

First Supplement to Memorandum 74-45

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

Attached as Exhibit I to this memorandum are comments on the tentative recommendation from the County of Los Angeles. We anticipate receiving additional comments from the City of Los Angeles and will forward them as soon as they are received.

We have sent to the County Counsel another copy of the special district pamphlet as requested in the first part of their letter. The county's comments with respect to particular sections of the tentative recommendation are noted briefly below.

§ 1240.010. Public use limitation. The county objects to the elimination of the listing of public uses presently found in Code of Civil Procedure Section 1238. The Commission reviewed this matter at its last meeting and determined to expand the Comment to Section 1240.010 to make clear that all condemnation authority of public entities is preserved elsewhere.

§ 1240.410. Condemnation of remnants. The county objects to the "little market value" test and would prefer to leave the matter of when the remainder may be taken to the discretion of the court. The Commission considered this matter at its last meeting and determined to leave the excess condemnation provisions unchanged.

§ 1255.010. Deposit of amount of appraised value of property. The county objects to the requirement that the condemnor supply the condemnee with a full appraisal report. The county points out that the practical effect of this requirement will be to "eliminate the public entity's use of its staff appraisers at trial," thereby requiring the entity to retain an

independent private appraiser in addition to the staff appraiser. For other objections to this provision, see Memorandum 74-45 on pages 9-10.

§§ 1255.040 and 1255.050. Deposits on motion of certain defendants.

The county believes that money needed for relocation can best be handled through the relocation assistance provisions and that, in any case, the "net rental losses" test of Section 1255.050 should be deleted absent procedural steps and guidelines for its application. For other comments on these sections, see Memorandum 74-45 on pages 12-15.

§ 1255.420. Stay of order for hardship. The county objects to this provision because it will create scheduling problems. Also, it has found very few true "hardship" cases, and the existence of the provision will invite litigation. For a staff recommendation to ease the scheduling problems, see Memorandum 74-45 on page 19.

§§ 1263.260-1263.280. Removal of improvements pertaining to the realty.

The county believes that these provisions are basically relocation provisions and should not be dealt with in the context of the eminent domain proceeding. Moreover, the county believes that the legal issue of whether improvements pertain to the realty should be determined before dispossession. For a staff recommendation to accomplish this, see discussion of Section 1263.270 in Memorandum 74-45 on pages 27-28.

§ 1263.510. Loss of goodwill. The county joins the chorus of public entity opposition to this provision. See Memorandum 74-45 on pages 33-34. The county suggests that, if the provision is to stay, it requires "very stringent" rules, procedures, and guidelines concerning proof (can tax returns be used?), and the like.

§ 1268.720. Costs on appeal. The county believes that the prevailing party should recover costs on appeal--to award the defendant his costs

regardless of success is an invitation to "take a chance." For other objections to this provision, see Memorandum 74-45 on pages 42-43.

Respectfully submitted,

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August 16, 1974

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California Law Revision Commission
School of Law
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**Re: Comments on the California Law Revision
Commission Tentative Recommendations Relating
to Condemnation Law and Procedure**

Gentlemen:

On August 9, 1974, I, along with Deputy City Attorneys (City of Los Angeles) James Pearson, Leslie Pinchuk and Roger Weisman, met with Mr. DeMouilly and Mr. Sterling of your staff. The meeting was very fruitful and worthwhile. As a result of that meeting, Mr. Sterling wrote a letter dated August 12, 1974, indicating that certain recommendations for changes in certain of the proposed statutes would be made by the staff to your Honorable Body at your next meeting. With the knowledge that your staff will be making recommendations for some changes, our comments for your consideration will only be directed to those sections of the new eminent domain law which we feel are of the utmost importance and of which no specific recommendation will be made by your staff. Our silence on any section not mentioned does not necessarily mean we approve it or oppose it. In making these comments, we do not have before us the proposed recommendations of the Commission with respect to special districts, such as the Los Angeles County Flood Control District. We have not, as of the writing of this letter, received a copy of any booklet or papers pertaining to revised changes with respect to special districts, but we understand from Mr. DeMouilly that such a book is in existence and after we receive it from Mr. DeMouilly, we will possibly give you some additional comments on it.

At the outset, let us express the opinion that you and your competent staff have made some excellent revisions and additions to our eminent domain law. However, as attorneys for the County of Los Angeles, Los Angeles County Flood Control District and the approximate 98 unified school districts we represent, our concern is that in your zeal to enact a compre-

hensive statute governing eminent domain law, you have added some new and novel provisions that we sincerely believe should be further studied by your Honorable Body and by other qualified persons. The best example illustrative of this point is your provision making loss of goodwill compensable.

It is our opinion that "goodwill" should not be compensable. However, if you must allow compensation for loss of "goodwill", you should carefully consider very stringent rules, procedures and guidelines as to the valuation of such a complex and elusive interest. I think you must consider carefully as to how it is going to be proved whether there is or is not a loss of goodwill and, if so, how much. Will, for example, the condemning agency be permitted to examine Federal and State income tax returns of the business? (Tax returns are considered confidential, and if the public agency cannot examine and consider them, will he be forced to the burden of hiring accountants to audit the books of the business). We think, also, that consideration should be given to limiting loss of goodwill to a specified period of time, preferably, two to three years. It is apparently very common in a sale of businesses that payment is made for goodwill for a period projected over only two to three years. Going beyond a certain time period may become totally speculative and guess-work.

As to goodwill, the above are admittedly general thoughts as to what we believe are a multitude of problems which are inherent in the very simple general statutory provision you now have as a tentative recommendation to the Legislature for payment of goodwill (Section 1263.510). We petition you to carefully consider that something of the elusive and conjectural nature such as goodwill should not be thrown out to the trier of fact without some very precise and stringent guidelines - Section 1263.510 does not have any guidelines and some should and must be provided in order that pure speculation on goodwill does not result in acquisition costs that will force taxes to an ever spiraling height in these difficult inflationary days.

We will now commence to go through some of the other various statutory provisions that we feel present a particular problem to the public entities we represent.

Section 1240.010 (Public Use Limitation): We think the proposed elimination of Code of Civil Procedure Section 1238 is a mistake. A section such as 1238 which sets out a multitude of "public uses" is of invaluable assistance to both the public entity and the courts in determining whether a taking is a valid

"public use". A court certainly likes to have the guidance of the Legislature and with the elimination of C.C.P. 1238, a specific statute authorizing a particular public use will have to be found. We believe that if C.C.P. 1238 is deleted, a substitute section should be adopted by the Legislature with a more updated (modern) listing of "public uses".

Sections 1240.150, 1240.410 and 1240.420 (Condemnation of Remnants - Excess Condemnation): We recognize that the acquisition of remainders in order to avoid the payment of severance damages by the public entity is a very sensitive area - however, Section 1240.150 does not attempt to solve the problem where there is a dispute between the public entity and the property owner as to the acquisition of the remainder. Section 1240.410 doesn't offer much assistance to solve the problem as to the public entity taking a "remnant" to avoid the payment of excessive severance damages. In fact, 1240.410 only creates the necessity of court litigation as to whether a remainder is of "little market value". "Little market value" per the comment to Section 1240.410 means a remainder that is just about totally wiped out and useless. Those types of remainders are not the typical type remainders that we see in the vast majority of our condemnation cases here in Los Angeles County - most often the remaining property has value for some other use.

We believe that in this day of spiraling economic inflation, the Commission should consider the problem of allowing the public entity to acquire the remainder instead of paying high severance damages. If a formula cannot be determined to the satisfaction of the members of the Commission, the Commission should simply let the matter as to whether a remainder can be acquired by the public entity lie within the sole discretion of the court. We believe that this is one of those difficult areas of eminent domain law that should be further studied rather than putting forth the provision as now proposed in Section 1240.410.

Section 1255.010(b) (Deposit of Amount of Appraised Value of Property): We believe the requirement for the property owner to be given the public entity's complete appraisal report in order for the public entity to deposit "probable compensation" is unnecessary and is unfair to the public entities. Under the "relocation assistance" provisions commencing at Section 7260 of the Government Code, the property owner has already received prior to the filing of the eminent domain action "a written summary" of the just compensation established for his property. It is our opinion that the adoption of 1255.010(b) will, as a practical matter, eliminate the public entity's use of its staff

appraisers at trial and will further force the public entity to expend additional taxpayers' money to retain an independent private appraiser in addition to the staff appraiser.

Our experience in Los Angeles County has demonstrated that it rarely does any good in the settlement of acquisitions of property to "reveal" to the property owner or his attorney all of your factual data and opinions which support your appraiser's conclusion of value.

Sections 1255.040 and 1255.050 (Deposits of Money for Relocation Purposes): It appears to us from these sections that the Commission, in its attempts to organize and revise our eminent domain statutes, is with sections like 1255.040 and 1255.050 proceeding into the relocation assistance field. Relocation assistance should be handled separately and apart from the eminent domain statute or we will have relocation statutes all over the books. If the matters provided for in 1255.040 and 1255.050 were handled pursuant a "relocation assistance" program rather than as compensation in an eminent domain action, we believe the problems inherent therein could more readily be solved on an administrative basis. Your proposed solution, especially under 1255.050, will create an abundance of additional litigation that will be costly to the government, will add to the court's burden and could be avoided if handled on a relocation program basis with an administrative agency set up with guidelines and procedures.

However, if such provisions for relocation are needed within the eminent domain statutes, we believe that the provision for "net rental losses" as provided in 1255.050 should be deleted as it is one of those provisions that becomes very difficult for the public entity to disapprove unless certain procedural steps and guidelines are set down.

Section 1255.420 (Stay of Order for Hardship): Under this section, the public entity can obtain an order of possession, serve it on all of the necessary parties, enter into a contractual obligation with a contractor for construction of its project by a certain time and then the public entity can be subject to a full scale court hearing as to whether it is necessary for the public entity to continue its project and take possession of the subject parcel at this time. Again, our experience in Los Angeles County, within the County Counsel's office, is that it is rare (if ever) that we had to force anyone out of a dwelling where they had a "hardship". I personally do not know of a case in our county where we forced someone out with

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a legitimate "hardship", and I recognize as I write this that "hardship" is certainly a relative term. We believe 1255.420 is totally unnecessary. We must note, however, that on a provision such as this to determine "hardship" for the property owner, the Commission is able to come up with some guidelines and leave it to the court's discretion, whereas with respect to the taking of "excess property" (Sections 1240.410 and 1240.420), the Commission is apparently unable to come up with any guidelines and is unwilling to let the court determine whether such "excess" taking should be permitted (other than the rare "little market value" test which is of no help). We respectfully request the Commission to reconsider its position on Section 1255.420. We feel that by its very presence, it will "suggest" hardship in some people and will create unnecessary and costly litigation.

Section 1255.440 (Vacating Order for Possession): We believe the word "shall" should be substituted with "may" in order to prevent a vacation of the order for possession because of some technical deficiency under 1255.410.

Sections 1263.260, 1263.270 and 1263.280 (Improvements Pertaining to Realty): We believe that these three sections create a substantial amount of confusion that can only result in additional litigation that is not necessary. These sections are basically involved with the relocation, and we believe that relocation problems should be handled separately and not as part of compensation in the eminent domain action. We further believe that whether an item is a "fixture" (under the old law) and, therefore, part of the building, should be a legal issue for the court and its determination should be directly tied into the provisions for immediate possession so that the issue can be decided timewise before the owner (tenant) must vacate the premises.

Section 1268.720 (Costs on Appeal): We believe the prevailing party should be awarded costs. Payment by the public entity of the defendant's appellate costs where the public entity has prevailed is an invitation for defendants to "take a chance" on a case whose merits do not deserve the "chance".

We thank you for the opportunity of presenting to you some of our views. We commend the work you have done, and we respectfully request that you consider further study on some key sections,

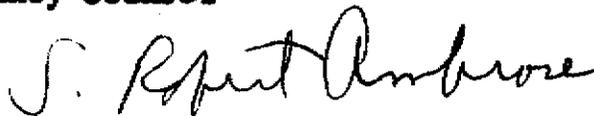
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especially Section 1263.510 on goodwill.

Very truly yours,

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By



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