

September 27, 1974

Time

October 10 - 7:00 p.m. - 10:00 p.m.  
October 11 - 9:00 a.m. - 5:00 p.m.  
October 12 - 9:00 a.m. - 12:00 noon

Place

International Inn - Bangar Room  
Bayshore Freeway at Airport Blvd.  
South San Francisco 94080  
(415) 583-9600

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

October 10-12, 1974

1. Minutes of September 5-7, 1974, Meeting (sent 9/19/74)
2. Administrative Matters
3. Study 36.300 - Condemnation Law and Procedure

Review of Tentative Recommendation on Eminent Domain Law

Memorandum 74-45 (sent for September meeting)(start on page 21)  
First Supplement to Memorandum 74-45 (sent for September meeting)  
Second Supplement to Memorandum 74-45 (sent for September meeting)  
Memorandum 74-46 (sent for September meeting)(start on page 35)  
Memorandum 74-58 (sent 9/19/74)

Discovery

Memorandum 74-51 (to be sent)

Evidence

Memorandum 74-50 (sent for September meeting)  
First Supplement to Memorandum 74-50 (to be sent)

State Condemnation and Special District Statutes

Memorandum 74-52 (sent 9/19/74)

Revisions Made as Result of Decisions at Previous Meetings

Memorandum 74-53 (enclosed)  
First Supplement to Memorandum 74-53 (enclosed)

Background Materials to Be Brought to Meeting

Printed Tentative Recommendations Relating to Condemnation  
Law and Procedure:

The Eminent Domain Law  
Conforming Changes in Special District Statutes  
Condemnation Authority of State Agencies  
Draft of Uniform Eminent Domain Act (to be sent)

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4. Study 63 - Evidence

63.30 - View by Trier of Fact in Civil Cases

Memorandum 74-55 (sent 9/19/74)

63.40 - Good Cause Exception to Physician-Patient Privilege

Memorandum 74-56 (sent 9/19/74)

Tentative Recommendation (attached to Memorandum)

5. Study 47 - Oral Modification of Written Contract

Memorandum 74-57 (sent 9/19/74)

6. New Topics

Memorandum 74-54 (sent 9/20/74)

7. Statutes Held Unconstitutional or Impliedly Repealed

Memorandum 74-59 (to be sent)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

OCTOBER 10 AND 11, 1974

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on October 10 and 11, 1974.

Present: Marc Sandstrom, Chairman  
John N. McLaurin, Vice Chairman  
John J. Balluff (Thursday)  
John D. Miller  
Thomas E. Stanton, Jr.  
Howard R. Williams

Absent: Robert S. Stevens, Member of Senate  
Alister McAlister, Member of Assembly  
Noble K. Gregory  
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Nathaniel Sterling, Stan G. Ulrich, and Mrs. Jo Anne Friedenthal, members of the Commission's staff, also were present. Professor Arvo Van Alstyne, Commission consultant on condemnation law and procedure, was present on Thursday and Friday, October 10 and 11. Mr. Thomas M. Dankert, Commission consultant on condemnation law and procedure, was present on Friday, October 11. Professor Stefan A. Riesenfeld, Commission consultant on creditors' remedies, was present on Friday, October 11.

The following persons were present as observers on days indicated:

Thursday and Friday, October 10 and 11

S. Robert Ambrose, County Counsel, Los Angeles  
Gavin P. Craig, Dept. of Water Resources, Sacramento  
Norval Fairman, Dept. of Transportation, San Francisco  
William C. George, County Counsel, San Diego  
Thomas P. Gilfoy, Southern California Edison Co., Los Angeles  
James H. Pearson, City Attorney, Los Angeles  
Anthony J. Ruffolo, Dept. of Transportation, Los Angeles  
Roger D. Weisman, City Attorney, Dept. of Water and Power, Los Angeles

Minutes  
October 10 and 11, 1974

ADMINISTRATIVE MATTERS

Minutes of September 5-7, 1974, Meeting

The Minutes of the September 5-7, 1974, Meeting, were approved as submitted.

Legislative Program

The Executive Secretary reported that the Governor signed AB 2948 (prejudgment attachment), this bill being chaptered as Chapter 1516 of the Statutes of 1974.

New Topics

The Commission considered Memorandum 74-54 and approved the following as topics that the Commission will request authority to study from the 1975 session:

- (1) Limitation of Possibilities of Reverter and Powers of Termination.
- (2) Transfer of Out-of-State Trusts to California.
- (3) Discovery in Civil Cases.
- (4) Offers of Compromise.
- (5) Class actions.

Statutes Held Unconstitutional or Impliedly Repealed

The Commission considered Memorandum 74-59 and the attached draft of the portion of the Annual Report relating to statutes held unconstitutional or impliedly repealed. The draft was approved for printing after it had been revised to delete the reference to In re Bye, this case not being one that held a statute unconstitutional or impliedly repealed. Also, the staff should check to see whether the Supreme Court is reconsidering Gordon v. Justice Court.

Printing of Pamphlet in Cooperation With Continuing Education of Bar

The Executive Secretary reported that the Continuing Education of the Bar has indicated that it is willing to pay the estimated cost (\$5,450) of publishing a pamphlet containing the prejudgment attachment statute, claim and delivery statute, and civil arrest section. The pamphlet would be used by Continuing Education of the Bar for its program to acquaint lawyers with the new statutes and a generous supply of copies of the pamphlet would be provided free to the Law Revision Commission for use in its study of creditors' remedies. The Executive Secretary reported that the amount to be paid by the Continuing Education of the Bar is the cost estimated by the printer for publishing the pamphlet; but, in the event the cost exceeds the estimate (considered unlikely), the Commission would have to pay the excess. The Commission approved the publication of the pamphlet. It was considered highly desirable that lawyers be given information concerning the new laws so that the transition from the old law to the new law would be as smooth as possible. Also, it was the Commission's belief that the pamphlet with the new laws and official Comments would be useful in the Commission's work on the creditors' remedies study.

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STUDY 36.300 - CONDEMNATION LAW AND PROCEDURE

The Commission continued its review of the tentative eminent domain recommendations, considering Memorandum 74-45 and the First and Second Supplements thereto, Memorandum 74-46, Memorandum 74-58, Memorandum 74-52, and Memorandum 74-53 and the First Supplement thereto.

The Commission approved the recommendation to print subject to changes made at the meeting and subject to such additional editorial and technical changes as the staff deems necessary. The Commission determined to defer consideration of discovery matters, other than those already proposed in the tentative recommendation, until some future time. The Commission also determined to make only necessary conforming changes in the Evidence Code and to defer consideration of substantive evidence matters until some future time.

The Commission made the following changes in the tentative recommendation:

§ 1230.065. Operative date

The Commission adopted the following operative date provision for the Eminent Domain Law:

§ 1230.065. Operative date

1230.065. (a) This title becomes operative July 1, 1977.

(b) Subject to subdivisions (c) and (d), in the case of an eminent domain proceeding commenced prior to the operative date, this title upon the operative date applies to the proceeding to the fullest extent practicable with respect to issues on which a judgment has not been entered or which are retried pursuant to an order of the trial or appellate court.

(c) Chapters 3, 4, and 5 of this title do not apply to an eminent domain proceeding commenced prior to the operative date.

(d) If, on the operative date, an appeal, motion to modify or vacate the verdict or judgment, or motion for new trial is pending, the law in effect immediately prior to the operative date governs the determination of the appeal or motion.

Comment. Subdivision (a) of Section 1230.065 delays the operative date of this title until July 1, 1977, to allow sufficient time for state and local officials, lawyers, and the public to become familiar with the new law.

Subdivision (b) adopts the policy that this title is to apply to the fullest extent practicable to pending proceedings. In most proceedings, except perhaps those in trial or awaiting imminent trial, the immediate application of this title would not obstruct the parties or court in proceeding to judgment. Immediate application, moreover, would prevent inconsistencies of result as between proceedings commenced just prior to the operative date and those commenced shortly thereafter. The phrase "to the fullest extent practicable" is intended to give the court ample discretionary power to adapt the application of the title to the circumstances of individual cases, thereby reducing the possibility that immediate application of these provision to pending litigation might in special cases effect an injustice.

Subdivision (c) excludes from application to pending proceedings provisions dealing with the right to take, precondemnation activities, and pleadings.

Subdivision (d) provides, in the interest of fairness, that any decision on a posttrial motion or appeal pending on the operative date should be based upon the law that was in effect when the action was tried. It would be unfair to hold litigants to a different rule of law in the determination of claimed error than the law which governed at the time the claimed error was committed. If the motion or appeal results in a new trial, however, this title would govern the further proceedings in the action under subdivision (b).

§ 1230.070. Effect of enactment of title on prior proceeding

The Commission revised this section to read:

§ 1230.070. Effect of enactment of title on prior proceeding

1230.070. No judgment rendered prior to the operative date of this title in a proceeding to enforce the right of eminent domain is affected by the enactment of this title and the repeal of former Title 7 of this part.

Comment. Section 1230.070 is new. It makes clear that the repeal of the former eminent domain title of this code and the enactment of new provisions of the Eminent Domain Law in no way affect the validity of judgments rendered prior thereto.

§ 1240.410. Condemnation of remnants

The Commission revised the discussion of excess condemnation in the preliminary part of the recommendation to read as follows:

Acquisition of physical and financial remnants. The acquisition of part of a larger parcel of property for public use will on occasion leave the remainder in such size, shape, or condition as to be of little market value. The elimination of such remnants may be of substantial benefit to the community at large as well as to the owners of such property. Generally speaking, California's condemnors with any substantial need therefor have been granted specific statutory authority to condemn the excess for the purpose of remnant elimination.<sup>54</sup> Some of these statutes are so broadly drawn that they literally authorize exercise of the power of eminent domain to acquire remnants in circumstances not constitutionally permitted.<sup>55</sup>

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54. E.g., Code Civ. Proc. § 1266 (city and county highway authorities); Sts. & Hwys. Code § 104.1 (Department of Transportation); Water Code §§ 254 (Department of Water Resources), 43533 (water districts). These statutes, however, vary from agency to agency, often with little or no apparent reason for the difference.
55. See *People v. Superior Court*, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).



The Commission has concluded that all public entities should be granted the authority to condemn excess property for the purpose of remnant elimination,<sup>56</sup> whether the remnant be physical or financial. Under existing law, a public entity may acquire a remainder if the acquisition would be justified to avoid "excessive" severance or consequential damages to the remainder.<sup>56a</sup> The Commission recommends that a more meaningful test be used to determine whether the remainder may be taken--that it be left in such size, shape, or condition as to be of little market value. Under this test, for example, if the taking of part of a larger parcel of property would leave a remainder, regardless of size, in such a condition that it is landlocked and no physical solution will be practical, the taking of the remainder would be authorized.<sup>56b</sup>

Remainders that are of little market value should be subject to acquisition by both voluntary means and by condemnation but, to safeguard against the abuse of such authority, the property owner should always be able to contest whether the remainder will be "of little market value." The property owner should also be permitted to show that the condemnor has available a reasonable and economically feasible means to avoid leaving a remnant; if he is successful in demonstrating such a "physical solution," condemnation of the excess should not be allowed.

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56. Nongovernmental condemnors have no statutory authority to acquire excess property. No change in this regard is recommended.

56a. *People v. Superior Court*, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

56b. This was the situation in *People v. Superior Court*, supra. Other instances where the taking of the remainder would be permitted are where the remainder (1) will be reduced below the minimum zoning limits for building purposes and it is not reasonably probable that there will be a zoning change, (2) will be of significant value to only one or few persons (such as adjoining landowners), or (3) will be landlocked and have primarily a speculative value dependent upon access being provided when adjacent land is developed and the time when the adjacent land will be developed is a matter of speculation.

On the other hand, a usable and generally salable remainder could not be taken even though its highest and best use has been downgraded by its severance or a serious controversy exists as to its best use and value after severance. Likewise, the remainder could not be taken (1) to avoid the cost and inconvenience of litigating the issue of damages, (2) to preclude the payment of damages, including damages substantial in amount in appropriate cases, (3) to coerce the condemnee to accept whatever price the condemnor offers for the property actually needed for the public project, or (4) to afford the condemnor an opportunity to "recoup" damages or unrecognized benefits by speculating as to the future market for the property not actually devoted to the public project.

§§ 1245.010-1245.070. Entry for survey

The Commission approved a staff recommended revision of Sections 1245.010-1245.070 as set out in Memorandum 74-58 with the following changes:

(1) The staff proposal to substitute "physical injury" for "actual damage" to conform with the terminology used in the Uniform Code was not approved.

(2) It was suggested that the phrase "with a few minor changes" should not be used in the Comment to revised Section 1245.020. The changes should be noted in the Comment to the particular sections.

(3) Section 1245.040 should be revised to refer only to "increased deposits."

§ 1245.250. Effect of resolution

The Commission directed the staff to make any conforming changes in the Eminent Domain Law necessitated by the enactment of AB 1575 (establishing the Energy Resources Conservation and Development Commission and providing a conclusive presumption for the acquisition of development rights around proposed generation sites).

The Commission also directed the staff to investigate the procedure whereby the Public Utilities Commission certifies the necessity and location for certain electric transmission lines with the view to affording the PUC certificate a presumption in the Eminent Domain Law. The Commission will review the staff's action on this matter when the report appears in printed form.

§ 1245.260. Remedies if eminent domain proceeding not commenced within six months from adoption of resolution

The Commission revised this section to read:

§ 1245.260. Remedies if eminent domain proceeding not commenced within six months from adoption of resolution

1245.260. (a) If a public entity has adopted a resolution of necessity but has not commenced an eminent domain proceeding to acquire the property within six months after the date of adoption of the resolution, the property owner may, by an action in inverse condemnation, do either or both of the following:

(1) Require the public entity to take the property and pay compensation therefor.

(2) Recover damages from the public entity for any interference with the possession and use of the property resulting from adoption of the resolution.

(b) No claim need be presented against a public entity under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code as a prerequisite to commencement or maintenance of an action under subdivision (a), but any such action shall be commenced within one year and six months after the date the public entity adopted the resolution of necessity.

(c) A public entity may commence an eminent domain proceeding or rescind a resolution of necessity as a matter of right at any time before the property owner commences an action under this section and, upon such commencement or rescission, the property owner may not thereafter bring an action under this section.

(d) After a property owner has commenced an action under this section, the public entity may rescind the resolution of necessity and abandon the taking of the property only under the same circumstances and subject to the same conditions and consequences as abandonment of an eminent domain proceeding.

(e) Commencement of an action under this section does not affect any authority a public entity may have to commence an eminent domain proceeding, take possession of the property pursuant to Article 3 (commencing with Section 1255.410) of Chapter 6, or abandon the eminent domain proceeding.

(f) In lieu of bringing an action under subdivision (a) or if the limitations period provided in subdivision (b) has run, the property owner may obtain a writ of mandate to compel the public entity, within such time as the court deems appropriate, to rescind the resolution of necessity or to commence an eminent domain proceeding to acquire the property.

Comment. Section 1245.260 continues the substance of former Section 1243.1 but makes a number of clarifying changes:

(1) Subdivision (a) of Section 1245.260 makes clear that the owner of the property may bring an inverse condemnation action seeking the various types of relief specified. In addition, subdivision (f) provides for relief by way of a writ of mandate as an alternative to bringing an inverse condemnation action. Former Section 1243.1 was unclear as to the nature of the relief that might be obtained in an inverse condemnation action and did not contain any provision relating to relief by way of a writ of mandate.

(2) Subdivision (b) eliminates the claims presentation requirement and specifies a statute of limitations that is comparable to the time within which a claim would have had to be presented to the public entity, assuming that the cause of action accrued upon the expiration of six months from the adoption of the resolution of necessity. See Govt. Code §§ 901 (date of accrual of cause of action), 911.2 (time for presentation of claims). Under former Section 1243.1, it was not clear whether a claim was required to be presented to the public entity.

It should be noted that the statute of limitations provided in subdivision (b) applies only to commencement of an inverse condemnation action under subdivision (a). The provision for a writ of mandate in subdivision (f) remains operative despite the expiration of the limitations period.

(3) Subdivision (c) makes clear that the public entity can commence an eminent domain proceeding or rescind the resolution of necessity at any time prior to the commencement of the action and thereby avoid liability under subdivision (a). This provision does not, however, affect the owner's right to bring an inverse condemnation action based on Article I, Section 14, of the California Constitution. See Klopping v. City of Whittier, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972). Former Section 1243.1 was silent on the consequences of commencing a proceeding or rescinding the resolution.

(4) Subdivision (d) makes clear that the public entity may rescind the resolution and abandon the taking after commencement of an action under this section only under the circumstances and subject to the same conditions and consequences as abandonment of an eminent domain proceeding. For the circumstances under which a plaintiff may abandon, see Section 1268.510. For conditions and consequences of abandonment, see also Sections 1268.610 and 1268.620. Former Section 1243.1 did not deal with this matter.

§ 1250.310. Contents of complaint

The following cross-reference should be made at the end of the second paragraph of the Comment to this section:

See generally Section 1230.040 and Comment thereto (rules of practice in eminent domain proceedings).

In addition, Article 4 (commencing with Section 1250.310) should be preceded by the following paragraph:

Comment. The rules of pleading provided in this article are special rules peculiar to eminent domain proceedings. They supplement the general rules of civil procedure governing pleadings and replace only those general rules that may be inconsistent with them. See generally Section 1230.040 and Comment thereto (rules of practice in eminent domain proceedings).

§ 1250.325. Disclaimer

The Commission added the following section to the Eminent Domain Law:

§ 1250.325. Disclaimer

1250.325. (a) A defendant may file a disclaimer at any time, whether or not he is in default, and the disclaimer supersedes an answer previously filed by the defendant. The disclaimer need not be in any particular form. It shall contain a statement that the defendant claims no interest in the property or in the compensation that may be awarded. Notwithstanding Section 1250.330, the disclaimer shall be signed by the defendant.

(b) Subject to subdivision (c), a defendant who has filed a disclaimer has no right to participate in further proceedings or to share in the compensation awarded.

(c) The court may implement the disclaimer by appropriate orders, including where justified awarding costs and litigation expenses.

Comment. Section 1250.325 provides a simplified method for a defendant to disclaim any interest in the property or compensation awarded in the proceeding. The disclaimer may be an informal document which merely states that the defendant claims no interest in either the property or the award. A defendant wishing to make only a partial disclaimer may do so by filing an answer describing only the limited interest claimed by him. See Section 1250.320. A disclaimer may be filed "at any time," even after an answer has been filed or after the defendant's right to respond has been terminated by his default. The disclaimer supersedes any earlier response.

The disclaimer, in effect, removes the defendant from the action and may result in a dismissal as to him. The power to implement a disclaimer, as provided in subdivision (c), is intended to assure that the court has full authority to enter a dismissal, with award of costs and litigation expenses where appropriate or to enter other implementing orders calculated to facilitate use of the disclaimer as an aid to settlement. Adequate flexibility in this regard may be particularly useful, for example, in disposing of claims having relatively slight value.

§ 1250.350. Pleading objections to the right to take

The portion of the recommendation commencing with Section 1250.350 and ending with Section 1250.370 should be made a separate article, "Objections to Right to Take."

§ 1250.410. Settlement offers (new)

The Commission determined to include in the Eminent Domain Law a provision imposing costs and expenses for the failure of the plaintiff to make a reasonable settlement offer, the provision to be based upon Cal. Stats. 1974, Ch. 1469 (AB 3925), attached as Exhibit V to Memorandum 74-53. Commissioner McLaurin was opposed to such a provision as a matter of policy. As modified for inclusion in the Eminent Domain Law, the provision reads:

§ 1250.410. Settlement offers

1250.410. (a) At least 30 days prior to the date of trial, the plaintiff shall file with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant shall file and serve on the plaintiff his final demand for compensation in the proceeding. Service shall be in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(b) If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses. In determining the amount of such litigation expenses, the court shall consider any written revised or superseded offers and demands filed and served prior to or during the trial.

Comment. Section 1250.010 continues the substance of former Section 1249.3, making clear that the offer and demand are to cover all of the compensation in the proceeding, including injury to the remainder, if any, are not merely the value of the part taken. For the definition of "litigation expenses," see Section 1233.140.

§ 1255.010. Deposit of amount of estimated compensation

This section was revised to read:

§ 1255.010. Deposit of amount of estimated compensation

1255.010. (a) At any time before entry of judgment, the plaintiff may deposit with the court the full amount indicated by an appraisal which the plaintiff reasonably estimates to be the compensation that will be awarded in the proceeding for the taking of all or a specified part of the property. The appraisal upon which the deposit is based shall be one that satisfies the requirements of subdivision (b). The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so.

(b) Before making a deposit under this section, the plaintiff shall have an expert qualified to express an opinion as to the value of the property (1) make an appraisal of the property and (2) prepare a written statement of, or summary of the basis for, the appraisal.

(c) On noticed motion, or upon ex parte application in an emergency, the court may permit the plaintiff to make a deposit without prior compliance with subdivision (b) if the plaintiff presents facts by affidavit showing that (1) good cause exists for permitting an immediate deposit to be made, (2) an adequate appraisal has not been completed and cannot reasonably be prepared before making the deposit, and (3) the amount of the deposit to be made is not less than the full amount of compensation that the plaintiff, in good faith, estimates will be awarded for the taking of all or a specified part of the property. In its order, the court shall require that the plaintiff comply with subdivision (b) within a reasonable time, to be specified in the order, and also that any additional amount of compensation shown by the appraisal required by subdivision (b) be deposited within that time.

§ 1255.020. Service of notice of deposit

This section was revised to require service of a copy of the written statement of, or summary of the basis for, the appraisal on which the deposit was based.

§ 1255.040. Deposit on notice of homeowner

This section was revised to read:

§ 1255.040. Deposit on notice of homeowner

1255.040. (a) Where the plaintiff has not made a deposit that satisfies the requirements of this article for all the property to be taken, and the property includes a dwelling containing not more than two residential units and the dwelling or one of its units is occupied as his residence by a defendant, such defendant may serve notice on the plaintiff requiring a deposit of the reasonably estimated compensation that will be awarded in the proceeding. The notice shall specify the date by which the defendant desires the deposit to be made. Such date shall not be earlier than 30 days after the date of service of the notice and may be any later date.

(b) If the plaintiff deposits the reasonably estimated compensation, determined or redetermined as provided in this article, on or before the date specified by the defendant, the plaintiff may, upon ex parte application to the court, obtain an order for possession that authorizes the plaintiff to take possession of the property 30 days after the date for the deposit specified by the defendant or such later date as the plaintiff may request.

(c) Notwithstanding Section 1268.310, if the deposit is not made on or before the date specified by the defendant or such later date as the court specifies on motion and good cause shown by the plaintiff, the compensation awarded in the proceeding to the defendant shall draw legal interest from that date. The defendant is entitled to the full amount of such interest without offset for rents or other income received by him or the value of his continued possession of the property.

(d) If the proceeding is abandoned by the plaintiff, the interest under subdivision (c) may be recovered as costs in the proceeding in the manner provided for the recovery of litigation expenses under Section 1268.610. If, in the proceeding, the court or a jury verdict eventually determines the compensation that would have been awarded to the defendant, then such interest shall be computed on the amount of such award. If no such determination is ever made, then such interest shall be computed on the amount of reasonably estimated compensation as determined by the court.

(e) The serving of a notice pursuant to this section constitutes a waiver by operation of law, conditioned upon subsequent deposit by the plaintiff of the reasonably estimated compensation, of all claims and defenses in favor of the defendant except his claim for greater compensation.

(f) Notice of a deposit made under this section shall be served as provided by subdivision (a) of Section 1255.020. The defendant may withdraw the deposit as provided in Article 2 (commencing with Section 1255.210).



(g) No notice may be served by a defendant under subdivision (a) after entry of judgment unless the judgment is reversed, vacated, or set aside and no other judgment has been entered at the time the notice is served.

§ 1255.245. Investment of deposit

The following section was added to the Eminent Domain Law:

§ 1255.245. Investment of deposit

1255.245. (a) Prior to entry of judgment, a defendant who has an interest in the property for which a deposit has been made under this chapter may, upon notice to the other parties to the proceeding, move the court to have all of such deposit invested for the benefit of the defendants.

(b) At the hearing of the motion, the court shall consider the interests of the parties and the effect that investment would have upon them. The court may, in its discretion, if it finds that the interests of justice will be served, grant the motion subject to the following terms and conditions and such additional terms and conditions as are appropriate under the circumstances of the case:

(1) The investment of a deposit has the same consequences as if the deposit has been withdrawn under this article.

(2) The investment shall be specified by the court and shall be limited to the United States Government obligations or secure interest-bearing accounts in an institution whose accounts are insured by an agency of the federal government.

Comment. Section 1255.245 provides a method whereby a defendant may have a prejudgment deposit invested for the benefit of all defendants. For a comparable postjudgment provision, see Section 1268.150. The primary use for this section is to supply an expeditious means for the defendants to obtain interest on the deposit in cases where the plaintiff has not taken possession or to obtain a higher rate of interest than the legal rate in cases where the plaintiff has taken possession without the need for a hearing on the respective rights of the parties.

Under subdivision (a), one defendant may require the whole deposit invested. The return on the investment, however, is for the benefit of all defendants and will be apportioned according to their interests as finally determined in the eminent domain proceeding.

Subdivision (b) makes clear that the granting of a motion under this section is in the discretion of the court. The court should determine whether any of the parties would be prejudiced by the withdrawal. Factors that might be taken into consideration include the resistance of a defendant who is an occupant of the property because withdrawal of the deposit will subject him to dispossession under Section 1255.460, or the resistance of a defendant who has a bona fide objection to the right to take that would be waived by withdrawal under Section 1255.260.

Under subdivision (b), the court must tailor its order for withdrawal and investment to fit the circumstances of the particular case. Factors the court might take into consideration in making its order include length of commitment of investment, e.g., in certificates of deposit in anticipation of either lengthy or speedy conclusion of trial, or provision for withdrawal by individual defendants from the lump-sum investment where necessary for relocation, and the like. Likewise, the court may impose the risk of loss on the defendant requesting the investment in an appropriate case.

Subdivision (b)(1) makes clear that investment under this section carries with it the same consequences as a withdrawal of a pre-judgment deposit. Among these consequences are waiver of defenses (Section 1255.260), subjection to possession (Section 1255.460), and cessation of interest (Section 1268.320).

Under subdivision (b)(2), the lump sum may be invested in amounts greater than are insured by an agency of the federal government so long as the institution in which it is invested does carry such insured accounts and provided the investment made is actually secure.

#### § 1255.410. Order for possession prior to judgment

The Commission added the following material to this section:

(c) Where the plaintiff has shown its urgent need for possession of unoccupied property, the court may, notwithstanding Section 1255.450, order possession of such property on such notice as it deems appropriate under the circumstances of the case.

Comment. [Substitute following for last two paragraphs of Comment:]

Subdivision (b) is limited by the requirement of a 30-day or 90-day period following service of the order before possession can be physically assumed. See Section 1255.450. Subdivision (c), however, permits possession of property that is unoccupied on lesser notice in cases where the plaintiff is able to make an adequate showing of need.

It should be noted that, under both subdivisions (b) and (c), the court may authorize possession of all, or any portion or interest, of the property sought to be taken by eminent domain.

§ 1258.280. Limitations upon calling witnesses and testimony of witnesses

The following sentence should be added 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).

§ 1260.250. Compensation for appraisers, referees, commissioners, and others

The Commission determined to delete this section from the Eminent Domain Law, noting that the matter of compensation for services of referees and the like is governed by general law.

§ 1263.010. Right to compensation

The third paragraph of the Comment to this section was revised to read:

Likewise, this chapter in no way limits compensation that may be required by Article I, Section 14, the "just compensation" clause of the California Constitution. On the other hand, the "just compensation" clause does not limit the compensation required by this chapter. This chapter is intended to provide rules of compensation for eminent domain proceedings; the law of inverse condemnation is left for determination by judicial development. See Section 1230.020 and Comment thereto (law governing exercise of eminent domain power).

Commissioner McLaurin was opposed to inclusion of the foregoing paragraph.

§ 1263.110. Date of valuation fixed by deposit

Subdivision (b) of Section 1263.110 was revised to read:

(b) Whether or not the plaintiff has taken possession of the property or obtained an order for possession, if the court determines pursuant to Section 1255.030 that the probable amount of compensation exceeds the amount previously deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 and the amount on deposit is not increased accordingly within the time allowed under Section 1255.030, no deposit shall be deemed to have been made for the purpose of this section.

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§ 1263.140. New trial

This section was revised to read:

1263.140. If a new trial is ordered by the trial or appellate court and the new trial is not commenced within one year after the commencement of the proceeding, the date of valuation is the date of the commencement of the new trial unless, in the interest of justice, the court ordering the new trial orders a different date of valuation.

The Comment should be adjusted accordingly. Commissioner McLaurin opposed this revision.

§ 1263.150. Mistrial

This section was revised to read:

1263.150. If a mistrial is declared and the retrial is not commenced within one year after the commencement of the proceeding, the date of valuation is the date of the commencement of the retrial of the case unless, in the interest of justice, the court declaring the mistrial orders a different date of valuation.

The Comment should be adjusted accordingly. Commissioner McLaurin opposed this revision.

§ 1263.220. Business equipment

The Commission determined to delete this section and to replace it with the following provision:

§ 1263.205. Improvement pertaining to the realty

1263.205. "Improvement pertaining to the realty" includes any facility, machinery, or equipment that is installed for use on the property taken or damaged and cannot be removed without a substantial economic loss or without substantial damage to the property on which it is situated, regardless of the method of installation.

The Comment to this section should indicate that, in determining whether the property can be removed without a substantial economic loss, the value of the property in place as part of the realty should be compared with the value of the property to be removed and sold.

Chairman Sandstrom and Commissioner Stanton opposed the foregoing revision.

§ 1263.250. Harvesting and marketing of crops

The Commission revised this section to incorporate the following features of the Uniform Eminent Domain Code: (1) the defendant may plant annual crops after service of summons unless the plaintiff obtains an order precluding the planting; (2) where the plaintiff obtains an order precluding planting, the defendant should recover the loss of use value of his property; (3) where no order is obtained but possession is taken at a time that prevents the defendant from harvesting the crops, the defendant should recover the fair market value of the crops.

§ 1263.270. Removal of improvements for storage in case of dispute

The Commission determined to delete Section 1263.270 and substitute for it the following provision:

§ 1260.030. Determination of character of improvements where parties are unable to agree

1260.030. (a) If there is a dispute between plaintiff and defendant whether particular property is an improvement pertaining to the realty, either party may, not later than 30 days prior to the date specified in an order for possession of the property, move the court for a determination whether the property is an improvement pertaining to the realty.

(b) A motion under this section shall be heard not sooner than 10 days and not later than 20 days after service of notice of the motion. At the hearing, the court may consider any relevant evidence, including a view of the premises and property, in making its determinations.

Comment. Section 1260.030 is new; it is designed to enable the parties to obtain a prompt resolution of disputes concerning the character of improvements so that, when possession is transferred, the parties will know their rights with respect to the property.

§ 1263.270. Improvements located partially on part taken

The Commission determined to include in the Eminent Domain Law the substance of the following section:

§ 1263.270. Improvements located partially on part taken

1263.270. Where an improvement pertaining to the realty is located in part upon property taken and in part upon property not taken, the court may, on motion by either party and a determination that justice so requires, direct the plaintiff to acquire the entire improvement, including the part located on property not taken, together with an easement or other interest reasonably necessary for use of the improvement or for its demolition, removal, or relocation.

§ 1263.410. Compensation for injury to the remainder

Subdivision (b) of Section 1263.410 was revised 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.

The following paragraph was added to the Comment to this section:

It should be noted that the term "larger parcel" is not defined in the Eminent Domain Law, just as it was not defined in the former eminent domain provisions of the Code of Civil Procedure. The legal definition of the larger parcel is in the process of judicial development. See, e.g., City of Los Angeles v. Wolfe, 6 Cal.3d 326, 491 P.2d 813, 99 Cal. Rptr. 21 (1971)(contiguity not essential). Leaving the larger parcel definition uncodified permits continued judicial development of the concept.

§ 1263.510. Loss of goodwill

Section 1263.510 was revised to read:

§ 1263.510. Loss of goodwill

1263.510. (a) The owner of a business conducted on the property taken, or on the remainder if such property is part of a larger parcel, shall be compensated for loss of goodwill only if the owner proves that the loss (1) is caused by the taking of the property or the injury to the remainder, (2) cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill, (3) will not be included in payments under Section 7262 of the Government Code, and (4) will not be duplicated in the compensation awarded to the owner.

(b) Within the meaning of this section, "goodwill" consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.

Commissioner McLaurin opposed placing the burden of proof of loss of goodwill on the defendant.

§ 1263.620. Partially completed improvements; performance of work to protect public from injury

The scope of this section should be expanded to apply to protect partially installed machinery or equipment from damage, deterioration, or vandalism, and the title of the section should be changed accordingly.

The section should also be amended to make clear that the property owner must give the condemnor notice of intent to make the improvement; if notice is not given and there is no emergency, the improvement will not be deemed reasonable; if notice is given and there is a dispute over the reasonableness of the improvement, there is no burden of proof on the issue.

§ 1265.130. Termination of lease in partial taking

The last sentence of this section was deleted. The staff should consider incorporating language in the Comment from the comparable comment in the Uniform Eminent Domain Code.

§ 1265.150. Remedies of parties not affected

The Comment to this section should contain a cross-reference to Section 1260.220 (procedure where there are divided interests).

§ 1265.310. Unexercised options.

The Commission added the following sentence to the Comment to this section:

Since the value of the fee owner's interest in the property is diminished to the extent of the value of the option holder's interest, the award for the value of the property must be so apportioned. See Section 1260.220 (procedure where there are divided interests).

§ 1265.410. Contingent future interests

The Commission added the substance of the following sentence to the Comment to this section:

Since the value of the fee owner's interest in the property is diminished to the extent of the value of the contingent future interest, the award for the value of the property must be so apportioned. See Section 1260.220 (procedure where there are divided interests).

§ 1268.140. Withdrawal of deposit

A sentence should be added to the Comment to this section to make clear that this section is the only provision for withdrawal of a deposit after judgment regardless whether the deposit was made before or after judgment.

§ 1268.160. Repayment of excess withdrawal

A sentence should be added to the Comment to this section noting that, in the case of a stay, interest will run on the amount of the judgment during the stay.



§ 1268.330. Offsets against interest

The following sentences were added to subdivision (a) of this section:

For the purpose of this section, the value of possession of the property shall be presumed to be the legal rate of interest on the compensation awarded. This presumption is one affecting the burden of proof.

§ 1268.620. Damages caused by possession

This section should be amended to provide for damages where the defendant has vacated the property in reasonable contemplation of its taking by the plaintiff, and the damages should extend to all those that are a proximate result of the abandonment regardless whether the condemnor takes possession of the property. The section should also make clear if there is a dismissal as to particular property, only those damages which are attributable to that property are recoverable.

§ 1268.720. Costs on appeal

The Commission determined to remove from the Judicial Council the discretion to deny the defendant's costs on appeal and to place such discretion in the court. The statute should also make clear that the plaintiff does not bear the costs of an appeal between defendants.

§ 1273.010. Arbitration of amount of compensation authorized

The Commission determined to add to either the Comment or the text of the statute a statement that two defendants can agree to arbitrate the apportionment of the award.

Civil Code § 1001

The Commission made no change in its recommendation to repeal Civil Code Section 1001, but authorized the staff to accept legislative committee

decisions to provide for private condemnation by narrowly-drawn provisions designed to cure specific problems where the committees feel a need for such provisions.

Fish & Game Code § 1348

The Commission determined not to recommend any substantive change in existing Fish and Game Code Section 1348, authorizing condemnation by the Department of Fish and Game on behalf of the Wildlife Conservation Board in certain limited situations.

Los Angeles County Flood Control Act § 16-5/8

The Comment to this section should refer specifically to Code of Civil Procedure Section 1240.350 (substitute condemnation to provide utility service or access to public road).

Public Utilities Code § 613

The Commission determined that the statutes should make clear that the power of eminent domain may be exercised for the underground storage of natural gas.

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STUDY 47 - ORAL MODIFICATION OF WRITTEN CONTRACTS

The Commission considered Memorandum 74-57 and the attached Recommendation Relating to Oral Modification of Written Contracts. The recommendation was approved for printing subject to editorial changes.

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STUDY 63.30 - EVIDENCE (VIEW BY TRIER OF FACT IN CIVIL CASE)

The Commission considered Memorandum 74-55 and the attached Recommendation Relating to View by Trier of Fact in Civil Case. The recommendation was **approved** for printing.

In preparing the recommendation to send to the printer, the staff should consider the editorial revisions noted on copies of the recommendation turned in by members of the Commission. The staff should check footnote 7 on page 4 to be sure that the cases cited support the statement in the text.

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STUDY 63.40 - "GOOD CAUSE" EXCEPTION TO THE PHYSICIAN-PATIENT PRIVILEGE

The Commission considered Memorandum 74-56 and the attached Recommendation Relating to the "Good Cause" Exception to the Physician-Patient Privilege.

The recommendation was approved for printing after the revision suggested on page 1 of Memorandum 74-56 has been made and editorial revisions are made. The revision suggested in Memorandum 74-56 is to insert a new sentence (following the reference in the Comment on page 4 of the recommendation to the Marcus case) to read: "However, even in such malpractice actions, it sometimes may be possible to provide the necessary information without violating the privilege. See Rudnick v. Superior Court, 11 Cal.3d 924, 933 n.13, \_\_\_ P.2d \_\_\_, \_\_\_ n.13, \_\_\_ Cal. Rptr. \_\_\_, \_\_\_ n.13 (1974)."

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65.70  
STUDY 65 - INVERSE CONDEMNATION (Claims Statute)

Claims statute. The staff was directed to prepare a tentative recommendation proposing the elimination of the claims presentation requirements in inverse condemnation actions. When prepared, the tentative recommendation should be presented for Commission consideration.

Planning of work on inverse condemnation. The staff was requested to contact Professor Van Alstyne and solicit his views as to which areas of inverse condemnation should be taken up by the Commission with a view to preparing recommendations for legislation in various specific areas and his suggestions as to the priorities to be given to the various areas.

APPROVED

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairman

\_\_\_\_\_  
Executive Secretary