36.55 6/16/69

Memorandum 69-74

Subject: Study 36.55 - Condemnation (Arbitration)

Attached are seven letters that comment on this tentative recommendation. In addition to these letters, we note below other comments not reproduced as exhibits.

General reaction to recommendation

The reaction to the tentative recommendation was mixed. The position of the State Bar Committee on Governmental Liability and Condemnation is reported to us as follows:

> "(18) The Committee agreed by a vote of 6 yes and 3 no re LRC Tentative Recommendation relating to Condemnation Law and Procedure No. 2, "Arbitration of Just Compensation," that the LRC recommendation re arbitration be disapproved."

No further information is provided by the State Bar Committee in support of its views. However, the best argument in opposition to the tentative recommendation is stated by Mr. Huxtable in Exhibit III (green). Generally, Mr. Huxtable believes that "over zealous representatives of public agencies will use the agreement to arbitrate as a device to discourage unrepresented property owners from employing either an attorney or an appraiser, to waive their right to a jury trial, to consent to an apportionment of costs which otherwise could only be imposed on the condemning agency." He further states:

> I firmly believe that this law, if enacted, will require most condemnation lawyers to become experts in actions brought to rescind agreements to sell and arbitrate on the grounds that such were fraudulently obtained by over zealous right-of-way agents or were contracts of adhesion signed by property owners who thought they were only agreeing to an alternative procedure without forfeiture of legal rights in a judicial proceeding.

Mr. Huxtable believes that the tentative recommendation presents many problems and again urges as a solution his suggestion that a three judge tribunal procedure be established to be applicable in cases where the property owner is willing to limit his maximum recovery and waive a jury trial. He states: "I believe that such a procedure would fulfill many of the purposes intended by your arbitration proposal, would not be dependent upon the agreement of both parties, and would provide a remedy for many small claimants who do not now get a chance for a judicial review of the condemning agency's appraisal."

Gerald B. Hansen, San Jose attorney, in Exhibit IV (gold) urges that no recommendation should be made to the Legislature in this area. He believes that arbitration generally is bad in any field of law and would be particularly bad in eminent domain cases. He devotes three single-spaced pages to justifying his position.

The tentative recommendation was approved as drafted by the County of San Diego. Se Exhibit I (pink). Earl A. Radford (who represents the Shell Oil Company) (Exhibit II-yellow) also approved the tentative recommendation. James Vizzard (Exhibit VII - white), a member of the California Trial Lawyers Association Eminent Domain Committee believes that the tentative recommendation is a step forward in the field of eminent domain and does not suggest any changes in the reommendation. However, he believes that some form of jurisdictional offer is the only system that will permit a just result in cases where the value of the property is not very great and the condemnee is offered an unduly low price. Mr. Richard L. Desmond, Sacramento Attorney, states in Exhibit V (blue) that in some instances the tentative recommendation might be beneficial. It is important to note that both Mr. Radford and Mr. Desmond indicate that

their approval of the tentative recommendation is not to be considered an approval of a compulsory arbitration system.

The California Real Estate Association (Exhibit VI) states: "We applaud the concept of the proposal to establish this optional or alternative method to be ranked with negotiation and with eminent domain as a means of determining just compensation in the taking of property for public purposes." At the same time, the Association believes that significant changes must be made in the proposed statute in an "attempt to equalize the parties in their dealings with each other." This latter point is a matter of concern to some commentators who objected to the tentative recommendation. The most significant suggestion of CREA is that the property owner should be permitted to have the matter submitted to arbitration even though the condemnor does not agree.

In the course of our research, we came across an article which was reprinted in the RIGHT OF WAY Journal for June 1969, by permission of the Institute of Real Estate Management. The article was originally presented in speech form with a time limit and is generally critical of eminent domain law. We will reproduce the article and send you a copy. As far as arbitration is concerned, the following is extracted from the article:

> 3. When acquisition time arrives the property owner should be given three choices:
>
> A. Accept the offer of the agency if he is satisfied that gain [sic] market value is being paid.
>
> B. Submit to arbitration where the agency appraiser would act as the agency representative. The owner would hire an appraiser to represent him and the two appraisers would select a mutually agreeable third appraiser who would act as the neutral party. The agency would pay all costs of their appraiser, the owner would pay all costs of their expert and the costs of the third would be shared equally by the two parties. Both would be bound by the arbitrators decision. This

would be faster, cheaper and more equitable for all parties than would actual litigation. There should be a reasonable time limit imposed to elect this method, say 60 days after the agency offer is first made.

C. If the owner is not satisfied with the offer and does not believe in arbitration he could elect to allow the matter to proceed to jury trial.

By having these alternatives available the property owner has a reasonable means of litigating through arbitration which is, in most cases, cheaper and faster than a jury trial. This would protect the small owners who are not arguing about wide value differences.

It is apparent that significant revisions are needed in the tentative recommendation if one that would be acceptable is to be devised. Assuming that the Commission concludes that the concept of arbitration offers sufficient promise to justify further attention, the following is an analysis of the various specific suggestions made by the persons who commented on the tentative recommendation.

Specific suggestions

Right of property owner to compel condemnor to submit matter to arbitration. The California Real Estate Association suggests that the property owner should have a right to compel the condemnor to arbitrate the amount of just compensation. See Exhibit VI. For another approach along the same lines, see the staff suggestion concerning the appointment of a panel of arbitrators by the Chief Justice made in Memorandum 69-66 (item 8 on Agenda for June 27). Another alternative would be to establish an Eminent Domain Review Board which would hear cases in various parts of the state and would function like a small claims court. The decision of the Board could be limited to an award not less than the offer of the condemning agency and could be made final as far as the property owner

is concerned. The condemnor could be given a right to a trial de novo in the Superior Court with the property owner having a right to avoid such trial by accepting the amount of the offer. A modest fee, such as $250, could be required to be paid by the property owner to obtain a hearing by the Board and the Board could have the responsibility of rendering a fair decision whether or not the property owner is represented by counsel or presents any witnesses. In other words, the Board would have the responsibility of appraising the property and the attorney for the condemnee could cross-examine the experts for the condemnor to determine whether the appraisal on which the offer is based is a sound appraisal. Hearing officers who were qualified as appraisers could be used in small cases. Consideration also should be given to the suggestion of Mr. Huxtable that special condemnation courts be established. It does not appear, however, that such courts would help the property owner in a case where $12,500 is offered for a $15,000 house and the owner's equity in the house is only $3,000.

It is suggested that the matter of compulsory arbitration be kept in mind as a concept that may have some merit but that the tentative recommendation should, for the present at least, be limited to merely authorizing the submission of the amount of just compensation to arbitration.

Section 1273.01

CREA suggests that the definition of "person" is somewhat awkward. The staff suggests that Section 1273.01 be revised to read:

> 1273.01. As used in this chapter:
> (1) In the case of a public entity, "person" refers to the particular department, officer, commission, board, or governing body authorized to acquire property for public use on behalf of the public entity.

(2) "Public entity" includes the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State.

Section 1273.02

As previously noted, CREA believes that the property owner should have a right to compel the condemnor to arbitrate the amount of just compensation. In connection with the arbitration procedure, consideration should be given to the suggestion made by Mr. Hanford which is quoted from his article under the heading "general reaction."

Binding effect of agreement

Mr. Huxtable states that he does not believe that any provision authorizing agreements to arbitrate should, as a matter of public policy, preclude a property owner who subsequently employs an attorney from being released from the effect of that agreement prior to determination by the arbitrator. He is concerned primarily, but not exclusively, with the possibility that some of the costs of the arbitration proceeding might be imposed on the property owner.

CREA takes basically the same position--that the acquiring agency should pay the costs of the arbitration proceeding in every case--and, lacking this requirement, believes that the proposed legislation should provide "if the agreement is executed by the property owner without benefit of counsel that he be advised of the desirability to consult counsel and given three days following execution of the agreement to rescind after consultation with counsel."

The staff believes that the cost problem should be considered on its own merits and the proper rule provided. Assuming that this problem is met directly by providing that the costs of the arbitration proceeding are to be borne entirely by the condemnor (not including attorney and expert witness fees of the property owner) the Commission might nevertheless wish to permit a property owner who was not represented by counsel at the time the arbitration agreement was executed to rescind the arbitration agreement at any time before the arbitrator has commenced the hearing subject to the requirement that the property owner reimburse the public entity for any expenses it has incurred in connection with the arbitration proceeding and subject to the limitation that all issues in the case other than the right to and amount of compensation are waived by the property owner.

Appointment of arbitrators

The County of San Diego notes:

> We are particularly interested in insuring that the number and method of selection of arbitrators in a case are such that the interests of both parties would be protected. Adequate safeguards appear to exist in the present arbitration provisions (Section 1281.6).

Section 1281.6 of the Code of Civil Procedure provides:

> If the arbitration agreement provides a method of appointing an arbitrator, such method shall be followed. If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator.
>
> When a petition is made to the court to appoint a neutral arbitrator, the court shall nominate five persons from lists of persons supplied jointly by the parties to the arbitration or

obtained from a governmental agency concerned with arbitration or private disinterested association concerned with arbitration. The parties to the agreement who seek arbitration and against whom arbitration is sought may within five days of receipt of notice of such nominees from the court jointly select the arbitrator whether or not such arbitrator is among the nominees. If such parties fail to select an arbitrator within the five-day period, the court shall appoint the arbitrator from the nominees.

CREA expresses concern as to the manner of selecting the arbitrators but concludes that there is little than can be done to meet the problem:

> Obviously, the implementation of this proposed statute in the public interest would be greatly affected by the quality of the arbitrators selected in these proceedings. Here again the equality and knowledge of the parties is a point. While it is probably inappropriate to attempt to specify in the statute any standards or guidelines for the selection of arbitrators, it is possible that the property owner should at least be advised to consult counsel on this point before selection of an arbitrator from a panel which might be suggested by the acquiring agency.

Mr. Huxtable is also concerned as to the manner of selection of the arbitrators and makes the following comment and suggestion:

> One reason why I believe that experienced condemnation attorneys would not allow their clients to consent to arbitration is a method by which arbitrators are appointed under Section 1281.6 of the Code of Civil Procedure. I do not feel it appropriate in a condemnation case, that the judge would be permitted to nominate arbitrators from a list compiled by a governmental agency. Secondly, I do not feel it appropriate that the parties should have no opportunity to object to one or more of the nominees. If the arbitration act becomes applicable to condemnation cases, I believe that Section 1281.6 should be amended so as to preclude the court's nomination of arbitrators from lists compiled by governmental agencies; and, in single arbitrator situations, to permit each side to file objections to as many as two of the five names nominated by the court. In cases where the agreement calls for more than one arbitrator, the number of names to be nominated by the court would be enlarged so the total number of names is at least six greater than the number of arbitrators to be appointed and each side would have the rights to object to as many as three of the persons nominated by the court.
>
> I feel that the objection procedure is necessary since I observe that many persons are convinced that there is a commitment to concepts of value on the part of others in the

field, whether those other perons be attorneys, appraisers, or judges. It would be very regretable if an attorney advising a client as to whether or not he should sign an agreement to arbitrate, were unable to give him any absolute assurance that the deck could not be "stacked against him."

The staff believes that the manner of selection of the arbitrators may present a problem. However, the problem is basically the same as the problem presented under the uninsured motorist statute or the arbitration of fire damage under a fire insurance policy. Those who dislike arbitration can always point out deficiencies in the process.

Number of arbitrators

Mr. Radford (Exhibit II) believes that in most instances there should be three arbitrators. Mr. Huxtable (Exhibit III) takes the same view. Further, he fears that, if a single arbitrator is not suspected of being biased, he will most likely be inexperienced. The number of arbitrators is, of course, a matter for agreement by the parties and it would not, the staff believes, be desirable to require that there be three arbitrators.

Section 1273.03

CREA suggests that this section be clarified. The staff suggests that the section be revised to read:

> 1273.03. Where property is already devoted to a public use, the person authorized to convey such property for another public use or to compromise or settle the claim arising from a taking of such property for another public use may enter into an agreement to submit, and submit to arbitration in accordance with the agreement, any controversy as to the compensation to be received in connection with the conveyance or claim.

Section 1273.04

There was a great deal of criticism directed to this section. Mr. Huxtable believes that, as a matter of public policy, the arbitration

agreement should not be permitted to impose the costs of the arbitration proceeding, or any portion of those costs, on the property owner. CREA makes in substance the same suggestion. The staff believes that there is considerable merit to the suggestion. As pointed out by the commentators in the attached exhibits, the costs of the arbitration proceeding could be substantial. Accordingly, the staff suggests that Section 1273.04 be revised to read:

> 1273.04. (a) Notwithstanding Section 1284.2, the person acquiring the property shall pay all of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or expert witness fees or other expenses incurred by other parties for their own benefit.
>
> (b) An agreement authorized by this chapter may require that the person acquiring the property pay reasonable counsel fees or expert witness fees, or both, to any other party to the arbitration. If the agreement requires the payment of such fees, the amount of the fees shall be a matter to be determined in the arbitration proceeding unless the agreement prescribes otherwise.
>
> (c) The person acquiring the property may pay the expenses and fees referred to in subdivisions (a) and (b) from funds available for the acquisition of the property or other funds available for the purpose.

Section 1273.05

There were no comments on this section.

Section 1273.06

CREA points out that the agreement might be one that makes it possible for the property owner inadvertently to bargain away the rights he possesses when an eminent domain proceeding is abandoned. In this connection, subdivision (c) of Section 1255a of the Code of Civil Procedure provides:

(c) Upon the denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their recoverable costs and disbursements. Recoverable costs and disbursements include (1) all expenses reasonably and necessarily incurred in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action and (2) reasonable attorney fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the defendant's interests in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action, whether such fees were incurred for services rendered before or after the filing of the complaint. In case of a partial abandonment, recoverable costs and disbursements shall include only those recoverable costs and disbursements, or portions thereof, which would not have been incurred had the property or property interest sought to be taken after the partial abandonment been the property or property interest originally sought to be taken. Recoverable costs and disbursements, including expenses and fees, may be claimed in and by a cost bill, to be prepared, served, filed, and taxed as in civil actions. Upon judgment of dismissal on motion of the plaintiff, the cost bill shall be filed within 30 days after notice of entry of such judgment.

We believe that there is merit to the objection and suggest that Section 1273.06 be revised to read:

1273.06. An agreement authorized by this chapter may specify the privilege, if any, of the party acquiring the property to abandon the acquisition, the arbitration proceeding, and any eminent domain proceeding that may have been, or may be, filed. Unless the agreement provides that the acquisition may not be abandoned, the party acquiring the property may abandon the acquisition, the arbitration proceeding,

and any eminent domain proceeding at any time not later than the time for filing and serving a petition or response to vacate an arbitration award under Sections 1288 and 1288.2. In event of abandonment of the proceeding after the arbitration agreement is executed, the party from whom the property was to be acquired is entitled to recover (1) all expenses reasonably and necessarily incurred in preparing for the arbitration proceeding, during the proceeding, and in any subsequent judicial proceedings in connection with the arbitration proceeding and (2) reasonable attorney fees, appraisal fees and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect his interest in connection with the acquisition of the property. Unless the agreement otherwise provides, the amount of such expenses and fees shall be determined by arbitration.

Section 1273.07

CREA suggests a procedure that it believes would simplify the problem dealt with in this section:

> It is our belief that this procedure could be simplified by eliminating the necessity of recording the entire agreement and providing instead for recording a notice of pending arbitrations similar to a lis pendens and at the time of abandonment or conclusion of the arbitration a filing of a notice of abandonment or a recital in the conveyance to terminate the notice and clear the record title.

It is possible under existing law to record a "notice" of a lease, contract, option or other lengthy document if the notice is acknowledged and otherwise in proper form. It might be desirable, however, to revise this section to specify that a prescribed "notice" of the arbitration and sale agreement may be recorded.

Exchange of valuation information

CREA suggests:

> May we suggest that the proposed statute also incorporate by reference the provisions of Sections 1272.01 et seq. of the Code of Civil Procedure relating to exchange of information in eminent domain proceedings and make them applicable to the arbitration proceeding. We believe the rights extended by those provisions should be available in an arbitration proceeding and that this should be stipulated.

Perhaps the parties should be permitted to specify in the agreement whether the exchange of valuation information procedure is to apply in the arbitration proceeding. There is no doubt that it would be of great value to have such an exchange in cases where both parties are represented by counsel and are presenting expert witnesses. However, there may be cases where the property owner merely is using the evidence produced by the witnesses for the condemnor to establish his case and does not present any experts of his own. Perhaps the arbitrators should be authorized to require an exchange of valuation information. It appears desirable to include some provision in the statute dealing with this matter.

Preparation and Distribution of Revised Tentative Recommendation

If the Commission determines to continue to work on this proposal, the staff believes that significant changes should be made in the tentative recommendation (as indicated above) and that a revised tentative recommendation should be distributed for comment. We suggest that the revised recommendation be prepared after the June 26-28 meeting, be distributed to members of the Commission for review, and after suggested revisions, if any, from members of the Commission have been taken into account, the revised recommendation should be distributed for comment. This procedure will permit the Commission to consider this matter at its October 1969 meeting and, at that time, a determination could be made whether to submit a recommendation to the 1970 Legislature.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 69-74

EXHIBIT I

County of San Diego

OFFICE OF

COUNTY COUNSEL

302 COUNTY ADMINISTRATION CENTER
SAN DIEGO, CALIFORNIA 92101

BERTRAM MC LEES, JR.
COUNTY COUNSEL

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DEPUTIES
DUANE J. CARNES
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JOSEPH KASE, JR.
LAWRENCE KAPILOFF
LLOYD M. HARMON, JR.
BETTY E. BOONE
PARKER O. LEACH
WILLIAM C. GEORGE
ROBERT B. HUTCHINS
JAMES E. SMITH
JOHN MC EVOY
ARNE HANSEN

June 2, 1969

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, CA 94305

Dear Mr. DeMoully:

Re: Condemnation Law and Procedure Number 2,
Arbitration of Just Compensation
Tentative Recommendation

We have reviewed the tentative recommendation of the California Law Revision Commission relating to arbitration of the amount of just compensation when property is acquired for public use. We are in agreement with the proposal. We do not have any comments for suggested changes. We note that under the proposal arbitration would be commenced in accordance with existing provisions of the Code of Civil Procedure, Section 1280, et seq.

We are particularly interested in insuring that the number and method of selection of arbitrators in a case are such that the interests of both parties would be protected. Adequate safeguards appear to exist in the present arbitration provisions (Section 1281.6).

Very truly yours,

BERTRAM McLEES, JR., County Counsel

By Donald L. Clark
DONALD L. CLARK, Deputy

DLC:KIG

36.55.3

Memo 69-74

EXHIBIT II

EARL A. RADFORD
ATTORNEY AT LAW

MADISON 6-7341

SUITE 610 SHELL BUILDING
1008 WEST SIXTH STREET
LOS ANGELES 17
CALIFORNIA

June 4, 1969

Subject: Tentative Recommendation
Condemnation Law and Procedure
Number 2 - Arbitration of Just
Compensation

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

Attention Mr. John H. DeMoully
Executive Secretary

Gentlemen:

I feel that your proposed recommendation relative to arbitration is acceptable provided (a) the procedure is entirely voluntary and (b) no limitation is placed on the type of agreement which the parties may enter relative to arbitration. In particular, I feel it would be highly advisable in most instances if the arbitration were conducted by three arbiters, only one of whom need be neutral, the decision of the majority of the three, however, to be binding.

At this time I believe that arbitration should be limited strictly to questions of valuation and should not cover such matters as what is or is not a fixture, whether access has been deprived or not, etc. It appears advisable to me that a procedure be set up in order that these matters might be handled by the court before the actual beginning of arbitration relative to value.

Yours very truly,

Earl A. Radford

EAR:mbc

Memo 69-74

EXHIBIT III

[redacted]

LAW OFFICES OF
O'NEILL, HUXTABLE & COSKRAN
ONE WILSHIRE BUILDING - SUITE 1212
LOS ANGELES, CALIFORNIA 90017
TELEPHONE (213) 627-5017

FRANCIS H. O'NEILL
RICHARD L. HUXTABLE
WILLIAM G. COSKRAN

LESLIE R. TARR
OF COUNSEL

April 18, 1969

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

Attention: John H. DeMoully, Executive Secretary

Re: Recommendation for Arbitration of Just Compensation in Condemnation Proceedings

Gentlemen:

I have received and reviewed your Recommendation No. 2 as revised March 26, 1969.

Although there is much to be said in favor of having the arbitration procedure available in determination of just compensation, I very sincerely doubt that it will be used in cases where both sides are represented by experienced attorneys and I fear that over zealous representatives of public agencies will use the agreement to arbitrate as a device to discourage unrepresented property owners from employing either an attorney or an appraiser, to waive their right to a jury trial, to consent an apportionment of costs which otherwise could only be imposed on the condemning agency.

I am further dismayed by the language in proposed Section 1273.05 that, "The effect and enforceability of an agreement authorized by this chapter is not defeated or impaired by contention or proof by any party to the agreement that the person acquiring the property pursuant to the agreement lacks the power or capacity to take the property by eminent domain proceedings."

I firmly believe that this law, if enacted will require most condemnation lawyers to become experts in actions brought to rescind agreements to sell and arbitrate on the grounds that such were fraudulantly obtained by over zealous right-of-way agents or were contracts of adhesion signed by property owners who thought they were only agreeing to an alternative procedure without forfeiture of legal rights in judicial proceedings.

I do not believe that any provision authorizing agreement to arbitrate should, as a matter of public policy, allow the acquiring agency to solicit the agreement of the property owner that the property owner would share in the cost of arbitration or which would preclude a property owner who subsequently employes an attorney from being released from the effect of that agreement prior to determination by the arbitrator.

One reason why I believe that experienced condemnation attorneys would not allow their clients to consent to arbitration is a method by which arbitrators are appointed under Section 1281.6 of the Code of Civil Procedure. I do not feel it appropriate in a condemnation case, that the judge would be permitted to nominate arbitrators from a list compiled by a governmental agency. Secondly, I do not feel it appropriate that the parties should have no opportunity to object to one or more of the nominees. If the arbitration act becomes applicable to condemnation cases, I believe that Section 1281.6 should be amended so as to preclude the court's nomination of arbitrators from lists compiled by governmental agencies; and, in single arbitrator situations, to permit each side to file objections to as many as two of the five names nominated by the court. In cases where the agreement calls for more than one abritrator, the number of names to be nominated by the court would be enlarged so the total number of names is at least six greater than the number of arbitrators to be appointed and each side would have the rights to object to as many as three of the persons nominated by the court.

I feel that the objection procedure is necessary since I observe that many persons are convinced that there is a commitment to concepts of value on the part of others in the field, whether those other persons be attorneys, appraisers, or judges. It would be very regreatable if an attorney advising a client as to whether or not he should sign an agreement to arbitrate, were unable to give him any absolute assurance that the deck could not be "stacked against him."

In practice, I have observed that certain public agencies will never waive a jury trial until they are absolutely certain of who the judge will be. I assume this is true, because there may be some judges who are not completely impartial as a result of some past experience with the public agency in question. This is one of the reasons why I believe

the agreement to arbitrate will not be used by condemning agencies unless there is a substantial benefit to be gained over and above the mere avoidance of jury fees or the "uncertainty" of jury verdicts.

I am also critical of the arbitration concept in that it would seem to perfer the single arbitrator mode of determination under Code of Civil Procedure Section 1282(a). In condemnation cases in particular, I believe in decision by pragmatic discussion after the advocate's arguments have been heard. There are many elements indicating the presence or lack of value, or the reality or speculative character of damages, that seem far-fetched to one judge yet quite real to another. I believe there should be at least three arbitrators so that the case is tested by discussion in the determinative process itself.

On February 20, 1969 I wrote to you a letter relating to your condemnation expense study. In that letter I made a suggestion relating to a three judge tribunal procedure which would be applicable in cases where the property owner was willing to limit his maximum recovery and would waive a jury trial. I believe that such a procedure would fulfill many of the purposes intended by your arbitration proposal, would not be dependent upon the agreement of both parties, and would provide a remedy for many small claimants who do not now get a chance for a judicial review of the condemning agency's appraisal.

Very truly yours,

RICHARD L. HUXTABLE

RLH:mc

April 23, 1969

Richard L. Huxtable, Esq.
One Wilshire Bldg., Suite 1212
Los Angeles, California 90017

Dear Dick:

We have received your letter of April 18, commenting on the tentative recommendation on arbitration of just compensation in condemnation proceedings.

The Commission has not made a definite decision on what additional methods should be provided as a remedy for small claimants. The main problem with your suggestion is that reliable estimates indicate that it costs approximately $300,000 yearly to establish and maintain one Superior Court judge and related personnel and facilities. We have not, however, completely rejected this idea, but will be talking about it at future meetings.

Your letter will be reproduced and brought to the attention of the Commission when the Commission considers comments on this proposal.

Sincerely,

John H. DeMoully
Executive Secretary

JHD:aj

Memo 69-74

EXHIBIT III

LAW OFFICES OF
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LESLIE R. TARR
OF COUNSEL

April 25, 1969

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

Attention: John H. DeMoully, Executive Secretary

Re: Recommendation for Arbitration of Just Compensation in Condemnation Proceedings

Dear John:

Thank you for your letter of April 23, 1969. I believe the economics you suggest is a compelling argument in favor of my belief that a substantial portion of the condemnation case load could be more efficiently disposed of by a specializing tribunal. At any given time you can find the time of at least five trial departments being consumed by condemnation cases in Los Angeles County alone. At least two such cases are on the jury trial calendar in Department 1 every day. I believe that a specializing tribunal could handle at least one-third of this case load and a similar proportion of case load of at least two or three other counties and still have enough time left over to hear numerous cases where the property owner, under present procedures, are economically squeezed out of the remedy to which the constitution says they are entitled.

My plan offers the additional incentive that it does not require constitutional amendment and is still not dependent upon both parties voluntarily accepting the procedure.

My primary objection to the arbitration suggestion is that if a single arbiter is not to be suspected of being bias, he will most likely be inexperienced. In such circumstances it will still cost just as much money and take just as much time to prepare for trial, educate the arbiter, and persuade him. Worst of all, if the arbiter's determination

favors either one of the parties, the other will suspect that he was denied a fair trial, and, if the determination is an obvious compromise, both will suspect that the arbiter abdicated his duty.

I have on several occasions, for one reason or another, waived a jury in a condemnation case and tried the issue of fair market value to a single judge. In only one such case where I was able to establish that the basic premise upon which the other side's witnesses had based their opinions was absolutely false, was the verdict one where all parties felt a just result was reached. In all other such cases the verdict was identified by one party or the other as a "gift of public funds" or a "confiscation of private property."

I have also represented many property owners who received compensation which was substantially less than that that they had hoped to recover. Where the determination was one of the multiple intellect of the jury, most have felt that, at least, they had had a fair trial.

In short, I feel that although we should strive to do justice, it is equally important that the people whose rights are adjudicated should believe that justice was fairly administered.

I also believe that you have completely failed to appreciate the probable cost of arbitration procedures. I have sat as an arbitrator for the American Arbitration Association, without compensation. I can only do so because the type of case they have asked me to hear are those that can be disposed of in one-half day or one day at a maximum. If I were asked to sit as an arbitrator in a case which would take five, or six or ten days to hear, I would be required to charge a substantial fee for those services. The arbitration association, through the levy of its fees and charges would have to recover its cost of administrative staff, and provision of hearing rooms and other facilities. It is my understanding that the fee charged for the filing of a petition for arbitration is already substantially higher than the fee charged for filing an action in the Superior Court.

Perhaps the obvious solution to the above is to assume that inexperienced, and perhaps unqualified arbitrators will be used and that the hearings will be heard in improvised surroundings.

All things considered, I can only conclude that a determination of fair market value that will be regarded as fair and just by all parties will have to be made by experienced and qualified persons in a dignified proceeding and that the only effective way to save money is to cut down the time that it will take for the case to be heard.

Very truly yours,

RICHARD L. HUXTABLE

RLH:mc

Memo 69-74

EXHIBIT IV

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GERALD B. HANSEN
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April 14, 1969

California Law Revision Commission
School of Law
STANFORD UNIVERSITY
Stanford, California 94305

Re: Comment on Tentative Recommendation Relating to Condemnation Law and Procedure Number 2 -- Arbitration of Just Compensation

Gentlemen:

We have reviewed your tentative recommendation revised through March 26, 1969.

Our comment is that no recommendation should be made by you to the Legislature in this area.

Our reasons are twofold:

a) The area of voluntary arbitration is not important enough to justify your spending time on it. Having handled hundreds of comdemnation matters, I do not know of any where any party would have wanted the additional burden of arbitration.

b) Arbitration is seldom a better procedure than the legal procedure, and quite often results in literally arbitrary results and horrendous miscalculations as to results. Some of the objections generally to arbitration in condemnation that we would have, of course, would apply more specifically to any attempt at an involuntary arbitration requirement, but likewise generally do have validity with reference to ~~in~~voluntary condemnation arbitration, insofar as an attorney who gets his client into an arbitration channel is often giving up the relative security and certainty of judicial proceedings for the uncertainty of procedure and result involved in arbitration. Some of these objections are as follows:

1) Past history has shown that there really is no big problem in relation to juries mishandling condemnation cases. It is the law itself which needs clarification and we need judicial proceedings in the trial courts to frame some of these problems for appellate termination. (Your time could be better spent in getting rid of the horribly unjust Symons rule, to the extent that it is not always overlooked in California.)

2) Arbitration remains to be a derogation of the adversary proceeding in its fullest extent; the strength of adjudication is the adversary proceeding. Too often arbitrators step in and take over this field.

3) If the main reason why this proposal is recommended is that there is some doubt as to the legal authority of the public entities to submit to arbitration, why is not the area of permissible arbitration expanded to include all types of law suits, controversies, etc., such as automobile accidents, tort claims, and everything else that the governmental entities are involved in?

4) Arbitration is derogation of due process of law. It is also in derogation of the common faith that attorneys, judges, scholars and impartial commissions should have in the process of adversary proceedings under a rule of law rather than a rule of convenience or lack of rule which is the characteristic of arbitration.

5) The uncertainty as to the contents of an arbitration agreement, which of course requires the agreement of parties on many different matters, is a matter which can and often does present a double burden to the parties involved. I presently have on my desk a difficult situation where we have finally, after much revision, agreed to a certain portion of a building contract to be arbitrated because it was a dispute. The basic building contract unfortuantely called for arbitration in the event of dispute. The building contract was for about $45,000, and

the area of dispute was agreed to be on their claim for about $3500. We'll have a separate arbitration on that. Now it's going to develop that there will be difficulties as to whether or not the other side will agree that interest runs on the remaining amount of money which supposedly is due. This is going to result in another dispute and a separate arbitration. We will only be able to get the second arbitration after applying to the court for the appointment of arbitrators because we simply will not be able to agree on what the issue is in the second arbitration. They won't even agree to submit all matters of possible dispute to arbitration.

6) Arbitration is inherently detrimental to the condemnee. It is difficult enough in a complicated legal rule area and complicated factual area, as is the nature of the complicated condemnation case, for the condemnee to sustain his burden of proof. Now when you add to that the fact that an arbitrator or a panel of arbitrators may try to follow legal rules, or try to follow them in part, or disagree amongst themselves as to what extent they would be followed, you have a very difficult presentation of areas of proof to guess upon ahead of time and to try and lay out, as well as undertaking the tremendous risk of confusion which only inures to your detriment so you have the burden of proof of not only proving the facts, but guessing what you're supposed to prove. Some condemnor conceivably could get an awful surprise in condemnation if he showed up at the hearing waiting for the condemnee to proceed with the proof, only to find out that he pulled an arbitrator who thinks that the condemnor should proceed, since he is the "plaintiff" and is the one who started the whole proceeding. So it may be both sides that have prepared to proceed with a full presentation of proof. Such is an additional waste of arbitration, resultant from the lack of pre-knowledge of what the rules are going to be.

It is respectfully submitted that the Commission spend its time on something more important.

Very truly yours,

Gerald B. Hansen

GBH:lc

Item 69-72 EXHIBIT V

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JOHN R. LEWIS, JR.

April 29, 1969

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

Gentlemen:

I have reviewed your recommendations relating to Condemnation Law and Procedure - Arbitration of Just Compensation.

As I analyze this, it simply creates the machinery to give the condemning authority the power to enter into contracts for arbitration. In some instances this might be beneficial, and if this is all that is intended by the legislation, I can see no real argument with it. If this is, however, an attempt to take the first step toward compulsory arbitration, then, of course, my reaction would be much different.

Yours very truly,

Richard F. Desmond

DESMOND, MILLER, DESMOND & WEST

RFD:bk

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CALIFORNIA REAL ESTATE ASSOCIATION
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EXECUTIVE OFFICES
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11th and L Building, Suite 503
Sacramento, California 95814
June 11, 1969

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

Subject: Arbitration of Just Compensation

Gentlemen:

The California Real Estate Association has reviewed with a great deal of interest the Commission's tentative recommendation on this subject in its revised form dated March 26, 1969. We applaud the concept of the proposal to establish this optional or alternate method to be ranked with negotiation and with eminent domain as a means of determining just compensation in the taking of property for public purposes. In our view the enactment of a statute as proposed would tend to have a beneficial effect of producing quicker decisions at less cost than the process of condemnation through court action and would tend to alleviate to some degree the concern of members of the public who for the first time in their lives are dealing with a public agency about pitting their fortunes against those of the state in litigation.

In evolving this alternate method, we believe that one prime consideration must be an attempt to equalize the parties in their dealings with each other. Obviously, it will not be possible to do so entirely.

In discussing condemnation, the Attorney General has said (51 Opns. Cal.Atty.Gen.50) that "the only choice available to an owner faced with the threat of eminent domain is to complete the transaction by settlement or trial. He does not have the choice of withdrawing fro the transaction. For this reason, the sale is involuntary whether

effected by deed or court order." While the proposal your Commission suggests does not alter that situation, it does provide another option in proceeding.

It is our hope, however, that the proposal can be modified in an attempt to further equalize the parties. For example, the draft of March 26 leaves the option entirely with the acquiring agency on whether the issue will be submitted to arbitration and, if it is, allows that agency to almost unilaterally establish the rules which will govern it including distribution of costs of the arbitration process. This is so because the acquiring agency can withdraw an offer to arbitrate and proceed by eminent domain if the prospects do not appear favorable to them or if the rules including specifications on distribution of costs are not as they desire.

The California Real Estate Association would agree that public entities generally have proceeded on the policy of weighing their responsibility to the property owner as well as to their employer in these situations. There are documented instances, however, when this has not been so. For example, see the report, "Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs" (December 22, 1964; Committee on Public Works; 88th Congress, Second Session; Print No. 31). That report presented documents showing conclusively a federal agency practice of offering approximately 75 percent of all property owners affected less than the agency approved appraisal of fair market value.

To turn then to specific comments on individual sections in your proposal:

1. Section 1273.01---definition of "person".

For reasons which will become more apparent in our discussion of the next section, we would propose that this definition be expanded to include all persons having the power of eminent domain (particularly see Civil Code 1001 and Code of Civil Procedure 1238). Further, we believe that the term "but refers" is awkward and would suggest other language, as for example, "and specifically extends."

2. Section 1273.02---arbitration authorized.

Here we believe is an area in which the proposal can be strengthened

by permitting the person from whom the property is to be acquired the right to demand arbitration and to provide that such demand shall not be unreasonably denied. In such a circumstance, the property owner should then have the right to petition the court for a determination of whether the agency unreasonably refused to arbitrate.

Since the purpose of allowing property to be taken for public use is solely for the benefit of the acquiring agency and not for the benefit of the property owner and since the option of instituting condemnation rests only with the public agency, it would seem to equalize the situation to some degree to permit the property owner to reasonably demand the arbitration process. Obviously, if this right is granted, it will be valuable only if the statute defines the type of agreement to be used, which will be discussed later.

3. Section 1273.03---takings of public property.

It seems to us that this section could be clarified to provide the authority to persons authorized to convey public property to another public agency for public use, to submit the matter of compensation to arbitration.

4. Section 1273.04---expenses of arbitration.

This section as proposed would in effect provide alternate means of dividing expense of arbitration. Under subsection (a) the parties could agree mutually to a division of the costs, while under subsection (b), it is stipulated that in the absence of agreement the acquiring agency shall pay all expenses not including attorney's fees of other parties to the arbitration.

Here we again come to the issue of the equality of the parties. It would be possible for the property owner to inadvertently bargain away the rights which he possesses under an eminent domain proceeding which are referred to in your comments, to recover his "taxable costs". (See "California Condemnation Practice", Continuing Education of the Bar, at page 349, et seq). If an unsophisticated property owner were presented with an arbitration agreement by a public agency right of way agent with the comment that the agreement was the standard form used by the agency, the property owner might not realize the alternate available to him for purposes of bargaining under the provisions of 1273.04 (b). Obviously also, if the property owner were to be given a right to demand arbitration as suggested in our

comments on Section 1273.02, above, that demand could be frustrated by the public agency's insistence on a disproportionate allocation of the costs of arbitration to the property owner.

We would suggest that the proposed subsection (b) be the only alternate provided in the statute or lacking this that if the agreement is executed by the property owner without benefit of counsel that he be advised of the desirability to consult counsel and given three days following execution of the agreement to rescind after consultation with counsel.

The question of what are appropriate taxable costs would, of course, be subject to determination by the arbitrator in his award.

5. Section 1273.05---effect and enforceability of agreements.

No comments under this section.

6. Section 1273.06---abandonment.

Here again the equality of the parties is at issue. The proposed section as in 1273.04 allows the parties to agree on the expenses to be awarded the property owner in case of abandonment but alternately states that he shall be entitled to all of his expenses including reasonable attorney fees "unless the agreement otherwise provides."

Again, we believe that a policy similar to the one we suggested under 1273.04 should be adopted here. Again, reference to the Continuing Education of the Bar study referred to above is useful.

7. Section 1273.07---recordation of agreements.

It is our belief that this procedure could be simplified by eliminating the necessity of recording the entire agreement and providing instead for recording a notice of pending arbitrations similar to a lis pendens and at the time of abandonment or conclusion of the arbitration a filing of a notice of abandonment or a recital in the conveyance to terminate the notice and clear the record title.

8. Section 15854 (Government Code)

No comment on this section.

9. Exchange of information.

May we suggest that the proposed statute also incorporate by reference the provisions of Sections 1272.01 et seq of the Code of Civil Procedure relating to exchange of information in eminent domain proceedings and make them applicable to the arbitration proceeding. We believe the rights extended by those provisions should be available in an arbitration proceeding and that this should be stipulated.

10. Selection of arbitrators.

Obviously, the implementation of this proposed statute in the public interest would be greatly affected by the quality of the arbitrators selected in these proceedings. Here again the equality and knowledge of the parties is a point. While it is probably inappropriate to attempt to specify in the statute any standards or guidelines for the selection of arbitrators, it is possible that the property owner should at least be advised to consult counsel on this point before selection of an arbitrator from a panel which might be suggested by the acquiring agency.

We appreciate the opportunity to submit our views with respect to this subject. Should there be any questions by the Commission, we would be happy to attempt to respond and will, in addition, be grateful for the opportunity to review the action and comments of the Commission as later drafts of this proposal are evolved.

Sincerely,

Dugald Gillies
Legislative Representative

DG/bl
cc: H. Jackson Pontius

Memo 69-74

EXHIBIT VII

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IN REPLY REFER TO:

May 22, 1969

California Trial Lawyers Association
California Law Revision Commission
School of Law, Stanford University
Palo Alto, California

Gentlemen:

At the request of the Chairman of the Eminent Domain Committee of the California Trial Lawyers Association, I have read and studied certain tentative recommendations to the law of eminent domain relating to arbitration of just compensation for the use of eminent domain to acquire by-roads, and a provision for alternative means for arbitration of eminent domain matters.

All of these suggestions appear to me to be a step forward in the field of eminent domain, and I would not have any further suggestion for modification or improvement of the statutory changes already suggested.

While it may not be germane to this particular letter, I still wish to stress the point that the very heart of improvement and correction of eminent domain legislation from the point of view of making it more fair and equitable to the property owner is to achieve legislation under which the condemnor will be required in its pleadings to set out a value of the property similar to the provision for a "jurisdictional offer" provided in a majority of states, and the further provision that in the event the condemnee goes to trial and obtains a better and higher result by some set percentage, whether it be 5% or 10%, the condemnor will then become additionally liable for reasonable attorneys' fees, reasonable costs of appraisal and other reasonable costs of the condemnee that cannot now be recovered by a cost bill.

Under the present system, many condemning agencies lose sight of the fact that the condemnee is not a wrongdoer in any

sense and is a taxpayer and usessuccessive appraisals as a means of obtaining a lower bargaining appraisal for use before a jury, and also utilizes public funds to prosecute actions under which the condemnee must face substantial and sometimes hazardous out-of-pocket expense if he has reason to believe that he is being coerced into accepting an unfair offer. This is particularly true where the value of the property is not very great so that the condemnee must sacrifice his property rather than meet legal expenses and heavy appraisal expenses which would not justify a trial, even though he had strong reason to believe he could corroborate his position that he is being offered an unduly low price for his property.

Yours very truly,

VIZZARD, BAKER, SULLIVAN, McFARLAND & LONG

By

JV:BB

cc: California Trial Lawyers Association
1020 12th Street
Sacramento, California 95814
Attention: Louis N. Desmond, Chairman
C.T.L.A. Eminent Domain Committee

36 Revised March 26, 1969

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

CONDEMNATION LAW AND PROCEDURE

NUMBER 2--ARBITRATION OF JUST COMPENSATION

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

NOTE: COMMENTS OF INTERESTED PERSONS AND ORGANIZATIONS MUST BE IN THE HANDS OF THE COMMISSION NOT LATER THAN JUNE 2, 1969, IN ORDER THAT THEY MAY BE CONSIDERED BEFORE THE COMMISSION'S RECOMMENDATION ON THIS SUBJECT IS SENT TO THE PRINTER.

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

CONDEMNATION LAW AND PROCEDURE

NUMBER 2--ARBITRATION OF JUST COMPENSATION

BACKGROUND

Section 14 of Article I of the California Constitution forbids the taking of property for public use "without just compensation having been first made to, or paid into Court for, the owner." The section also specifies that the compensation "shall be ascertained by a jury, unless a jury be waived, as in other cases in a Court of record, as shall be prescribed by law." When adopted in 1879, this language merely "confirmed" the condemnation procedure already set forth in Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure. The provisions of the Code, in turn, were not new. They were taken from one of California's earliest "railroad laws" with the sections being "only modified where necessary to give perspicuity, and to make them general or adaptable to all cases of condemnation."[1]

The imprint of these quaint origins of California condemnation procedure remains with us. For the most part, the taking of property for public use is still viewed from the rather limited vantage point of the courtroom and, more particularly, of the jury room. This is so much the case that the heart of the matter--compensation--is often discussed in terms of jury behavior and the fortunes and hazards of jury verdicts.[2]

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1. See the Code Commissioners' Note to Cal. Code Civ. Proc. § 1238.

2. For a discussion of the tactical positions of California condemnors and condemnees, and of the idiosyncracies of juries, see Recommendation and Study Relating to Evidence in Eminent Domain Proceedings, 3 Cal. L. Revision Comm'n Reports A-1, A-11 (1960).

A specific consequence of California's traditional "jury trial" approach to the law of eminent domain has been a marked lack of experimentation with other methods for determining "just compensation." The only exceptions to jury trial in California law are (a) the little-used procedure for determining the value of public utility property by the Public Utilities Commission;[3] (b) provisions for voluntary reference of the issue of compensation to "referees" in a few of the early improvement acts;[4] and (c) the provisions in the Code of Civil Procedure for factual determinations by referees in civil litigation generally.[5] In contrast, other jurisdictions have experimented extensively with alternatives to jury trial. At the time Rule 71a of the Federal Rules of Civil Procedure was adopted in 1951, throughout the United States there were more than 300 distinguishable procedures for assessing compensation in connection with the taking of property.[6]

In recent years, the idea has evolved that one practicable alternative to jury trial would be voluntary arbitration of the issue of compensation. It has been pointed out that arbitration can reduce the costs, delays, and ill will inherently associated with judicial proceedings and, at the same time, relieve the overburdened courts of a volume of jury cases that, at best, accomplish nothing more than the fixing of fair acquisition

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3. See Cal. Const., Art. XII, § 23a; Pub. Util. Code §§ 1401-1421.

4. E.g., The Street Opening Act of 1903 (Cal. Sts. & Hwys. Code §§ 4000-4443) and The Park and Playground Act of 1909 (Cal. Govt. Code §§ 38000-38213).

5. Section 1248 of the Code of Civil Procedure refers to the assessment of compensation by the "court, jury, or referee." The mention of "referees" alludes to Sections 638-645 which provide generally for referees and trials by referees.

6. See the notes of the Advisory Committee on Rules of Civil Procedure, 28 U.S.C. § 2070 (1952).

prices.[7] It has also been pointed out that voluntary arbitration is a flexible and adaptable procedure eminently suitable for the determination of valuation questions.[8] Although California has had no reported experience with arbitration in this connection, there appears to be a substantial interest in this alternative in other parts of the United States. Last year, the American Arbitration Association published a set of "Eminent Domain Arbitration Rules" in response to an expressed need for an efficient arbitration procedure adaptable to condemnation cases. Unfortunately, neither the issuance of those rules nor any other private activity can overcome the impediment that exists to arbitration of compensation in California. Under existing law, the obstacle to arbitration appears to be the lack of any clear authority on the part of governmental entities and agencies to submit the issue of compensation to arbitration. The hundreds of California statutes that authorize acquisition of property for public use do not contemplate that practice. The typical provision authorizes acquisition by purchase "or by proceedings had under

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7. See Latin, The Arbitration of Eminent Domain Cases, 14 Right of Way 57 (1967).

8. See Brundage, The Adaptation of Judicial Procedures to the Arbitral Process, 5 San Diego L. Rev. 1, 3 (1968):

> If there is a discernible trend toward greater formalism and legalism in the arbitral process, resulting from judicial and legislative sanction of arbitration, with a disposition to emphasize the reviewing powers of the courts rather than their circumscription, this is indeed an unfortunate turn of events. . . . [T]he arbitral process must remain fluid and flexible since it is consensual in origin and because its survival is dependent upon its effectiveness in serving the needs of the parties.

the provisions of title seven, part three, of the Code of Civil Procedure,"[9] and thereby seemingly compels resort to judicial proceedings.

Before 1961, an additional obstacle existed to arbitration. California judicial decisions had excluded valuations and appraisals from the coverage of the arbitration statute on the general grounds that they do not involve a "controversy" and, moreover, that the parties do not necessarily contemplate either a formal hearing or the taking of evidence.[10] In revising the California Arbitration Act in 1961, the Legislature took care to assure that enforceable arbitration agreements include "agreements providing for valuations, appraisals, and similar proceedings."[11] This express statutory approval of the arbitration of valuation questions, however, has not as yet generated any interest in the arbitration of condemnation cases.

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9. See, e.g., Cal. Civil Code § 1001. On the other hand, the only California statute that seems definitely to require judicial assessment of compensation is The Property Acquisition Law (Govt. Code §§ 15850-15866) which authorizes the State Public Works Board to acquire property for the general purposes of state agencies. See Govt. Code § 15854. That act, however, permits the board to agree with the owner as to the compensation to be paid and to incorporate that agreed figure in a stipulation in the condemnation proceeding (Govt. Code § 15857).

10. E.g., Bewick v. Mecham, 26 Cal.2d 92, 156 P.2d 757 (1945).

11. See Cal. Code Civ. Proc. § 1280. See also Recommendation and Study Relating to Arbitration, 3 Cal. L. Revision Comm'n Reports, G-1, G-34 (1961).

RECOMMENDATION

The Commission believes that voluntary arbitration of the issue of compensation can become a useful alternative to the rather awkward determination of that issue by jury trial. Certainly, there is nothing sacrosanct about jury-determined valuation figures or the process by which they are reached. Inasmuch as "value" is determined solely from the opinions expressed by expert witnesses and the owner, the amounts determined by professional arbitrators might be considered more "reliable" and might even prove more satisfactory in the long run to both condemnors and condemnees.

The Commission recognizes that voluntary arbitration is not "the answer" to the need for improvements in California condemnation procedure. Indeed, both condemning agencies and property owners may continue to display their traditional preference for jury assessment of compensation however clearly arbitration may be authorized and however practicable the arbitration process may be made to appear. Nonetheless, as long as resort to arbitration is authorized on a purely voluntary basis and the content of the arbitration agreement is left to the parties, arbitration might prove to be a valuable alternative to judicial proceedings notwithstanding that substantial changes may be made in both the substantive and procedural aspects of California's condemnation law. In short, the parties can be expected to adapt the terms upon which they are willing to arbitrate, and the particular content of their arbitration agreement, in accordance with those changes.

The Commission therefore recommends enactment of statutory provisions that will explicitly authorize California condemnors to submit the issue of compensation to arbitration. Public entities and agencies from whom property is taken should be given a similar authority. The legislation should leave the matter of the expenses of the arbitration to the parties, but public agencies should be clearly authorized to defray those expenses or their share of them. It should be made clear that agreements to arbitrate compensation are subject to, and enforceable under, the California Arbitration Act. In addition, the legislation should anticipate and resolve questions that might arise as to the effect of an agreement to arbitrate upon the condemnor's power to file an eminent domain proceeding, to abandon the acquisition, and the like. Lastly, the statute should authorize recordation of arbitration agreements as a means of preventing conveyance or encumbrance of the property without notice or being subject to the pending arbitration.

RECOMMENDED LEGISLATION

The Commission's recommendations would be effectuated by the enactment of the following measure:

An act to add Chapter 3 (commencing with Section 1273.01) to Title 7 of Part 3 of the Code of Civil Procedure, and to amend Section 15854 of the Government Code, relating to the acquisition of property for public use.

The people of the State of California do enact as follows:

Section 1. Chapter 3 (commencing with Section 1273.01) is added to Title 7 of Part 3 of the Code of Civil Procedure, to read:

CHAPTER 3. ARBITRATION OF COMPENSATION IN ACQUISITIONS OF PROPERTY FOR PUBLIC USE

Section 1273.01. "Person" defined; includes all entities, agencies, and officers authorized to acquire property for public use

1273.01. As used in this chapter, "person" includes all public entities, as defined in Section 811.2 of the Government Code, but refers to the particular department, officer, commission, board, or governing body authorized to acquire property for public use on behalf of the entity.

Comment. Chapter 3 is added to provide explicit authority for arbitration of "just compensation" in acquisitions of property for public use. The intention of the chapter is to make arbitration available as an alternative means of determining compensation in any case in which an eminent domain proceeding may be brought. Although various persons and corporations, especially public utility corporations, may take property by eminent domain (see Civil Code Section 1001 and Section 1238 of the Code of Civil Procedure), no authorization for these nongovernmental acquirers to arbitrate the matter of compensation is necessary. The definition of "person" in Section 1273.01 is therefore limited to "public entities" as encompassingly defined in Section 811.2 of the Government Code. However, condemnation authorization statutes, of which there are several hundreds, are not addressed, in many cases, to the "entity" on whose behalf the property is to be taken. With respect to the State of California, for example, authorizations to acquire property for various public purposes are conferred upon specific agencies, boards, and officers, such as the Department of Public Works, the Department of Water Resources, the State Public Works Board, and the Director of Aeronautics. Section 1273.01

makes it clear that the authority to arbitrate conferred by this chapter is bestowed upon these authorized acquirers and similar instrumentalities of local governmental entities.

Section 1273.02. Arbitration authorized; acquisitions of property for public use

1273.02. Any person authorized to acquire property for public use may enter into an agreement to submit, and submit to arbitration in accordance with the agreement, any controversy as to the compensation to be made in connection with acquisition of the property.

Comment. Section 1273.02 authorizes any acquirer of property for public use to agree to arbitrate the question of compensation and to act in keeping with the agreement. The following section confers a reciprocal authority upon any "person" from whom property is being acquired. See Recommendation Relating to Condemnation Law and Procedure: Number 2--Arbitration of Just Compensation, __ Cal. L. Revision Comm'n Reports 000 (19).

Addition of this authority does not imply that arbitration was not authorized, or was precluded, before enactment of this chapter. Neither does this chapter imply that public entities, agencies, and officers authorized to purchase, but not to condemn, property are not authorized to agree to arbitration. Rather, this chapter authorizes arbitration in connection with or in lieu of eminent domain proceedings and leaves unaffected any other cases in which arbitration may be available.

Section 1273.02 does not imply that the public entity must have complied with the formalities (such as the adoption of a formal condemnation resolution) commonly prescribed as conditions precedent to the commencement of an eminent domain proceeding. Rather, the section contemplates that the question of compensation may be submitted to arbitration whenever acquisition is authorized in the manner followed by the particular entity or agency in authorizing purchases of property. As the arbitration

agreement ordinarily would commit the public entity to purchase the property at the amount of the award (see Section 1273.06), the agreement should be approved and executed in the same manner as a contract to purchase property.

The term "compensation to be made in connection with acquisition of the property" is intended to encompass any amounts that may be assessed or awarded in a condemnation proceeding and, specifically, to include severance or other damages.

The term "controversy" is defined, for purposes of arbitration, in subdivision (c) of Section 1280.

Section 1273.03. Arbitration authorized; takings of public property

1273.03. Any person authorized to convey property for public use or to compromise or settle the claim arising from a taking of the property may enter into an agreement to submit, and submit to arbitration in accordance with the agreement, any controversy as to the compensation to be received in connection with the conveyance or claim.

Comment. Section 1273.03 extends the authorization provided by this chapter to include "persons" who own, hold, or control public property that may be taken by eminent domain proceedings. Public property may be taken by eminent domain proceedings whether or not it is already "appropriated to a public use" (see Sections 1240 and 1241), and intragovernmental condemnation proceedings are a rather common phenomenon. As is the case with Section 1273.02, Section 1273.03 encompasses all public entities, but refers to the particular agency, board, commission, or officer authorized to convey public property or to compromise or settle the claim for compensation that arises from its being taken.

Section 1273.04. Expenses of arbitration

1273.04. (a) Notwithstanding Sections 1283.2 and 1284.2, an agreement authorized by this chapter may:

(1) Provide for payment by either party or for apportionment of all expenses of the arbitration, including witness fees and other expenses (not including attorney fees) incurred by a party for his own benefit;

(2) Permit the arbitrator to award such expenses, or any portion of them, in favor of any party to the arbitration;

(3) Require the person acquiring the property to pay a reasonable attorney fees, to be determined in accordance with the agreement or by the arbitrator, to any other party to the arbitration.

(b) Unless the agreement otherwise provides, the person acquiring the property shall pay all expenses of the arbitration, not including attorney fees of other parties to the arbitration.

(c) The person acquiring the property may defray the expenses of arbitration, including attorney fees, from funds available for the acquisition of the property or other funds available for the purpose, and the person relinquishing the property may defray the expenses of arbitration from the award or from other funds available for the purpose.

Comment. Arbitration agreements typically provide for the payment or allocation of expenses incident to the arbitration, and such provisions are effective. See Olivera v. Modiano-Schneider, Inc., 205 Cal. App.2d 9, 23 Cal. Rptr. 30 (1962). If an agreement authorized by this chapter were patterned after the rule applicable to eminent domain proceedings,

the person from whom the property is being acquired would be entitled to recover all "taxable costs." See Oakland v. Pacific Lumber & Mill Co., 172 Cal. 332, 156 Pac. 468 (1916); City & County of San Francisco v. Collins, 98 Cal. 259, 33 Pac. 56 (1893). However, Section 1283.2 (a section of the general arbitration statute) seemingly requires each party to an arbitration to bear the witness fees and mileage of his own witnesses. Similarly, Section 1284.2 does not provide for the award of "expenses incurred by a party for his own benefit." Section 1273.04 permits the contracting parties to govern by their agreement the award of these items, as well as all other expenses of the arbitration, including the fees of arbitrators and professional arbitration associations. With respect to attorney fees, however, subdivision (a) permits only the person acquiring the property to undertake payment of the fees incurred by other parties to the agreement. For the remote eventuality in which the matter of expenses is not covered by the agreement, subdivision (b) provides that all expenses, exclusive of attorney fees, shall be discharged by the acquiring agency. Subdivision (c) is included to assure that any party to the agreement is authorized to defray expenses from the funds available for acquisition of the property, from the award, or from other funds available for the purpose.

Section 1273.05. Effect and enforceability of agreements

1273.05. Except as specifically provided in this chapter, agreements authorized by this chapter are subject to Title 9 (commencing with Section 1280) of this part. Such an agreement may be made whether or not an eminent domain proceeding has been commenced to acquire the property. If an eminent domain proceeding has been commenced or is commenced, any petition or response relating to the arbitration shall be filed and determined in the eminent domain proceeding. Notwithstanding Section 1281.4, an agreement authorized by this chapter does not waive or restrict the power of any person to commence and prosecute an eminent domain proceeding, including the taking of possession prior to judgment, except that upon motion of a party to the eminent domain proceeding, the court shall stay the determination of compensation until any petition for an order to arbitrate is determined and, if arbitration is ordered, until arbitration is had in accordance with the order. Unless the agreement otherwise expressly provides, the effect and enforceability of an agreement authorized by this chapter is not defeated or impaired by contention or proof by any party to the agreement that the person acquiring the property pursuant to the agreement lacks the power or capacity to take the property by eminent domain proceedings. Notwithstanding the rules as to venue provided by Sections 1292 and 1292.2, any petition relating to arbitration authorized by this chapter may be filed in the superior court in the county in which the property, or any portion of the property, is located.

Comment. Section 1273.05 makes it clear that, in general, agreements to arbitrate an issue of compensation are subject to the arbitration statute (Sections 1280-1294.2). See, in particular, Sections 1285-1288.8 (enforcement of the award) and 1290-1294.2 (judicial proceedings relating to the arbitration or the award). The section makes minor adaptive changes in the application of that statute to such agreements. The section also makes clear that an eminent domain proceeding may be begun and prosecuted notwithstanding an agreement to arbitrate the question of compensation. There are, of course, constitutional obstacles to any attempt to "contract away" the power to take property by eminent domain. There would appear to be no objection, however, to staying the determination of compensation in an eminent domain proceeding pending an agreed arbitration. That practice is provided for as to other arbitrations by Section 1281.4. This provision of Section 1273.05 may allay the fears of condemnors that entry into an agreement to arbitrate may impair or delay the condemnor's power to take the property or to take "immediate possession." If an eminent domain proceeding is pending, good sense dictates that any petition relating to the arbitration or award should be filed and determined in the eminent domain proceeding. The section also contemplates that, if an eminent domain proceeding is pending, the arbitration award, whether confirmed (see Section 1287.4) or not confirmed or vacated (see Section 1287.6) may be entered as the amount of compensation in the judgment of condemnation. See Cary v. Long, 181 Cal. 443, 184 Pac. 857 (1919); In re Silliman, 159 Cal. 155, 113 Pac. 135 (1911). The section makes it clear, however, that, unless the parties expressly agree to the contrary, an agreement to arbitrate and to purchase and sell at the amount of the award

is not impaired by any contention of either party that the acquirer lacks the power to take the property by eminent domain. Cf. People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967); Beistline v. City of San Diego, 256 F.2d 421 (9th Cir. 1958). The last sentence of the section permits judicial proceedings relating to the arbitration to be brought in the county in which the property lies, in addition to the other counties specified in Sections 1292 and 1292.2. This additional venue corresponds with the rule as to venue for eminent domain proceedings. See Section 1243.

Section 1273.06. Abandonment of acquisition; consequences of abandonment

1273.06. An agreement authorized by this chapter may specify the privilege, if any, of the party acquiring the property to abandon the acquisition, the arbitration proceeding, and any eminent domain proceeding that may have been, or may be, filed. Unless the agreement otherwise provides, the party acquiring the property may abandon the acquisition, the arbitration proceeding, and any eminent domain proceeding within the period for filing and serving a petition or response to vacate an arbitration award under Sections 1288 and 1288.2. The agreement may also specify the expenses, if any, to be awarded the party from whom the property was to be acquired. Unless the agreement otherwise provides, that party shall be entitled to all of his expenses of the arbitration, including but not limited to reasonable attorney fees, appraisal fees, and fees for the services of other experts, and the amount of such expenses may be determined by the arbitrator and be included in the award.

Comment. Section 1273.06 permits the parties to the agreement to deal with the privilege of the acquirer to abandon the acquisition and to specify the consequences of abandonment. For the remote case in which the agreement would not cover the privilege to abandon, the section permits the party who was to have acquired the property to abandon within the time within which a petition or "response" to vacate an arbitration award may be filed and served. Generally this period is 100 days after service of the award or ten days after service of a petition to confirm an award.

See Coordinated Constr., Inc. v. Canoga Big "A," Inc., 328 Cal. App.2d 313, 47 Cal. Rptr. 749 (1965). The section also makes it clear that the agreement may specify the expenses, if any, that are to be awarded to the "condemnee" in the event of abandonment. The expenses made recoverable in the absence of agreement are generally those specified in Section 40 of the Eminent Domain Arbitration Rules of the American Arbitration Association (June 1, 1968), except that no provision is included for payment of "an amount not in excess of ten-percent (10%) of the amount the Owner would have been entitled to had the Agency not abandoned those proceedings." In the absence of agreement, of course, if an eminent domain proceeding has been filed, the abandonment of that judicial proceeding and the recovery of expenses in that proceeding would be governed by Section 1255a, rather than by Section 1273.06. In determining the "expenses reasonably and necessarily incurred" in that proceeding, the court undoubtedly would take into account the arbitration award of expenses, and preclude duplicate recovery of the same items.

Section 1273.07. Recordation of agreements

1273.07. Agreements authorized by this chapter may be acknowledged and recorded in the same manner and with the same effect as conveyances of real property.

Comment. Section 1273.07 permits the agreements authorized by this chapter to be acknowledged and recorded to afford "constructive notice" to subsequent purchasers and lienors. Arbitration rules may provide for the escrowing of an instrument of transfer (see, e.g., Sections 1, 44, and 45 of the Eminent Domain Arbitration Rules of the American Arbitration Association (June 1, 1968)), but such an escrow would not, of itself, protect the "condemnor" against subsequent transferees. This section provides a means for obtaining such protection (see Civil Code Sections 1213-1220) and is calculated to make unnecessary the filing of an eminent domain proceeding for no purpose other than to obtain the effect of a lis pendens. This chapter contains no provisions comparable to Code of Civil Procedure Sections 1244, 1246, and 1246.1, which require that all persons having an interest in the property be named as defendants in the condemnation complaint, permit any unnamed interest holder to intervene in the proceeding, and provide for allocation of the award among holders of various interests. The chapter assumes that prudence on the part of the acquiring agency will assure that it agrees to arbitrate with the person who owns the interest it seeks to acquire. Also, the interests of persons other than parties to the arbitration would be unaffected by the arbitration agreement or the effectuation of that agreement. In short, unlike the in rem character of an eminent domain proceeding, an arbitration operates only as a contract and conveyance between the parties to the particular agreement.

Sec. 2. Section 15854 of the Government Code is amended to read:

15854. Property shall be acquired pursuant to this part by condemnation in the manner provided in Title 7 of Part 3 of the Code of Civil Procedure, and all money paid from any appropriation made pursuant to this part shall be expended only in accordance with a judgment in condemnation or with a verdict of the jury or determination by the trial court fixing the amount of compensation to be paid. This requirement shall not apply to any of the following:

(a) Any acquisitions from the federal government or its agencies.

(b) Any acquisitions from the University of California or other state agencies.

(c) The acquisitions of parcels of property, or lesser estates or interests therein, for less than five thousand dollars ($5,000), unless part of an area made up of more than one parcel which in total would cost more than five thousand dollars ($5,000) which the board by resolution exempts from this requirement.

(d) Any acquisition as to which the owner and the State have agreed to the price and the State Public Works Board by unanimous vote determines that such price is fair and reasonable and acquisition by condemnation is not necessary.

(e) Any acquisition as to which the owner and the State Public Works Board have agreed to arbitration of the compensation to be paid in accordance with Chapter 3 (commencing with Section 1273.01) of Title 7 of Part 3 of the Code of Civil Procedure.