#36 2/24/66

First Supplement to Memorandum 66-4

Subject: Study 36(L) - Condemnation Law and Procedure (Taking Possession Prior to Judgment)

You have already received the first 27 pages of the research study on Possession Prior to Final Judgment. Attached is a copy of the remainder of the study. We prepared the remainder of the study under considerable pressure in an effort to have it available for your consideration at the February meeting. We plan to reorganize the study to some extent after the meeting and to expand or delete portions of it. In connection with the problems discussed in this study, see generally Exhibit XVI (yellow) attached (Model Statute).

The following policy questions are presented by the study and the attached materials:

1. Condemnors authorized to take immediate possession; authorized purposes. See Study pages 33-37. See also Exhibit II (green) attached. Note the recommendation on pages 1-3 of Exhibit II. We think that this recommendation is a practical one that might be acceptable to all interested groups. Public agencies that now have the right of immediate possession will be concerned that such right is not preserved in the Constitution. Note that, under the recommendation, only public agencies have an absolute right to take for right of way or reservoir purposes. Private utility companies will have only a discretionary right, depending on the court's decision in weighing the need for immediate possession against the inconvenience to the property owner. Should the Public Utilities Commission be authorized to determine whether immediate possession is needed in private utility cases? Please read Exhibit II with care.

2. Right of property owner to compel condemnor to take possession prior to final judgment. See Study, pages 68-71. See Exhibits VII (white), VIII (pink), and X (green) attached.

3. Appeals, standards, and judicial discretion. See Study, pages 37-39. Note the first paragraph on page 38 (which could be included in the statute as a statutory provision), the language from the Commission's 1961 recommendation quoted at the bottom of page 38, and the provision of the Illinois statute quoted on page 39.

4. Preliminary determination of public use and necessity. See Study, pages 39-40. This, and most of the following subtopics parallel the Commission's study and recommendations in 1961, except that the earlier consideration was not directed primarily to change in the Constitution.

5. Preliminary determination of compensation. See Study, pages 41-43.

6. Procedure for obtaining order (ex parte or noticed motion). See Study, pages 44-48. This recommendation applies particularly to condemnors not now having the right to immediate possession.

7. Immediate possession of public utility property. See Study, pages 48-49. We propose to defer consideration of this until we study condemnation of public utility property generally.

8. Immediate possession distinguished from entry for survey, examination, or appraisal. See Study, pages 49-50.

9. Enforcement of orders for possession. See Study, pages 50-51.

10. Period of Notice to Condemnee. See Study, pages 52-55. See also the attached tables: California (gold) and National Summary (blue).

11. Interest in Immediate Possession Cases. See Study, pages 55-57. See also Exhibit I (pink) attached. Note the Illinois statute in footnote 154.

12. Withdrawal of Amount Deposited. See Study, pages 57-60.

13. Date of Valuation. See Study, pages 60-63.

14. Abandonment and Delay in Payment. See Study, pages 63-68. See also Exhibit VI (gold) attached.

15. Conforming provisions for immediate possession with those for possession pending appeal. See Study, page 72.

16. Constitutional Amendment. See Study, pages 26-27 for proposed constitutional amendment. See Memorandum 66-4 for a more detailed discussion.

Respectfully submitted,

Clarence B. Taylor
Special Condemnation Counsel

EXHIBIT I

U.S. DEPARTMENT OF COMMERCE
BUREAU OF PUBLIC ROADS
WASHINGTON, D.C. 20235

September 13, 1965

INSTRUCTIONAL MEMORANDUM 21-9-65
39-10

SUBJECT: Right-of-Way -- Partial Payments to Owners

A private property owner whose property has been acquired for rights-of-way on a Federal-aid project where Federal funds are participating in the cost of rights-of-way shall not be required to surrender physical possession of such property until payment of 75 percent or more of the fair market value as determined by the State review appraiser has been made available to the property owner without prejudice. Such payment could be made available to the property owner either by direct tender in negotiated acquisitions or by deposit into court in a condemnation case provided the condemnee has the right to draw against such deposit.

When under State law a deposit in court is based on a commission finding or similar determination of value rather than on the review appraiser's determination, if at least 75 percent of such amount is made available to the property owner the procedure will be considered to meet the requirements of this memorandum. Likewise, payment to a lienholder would be considered payment to the property owner. Where there is a title question that must be determined in court the partial or full payment must be available to such owners immediately after such determination if possession has already been taken.

Federal funds will not be available for reimbursement of any interest payments to the property owner after the date payment is made available to him, on the portion of the final settlement or award represented by such partial payment.

The division engineer may waive in advance the requirements of this memorandum upon an individual parcel basis provided the file is documented to show that such action is in the public interest.

If a State cannot meet the requirements of this memorandum because of lack of legal authority a fully documented showing to this effect should be submitted to the Administrator for consideration.

This memorandum shall become effective 90 days after issuance unless a different date is determined by the Administrator after review of the statement required by the preceding paragraph.

Rex M. Whitton
Federal Highway Administrator

EXHIBIT II

Condemnors Authorized to Take Immediate Possession; Authorized Purposes

Existing Law

Both the California Constitution and statutory law limit the public agencies which can obtain an order of immediate possession to "the State, or a county, or a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation."[9] A sanitary district has been held a "similar public corporation."[10]

By Constitution and statute, the purposes for which immediate possession may be taken are limited to "right of way" and "lands to be used for reservoir purposes."[11] The court order authorizing immediate possession must reflect one of these purposes.[12]

Recommendation

It is recommended that all public entities be authorized to take immediate possession for right-of-way or reservoir purposes. This will make no great change in existing law since the constitutional grant of immediate possession authority now embraces almost all public agencies. In addition, it is recommended that all condemnors be authorized to take immediate possession in any other case in accordance with the immediate possession procedure if the court first determines after weighing the need for immediate possession against the inconvenience to the property owner, that immediate possession is necessary in the particular case.

If the changes in immediate possession procedures hereinafter recommended are adopted, this extension of the right of immediate possession will benefit both property owners and condemnors. Insofar as the condemnor is concerned, the right to take immediate possession permits it to follow an orderly and

systematic program of property acquisition and project construction. Under present economic conditions, with ever-rising costs of labor and material, delays in commencing a project reflect themselves in the increased cost of the public improvement which cost is, in turn, reflected in increased taxes. Moreover, since so many of our modern public improvements are financed by bond issues, the inability to take immediate possession may cause inability to meet the bonding requirements and, consequently, may not only retard but completely prevent the construction of the improvement. Often under bonding provisions, delay in the construction of the improvement increases already heavy interest rates even before the construction has begun. To avoid an undue delay in the acquisition of one essential parcel, the condemnor may be forced to pay the owner of that parcel far more than the property is worth and far more than the owners of the surrounding property received. For these reasons and the reasons indicated elsewhere,[13] the right of immediate possession should be available to all condemnors in appropriate cases.

In view of the protections afforded the condemnee by existing law and the additional protections hereinafter recommended, the taking of immediate possession will frequently benefit him as well as the condemnor. Upon commencement of the condemnation proceedings, a landowner is deprived of many of the valuable incidents of ownership. He cannot receive any compensation for improvements to the property made after that time. He is precluded, as a practical matter, from selling or renting the property, for few persons wish to purchase a law suit. Yet, no compensation is given for these inconveniences. Moreover, in the usual case, the condemnee is deprived of any increase in the value of his property occurring after the commencement of the proceeding, for the condemnation award is ordinarily based on the

value of the property on that date. In addition, because his property is being taken, he must seek out and purchase new property to replace it and prepare to move. At the same time, he must incur the expenses attendant upon litigating the condemnation action. While these expenses must be incurred whether immediate possession is taken or not, the landowner receives no compensation under existing law until after the trial of the case or the conclusion of the litigation unless immediate possession is taken. If he has no available funds to meet these expenses, the landowner may be forced to settle for an inadequate amount in order to relieve the immediate economic hardship caused by the condemnation action.

Where immediate possession is taken, however, the existing statutory law assures that the condemnee will have available to him an amount fixed by the court as the probable compensation that will be paid in the eminent domain proceeding. This enables the condemnee to go to trial on the issue of value, if he wishes, and still receive sufficient funds to obtain other property while awaiting trial. Condemnees without substantial assets other than the condemned property have found this to be of great assistance in meeting the problems that arise when property is condemned. If the condemnee does not need the money immediately, he may decline to withdraw the amount deposited as the probable compensation; in this case, he is compensated for the use of his property by the condemnor by interest on the final condemnation award computed at the rate of seven percent from the date on which immediate possession was taken.

For these reasons, the taking of immediate possession frequently will benefit the property owner. To further insure that he will receive such benefits, it is hereinafter recommended that the condemnor be <u>required</u> to take immediate possession upon request of the property owner even if the condemnor does not elect to do so on its own initiative.

EXHIBIT VI

RICHARD L. RIEMER
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December 28, 1965

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Attention: Mr. John H. DeMoully
Executive Secretary

Dear Mr. DeMoully:

I have your letter of December 22, 1965, requesting instances wherein existing statutes seem to be inadequate in connection with particular situations in the Eminent Domain field. While I am presently engaged in trial and perhaps with more thought will come up with additional problems, one problem has been apparent to me for a considerable period of time and it would appear to me that legislation of some sort is necessary.

As you are, of course, aware, our present statutes permit the condemning agency in certain situations to take immediate possession of property in order to initiate construction of the public improvement. It is also provided in Section 1255a of our Code of Civil Procedure that subsequent to the trial of a condemnation case, the condemnor has the right, be he dissatisfied with the verdict, to abandon the project. It has been my experience in two or three instances to find a distinct problem existing because of the authority given to the condemning agency in these two separate areas.

In one case that I can readily bring to mind, immediate possession was taken by the county of a portion of an abandoned railroad right of way running down the center of a divided highway. The county had in gaining possession initiated construction of the improvement and in fact graded and placed paving on the property being acquired so as to complete a traffic plan. Subsequent to the trial, it was determined that the price established by the jury was beyond the means of the agency, and the county was faced with the necessity of abandoning its acquisition. It would appear from an examination of the existing statutes that there are no provisions whatsoever to compensate the property owner for the damages which have accrued to his property independent of the filing of an action in inverse condemnation.

A similar situation existed in connection with an acquisition by the City of Los Angeles in the San Fernando Valley area where a strip of property was being acquired along the highway for the purpose of acting as an access road to a proposed reservoir. Subsequent to the city acquiring immediate possession to the access way, it was discovered that the reservoir property was unsuitable for such purpose, and as a consequence the action was abandoned. In the interim, the property owner had sold the remainder of the property and was now left with a narrow strip of property along the highway suitable for no use whatsoever.

An even more drastic situation occurred in Riverside County where a developer was in the process of improving a parcel of property with a golf course. The public agency determined that it would acquire a portion of the property and took immediate possession after filing an action in condemnation. As a result of the acquisition by the public agency, the property owner was required to completely redesign his golf course, and it was not until long after the golf course itself had been completed that the condemnation case was tried with the result that the public agency, being dissatisfied with the jury verdict, decided to abandon the acquisition. The property owner was now left with a parcel of property adjacent to his golf course having no access whatsoever to it, and having no use for it.

It would appear that situations such as those set forth above will occur with increasing regularity when one considers today's rising markets. It is suggested that as an alternative Section 1255a providing for the right of abandonment be amended to eliminate that right in actions where immediate possession has already been taken by the public agency. As an alternative, it might be possible to adopt a rule similar to the Federal Statutes and provide for a passing of title concurrently with possession. This, of course, would result in the same waiver of the right of abandonment by the public agency.

I trust that the suggestions set forth above might be brought to the attention of the Commission for their consideration.

Very truly yours,

Richard L. Riemer

RICHARD L. RIEMER

RLR/hs

EXHIBIT VII

HAROLD W. KENNEDY
COUNTY COUNSEL

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MARTIN PETER SHERMAN
DEPUTIES

December 15, 1965

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Re: DATE OF VALUATION
IMMEDIATE POSSESSION

Dear Mr. DeMoully:

It will not be possible for a representative of this office to attend the December meeting of the Law Revision Commission. For this reason, we wish to express our views with respect to the above two topics which were discussed at the November meeting.

DATE OF VALUE

We have reviewed the letter of the Department of Public Works dated March 13, 1961, treating Date of Valuation in eminent domain cases. We firmly support the position taken by the Department of Public Works in that letter. We believe that People vs. Murata, 55 Cal. 2d 1, should be sustained as the law. We believe that this opinion is well reasoned and establishes a desirable public policy. If counsel for property owners in condemnation trials know that they can get a later date of value by inducing the trial court to permit the introduction of evidence not properly admissible, such counsel will have every incentive to try to do so. Either the plaintiff will not appeal and the property owner will have the benefit of having the jury consider improper evidence obviously introduced to sustain a high value, or the plaintiff will appeal with the resulting consequence that a different and later date of value would prevail even though the plaintiff might succeed in establishing that defendant had introduced error. These would be

the alternatives in the event that the Murata rule is not retained. It is not a sufficient argument in favor of replacing the current date of filing as the date of value with the date of possession as the date of value to say that the plaintiff can take possession under Code of Civil Procedure Section 1254 if it intends to appeal and thus reduce to a minimum the postponement in the date of value. Code of Civil Procedure 1254 does permit the plaintiff to take possession after trial and still retain its right to appeal. Nevertheless, Section 1255(b), subsection 2, requires the plaintiff to pay interest at 7 percent on the ultimate award from the date it takes possession. Thus assuming the case where the defendant has caused error and the plaintiff appeals and actually establishes that fact and the case is sent down for retrial, the property owner would have benefited by his own error by achieving a date of value approximately one year later (using possession as date of value and assuming condemnor takes possession pursuant to CCP 1254 before appealing) and obtaining interest at 7 percent on the award in addition thereto from the date of possession. We believe that the Law Revision Commission should not provide such incentives to property owners' counsel to go to the edge of propriety in the submission of evidence in the trial of condemnation cases.

We, therefore, submit that the rule in People vs. Murata should be retained. If any change is deemed desirable, it would be acceptable to this office to condition the retention of the original date of value upon the bringing of the matter to trial within a stated period of time from the date of the appellate decision granting the new trial, the original date of trial to be so maintained unless the delay in bringing the matter to trial again is caused by the condemnor, in which event the date of trial should be the date of value.

IMMEDIATE POSSESSION

The Office of the Los Angeles County Counsel would offer no opposition to an extension of the right of immediate possession provided that any such extensions would be statutory. We feel that the constitutional provisions with respect to immediate possession should remain intact.

We submit that the condemning agency should retain discretion with respect to whether or not it should take immediate possession. The cost to the public at 7 percent interest, which runs under current law from the date of possession, is a substantial cost factor which should not be imposed upon the public if the condemning agency cannot use that possession in the best interest of the public.

In the event that the Commission might deem it desirable to allow a property owner to require the condemnor to take possession, then as a correlary of such change in present law, the condemnor should be empowered to require the condemnee to withdraw the money deposited to secure the Order of Immediate Possession. Perhaps the law could be drafted to provide that in the event the condemnee obtains an order requiring the condemnor to take possession that in such event no interest would be payable on the deposit to secure the order. We feel that such provisions would balance the equities between the legitimate public interest in holding the line on the cost of public improvements and the legitimate interest of some defendants in obtaining a sum of money approximately equivalent to the value of their property prior to the final determination of the valuation of the property.

Very truly yours,

HAROLD W. KENNEDY
County Counsel

By Terry C. Smith
Terry C. Smith
Deputy County Counsel

TCS:mzs

cc: Mr. David B. Walker
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August 27, 1965

California Law Revision Commission
Room 30 Crothers Hall
Stanford University
Stanford, California 94305

Attention: Mr. John H. DeMoully
Executive Secretary

Condemnation Law and Procedure

Dear Mr. DeMoully:

Your circular letter of July 20 has been referred to me. I apologize for this somewhat tardy response, but I do appreciate your including this office on your mailing list appropriate to this subject. I would be pleased to receive and review the proposed tentative studies which are anticipated in this field. For sometime I have felt that the California Statutory Law appropriate to the field of Eminent Domain was in need of rather substantial revision.

Your letter solicits suggestions relative to matters which might be included in the study outline. Your tentative outline appears to be all-inclusive, however, I would suggest one further matter be included for further consideration, that being the matter of condemnation of buildings under construction. To expand on this more fully, I have experienced instances where a property owner who contemplates development of a parcel of property receives some informal unofficial notification that some portion or all of his property may be required for some public use. The property owner may or may not have committed himself by contract or otherwise to proceed with the project and is thus placed in the quandary of should he proceed with the construction with the attendant possibility that the condemnation action is thereafter initiated before the construction is completed or elect the alternative of halting the project or construction, with the attendant risk of

breach of contract actions by the contractor, financing agency, etc. I feel that some provision should be made in the laws for this situation and on the one hand the property owner protected from such a dilemma, and on the other hand, the public saved from having to purchase a newly constructed building where efficient prior planning and notification would have prevented this situation from arising.

I am looking forward to receiving the tentative studies anticipated under this program.

Very truly yours,

Stephen W. Hackett

SWH/cjb

EXHIBIT X

LAW OFFICES OF
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SAN JOSE 13, CALIFORNIA

HARD V. BRESSANI
(1894-1959)

GERALD B. HANSEN
CLARENCE J. SHUH
RICHARD B. BLOS

December 28, 1965

Mr. John R. DeMoully, Executive Secretary
California Law Revision Commission
Room 30, Caruthers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

In response to your circular letter of December 22nd requesting comments relative to condemnation law and procedure, we reply as follows:

As attorneys representing condemnees in about fifty or sixty trials during the last twelve years and settling an additional equal number during that period, we address ourselves to the questions proposed to condemnees' attorneys.

1. Does the existing law provide just compensation, and, if not, what examples can be given of specific instances where compensation has been inadequate as a result of the existing statutory or case law?

No, the existing law does not provide just compensation in all cases. Specific instances of this inadequacy is as detailed in the appelate report of the case, namely Town of Los Gatos vs. Sund, 1965, 234 A.C.A. 25 at 26, namely: 1. cost sum $5,100.00, of moving personal property used in the business; 2. cost of the option of purchase of new site; 3. appraisal fees (for the new site); 4. architect's fees on new site; 5. interest and loan fees on the interim financing and construction of improvements on the new site; 6. additional management cost; 7. increased insurance cost; 8. advertising cost for new location (which is an out-of-pocket expression of permanent loss of non-transferrable good will); 9. accountants and legal fees.

(The State Bar has made part of its legislative program amendment to CCP 1248 to require payment for the reasonable cost of moving personal property, loss of non-transferrable good will of any business and such other transition costs reasonable under all of the circumstances, and also condemnees reasonable appraisers and attorneys fees). The permissive statutory relief given by amendments to S & H code (section 103.8) and Government code 15950 allowing $200.00 for a family moving and $3,000.00 for a business concern moving in freeway and water acquisitions, does not change the law. This is not a right that can be enforced in court since the departments are only "authorized" to make these payments.

While volumns have been written on the meaning of "just compensation" with reference to these incidental or consequential damages, I think that it all boils down to the fact that in our law the concept of "market value for the property taken" was set forth as the measure of evaluating what was to be compensated for. The statement of the "fair market value rule" was never intended to act as an exclusion of consideration of other losses which did not literally come within the meaning of the property being taken. The measure of the subject matter mistakenly and illogically became to be assumed as the exclusive definition of what was to be compensated for. The measure and the subject matter became confused. Historically the courts became so used to talking of fair market value for the property taken as the rule, they found themselves trapped by the literary mistake they originally made. When most condemnations in this country were cow pastures, the rule was adequate.

The commission has in the past called the same situation the in rem in personam dichotomy. Nothing could be truer. When the courts want to give compensation they emphasize the loss to the owner, and when they wish to deny compensation they say that compensation need only be paid "for the property taken". Logic is out the window. In the Sund case supra, the Supreme Court refused to hear the case although our petition thoroughly developed the concept stated. We didn't get a vote, but we got a lot of sympathy letters from attorneys and the State Bar has taken action.

The appellate opinion in the Sund case hit its high point of logic at page 28 by stating "the compensation is 'for the property, and not the owner'." which is an expression of the in rem concept and which in rem concept followed to its logical conclusion would deny severance damages to an owner, for the condemnor does not acquire any property interest on the land which suffers a diminution in value although not taken. At the other end of the scale we have Kimball Laundry Co. vs. U. S. wherein the Supreme Court said that the Army had to include in its compensation for the temporary occupation for a term of years of a going laundry, the fair market value of the "customer lists" which the laundry route drivers serviced! This is the in personam view starting in with the concept of what was lost to the owner.

We think our experiences show that the fair market value is an eminently fair measure for evaluation. Too bad the rule on the measure became the rule as to what was to be measured.

2. Do the present procedures for taking immediate possession result in serious problems for persons occupying land?

No, the problems are smaller ones such as a rampaging contractor who never obeys the theoretical temporary construction easements provided for and does much damage on condemnees adjoining land. A separate suit, of course, is necessary to recover against this contractor and it usually isn't worth it. One cannot recover directly from the condemnor who has hired this independent contractor. The other problem

on immediate possession is that sometimes the condemnor is so anxious to get in that they inadequately plead the nature of the easement they seek. For instance in a case currently in the pre-trial stage, the complaint read solely for a "perpetual easement". No mention was made whether this was for a water pipe line, railroad train or freeway. The complaint was brought by the Department of Water Resources, but we had to guess at the terms of the easement and here they have installed a pipeline and we still don't have any definition of the respective rights into the easement area. Little questions remain unanswered such as whether or not we can cross this easement with a public street vehicle. One of their amendments said we could cross it with vehicles smaller than "rototillers". This case is People vs. Cataldi, Santa Clara County No. 153595.

3. Is the existing procedure for apportionment of the award between landlord and tenant satisfactory?

Yes, but often surprising to the landlord that the tenant is entitled to its bonus value.

4. Has injustice resulted in cases where a condemnation proceeding is abandoned?

I've never had a client who was so lucky. If that did happen, at least he could get attorney's and appraiser's fees. If it goes to trial, and judgment, these fees are not compensable. Does this make sense?

5. Have problems arisen where buildings or other improvements are being constructed at the time the summons is served in the condemnation proceeding?

Not to any extent except valuation problems. I could imagine a case however where a building is condemned just before the roof is put on before the rainy season. Under present law the owner couldn't get compensation for putting the roof on. If the condemnor didn't have the right to immediate possession, the condemnor might be unhappy. Presumably a condemnation of a building under construction is for purposes of removing those improvements. I have a case of that now where suit was filed and summons served right after the foundations of several houses were poured. Our subdivider from whom our clients purchased, had conformed to a freeway line as established by the state and public authority in the form of an unofficial plan line. This, of course, is not binding on the state and when building began, the state then widened its right-of-way and condemned by suit.

This does raise the problem of an official plan line and unofficial plan line. An official plan line is adopted by legislative act and prohibits construction of improvements within an area and is constitutionally justified as a precursor of the exercise of emminent domain or a constitutional or unconstitutional requirement of dedication. Only if a change of zoning use which would reasonably

justify the improvement is undertaken, is this constitutional. Otherwise where a normal, presently permitted, that is, presently zoned use, is sought to be undertaken and improvements put into the area covered by the plan line, we have a denial of use based upon a legislative act which is a precursor to emminent domain. If the sole justification in this situation is the emminent domain power, is not the legislative declaration of it a function of the emminent domain power requiring just compensation? It is a legislative declaration of a negative building easement by means of inverse condemnation in our opinion.

The law in this area is sparse and needs refinement. What few cases there are upon the subject sidestep the issue, and sometimes an attack has been made upon these as being unconstitutional which only gives them greater stature when they survive.

6. Has the distinction between real and personal property created serious problems?

No, not serious problems although we did have the problem once of an order of condemnation being signed after judgment on a cherry orchard, immediately before the cherries were to be picked, when the valuation date on the real property was earlier, presumably without any or little value in the crop. We insisted on behalf of our client, and argued successfully by analogy to the law of emblements, that since the term of the prior occupant was terminated by operation of law, that the law implied the occupant's right to stay on or re-enter for the purpose of removing those crops since they were "fructus industriales" and not "fructus naturales". That case was Sunnyvale School District vs. D'Arrigo Bros. Co. of California. There was another case where our State Highway Department obtained an order of immediate possession and its contractor went through an orchard just before harvest time and utterly destroyed a crop, and it was worth $9,600.00 (after harvesting and delivery). That case was People (State Highway) vs. Borello. That could pose some nice questions.

7. Has the effect of general knowledge that a public improvement is likely created serious problems for landowners in the area where the public improvement is likely to be constructed?

Most definitely. This is an extremely important consideration in solving the valuation problem. We roughly refer to it as the dead hand of condemnation reaching over an area in which the improvement is someday going to be installed and scaring potential purchasers off (thereby reducing actual market values below fair market value). We have successfully argued and obtained instructions at the Superior Court level that no enhancement of value should be put on the property arising out of the advance knowledge of the public improvement and that similarly no depression in market values shall be attributed to the subject property by reason of the advance

knowledge, but that the jury should view the value of the property as though it was always available free of the threat of condemnation in the area. People don't like to buy lawsuits even when the law is fair. The Continuing Education of the Bar Handbook has a similar but not thorough instruction in this regard. There is no appellate nor statutory law on this however. A clear instance of how advance knowledge of public improvement does away with market activity except to lower prices is the installation of Bayshore Highway from Palo Alto down through San Jose within the last fifteen years. Everybody knew that this was being made a wider freeway and people just would not buy adjoining parcels for fear of being involved in a healthy lawsuit. Market sales were quite active away from the freeway but nobody would touch the freeway land generally speaking.

I happen to have on my desk at the moment by coincidence another aspect of this problem. Where a freeway route in East San Jose (680) proceeds easterly and touches Jackson Avenue, there was a subdivision which was laid out with the approval of county authorities and the state version as of then where the freeway was going to go. The lots backed onto the freeway. There were several years delay in subdividing the property becasue of the uncertainty of the freeway location. Everyone thought it was settled. The builder began to pour foundations, and the state changed its design lines and has cut through five or six lots and is taking those lots with the foundations being poured. Incidentally, for years I have gotten a kick out of the maps furnished by the State Highway Department, insofar as they, in the middle of litigation, furnish us maps with a big stamp on them "incomplete plan for design study". They can change their mind even after a verdict has come in prior to the final order of condemnation, subject to re-trying the case. In the meantime we have the burden of proof on valuation.

8. Do condemnors offer a fair amount for the property prior to commencing the condemnation proceeding?

No. Neither subjectively nor objectively do condemnors offer a fair amount before condemnation or in the early stages, after condemnation is filed. I believe this is for the following reasons: A. Right-of-way agents in the initial stages are bound by appraisals made by appraisers who are employed on a mass production basis for the condemnors. The right-of-way agent is trying to do what he considers a good job for his principal, which means to get the property as cheaply as he can short of grand larceny. B. Some right-of-way agents are often personally and subjectively unfair insofar as they do not even offer the extent of the state or condemnor appraisal. C. Condeming authorities usually do not pay their appraisers enough to permit them to look into complicated matters thoroughly enough to even formulate a position with reference to take value and particularly severance problems. Even if they did pay them enough, these appraisers have less objectivity about them than counsel at the trial.

Objectively, in approximately 98% of the cases which I have either tried, settled or had knowledge of, the condemnor has ended up paying anywhere from 15% to 125% more. As I had occasion to point out to you in a letter on another matter, the freeway that is going through Stanford also goes through St. Joseph's Seminary and Maryknoll College south of Stanford. We represent them. The state's offer commenced at $425,000.00 for the forty-five acres involved and this price, according to them, included severance damages. For close to a year and up to one week before trial while we were working incessantly on the case, they were adamant at that figure. On Friday before the Monday the jury was to be impaneled to try the case, they finally realized we meant business and in three jumps met our final demand and the case was settled for $947,250.00. The condemnor has an obligation to be closer to the correct figure.

With reference to the questions posed to the condemnor's side, we know no specific instances of serious problems on the questions you raised, and we would like to comment that we have never noticed any actual limitations on condemnors in acquiring property for future use. Most of the acquisitions are made under legislative resolutions passed by two-thirds vote which become conclusive of the stated need for immediate use, and this cannot be challenged beforehand nor years later if the improvement is not put in. I see no objection to giving the power to condemn for a future use, when the condemnation now is sought to prevent the encroachment of improvements in the area such as a particular neighborhood, or within an official or unofficial plan line, or just to take care of future park needs. With reference to the matter of "recognition of benefits to the remaining portion of a parcel" I would affirmatively state that the doctrine of special benefits is legally and logically correct. Properly viewed, severance damages, which is the difference between the before and after value of the remainder, already considers the affect of all benefits, general and special. Properly arrived at, severance damages already has taken from it, special benefits. To require a separate statement of special benefit carries the risk of a double deduction.

The distinction between general and special benefit is very well taken. While the definition of special benefit generally states that it is a benefit which inures in some way to the parcel being taken and possibly immediately adjoining parcels as opposed to a benefit to the entire area, or the community generally, and some degree of indefinitiveness is inherent therein, this is a necessary rule so that if in fact a new road does "open up an area for better access to downtown" where all those landowners directly or indirectly are paying their gasoline taxes and other taxes and are entitled to this general benefit to the area, we must not pick out again the poor condemnee and have this general benefit charged against him when it is being given to his neighbor who is not fortunate enough to be a party to a lawsuit. I would prefer a clarification of the definition of special benefit to reflect the principle that if the alleged benefit is not in someway being charged against a similarly situated neighbor, it should not be charged against the condemnee. Everybody pays taxes.

Mr. John R. DeMoully December 28, 1965

While the practice of condemnation law is pretty much a specialty, although admittedly a wide assortment of general practioners handle the cases, I do think that law students should have some exposure during law school to the practice aspect of condemnation. Most of the injustice that you are trying to cure comes about from the lack of skill of practioners in bucking condemnors. When I was at Stanford we had some outside lectures on patents and copyrights, and it was a helpful period. I think the students should get a few lectures on condemnation.

I hope we have given you specific instances that would be of interest to the commission. Please feel free to call upon us in any regard as we tremendously appreciate the work of the commission and yourself.

Very truly yours,

BRESSANI AND HANSEN

By _____
G. B. Hansen

GBH/bw

EXHIBIT XVI

[From: Study and Act Relating to Vesting of Possession Before Payment in Eminent Domain Proceedings, Univ. of Chicago Law School, Law Revision Studies, No. 1 (1956), substantially enacted as Ill. Rev. Stat. 1957, Ch. 47, §§ 2.1-2.16]

AN ACT TO AUTHORIZE THE TAKING OF REAL PROPERTY BEFORE JUDGMENT IN AN EMINENT DOMAIN PROCEEDING

Section 1. Motion for Taking During Proceeding. In any proceeding under the provisions of "An Act to provide for the exercise of the right of eminent domain," approved April 10, 1872, as amended, the petitioner, at any time after the petition has been filed and before judgment is entered in the proceeding, may file a written motion requesting that, immediately or at some specified later date, the petitioner either be vested with the title to, and be authorized to take possession of and to use, the real property (or a specified portion thereof) which is the subject of the proceeding; or only be authorized to take possession of and to use such property, if such possession and use, without the vesting of title, are sufficient to permit the petitioner to proceed with the project until the final ascertainment of compensation. The motion for taking shall state: (a) an accurate description of the property to which the motion relates; (b) the formally adopted schedule or plan of operation for the execution of the petitioner's project; (c) the situation of the property to which the motion relates, with respect to such schedule or plan; and (d) the necessity for taking such property in the manner requested in the motion. If the schedule or plan of operation is not set forth fully in the motion, a copy of such schedule or plan shall be attached to the motion.

Section 2. Notice and Hearing.

(a) The court shall fix a date, not less than five (5) days after the filing of such motion, for the hearing thereon, and shall require due notice to be given to each party to the proceeding whose interests would be affected by the taking requested, except that any party who has been or is being served by publication and who has not entered his appearance in the proceeding need not be given notice unless the court so requires, in its discretion and in the interests of justice.

(b) At the hearing, if the court has not previously, in the same proceeding, determined that the petitioner has authority to exercise the right of eminent domain, that the property sought to be taken is subject to the exercise of such right, and that such right is not being improperly exercised in the particular proceeding, then the court first shall hear and determine such matters. The court's order thereon shall be a final order, and an appeal may be taken therefrom by either party within thirty (30) days after the entry of such order, but not thereafter unless the court, on good cause shown, shall extend the time for taking such appeal. However, no such appeal shall stay the further proceedings herein prescribed unless the appeal is taken by the petitioner, or unless an order staying such further proceedings shall be entered either by the trial court or by the court to which such appeal is taken.

(c) If the foregoing matters are determined in favor of the petitioner and further proceedings are not stayed, or if further proceedings are stayed and the appeal results in a determination in favor of the petitioner, then the court shall hear the issues raised by the petitioner's motion for taking. If the court finds that reasonable necessity exists for taking the property in the manner requested in the motion, the court then shall hear such evidence as it may consider necessary and proper for a preliminary finding of just

compensation; and in its discretion, the court may appoint three (3) competent and disinterested appraisers as agents of the court to evaluate the property to which the motion relates and to report their conclusions to the court; and their fees shall be paid by the petitioner. The court then shall make a preliminary finding of the amount constituting just compensation.

(d) Such preliminary finding of just compensation, and any deposit made or security provided pursuant thereto, shall not be evidence in the further proceedings to ascertain finally the just compensation to be paid, and shall not be disclosed in any manner to a jury impaneled in such proceedings; and if appraisers have been appointed as herein authorized, their report shall not be evidence in such further proceedings, but the appraisers may be called as witnesses by the parties to the proceedings.

Section 3. Deposit and Order of Taking.

(a) If the petitioner shall deposit, with the clerk of the court, money in the amount preliminarily found by the court to be just compensation, and (unless the petitioner is the State of Illinois), in addition, at the petitioner's option, either shall deposit with the clerk a further sum of money equal to one-fourth (1/4) of such amount, or shall give such bond as the court may require to amply secure to the parties interested any additional compensation, interest, damages, costs, expenses, and attorney fees, which finally may be adjudged against the petitioner, the court shall enter an order of taking, vesting the title to the property in the petitioner (if such vesting has been requested, and has been found necessary by the court) at such date as the court shall consider proper, and fixing a date on which the petitioner is authorized to take possession of and to use the property.

(b) If, at the request of any interested party and upon his showing of undue hardship or other good cause, the petitioner's authority to take possession of the property shall be postponed for more than ten (10) days after the date on which the title thereto vests in the petitioner, or more than fifteen (15) days after the date of entry of such order when such order does not vest title in the petitioner, then such party shall pay to the petitioner a reasonable rental for such property, the amount thereof to be determined by the court. A writ of assistance, injunction, or any other appropriate legal process or procedure shall be available to place the petitioner in possession of the property on and after the date fixed by the court for the taking of such possession, and to prevent any unauthorized interference with such possession and the petitioner's proper use of the property.

(c) If any interested party shall establish that the damaging or destruction of any building or other structure on the property, prior to the viewing thereof by the jury, would substantially impair such party's ability to prove the fair value of such building or structure, the court may order the petitioner not to damage or destroy such building or structure until the jury shall have completed its viewing thereof. However, such jury view shall be conducted as soon as practicable, and the court may rescind its order relating to damaging or destruction if undue delay is caused by any interested party.

(d) At any time after the order of taking has been entered and before final judgment is entered, the court may require the petitioner (except the State of Illinois) to file a new or additional bond, when necessary for the purpose of maintaining ample security

for the parties interested as specified herein.

Section 4. Withdrawal of Deposit by Interested Party. At any time after the petitioner has taken possession of the property pursuant to the order of taking, if an appeal has not been and will not be taken from the court's order described in Section 2(b) of this Act, or if such an appeal has been taken and has been determined in favor of the petitioner, any party interested in the property may apply to the court for authority to withdraw for his own use his share (or any part thereof) of the amount preliminarily found by the court to be just compensation, and deposited by the petitioner in accordance with the provisions of Section 3(a) of this Act, as such share shall have been determined by the court. The court then shall fix a date for a hearing on such an application, and shall require due notice of such application to be given to each party whose interests would be affected by such withdrawal. After the hearing, the court may authorize the withdrawal requested, or such part thereof as shall be proper, but upon the condition that the party making such withdrawal shall refund to the clerk of the court, upon the entry of a proper court order, any portion of the amount so withdrawn which shall exceed the amount finally ascertained in the proceeding to be just compensation (or damages, costs, expenses, and attorney fees) owing to such party. The court shall not authorize the withdrawal of any portion of the amount deposited by the petitioner under the provisions of Section 3(a) of this Act, which is in excess of the amount preliminarily found by the court to be just compensation.

Section 5. Effect on Final Ascertainment of Compensation. Neither the petitioner nor any party interested in the property, by taking any action authorized by this Act, shall be prejudiced in any way in contesting, in later stages of the proceeding, the amount to be finally ascertained to be just compensation.

Section 6. Payment of Interest. The petitioner shall pay, in addition to the just compensation finally adjudged in the proceeding, interest at the rate of six per cent (6%) per annum upon:

(a) Any excess of the just compensation so finally adjudged, over the amount deposited by the petitioner in accordance with the provisions of Section 3(a) of this Act, from the date on which the parties interested in the property surrendered possession of the property in accordance with the order of taking, to the date of payment of such excess by the petitioner.

(b) Any portion of the amount preliminarily found by the court to be just compensation and deposited by the petitioner, to which any interested party is entitled, if such interested party applied for authority to withdraw such portion in accordance of Section 4 of this Act, and upon objection by the petitioner (other than on grounds that an appeal under Section 2(b) of this Act is pending or contemplated), such authority was denied; interest to be paid to such party from the date of the petitioner's deposit to the date of payment to such party.

When interest is allowable as provided in Subsection (a) of this Section, no further interest shall be allowed under the provisions of Section 3 of "An Act to revise the law in relation to the rate of interest and to repeal certain acts therein named," approved May 24, 1879, as amended, or any other enactment.

Section 7. Refunding of Excess. If the amount withdrawn from deposit by any interested party under the provisions of Section 4 of this Act exceeds the amount finally adjudged to be

just compensation (or damages, costs, expenses, and attorney fees) due to such party, the court shall order such party to refund such excess to the clerk of the court, and if refund is not made within a reasonable time fixed by the court, shall enter judgment for such excess in favor of the petitioner and against such party.

Section 8. Dismissal or Abandonment by Petitioner. After the petitioner has taken possession of the property pursuant to the order of taking, the petitioner shall have no right to dismiss the petition or to abandon the proceeding, as to all or any part of the property so taken, except upon the consent of all parties to the proceeding whose interests would be affected by such dismissal or abandonment.

Section 9. Restoration to Interested Parties. If, on an appeal taken under the provisions of Section 2 of this Act, the petitioner shall be determined not to have the authority to maintain the proceeding as to any property which is the subject thereof, or if, with the consent of all parties to the proceeding whose interests would be affected, the petitioner dismisses the petition or abandons the proceeding as to any such property, the trial court then shall enter an order revesting the title to such property in the parties entitled thereto, if the order of taking vested title in the petitioner; requiring the petitioner to deliver possession of such property to the parties entitled to the possession thereof; and making such provision as shall be just, for the payment of damages arising out of the petitioner's taking and use of such property, and also for costs, expenses, and attorney fees as provided in Section 10 of "An Act to provide for the exercise of the right of eminent domain," approved April 10, 1872, as amended; and the court may order the clerk of the court to pay such sums to the parties entitled thereto, out of the money deposited by the petitioner in accordance with the provisions of Section 3(a) of this Act. If the amount so deposited shall be insufficient to make such payments, any security provided by the petitioner may be subjected thereto, and if such security also is insufficient or if none exists, judgment for the deficiency shall be entered against the petitioner.

Section 10. Additional Right. The right to take possession and title prior to the final judgment, as prescribed in this Act, shall be in addition to any other right, power, or authority conferred by the laws of this State under which eminent domain proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such other right, power, or authority.

The following table is based on information provided by the California Department of Public Works to the United States Bureau of Public Roads.

TABLE I. -- ADVANCE NOTICE, TO PERSONS DISPLACED 1/ FOR SELECTED INTERSTATE HIGHWAY PROJECTS 2/ DURING THE PERIOD OCT. 23, 1962 THROUGH MAR. 31, 1964, OF THE DATE POSSESSION OF REAL PROPERTY WOULD BE REQUIRED--CALIFORNIA

ITEM	IDENTIFICATION OF HIGHWAY PROJECTS BY PROJECT NO. AND NEARBY CITY	AMOUNT OF ADVANCE NOTICE					
		31 DAYS OR LESS	32 TO 90 DAYS	91 TO 179 DAYS	180 TO 365 DAYS	MORE THAN 1 YEAR	TOTA
1. INDIVIDUALS AND FAMILIES:	11972 - Oakland						
URBAN AREAS:							
A. OWNERS		0	0	20	33	106	164
B. NONOWNERS		0	12	20	34	46	112
C. TOTAL (OWNERS AND NONOWNERS)		0	12	40	72	152	232
RURAL AREAS:							
A. OWNERS	122691 - San Ramon	0	0	2	11	5	18
B. NONOWNERS		0	1	0	2	0	3
C. TOTAL (OWNERS AND NONOWNERS)		0	1	2	13	5	21
ALL AREAS:							
A. OWNERS		0	0	22	49	111	182
B. NONOWNERS		0	13	20	36	46	121
C. TOTAL (OWNERS AND NONOWNERS)		0	13	42	85	157	303
2. BUSINESSES (OTHER THAN FARMS) & NONPROFIT ORGANIZATIONS:	11972 - Oakland						
URBAN AREAS:							
A. OWNERS		1	6	7	11	24	49
B. NONOWNERS		2	3	2	2	10	19
C. TOTAL (OWNERS AND NONOWNERS)		3	9	9	13	34	68
RURAL AREAS:							
A. OWNERS	122691 - San Ramon	0	0	0	2	1	3
B. NONOWNERS		0	0	0	2	0	2
C. TOTAL (OWNERS AND NONOWNERS)		0	0	0	4	1	5
ALL AREAS:							
A. OWNERS		1	6	7	13	25	52
B. NONOWNERS		2	3	2	4	10	21
C. TOTAL (OWNERS AND NONOWNERS)		3	9	9	17	35	73
3. FARM OPERATORS:	122691 - San Ramon						
A. OWNERS		0	0	0	0	1	1
B. NONOWNERS		0	0	0	2	0	2
C. TOTAL (OWNERS AND NONOWNERS)		0	0	0	2	1	3

1/ ALL LAWFUL OCCUPANTS CAUSED TO INCUR MOVING EXPENSES BECAUSE OF THE PROJECT, REGARDLESS OF TENURE.

2/ DATA IN THIS TABLE COVERS FOR EACH STATE ONE URBAN AND ONE RURAL INTERSTATE HIGHWAY PROJECT IN WHICH THERE WAS SUBSTANTIAL DISPLACEMENT DURING PERIOD 10-23-62 THROUGH 3-31-64. PROJECTS WERE SELECTED BY THE BUREAU OF PUBLIC ROADS TO PROVIDE A REPRESENTATIVE PICTURE OF THE TIME GIVEN DISPLACEES TO PLAN AND ACCOMPLISH THEIR MOVES.

TABLE II--ADVANCE NOTICE, TO PERSONS DISPLACED FOR SELECTED INTERSTATE HIGHWAY PROJECTS[2] DURING THE PERIOD OCT. 23, 1962 THROUGH MAR. 31, 1964, OF THE DATE POSSESSION OF REAL PROPERTY WOULD BE REQUIRED--NATIONAL SUMMARY

ITEM	IDENTIFICATION OF HIGHWAY PROJECTS BY PROJECT NO. AND NEARBY CITY	AMOUNT OF ADVANCE NOTICE					
		31 DAYS OR LESS	32 TO 90 DAYS	91 TO 179 DAYS	180 TO 365 DAYS	MORE THAN 1 YEAR	TOTAL
1. INDIVIDUALS AND FAMILIES:							
URBAN AREAS:							
A. OWNERS		54	1,156	1,168	336	307	3,023
B. NONOWNERS		60	825	542	138	196	1,761
C. TOTAL (OWNERS AND NONOWNERS)		114	1,983	1,710	474	503	4,784
RURAL AREAS:							
A. OWNERS		35	259	165	109	24	592
B. NONOWNERS		21	87	53	50	1	212
C. TOTAL (OWNERS AND NONOWNERS)		56	346	218	159	25	804
ALL AREAS:							
A. OWNERS		89	1,417	1,333	445	331	3,615
B. NONOWNERS		81	912	595	188	197	1,973
C. TOTAL (OWNERS AND NONOWNERS)		170	2,329	1,928	633	528	5,588
2. BUSINESSES (OTHER THAN FARMS) & NONPROFIT ORGANIZATIONS:							
URBAN AREAS:							
A. OWNERS		2	55	140	35	29	261
B. NONOWNERS		9	104	38	14	21	186
C. TOTAL (OWNERS AND NONOWNERS)		11	159	178	49	50	447
RURAL AREAS:							
A. OWNERS		0	20	25	11	1	57
B. NONOWNERS		0	16	0	4	0	20
C. TOTAL (OWNERS AND NONOWNERS)		0	36	25	15	1	77
ALL AREAS:							
A. OWNERS		2	75	165	46	30	318
B. NONOWNERS		9	120	38	18	21	206
C. TOTAL (OWNERS AND NONOWNERS)		11	195	203	64	51	524
3. FARM OPERATORS:							
A. OWNERS		1	17	50	11	2	81
B. NONOWNERS		0	0	10	2	0	12
C. TOTAL (OWNERS AND NONOWNERS)		1	17	60	13	2	93

1/ ALL FAMILY OCCUPANTS CAUSED TO INCUR MOVING EXPENSES BECAUSE OF THE PROJECT, REGARDLESS OF TENURE.

2/ DATA IN THIS TABLE COVERS FOR EACH STATE ONE URBAN AND ONE RURAL INTERSTATE HIGHWAY PROJECT IN WHICH THERE WAS SUBSTANTIAL DISPLACEMENT DURING PERIOD 10-23-62 THROUGH 3-31-64. PROJECTS WERE SELECTED BY THE BUREAU OF PUBLIC ROADS TO PROVIDE A REPRESENTATIVE PICTURE OF THE TIME GIVEN DISPLACEES TO PLAN AND ACCOMPLISH THEIR MOVES. (IF A STATE HAS NO INTERSTATE URBAN PROJECT MEETING THESE REQUIREMENTS, SUBSTITUTE A PRIMARY PROJECT MEETING THE REQUIREMENT.)