined the meeting.

Passed 9 votes to 1.

Reason - The owner of the substitute property would have his property taken by eminent domain for a use which was not a public use under the Constitution. This was felt impermissible except with the owner's consent.

Baggot moved that if the Law Revision Commission did not respond favorably to the Committee's recommendations, that the Committee communicate with the Board of Bar Governors requesting the Governors adopt the Committee position.

Keagy seconded.

Passed unanimously.

§1240.350. Substitute Condemnation for Utility Service or Access to Public Road (March 18, 1972 Minutes, p. 4)

No action was taken as it was felt the Law Revision Commission if pursuaded by the Committee's recommendation on §1240.340 could make conforming amendments.

§1240.650. Use by Public Entity More Necessary Than Use by Other Persons (March 18, 1972 Minutes, p. 4)

Newton moved to approve the section as proposed by the Commission.

Rinehard seconded.

Passed 9 to 1.

§1255.240 (formerly §1255.050). Conflicting Claims to Security Deposit (May 20, 1972 Minutes, p. 2)

Newton moved to recommend amendment to make provision of a bond mandatory by substituting the word "shall" for "may".

Horgan seconded.

Failed 2 to 8.

§1255.410. (formerly §1255.210). Order for Possession prior to Judgment (May 20, 1972 Minutes, p. 3)

Newton moved to amend to add to subparagraph (a) "Plaintiff must show an actual need as of the effective date of the requested order of possession."

Sullivan seconded.

Passed 6 to 4.

Reason - Possession should not be given without a showing of a need as of the time possession is being taken.

Repeal of CCP §1001 (September 16, 1972)

Newton moved to recommend retention of §1001.

Keagy seconded.

Unanimously passed.

Reason - The section was felt to serve a utilitarian purpose and in the collective experience of the Committee membership had not been subjected to abuse.

§1240.120. Taking Property to Make Effective Use of Other Property with Power to Grant Out Subject to Reservations (September 16, 1972 Minutes p. 6)

Newton moved to recommend disapproval.

Baggot seconded.

Unanimously passed.

Reason - This was felt to be a taking not for a public use and several committee members had experienced abuse of the power of eminent domain being used in takings "for reservations as to future use".

§1263.220. Business Equipment (August 24, 1973 Minutes p. 5)

Sullivan moved to substitute "personal property designed for business purposes located" in place of

"equipment designed for business purpose that is installed".

Jackson seconded.

Passed unanimously

Reason - "Equipment" was felt to be capable of being interpreted more narrowly than "personal property". "Installed" was felt to be capable of narrower interpretation than "located".

The Committee felt this salutary recommendation should be given full effect and as little opportunity as possible provided by language choice for narrowing its effectiveness.

§1263.620. Work to Protect Public from Injury (August 24, 1973 Minutes, p. 11)

Sullivan moved to strike the word "other".

Newton seconded.

Passed unanimously.

Reason - It was felt that the salutary purpose of this section should be extended to the property itself, as well as to other property.

§1263.240. Improvements after Service of Summons (August 24, 1973 Minutes, p. 11)

Baggot moved to recommend disapproval unless all of (c) is deleted except for the first sentence.

Sullivan seconded.

Passed unanimously.

Reason - The Committee approves of a court being empowered to permit good faith improvements and feels that the limitation in the sentences recommended to be deleted should not be enacted as they limit the scope of the basic idea of the section.

§1245.250. Conclusive Effect of Resolution

Fadem moved that resolutions of necessity be subject to the same judicial review for fraud or collusion as any other governmental action.

Baggot seconded.

Passed 7 to 3.

Reason - Our most fundamental concept of government calls for no governmental action being free of the check and balance of review by the judiciary. The Committee recommends reviewability of resolutions of necessity only in the narrow, but not infrequent, situations where resolutions of necessity have been tainted by fraud or collusion.

Grave miscarriages of justive have occurred because of the conclusive nature of necessity. Recent events prove that no branch of government is free from misconduct and no governmental activity should be free of judicial review.

§1268.140. Withdrawal of Deposit

Sullivan moved that the comment be augmented by adding that this is an alternative procedure where there was no right to an order of possession.

Jackson seconded.

Passed unanimously.

§1263.110. Date of Valuation (August 24, 1973 Minutes p. 3)

Fadem moved that the date of value is the date of trial or the date of deposit, whichever is sooner.

Baggot seconded.

Passed 9 to 1.

Reason - Tying value to a past time works against the owner in a market in California which has for a generation now been generally rising and which in the current picture is inflationary.

It is always difficult to find the latest sales, which tend to be the higher priced ones. This is a penalty in itself as to the owner, but unavoidable. But valuing the property at a time before it is taken is avoidable.

An Owner should have his property valued as close as possible to the time that the owner actually loses his property. Under the statutory scheme proposed by the Commission, the date of trial most closely approaches this, or where there has been an order of possession, the date that there has been a deposit which permits the owner to withdraw his compensation substitute for the property seemed to most closely approach the ideal.

§1263.320. Fair Market Value (August 24, 1973 Minutes, p. 6)

Fadem moved that the definition of market value be retained in its present form with its reference to "the highest price".

Keagy seconded.

Passed unanimously.

Reason - The power of eminent domain is a drastic one generally contrary to our fundamental concept of the right of ownership of private property. Yet, we must recognize that the common good requires that property be taken under certain circumstances.

But where private property must be taken, it seems that the definition in use in California for nearly a century, that the owner receive the highest price that his property would have brought is most comformable with the spirit of the just compensation clause of the Constitution.

Additionally, an owner deprived of his property at an arbitrary date determined by the condemnor may well have irretreivably lost an expectancy of gain. There are many intangible losses when property is taken from an owner, such as the cost of acquiring a new property, and the application of entrepreneurial or personal time to the search for an adequate substitute property. These losses are uncompensated and are a further reason why the owner should receive the highest price his property would have brought on the date of value.

§1263.510 Goodwill Loss (August 24, 1973 Minutes, p. 10)

Fadem moved that the Committee recommend that "going concern value" should be substituted for "goodwill".

Sullivan seconded.

Passed 7 to 3.

Reasons - "Goodwill" and "going concern value" are not synonomous. It is the "going concern value" which is lost and therefore should be the measure of compensation.

§1268.320. Date interest stops (May 17, 1974 Minutes, p. 9)

Fadem moved to modify subsection (a) and (b) that deposit does not stop interest if there is a challenge to public use and no withdrawal occurs.

Sullivan seconded.

Passed unanimously.

Reasons - There are cases such as Morris v. Regents where there are legitimate questions of the right to take which are forced to be waived for the owner to withdraw the deposit. This in effect, either forces the owner to accept a year's long loss of return on his award, or give up his right to challenge the constitutionality of the taking.

Putting an owner to such an election is incompatible with the rights of the individual.

§1263.310. Measure of Compensation (August 24, 1973 Minutes, p. 6)

Jackson moved to insert "just" as the first word of the section and to insert "normal" as the second word of the second sentence of the proposed sentence.

Sullivan seconded.

Unanimously passed.

Reasons - The word "just" is felt to make clear the philosophy of justice to the owner whose property is taken.

The word "normal" is recommended because there are cases where market value is not available as a test. Particularly, this is true where a property is a unique one. There, recourse must be had to ancillary tests such as cost of reproduction.

§1268.310. Date interest commences to accrue (September 28, 1973 Minutes p. 8)

Jackson moved to delete the word "legal".

Baggot seconded.

Passed 7 to 3.

Reason - The legal rate of interest of 7% does not represent just compensation at this time. This has been the situation since 1970, may continue for an indefinite period, and may occur in the future. Therefore the market interest rule adopted in In re Manhattan Civic Center Area 229 NYS 2d 675 and State of New Jersey v. Nordstrom, 253 Atl 2d 163 of using the market rate of interest where it exceeds the legal rate seems necessary to make compensation just.

Sullivan moved that the Chairman write to the Board of Bar Governors that the matters raised by its letter of January 10, 1974, are deemed of great importance and are not being neglected by the Committee. The matter of indemnification for loss in value resulting from interference with owner's use of the land will be the topic of the next meeting of the Committee.

Keagy seconded.

It was unanimously passed.

The meeting was adjourned at 2:00 P.M.

Respectfully submitted,

JERROLD A. FADEM
Secretary

Memorandum 74-38

EXHIBIT III

County of San Diego

OFFICE OF

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MARY GELL
ANTHONY ALBERS
JACK LIMBER
R. KENT HARVEY
WILLIAM J. SCHWARTZ, JR.
TIMOTHY K. GARFIELD
YVES A. HEBERT
LEONARD W. POLLARD II
LEWIS P. ZOLLINGER
RALPH E. SHADWELL
GREGORY C.M. GARRATT
ROBERT C. RICE
D. RICHARD RUDOLF

July 1, 1974

California Law Revision Commission
School of Law
Stanford, California 94305

Attention John H. DeMoully

Gentlemen:

Re: Tentative Recommendation Relating to Condemnation Law and Procedure

At the time that you transmitted copies of your tentative recommendation relating to The Eminent Domain Law, you offered the recipients an opportunity to review and comment upon your recommendations. We are still in the process of reviewing the tentative recommendations. However, we submit the following comments at this time.

According to Article I, Section 14 of the California Constitution and your proposed revision thereof, private property shall not be taken or damaged for public use without just compensation having first been made to or paid into the court for the owner. We emphasize the words "for public use" because it appears that some of your recommendations are not directed toward compensation for public use but rather are an attempt to place the owner in a better position than prior to the taking by the public entity. Except for the prohibition against dual recovery, we note the limited discussion of relocation assistance provisions which would obviate the need for some of the changes recommended by you. As you have recognized by your numerous code change recommendations, eminent domain law is not in a vacuum. Acquisitions by public entities involve satisfaction or completion of environmental impact statements, planning commission findings and relocation assistance requirements as conditions precedent to such acquisitions. Even under your proposed constitutional amendment there is no

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requirement for payment for business good will, unexercised options or certain future interests since none of these would be "used" by the public entity for its public purposes.

Some specific comments: (Unless otherwise indicated, all references are to the proposed eminent domain law.)

1. Remnant acquisitions. (§ 1240.410) For remnant acquisitions it is recommended that if the owner is allowed to show that the condemning agency has a reasonable and economically feasible means to avoid leaving the remnant, he should be precluded from putting on evidence of severance damages in excess of the cost to cure or the cost of the solution.

2. Method of compensation. (§ 1263.410) We agree with the Commission's position that the present approach to valuation be retained rather than the "before and after" method. The before and after method might preclude the deduction of special benefits from the damages.

3. Establishment of the date of value. (§ 1263.110, 1263.120) Retention of the present method of establishing the date of value with the modification provided by the deposit of the probable amount of compensation in court appears to be equitable to both owner and condemning agency.

4. Divided interests; compensation therefor. (§ 1265.010 et seq.) We would object to any compensation of an interest unusable or not acquired by the public entity on the grounds that it is neither required by the Constitution nor is it logical. The condemning agency should be required to pay only for the total usable interests which it seeks to acquire. This would preclude compensation for any interest in excess of or in addition to the unencumbered fee. In the case of leaseholds the lessor's interest is diminished to the extent of the lessee's interest. Therefore, the total compensation paid to lessor and lessee should not be greater than the unencumbered lessor's interest.

5. Options. (§ 1265.310) Because the holder of an unexercised option has ample opportunity to provide for the happening of an eminent domain proceeding involving the real property subject of the option and because the option holder's interest is in no way usable by the public entity and is not property "taken or damaged for public use" and is not "an

interest in the property" subject of the option, there is no basis for compensation being paid to the option holder. To afford the holder of an unexercised option the right to compensation is to take away from the nature of the option the aspect of chance. The holder of an option is not firmly convinced of the value of the property and therefore takes an option which binds only the potential seller of the property but not the potential buyer. The proposed change in the law establishes a presumption of value for the option which may not be warranted. There are ample protections available to the holder of the option under existing law to obviate the need for the proposed change. We strongly object to this proposed change.

6. Future interests. (§ 1265.410) For reasons similar to the reasons stated in our objections to compensation for options, we would also object to compensation for any interest which is not vested prior to the commencement of the proceeding. To allow compensation for a future interest assumes that the necessary fact and legal questions have been answered to arrive at the conclusion that the interest is, in fact, a future interest as opposed to a condition or covenant.

7. Improvements. (§ 1263.260) In those situations where the owner is removing improvements and the condemning agency is paying for removal and relocation, the agency should not also be required to pay the value of the real property sought to be acquired as though improved.

8. Loss of good will. (§ 1263.510) Because the property owner appears to be adequately protected under the relocation assistance provisions of the Government Code and because there appears to be no constitutional requirement for compensation for the loss of good will and because it is logically not sound since it is not an interest acquired for public use, we object to the inclusion of loss of good will as a compensable item in eminent domain proceedings. We recommend that it be deleted. In the alternative, we recommend that relocation assistance provisions of the Government Code conflicting with the proposed law be repealed concurrently with the adoption of such proposed law. Also, since the method of valuing "good will" is different from the method applied to the valuation of the property sought to be acquired, the triers of fact will be confused and the condemnor prejudiced by admission of improper evidence insofar as valuation of the subject property.

9. Pleadings. (§ 1250.310) We concur in the recommendation that the complaint be accompanied by a map or plat depicting the property interests sought to be acquired and its relation to the project for which acquired. This would be applicable to all cases, not just those in which a right of way is sought to be acquired. The providing of the map should put on the defendant a duty of further inquiry with sanctions for failure to do so.

10. Cross-complaint claim requirement. (Proposed CCP § 426.70) We would object to the relaxation of the rules regarding the filing of a claim as a condition precedent to the filing of a complaint or cross-complaint against a public entity. Relaxation of the claim statutes would generate specious litigation. The property owner is already adequately protected under the claim statutes since he need not wait for an eminent domain proceeding to be filed in order to assert any valid claim against a public entity. If there has been a taking or damaging of property by some act of the public entity, the property owner whose property is taken or damaged need not wait for an eminent domain proceeding before filing an action after a claim for such taking or damaging.

11. Verification of pleadings. (§ 1250.330) We have not determined the impact, if any, on the proposed changes relative to verification of pleadings. However, we would suggest that the property owner be bound as to his allegation of value and damages in his answer. (We object to the deletion of the value requirement in the answer as proposed by the Commission.)

12. Amendment of pleadings. (§ 1250.340) The requirement of the subsequent adoption of a resolution of intention to increase the extent of the property sought to be acquired is logically sound. The mandatory requirement for payment of compensation for partial abandonment is not necessarily logically sound. For reasons which will be discussed under the section dealing with the abandonment costs, we believe some latitude should be allowed to the court to allow costs or not in order to stimulate negotiations between the parties.

13. Possession prior to judgment. (§ 1255.410 et seq.) We agree that the right of immediate possession by a public entity should be expanded beyond that which is now allowed. We recognize that a constitutional amendment will require time.

14. Amount of deposit. (§ 1255.010 et seq.) Your proposal requires that the security deposit be determined on the basis of an appraisal and that the defendants be advised of the making of the deposit and the basis for the deposit. This is another feature which duplicates the relocation assistance provisions in the Government Code. As is stated above, we recommend deletion of your proposal or repeal of the relocation assistance provisions concurrent with the adoption of your proposal. The provisions for review and change of the security deposit should be limited because of the potential for abuse. The interest recovery provisions of Section 1255.280 should be clearer.

15. Prejudgment deposits. (§ 1255.040) The prejudgment deposit provisions recommended by you appear to be equitable. However, this is another instance of duplication of relocation assistance provisions. It is recommended that either the relocation assistance provisions be repealed concurrent with the adoption of your proposal or, in the alternative, your proposal regarding prejudgment deposits be deleted.

16. Exchange of valuation data. (§ 1258.010 et seq.) The present procedures for exchange of valuation data under Code of Civil Procedure Section 1272.01 and following are not as adequate as they might be. The exchange occurs too close to the date of trial to be worthwhile. Issues which are raised in the exchange and which are properly the subject of discovery cannot be narrowed through such discovery prior to trial. In addition, those cases involving the owner witnesses result in an unfair burden being placed on the condemning agency since the courts are reluctant to preclude an owner from testifying even though he has failed to reply to the condemning agency's request for a list of expert witnesses and statement of valuation data. Conceding the owner's right to testify, nevertheless he should not be allowed to put on any valuation data which should have been included in a statement of valuation data. We agree with your comments to Section 1258.250. Since your proposal also encompasses the Evidence Code sections relating to eminent domain proceedings, you should probably include recommended amendments to the Evidence Code which would clarify any distinction between the owner witness and expert witness and what is required of each in terms of testimony and bases for testimony. The recommendation for the demand and exchange of valuation data at a time earlier in the proceeding is recommended. An attempt should be made to promote mutuality of exchange.

17. Burden of proof. (§ 1260.210) It is recommended that the present law with regard to the burden of proof as to compensation remain as is, with the defendant. In practice, juries do not appear to be cognizant of the burden. However, we do not wish to add to the real burden which is faced by all condemnors.

18. Valuation evidence. (Proposed Evidence Code § 813) Because of the potential for abuse in permitting a representative of the corporate defendant who is not otherwise qualified as an expert to testify in an eminent domain proceeding, we recommend against adoption of any provision allowing testimony by a lay witness. Further, it is suggested that the rationale behind allowing the owner to testify be examined and set forth in the Evidence Code as the conditions precedent for such owner to testify.

19. Comparable sales. (Proposed Evidence Code § 816) Because of the latitude in which the courts already have and which in practice results in the comparable sales provision of the Evidence Code being liberally construed, we recommend against any change. Your proposal assumes that this wider selection of comparable sales will lead to more relevant evidence. However, the present requirements as set forth in the Evidence Code as interpreted by case law have resulted in a plethora of sales with their adjustments causing confusion of the valuation issues in the minds of triers of fact.

20. Abandonment and dismissal. (§ 1268.510, 1268.610) Partial abandonment costs should not be mandatory and dismissals arising from out of court settlement by way of contract should not require the payment of costs to the defendant. We recommend against any proposals to the contrary since they work in an inequitable result against the condemning agency. The courts should be allowed discretion to allow costs and fees as the case warrants.

We would be happy to discuss in detail our comments contained in this letter and any additional comments we may have relative to the proposed changes in eminent domain proceedings.

Very truly yours,

ROBERT G. BERREY, County Counsel

By William C. George
WILLIAM C. GEORGE, Deputy

DC
WCG:kv

cc: Real Property Department
Attn: R. J. Pflimlin, Director

EXHIBIT IV

THE PHILOSOPHY OF THE DOMAIN CONCEPT

Analysis: "Research and legal problems solving within the Eminent Domain Law and procedure, Public Domain or National Domain".

Introduction

The United States Constitution is the embryo of the Domain Concept and procedure to make laws. The Fifth Amendment and the Fourteenth Amendment places restrictions on the State Courts, compensation with Administration of illigality of all practitioners. (See the 5th Amendment). All eminent lawyers cannot be dishonest persons. Tell me a person who is dishonest and I will answer he is no lawyer. He cannot be. Because that person is careless and reckless of justice, the law is not in his mind nor in his heart. The law is not the standard and rule of his conduct. Public wrongs are not popular rights in embryo.

The notion that a business is clothed with a public interest and has been devoted to public use is little more than fiction intended to beautify what is disagreeable to the sufferers. Proper does become clothed with a public interest when used in a manner to make it of public community at large, without due process of law.

Due process of law in each particular case means such an exercise of the powers of government as the settled maxims of law permit and sanctions, and under such safeguards for the protection of individual rights. The love of wisdom will ascertain political power, and will help our rulers of law-States learn the true philosophy of laws. (See P.C. sections 182-subdivisions 1,2,3,4,5,6,) Also see Fourteenth Amendment of the U.S., Constitution.

These are my comments as I see them in Law, fact and opinions within the legal system. The Domain Process is a decisional process and how

process influences the skills needed to resolve legal problems have been generally described in this book of (California Law Revision Commision), Condemnation Law and Procedure.

I will examine more closely the basic skills required to work with problems which may be resolved within the common law framework.

1. The first is the doctrine of (Stare Decisis).

2. The second, the broader one is the doctrine of precedents that is, if a court within a similar legal system has been previously considered and resolved a particular problem or problems, it's decisions or decision are worthy of consideration in resolution of future similar cases.

This book dees not deal with the rules controlling this initial determination, because of it's quasi constitutional application of the law, and a change is needed. See sections 4-5 of the Civil Code. The right to take is a correct technical defect in the philosophy of Eminent Domain powers. (See page 7). Because the section 1001 of the Civil Code states in part "Any person may, without further legislative action, acquire private property for any use specified in sections. 1238 of the code of civil procedure by exercise of the power of Eminent Domain. Section 1238 stipulates the grounds on which property may be condemned for public use. (See sub-sections 1 thru 22.) Also sections 1238.1 thru 1238.7 See sections 1239 and it's subsections and 1240 and it's subsections. I agree with you on; (The adoption of the approach will eliminate the need for separate listing of public uses in the general Eminent Domain Law. (See page 28)

Persons authorized to exercise power State Agencies. I agree with all respect to the delegation of condemnation authority to State Agencies, (Part 1 and 2 see page 29).

Special Districts. I agree with the general authority in the special

Districts have a special phraseology in some cases. I note that the commision has been reviewed these enabling statutes and concluded with a quasi exception. Because the omission of a grant in other statutes appears to be conscious legislative decision. Accordingly, absent any experience that demonstrates a need to grant the power of Eminent Domain to any of the special districts. I agree no change is needed. Cities and counties. I agree that thest activites of the brood condemnation authority are justified and power functions as stated in the 5th Amendment of the U.S. Constitution. (Page 30) Public Utilities. In my opinion, provision should be made to acquire property necessary to carry out their rigulated activites. Quasi-Public entities and private persons. To give Eminent Domain power to private persons is a bifucation act of judicial abuse because of a deficiency within the professional malpractice concept. Eminent Domain power calls for biofeedbackwith proficiency. This is a State violation within it's own laws in a pragmatic sence of the judicial process. The philasophy of moral turpitude has been misconstrued by the State. We need the Constitutional Authority within the government to aid experts in every area to meet standardized training and classification requirements, because of the use misuse and abuse of Eminent Domain Power by private persons. The biofeedback by private persons has had a psychological aspect. The public has medical legal problms because of emotioanl insecurity, and insurrection, this has forced some members into a psychotic breakdown.

Extraterritorial Condemnation Law. I agree within the case law

Concept to be codified, as stated in sections 1240 and 1241. Code of Civil Procedure subsection 1 thru 8 should stand as stated on page 355 Year book 1973-74. Edited by Warren L. Hanna, Standard California Codes Section 660 of the Eminent Domain law. See section 660 for Hearing Application.

Use of reporters notes, pleadings and files-time limit 60 days-determination by order. I agree with section 60 and section 12A. Determination of time: (See sections 12B and 6700 and 6701 of the government Code these sections also applies to section 659, 659-A, 946, and 974 thru 982 of this code. See sections 13 thru 13-B this code.

I used codes to show time because you are a part of this change of law and procedure for the revision commision, and showed know what is stated there-under.

I have made a survey of Book I, on the first one you sent to me on Condemnation law and Procedure. And I have commented on malpractice litigation and conflicts between the State or States and private persons in law and facts, principal topics and standard of care or steps you have taken to update the Domain philosophy as we continue this program toward eduration and professional expertise within the legal system with due process of law and procedure for 1975.

I feel within my person that Stanford University can do the job within it's legal department, best to ask depositions of others is the acme of philosophy to be honored by all persons like myself. May I say that Stanford Law Review is and shall be honored by all in the legal profession. Do not focus on the number of words I have used, but on the form and content of what I have written.

Yours Truly,

Memorandum 74-38 EXHIBIT V

Peter D. Bogart

ATTORNEY AND COUNSELOR AT LAW

Peter D. Bogart
2988 Beachen Hill Drive
Hollywood, Calif. 90068

PHONE:
461-2273

May 3, 1974

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

Re: Condemnation Law & Procedure

Gentlemen:

Upon perusal of the tentative recommendation for revision of the condemnation law and procedures, I realized, with great concern, that the recommendation continues the great hardship vested by existing law on property owners by the conclusive presumption, which is usually given to the resolution of public necessity of a public agency. (See Pasadena v. Stimson, 91 Cal. 238)

These resolutions of public necessity are - quite frequently - political decisions which are made without necessary safeguards of Due Process of Law. Even if hearing notices are published in some newspaper that no one reads, in small print, this does not warrant such decision to be "conclusive", rather than subject to judicial review on the merits.

As an example which I am dealing with now, a public utility desires to run a high-power transmission line through private land, adjacent to land which lies in the public domain. By using the hypothenuse, the utility can save approx. 10-15% of the construction cost of this particular sector, at the cost of making the private land practically unsuitable for residential development. Since the damages are prospective only, they are virtually impossible to prove.

It may be assumed that the public entity "routinely" concurred to the utility's request for route approval, upon the utility's representation that the additional costs would - inevitably - be borne by all users, and the issue of condemnation awards will be litigated in the court.

It is felt that many such projects are deemed "necessary" only because of the increased convenience to the public entity or utility, rather than a real necessity. It is also felt that the issue of "public necessity and convenience" should be open to litigation, or at least that the administrative determination be open to review by Writ of Mandamus (Administrative Mandamus) with a trial de novo of such issues guaranteed. Our statutes should guarantee the right of private ownership in property, as provided for by the federal and state constitutions, and should overrule such public-centered decisions as Hawthorne v. Peebles 166 CA2d 758, which interpret "necessity" synonymously with "convenience" or "cost-savings".

I would therefore suggest amending the proposed statutes to ensure that the rights of the property owner are protected against arbitrary taking of property, and especially those takings which are motivated primarily by cost-savings, rather than real necessity.

§ 1240.030, subdivision (c) to be amended:

"(c) The property sought to be acquired is necessary for the project, and the project cannot reasonably be located without acquiring such property.

§ 1240.040 Resolution of necessity required.

§ 1240.040. A public entity may exercise the power of eminent domain only if it has adopted a resolution of necessity, and a finding that the project cannot reasonably be located without acquiring all private property necessary for the project, that meets the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4.

§ 1245.250 (a) and (b) to be amended:

§ 1245.250 (a) Except as otherwise provided by statute, a resolution of necessity adopted by the governing body of the public entity pursuant to this article conclusively establishes a rebuttable presumption that the matters referred to in section 1240.030 are true. This is a presumption affecting the burden of producing evidence.

(b) If the taking is by a local public entity and the property described in the resolution is not located entirely within the boundaries of the local public entity, the resolution of necessity creates a rebuttable presumption that the matters referred to in Section 1240.030 are true. This presumption is a presumption affecting the burden of producing evidence.

§ 1250.360. Grounds for objection to right to take where resolution conclusive .

(c) The described property is not subject to acquisition by the power of eminent domain as the public interest and necessity does not require the acquisition of the property for the stated purpose, and the project can be reasonably located without acquiring such property.

§ 1250.370. (Delete entire section)

Add: Article 5. REVIEW.

§ 1250.400. Review of the decision and judgment of the Superior Court shall be on issues of fact and issues of law by appeal or by an extraordinary writ.

I trust that this opportunity to defend the right to private property against the ever-encroaching trend to socialization will not be missed, and that the proposed legislation will go far toward accomplishing that goal.

Sincerely yours,

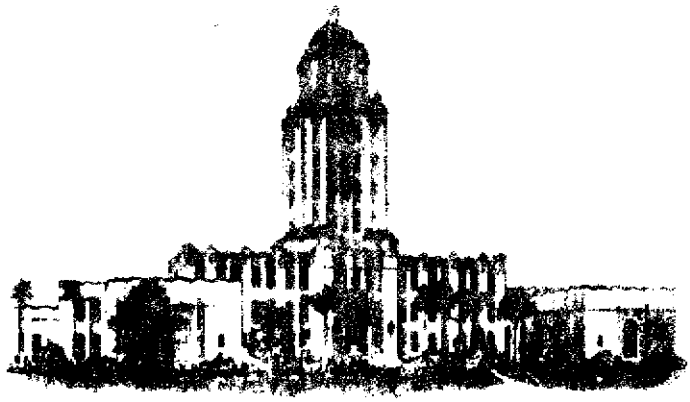
PETER D. BOGART

PDB:aa

Memorandum 74-38 EXHIBIT VI

ALLEN GRIMES
CITY ATTORNEY

JACK ALLEN
SR. ASS'T. CITY ATTORNEY
MITCHEL B. KAHN
ASS'T CITY ATTORNEY



CITY OF BEVERLY HILLS
CALIFORNIA
450 NORTH CRESCENT DRIVE
CRESTVIEW 6-9101 · BRADSHAW 2-2122

May 3, 1974

California Law Revision Commission
School of Law
Stanford, California 94305

Subject: Eminent Domain Law - Tentative Recommendations, Comment Thereon.

Gentlemen:

In examining the Commission's tentative recommendations, I am of the opinion that Section 1245.240 Article II Chapter 4 Title 7 of the proposed legislation, dealing with the adoption of the resolution of necessity, is vague and, if interpreted according to the Comment therein, is overly and unnecessarily restrictive. The section reads:

> "Except as otherwise provided by a statute, the resolution shall be adopted by a majority vote of a majority of the members of the governing body of the public entity."

In the Comment on Section 1245.240, it is indicated that the intent of the section is that the resolution of necessity must be adopted by a majority of all the members of the governing body of the entity, but not merely a majority of those present at the time of the adoption. However, the section that does not say all and is presently written, almost assuredly public entities will continue with their practice of enacting resolutions of necessity by merely a majority of those present at the time of the adoption of the resolution; therefore, if it is the intention of the legislature to require a majority of all of the members to enact such a resolution, the section should so state.

ES
APS

In my opinion it would be unwise to adopt such a restrictive requirement. The Comment to Section 1245.240 does not indicate any particular reason why the resolution of necessity must be given special consideration over all other legislative acts of the public entity. Most public entities have a rule that the majority of a quorum may pass any resolution. This is all that is required to pass any ordinance and many ordinances have far more significant consequences than does a resolution of necessity on an eminent domain action. Without further justification in the Comment, such an additional requirement for a resolution of necessity appears to be unnecessary.

Such a requirement may very well provide a vehicle for frustration of a majority view by a minority block within the governing body of a public entity. For example, in many communities there is a minority of the legislative body who are opposed to the acceptance of federal money. Because federal money may be involved in the condemnation action, they will vote against the project, not on its merits, but because of the financing. Should one or more Councilmen or supervisors, as the case may be, be absent, a minority may frustrate the project, even though as often is the case the absent members have indicated their intention to support the project. With the time schedules that are often imposed upon public entities who are attempting to obtain federal aid in their projects, it is very easy for a minority to kill the project, even though a majority of the members present could pass a resolution.

Another situation, one of which I have been directly involved where such a requirement could frustrate a majority, is one where litigation is in progress. I was actually on a case where a city was litigating a quiet title action on beach property. The property was considered vital to the public interest. The city had to be prepared, at any time, should the litigation go against the city to file condemnation proceedings. Because the owner had applications for building permits on files and if the city were to lose the action, a Writ of Mandate could have been issued directing the issuance of the building permits. For tactical reasons and also for legal reasons, no cause of action in condemnation could be plead while the action was in litigation. If a decision had been made against the city, it would have been necessary to call an emergency meeting of the City Council and there were no assurances all the members could be present and there was a minority who would have objected to the expenditure of the large amount of public funds necessary to make the condemnation. In our particular case, we succeeded in the quiet title action, however, a majority of all the members of the City Council had been required to enact a resolution of necessity in that situation, a very vital public policy of preserving beaches for public use might have been frustrated and, if not frustrated, made far more costly had an overly restrictive provision such as 1245.240 been in effect.

In summary, the Comment to Section 1245.240 does not state any reason whatsoever for requiring a majority of all the members of the governing body of the public agency to enact a resolution, and from my experience with public agencies, I know of none. In fact, as I have stated, vital public policies could be frustrated by minorities of governing bodies if the section is adopted with the intent as stated in the Comment to the section.

Very truly yours,

For the City Attorney

By _____
JACK ALLEN
Sr. Assistant City Attorney

JA/ft

Memorandum 74-38

EXHIBIT VII

LAW OFFICES
RALPH B. HELM, INC.
4063 RADFORD AVENUE
STUDIO CITY, CALIFORNIA 91604
(213) 877-1528

RALPH B. HELM
JEROME M. BUDINGER
WAYNE K. LEMIEUX

June 7, 1974

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

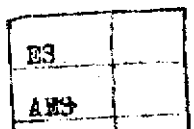
Re: Tentative Recommendations Relating to Condemnation Law and Procedure: Comments on Proposed Secs. 1235.180 and 1240.660

Gentlemen:

Your commission has sought comments concerning the proposed contents of the revision of California Law as it relates to eminent domain. The remarks which follow are directed to those provisions of your tentative recommendation dealing with the condemnation of property presently owned by a specified public entity.

We have had the opportunity in the past year of representing a condemnor in proceedings in which the provisions of the final paragraph of Sec. 1241(3) have been invoked and of representing a condemnee in which the same provisions have been invoked. In discussing this matter with other members of the profession in Los Angeles County, it appears that this experience is somewhat unique. As a result of our experience, we have formed very definite ideas as to the appropriateness of the current law.

From the standpoint of the condemnor, the current law is somewhat deficient in that a condemnee may claim that the various public entities listed in the final paragraph of Sec. 1241(3) refer to a generic class of public entities rather than to the specific entities named in the paragraph. It is our belief that the paragraph is limited to specific public entities named and that the generic use of the terms contained therein is inappropriate. Rather than to detail the complete basis for this statutory interpretation, it is perhaps sufficient to note that as a matter of policy the provisions should be limited to as narrow a range of entities as possible. Thus, from the standpoint of condemnor, we would suggest that proposed Sec. 1240.660 contain some language to indicate that the entities named therein are the only entities



to which the immunity or exemption applies and that the generic use of the terms therein is inappropriate.

For example, instead of merely listing a "water district" as exempt from condemnation, the section should be amended to read "California water district" to distinguish the score of public entities which are "water districts" e.g. county or municipal water districts.

The difficulties encountered by condemnee as a result of the language in the final paragraph of Sec. 1241(3) are a great deal different than the difficulties encountered by the condemnors as described above. As the tentative recommendations so amply highlight, the chief difficulty in applying the law as it exists today is in defining the meaning of the clause "appropriated to public use". We would suggest that the definition contained in proposed Sec. 1235.180 for the clause "appropriated to public use" does not in fact state the law as it currently exists. Once again, detailed analysis of our conclusion would require very lengthy presentation. However, hopefully, the following summary will provide you with an outline of the reason for our conclusion and enable you to make a judgment thereon.

East Bay Municipal Utility Dist. v. Lodi (1932) 120 CA2d 740, 750-758, cited in the comment to Sec. 1235.180 may arguably be used to support the definitions in the Section. However, the Supreme Court in City of Beaumont v. Beaumont Irr. Dist. (1965) 63 Cal.2d 291 Stated that only one case had been presented to the Appellate Courts prior to 1965 dealing with the problem encountered when one public agency named in the final paragraph of Sec. 1241(3) seeks to condemn the property of another public agency named in that paragraph. The one prior decision which the Supreme Court in the City of Beaumont case cited was the decision in County of Marin v. Superior Court (1960) 53 Cal.2d 633. It is submitted therefore that the City of Lodi case has been specifically reputiated by the Supreme Court in situtations such as we are discussing at the present time.

If the City of Lodi case does not present the criteria for the definition of the term "appropriated to public use" as it is used in the final paragraph of Sec. 1241(3), we must then search to discover where such criteria may be found. We are confident that you have already discovered, that the Supreme Court's comments in the Beaumont case were correct, to wit: there were only two decisions directly in point. Those two decisions, i.e. the Beaumont case and the County of Marin case, indicate that the appropriate criteria in

invoking the final paragraph of Sec. 1241(3) is whether the property is owned by a public entity named in the paragraph and sought to be condemned by another public agency named in the paragraph. Neither the Beaumont nor the County of Marin case expended any effort to determine whether the property was actually being used for active public service by the condemnee. It is interesting to note that in San Bernardino County Flood Control District v. Superior Court (1969) 269 CA2d 514, the Court in examining a "more necessary public use" situation seemed to indicate that ownership alone by one public entity was sufficient to block the condemnation of the property. The San Bernardino County case also contains an excellent discussion of the policies which should be invoked in a situation where one public agency condemns the property of another.

To summarize, it is submitted that the definition of "appropriated to public use" as it is presented in the tentative recommendations is inappropriate at least insofar as it applies to the law as is presently contained in the final paragraph of Sec. 1241(3). Perhaps the most appropriate method of solving the problem is by striking the language "appropriated to public use" as it is contained in 1240.660. Another solution to this problem would be to amend the section to state that property "owned or appropriated to the use" of the named entities is exempt from condemnation.

Thank you for the opportunity to address these comments to you. If we may be of any further assistance, please do not hesitate to call or write.

Very truly yours,

RALPH B. HELM, INC.

Wayne K. Lemieux

WKL/rg

Memorandum 74-38

EXHIBIT VIII

CITY OF SAN JOSE
CALIFORNIA

CITY ATTORNEY

151 WEST MISSION STREET
SAN JOSE, CALIFORNIA 95110
TELEPHONE (408) 277-4000

June 3, 1974

Mr. DeMoully
California Law Revision Commission
School of Law, Stanford University
Stanford, CA 94035

Re: Condemnation Law & Procedure

Dear Mr. DeMoully:

We have reviewed the tentative recommendation of the California Law Revision Commission relating to Condemnation Law and Procedure (The Eminent Domain Law and Condemnation Authority of State Agencies, both dated January, 1974).

You and your staff, as well as other attorneys who participated in the drafting of the statutes and the amendment to Art. I, § 14 of the State Constitution are to be complimented on a job well done.

We find ourselves in substantial agreement with the recommendations. However, we do not agree that the burden of proof to establish fair market value presently assigned to the property owner should be changed. Neither do we agree that compensation should be made for the good will of a business taken or damaged.

Very truly yours,

PETER G. STONE
City Attorney

Donald C. Atkinson

By DONALD C. ATKINSON
Division Chief Attorney

DCA:tc

cc: Wm. H. Keiser, Asst. Legal Counsel
League of California Cities
1108 "O" Street
Sacramento, CA 95814

Memorandum 74-38

HENRY C. MACK
D. BIANCO
HARVEY H. MEANS
HENRY C. MACK, JR.
JAMES M. STUART
THOMAS F. McCOY

EXHIBIT IA

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ATTORNEYS AT LAW
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TELEPHONE
(805) 324-9801

June 11, 1974

IN REPLY REFER TO:
DB:js

California Law Revision Commission
School of Law
Stanford, California 94305

In re: Tentative Recommendation Relating to Condemnation Law and Procedure

Attention: John H. DeMoully
Executive Secretary

Gentlemen:

Thanks very much for forwarding the copies of your tentative recommendations regarding the condemnation law and procedure. I have read these recommendations with considerable interest, but believe that revision is required in the area of special benefits referred to on page 41, note 69, which makes a comparison of Beveridge v. Lewis v. People v. Giumarra Farms, Inc.

The Commission may naturally think that because I was the losing lawyer in People v. Giumarra that I am somewhat prejudiced.

This is undoubtedly the case; however, I do believe that an injustice not only was done in that case, but will continue to be done if the rule of that case is continued to be applied. I can do no more to set forth my views as to what the law should be with reference to traffic constituting a benefit than to enclose the copy of our Opening Brief in the Giumarra case.

I sincerely hope that the Commission will give consideration to the points as set forth in that brief and bring the California law, with reference to traffic being a benefit, in line with the cases therein cited.

Thank you very much for the opportunity of submitting to you my views.

Yours very truly,

D. BIANCO

Encls.

P.S. There is also enclosed Appellant's Petition for Hearing by the Supreme Court which demonstrates the conflict which should be resolved. D.B.

EXHIBIT X

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
JOHN W. WITT
CITY ATTORNEY

ROBERT S. TEAZE
ASST. CITY ATTORNEY

CITY ADMINISTRATION BUILDING
SAN DIEGO, CALIFORNIA 92101
(714) 236-6220

July 3, 1974

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

Dear Mr. DeMoully:

California Law Revision Commission
Tentative Recommendation on
Condemnation Law & Procedure

I have been asked to respond to the above-referenced materials. As is the case with most municipal attorneys, I find my time constraints so limiting that I can only comment in a cursory manner.

Overall I would say that many of the provisions appear to have improved under the Commission's handiwork, e.g., § 1263.020, yet others tend to make me somewhat nervous as a government lawyer concerned about inverse actions, e.g., § 1235.170. Other comments and questions are:

(1) Section 1235.170 - the definition of "property" appears overly broad and would create inverse situations more readily.

(2) Section 1240.010 - eliminates the "stated public uses" for which property might be taken under § 1238 and would limit eminent domain powers to only those public uses declared by the legislature in other codes. Does this mean that some of the "uses" presently existing under § 1238 would be eliminated because not all powers enumerated therein are duplicated in other code provisions?

(3) Section 1240.030 - the word "project" should be defined in Chapter 2.

(4) Section 1263.020 - this is a valid change.

(5) Section 1263.140 - this provision appears "suspect" and would alter the results of People v. Murata, 55 Cal.2d 1 (1960). The remarks at p. 220 where it is said that "to avoid injustice to condemnee in a rising market" make the necessity of this provision questionable.

(6) Section 1263.330 appears to be a valid clarification.

These are only a few of my comments and remarks. They're obviously not "earth shattering" observations, but hope they are of some use to you. I would like at a later date to respond more in depth to more specific points.

As a final note, we wonder whether the Commission took into account Section 7260, et seq. of the Government Code in preparing its recommendations. This, in our opinion, warrants some consideration.

Sincerely,

JOHN W. WITT, City Attorney

By Donald W. Detisch

Donald W. Detisch, Deputy

DWD:rb
cc Wm. H. Keiser
Asst. Legal Counsel
League of CA Cities
1108 "O" Street
Sacramento, CA 95814

Memorandum 74-38

EXHIBIT XI

STANFORD LAW SCHOOL
STANFORD, CALIFORNIA 94305

May 13, 1974

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

Dear John:

I have looked over the Commission's very impressive "Tentative Recommendation Relating to Condemnation Law and Procedure." One matter particularly caught my attention. It appears to me that the Tentative Recommendation suggests a rather substantial change in the law with respect to public use and necessity. However, there is no clear indication in the text of the Recommendation that such a change is being made. This, in turn, greatly reduces the probability that there will be a useful discussion of whether such a change is desirable.

Let us use a concrete example. A state agency takes part of a larger tract in order to erect a public improvement -- say a school. The peculiar conditions are such that severance damages to the part not taken exceed additional fair market value that the state would have to pay if it took the whole tract. Under existing law, such "excess condemnation" would be legal. As I read the Tentative Recommendation, the state would not be allowed to take the remnant and would have to pay the severance damages. If I have correctly read the Tentative Recommendation, this is an important change in the law. Such a change requires discussion. What are the reasons for such a proposed change? Has the Commission considered those reasons and the counter arguments in arriving at this Recommendation? If so, why is there no discussion of that consideration in the Tentative Recommendation?

It is possible to read this part of the Tentative Recommendation more broadly as indicating a generally more restrictive attitude toward so-called "excess condemnation." That attitude appears in a number of ways in this part of the Recommendation. One of the more interesting ways in which it is shown is by causing the topic of excess condemnation to disappear by assimilation to the topic "Public Use." Thus, "acquisition for future use," as well as "acquisition of physical and financial remnants" and "acquisition for exchange purposes" are all treated as though they were subtopics of the public use requirement. In fact they are much better treated as a separate category, more related to public necessity than to public use. The day has long since

passed when it was doctrinally permissible to talk about excess condemnation in public use terms. The real objection to excess condemnation is that the state doesn't need the excess part taken for the particular public work contemplated. That is a necessity proposition, not a public use proposition.

In fact, there are two quite separate and readily distinguishable categories of necessity, which might be called necessity I and necessity II. Necessity I is best exemplified by excess condemnation cases. Necessity II is well summarized under the heading "Public Necessity" on pages 38-40 of the Tentative Recommendation. Necessity II issues are usually classifed as nonjusticiable, and I agree with the Commission's conclusion that they should continue to be so. Excess condemnation issues are, generally, thought to be justiciable.

Submersion of excess condemnation in "Public Use", where it does not belong, submerges a whole host of important and very far reaching issues about the proper relations between man, land, and the state. At the same time, the Tentative Recommendation adopts substantial positions that beg all of these submerged questions. It is important that these questions be openly and fully discussed and resolved, and I urge that you bring the matter to the attention of the members of the Commission with the recommendation that they do so.

Sincerely,

John Henry Merryman
Sweitzer Professor of Law

JHM:bf

Memorandum 74-38

EXHIBIT XII

STATE OF CALIFORNIA

FRANCHISE TAX BOARD

SACRAMENTO, CALIFORNIA 95857

June 27, 1974

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

Attention: John H. DeMoully
Executive Secretary

The tentative recommendation relating to condemnation law and procedure has been reviewed.

As this department is not directly charged with the exercise of the power of eminent domain, we will refrain from commenting on the technical aspects of the revisions as proposed.

Our primary concern, for tax purposes, involves the possible recognition of gain or loss arising from condemnation awards. Therefore, a more uniform condemnation procedure establishing these awards will promote a more efficient determination in this area of the law.

As your recommendation seemingly satisfies the need to revise an inconsistent and inexact area of the law, the results of your endeavors have our approval.

Martin Huff
Executive Officer

Memorandum 74-38

EXHIBIT XIII

Calif ornia Law Revision Commission
School of Law
Stanford University
Stanf ord,
California 94305

RE: Condemnation Law and Procedure
The eminant Domain Law
January 1974

Gentlemen:

First let me thank you for listing me as one of the contributors.

Mostly I agree with the recommendations, nopefully I am reading the text correctly. I am not an attorney, however have been badly burnt by the Div isoon of Highways and will start off with comments that eminate on ac count of this and condemanation actionc I have been personnally involved in as a fee appreiser.

Section CCP 1036--Former code of CP 1246.3 (INVERSE)
In my case in Contra Costa County 111141 heard April 24-25, 1973 the Judge did in fact rewrite the verdict of the jury in the trial of 1967 (104672) so as to include a easment not included therein, this easment being the reason for the INVERSE case. The D. H. admits it was not included, the judge refused to rule res judicata, but when the findings of fact camr thru, after failing to send us proper notice, they were written up as if he had ruled res judicata. I will cover this later in a series of articles, as this case is not 100% settled even at this late date.

The point I wish to make here is that we need to add one more line to this section, more/less thusly"such shall be construed to include ALL the comparable expense, or preparation, that the defendant may have accrued as preparation for defence, but not limited to the above named"

Comment: It has always been my experience that an appraiser and engineer were necessar y wherein the partial take involved grading, roadways, slopes. In this case I am expected to construct a roadway up a 230 foot 2-1 slope created by the D. H. (testimony of D. H. engineer in case 104672) In 111141 (inverse) the D. H. brought their engineer into court for two days, who sat side by side with their attorney, and their appraise into court for one day. Neither took the stand for as what appeared to be the only solution after the judges ruling, in fact the lessor of two evils, arrangement for settlement were made. This was after the judge SPLIT the ONE easment into two parts, ruling one was paid for , the other not, and ruled out severance damage. We did receive an award of $1000. for the later por tion by agreement-- such check is still not cashed by us. The D. H. refused to allow interest from 1967-the agree date of the "tresspass", later stated they would if this would settle the case, but we refused. Later this was written up without the interest, the judge then says an oversight and again this paper was rewritten. I attach a copy Menorandum of Decision 10-23-73 and 11-19-73

I also wrote the judge a letter-- copy attached- on this subject. of course no answer was received or expected. My letter would have been much stronger but my legal advise ruled it out. I brought this inverse up thru Board of Control, three demurrers and pre-trial then employed an attorney for the so-called trial in April 1973, which lasted 3½ hours.

The second addition that I feel should be made is that an INVERSE suit should be given the same preferance for an early trial date as the agency now enjoys in direct condemnation. This refers to section 1260.010 --formally 1264 and also 1245.260 formally 1243.01--I leave the wording to you.

Comment-argument in favor: Few persons can wait several years to come to trial-in my case 11114 I suit was filed in August 1968, trial was April 1973, both from the cost and the delay in property development or the normal routine of conducting business. Again in my case I still cannot use the remainder property without considerable adjustment and rearrangement as the D. H. took my only physical entrance and left me with a 2-1 slope for the entire legal length along the new frontage road, making development a question of whether it is feasibly sound at this time.

The third item is the question of costs. I do not find any provision in the recommendations for consideration of defendants costs wherein the agency is proven to be materially incorrect in their appraisal offer, or the sum deposited as fair value. I think that the public is entitled to a section simular to the bill introducted by Senator Berryhill in 1973--SB 476, which in its final form as amended applied only to state agencies, and provoded for a 10% leeway. This passed the Senate Judiciary and was killed in the Senate Finance by Collier. If you do not intend to consider this, then I should like to try again in the next session to again introduce such a bill--please advise.

1250.310- Contents of complaint. There is a definite need for an after drawing in case of partials, along with a firm statement of the exact location of all utilities. I realize that these are argued in court, if it gets that far, the engineer and appraisers makir. in my opinion a lot of statements based on wishful thinking, often materially changed in the actual construction, to the extent that some are non existant in a practical location-- sometime across the FREEWAY from the remainder, which I don't consider even loosely construed as "available". The cost and the permit to get to the property usually kills any use thereof. This happened in several cases on the San Ramon valley south of Danville to Dublin. Walnut Creek-

1255.010 Deposit-- this was long overdue--good for you. This takes it out of the lip service area.

1263.420 Damage to remainder- glad to see this non-contigeous aspect cleared-- for many much needed parking area or partial assembly areas are really of such value to lose would materially hamstring operations.

1263.430 Benefits- equal consideration with 1263.420 is certainly a step in the right direction.

1263.510 GOODWILL- This again is a long overdue clarification of often a sizeable business loss. Proving this in line with your comments should not be too difficult, where in fact it does exist, without putting the agency in the position of paying for a failing business(wilfully to show damage?)

Page 66-- I have studied this in depth in the Walnut Creek area some years ago and I believe that where a samall portion still adjoins the remainder of the ~~remainder~~ former owner or is of value ONLY to such person it should be offered on a first refusal basis, otherwise repurchase rights could be an impossible situation when an assembly would be required to get a saleable usable property. This method then reduced to administrative policy,, so I agree with you again. even tho I did have such a right at one time. now

There is a sore point in the public mind as respects the policy of D. H. in forcing the defendant to secure an appraisal before they will consider a counter of fer. Now I believe that an appraisal is necessary, however at this point the D. H. should also get an OUTSIDE appraiser to support their view, instead of waiting until just befor the actual trial as is their policy... In my case this and the lack of the facts in the AFTER condition in a PARTIAL made doubly certain that it would go to court. After we got our appraisal at a cost of several hundred $ the D. H. refused to consider as our appraisal "was more than 5%" above theirs. Now if they are pr oven to be only 57% correct as in our case 104672 and we were only 3% above the jury valuation then there is need to force the D.H. and any other public agency to be more realistic by the process of consideration of the defendants costs, including engineer and attorney simular to SB 476 (1973) failed to pass, also simular to section CCP 1036-formally 1246.3 but allow for a 10% differential- I am just not dold that the D. H. or any other agency should be penalized if not within the 5% crap they pull during negoications.

Thank for bearing with me.

I would offer to support the points herein in persons if you let me know when and where.

Sincerely yours

Howard Foulds

Howard Foulds,
P. O. Box 185 Downieville, Ca. 95936
on Golden Highway #49 at the conflux of the Yuba and Downie Rivers---
A WAY OF LIFE.

Customary comment--pr obably not required:
I am retired, do my own typing as I do not have a secretary, nor do I ever again hope to be so busy as to require one.

H. F.

Memorandum 74-38

EXHIBIT XIV

LAW OFFICES OF
BRONSON, BRONSON & MCKINNON
BANK OF AMERICA CENTER
555 CALIFORNIA STREET
SAN FRANCISCO 94104

July 2, 1974

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

Dear Mr. DeMoully:

Thank you very much for your letter of May 29 enclosing a copy ofthe tentative recommendations concerning Eminent Domain Law. As usual I think you have done a great job and have only two comments.

It may be too complicated to make these sections applicable to inverse condemnation but certainly many of the sections, particularly the discovery sections, should apply in inverse condemnation actions. It is possible that these sections could be held applicable but in my reading of the proposed revision I did not find it.

Another area which has concerned me, and I am sure others as well, (and which may be impossible to deal with) is the situation where it is apparent that property is going to be condemned but nothing has been done except very preliminary planning. The fact becomes known and it really does depress the value of the property under threat of condemnation. This is, perhaps, outside the scope of the present effort but I can think of at least three or four examples where clients have had to sell their property before actual condemnation and have had to take a real reduction because of the threat of condemnation. Since this is a type of case which I handle infrequently, there must be others with far greater experience on this subject than I.

Very truly yours,

Vernon L. Goodin

VLG:ka

ES	
AES	
AC	
AA	

Memorandum 74-38

EXHIBIT XV

SOUTHERN CALIFORNIA gas COMPANY

810 SOUTH FLOWER STREET • LOS ANGELES, CALIFORNIA

LAW DEPARTMENT

Mailing Address BOX 54790 TERMINAL ANNEX, LOS ANGELES, CALIFORNIA 90054

July 2, 1974

California Law Revision Commission
School of Law
Stanford, California 94305

Re: Condemnation Law and Procedure

Dear Sirs:

I am favorably impressed with the tentative recommendation of the California Law Revision Commission with respect to condemnation law and procedure. Of particular interest is the proposed recommendation "that any person authorized to acquire property by eminent domain should also be authorized to obtain possession of that property prior to judgment." Such an approach would be of benefit to both condemnor, property owners and the general public. The growing energy shortage has made "immediate possession" a necessity. Unnecessary, lengthy litigation should not be permitted to delay the flow of natural gas to the consuming public.

One other area of specific interest is the recommended addition of Public Utilities Code §613. This addition is to read as follows:

> A gas corporation may condemn any property necessary for the construction and maintenance of its gas plant.

Gas plant, as defined in Section 221 of the Public Utilities Code, includes all property used in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of gas, natural or manufactured, for light, heat, or power.

Although I am firmly of the opinion that the law, as presently stated, gives a gas corporation the legal right to condemn property for an underground natural gas storage field, the addition of Section 613 of the Public Utilities Code would strengthen this contention. However, so as to clarify any

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AC	
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possible doubt, I would suggest that either Section 613 or Section 221 could be modified to specifically make reference to the underground storage of natural gas.

The phrase "or for the underground storage of natural gas" could be added to proposed Section 613. This section would then read as follows:

> A gas corporation may condemn any property necessary for the construction and maintenance of its gas plant *or for the underground storage of natural gas.*

As an alternative, and possibly preferable approach, would be to add to the definition of gas plant as found in Section 221, the terms "underground storage." This section would then be as follows:

> "Gas plant" includes all real estate, fixtures, and personal property, owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, *underground storage*, or furnishing of gas, natural or manufactured, for light, heat, or power.

The underground storage of natural gas is necessary to serve firm loads. As the number of firm customers increase, the extent of underground storage must also increase if we are to continue to adequately serve our natural gas customers.

Thank you for giving me this opportunity to present my comments with respect to your proposed recommendations.

Sincerely,

F A Peaslee

FAP/rcg

Memorandum 74-38

EXHIBIT XVI

2738 35th Avenue
San Francisco, Calif. 94116

May 23, 1974

Mr. John D. Miller, Chairman
The California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Chairman Miller:

Re: Condemnation Law & Procedure, Tenative Recommendation Concerning: The Eminent Domain Law

The purpose of this letter is to suggest that the eminent domain law should be broadened to assure a legislative consent to a taking for recreational purposes; that is to say, the enactment of statutory recognition that public purpose includes recreation.

While my personal interest is limited -- i.e., trails through private property into public lands, trails bordering inland waters for fishing and hunting, and a trail along the coast for public access to rocks and beaches -- other recreational purposes should not be neglected.

I, therefore, submit Section 1240.680 might be amended in manner indicated below:

1240.680. Property appropriated to park, recreational or similar uses.

1240.680. (a) Subject to Sections ... property is presumed to have been appropriated for the best and most necessary public use if the property is appropriated to public use as any of the following:

* * * * *

(5) For recreational purposes.
(6) For paths and roads through private land into land available for public use, whether the ownership of such land is in the public or not.

Suggested revised language

(7) For hiking and horseback riding trails.
(8) For vehicular roads and trails.
(9) For paths bordering streams, lakes and water courses and along the seacoast, including vehicle parking areas immediately adjacent, and for stream and lake bottoms, water course areas, and the rocks and beaches along the seacoast contiguous to seacoast paths.

Sincerely yours,

Horace A. Weller

HORACE A. WELLER

Memorandum 74-38

EXHIBIT XVII

BLADE & LeCLERC
ATTORNEYS AT LAW
POST OFFICE DRAWER III
1660 LINCOLN STREET
OROVILLE, CALIFORNIA 95965
TELEPHONE (916) 533-5681

ROBERT V. BLADE
RAOUL J. LeCLERC

PERRY M. FARMER
1926-1972

June 5, 1974

California Law Revision Commission
School of Law
Stanford, California 94305

Attention: Mr. John H. DeMoulley, Secretary

Re: Proposed Revision of Condemnation Law Procedure

Gentlemen:

Your letter of May 29, 1974, and the enclosures have been received and are appreciated.

While I may have further comment to make with reference to the condemnation law, I hasten to express views on two subjects upon a preliminary review of the material.

On page 31, it is stated that the Commission recommends that condemnation by private persons be abolished except in certain stated instances. I vigorously disagree.

From time to time, as a result of incidents frequently not the fault of the owner, a parcel becomes landlocked. While it has been stated that it is contrary to public policy for land to be landlocked, in the absence of the ability to condemn access to a public road, the property becomes virtually useless. Sometimes the problem is solved by implied reservation or implied grant of easements. Sometimes it is remedied through prescription. However, these are uncertain solutions and do not apply in all cases. Moreover, property which has a use for residential purposes cannot be effectively so used by merely providing access. Public utility services when they are available in the area should also be available to each residence. The policy of the Pacific Gas and Electric Company is not to condemn easements or rights of way for private property but only for their main lines. Consequently, a person can spend a substantial sum of money for the construction of a home and then be unable to get utility service because of the lack of the right to install same and the refusal of the company to condemn it.

In my opinion, the right on the part of private persons to condemn for a public purpose should be retained. Perhaps a public purpose should be redefined. Certainly it ought

to include the right to condemn a roadway of proper width and location for ingress and egress and it should include the right to condemn for use by a public utility for the installation of water, sewer lines, power and telephone lines with proper safeguards to the properties over which such easements are condemned.

The other area subject of this letter appears on page 36 where you state that the Commission has concluded that the right to condemn additional land because the remainder would be in such size, shape and condition to be of little value should be retained. This power has been, in my opinion, repeatedly abused by the Department of Public Works, which has virtually gone into the land business. Sales of its collected remnants are constantly being held and provide a substantial source of revenue. The ability of a private land owner to convince a trial judge that a particular remnant is or is not "of little value" is questionable. Indeed, the logic requiring a land owner to assume this burden escapes me. Since the property is not needed for the public improvement and all that is being done is an attempt to reduce the cost to the public by allowing the agency to acquire additional land, install the improvements, and then sell the excess as a means of offsetting the costs a questionable extension of taking for a "public" purpose arises. Furthermore, if the power to acquire additional land for resale can be justified because of a reduction of the overall public expense, then it follows that the same right should be extended to private utilities whose rates are fixed by overall expenses. Yet you note on page 37 that nongovernmental condemning agencies have no such power and you propose that this not be changed. No reason for the discrimination is stated.

I will study the material further and comment additionally. However, for the record may I say that I am a private attorney handling condemnation matters on behalf of land owners and acquiring condemning agencies. I recently completed the acquisition of property and various easements on behalf of the City of Colusa. Consequently, I think I am in a position to see condemnation problems from both sides.

Yours very truly,

Robert V. Blade

Robert V. Blade
Blade & LeClerc

RVB/jo

Memorandum 74-38

EXHIBIT XVIII

July 11, 1974

California Law Revision Commission
School of Law
Stanford, California 94305

Gentlemen:

The legal staff of the California Hospital Association has recently reviewed the California Law Revision Commission's recommendation concerning eminent domain. We would like to take this opportunity to indicate our support of the recommendation concerning nonprofit hospitals as set forth on page 32, paragraph (2) of the Commission's report. We would call to your attention active legislation (Assembly Bill 3145, Brown) which may necessitate some additional revisions later on. While we are not opposed to the bill in its amended form, we feel that several of the qualifying requirements may further delay and complicate an already complicated process.

Thank you for the opportunity to review and comment on the issue prior to the introduction of specific legislation.

Sincerely,

J. E. Muir
Legislative Advocate

JEM:cld

California Hospital Association
925 L STREET, SUITE 1250, SACRAMENTO, CALIFORNIA 95814, (916) 443-7401

Memorandum 74-38

EXHIBIT XIX

ALBERT J. FORN, INC.
A Professional Law Corporation
ALBERT J. FORN
ATTORNEY AT LAW
SUITE 418 WILSHIRE NORTON BUILDING
4058 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010
TELEPHONE (213) 387-5438

July 12, 1974

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

Dear Mr. DeMoully:

Thank you for sending me the tentative recommendations of the Law Revision Commission re condemnation law. I have not had time to do more than scan them and read the Summary but I am impressed very favorably — even though I start with a decided bias in favor of the private landowner.

I would like to pass on one comment, based on my experience. There should be specific penalties for a condemnor's refusal to comply with discovery provisions. Too many judges assume (even after Watergate) that "the government" is always right and good. I know of a case where a Division of Highways attorney refused to submit his valuation data or even give the name of his appraiser-witness prior to trial. Yet the judge permitted him to use the surprise-witness and did not permit the defendant's lawyer time to check out some strange comparable sales. Fortunately the jury was not as impressed with "the government" as was the judge.

Very truly yours,

ALBERT J. FORN

AJF/ja