#36(L) 11/16/65

Second Supplement to Memorandum 65-74

Subject: Study No. 36(L) - Condemnation Law and Procedure (General Philosophy Concerning Method and Extent of Compensation)

I have some reservations about the recommendation in the First Supplement that we proceed to work on the elements of compensation in eminent domain proceedings on the theory that we basically accept for working purposes (1) the principle that benefits created and detriment caused by the construction and use of the improvement are to be recognized to the extent provided by existing law or (2) a modified version of that principle as suggested in the First Supplement (the so-called "before and after" test of compensation). It seems to me that the assumption made--that special and/or general damage and special and/or general benefits resulting from the construction and use of the improvement are to be taken into account in computing compensation--is one that should not be made until we consider the problem of damage and benefits to property belonging to persons who have not had a portion taken.

As has been pointed out in the basic memorandum and the first supplement thereto, the problem of deciding the extent to which the owners of property no portion of which is taken by condemnation should be compensated for the damages inflicted by public improvements (or should be assessed for benefits conferred) is essentially the problem we will consider in the inverse condemnation study. The problem is the same whether the particular landowner had any property taken or not. It seems to me that if we decide this question now we will be doing so more or less in ignorance. It is true that we can determine the extent to which California and other jurisdictions now compensate in eminent domain proceedings for damages caused by the public

improvement, and we can tinker around with the rules relating to this compensation to provide a little more here or a little less there. But such a procedure will not reflect any consistent underlying philosophy concerning the extent to which such damages should be compensated, for we can make no decisions on the underlying philosophy until we have considered Professor Van Alstyne's study.

I suggest that it may not be necessary for us to abandon the project at the present time in order to wait for Professor Van Alstyne's study. Perhaps we can determine what our philosophy should be toward compensating persons whose property is taken for the injury they suffer as a result of the taking. If we can, it seems to me that we should proceed to do so. The decisions made here would be without prejudice to whatever might be done in regard to compensation for damages caused by the public improvement after we have considered the inverse condemnation study. It may be that, after considering the inverse condemnation study, we will conclude that additional damages should be allowed in eminent domain proceedings for the kinds of injury we will consider in connection with the study (detriment and benefits resulting from public improvements). An appropriate adjustment can then be made in our eminent domain recommendations to permit such compensation. It may be, too, that administrative difficulties may force us eventually to permit damages to be awarded to persons whose property is taken while similar damages are not allowed to persons whose property is not taken. The approach that I suggest, however, does not commit us to any such distinction initially. If we make any such distinction, it will be only after we have decided that there should be an element of compensation and that it is impractical to permit such compensation to persons whose property is not

taken and it is unfair to deny it to persons whose property is taken. I suggest that there is no reason to accept any such distinction as an a priori matter.

Thus, I think that we should look at the elements of compensation at the present time without considering the effect on the remainder of the contemplated improvement. We should ascertain the compensation to be given for the property taken and the damage to the remainder as affected by the taking only but without regard to the type of improvement constructed. We should determine what we intend to allow as severance damages insofar as they may be caused by the taking itself. We should determine the extent to which we will allow moving expenses, damages for loss of good will, etc., when such damages are caused by the taking only. We should decide what constitutes the larger parcel by considering the effect on the condemnee's remaining property of the taking only.

We can thus arrive at a consistent philosophy of what compensation should be given for a taking. When inverse condemnation is considered, we can arrive at a consistent philosophy concerning the compensation that should be given for damage caused to property by public improvements. Where needed, then, we can integrate our inverse condemnation determinations into the eminent domain statute in order to obviate the need for two proceedings where a person suffers both kinds of damage.

It seems to me this is the only way in which we can proceed in the light of the studies that we have before us. Any other procedure requires us to assume that a distinction should be drawn between the damages a public improvement causes to a person whose property is taken and the damages a public improvement causes to a person whose property is not taken. I

don't think the assumption should be made, for we have little or no information upon which to base it. If a distinction must be made, it should be made as a reasoned decision based on all the relevant considerations that can be brought to the Commission's attention.

Perhaps we cannot proceed as I suggest. But if we cannot, it seems to me we must then wait for Professor Van Alstyne's study before considering elements of compensation so that our entire statute will reflect consistent, reasoned decisions as to the compensation that should be given instead of assumptions as to the compensation that should be given.

Respectfully submitted,

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