#65.30 6/16/69

Memorandum 69-80

Subject: Study 65.30 - Inverse Condemnation (Interference with Land Stability)

Attached to this memorandum is a draft statute (Exhibit I, pink sheets) which incorporates the decision made at the first June meeting to make Civil Code Section 832 (relating to excavations) applicable to public entities. The staff has also taken the liberty of extracting and defining the term "land stability disturbance damage" in an attempt to provide a suitable reference term. If the basic principles set forth here in Article 3 and in Article 2 of the draft statute attached to Memorandum 69-79 (water damage) are approved, the staff suggests that all the definitional sections, the "exclusivity" section, the "mitigation" section, and the "offsetting benefits" section be placed under Article 1 with appropriate nonsubstantive revisions to insure their applicability to both Articles 2 and 3. With these modifications the draft statute will (hopefully) be ready to form the basis for a tentative recommendation.

Respectfully submitted,

Jack I. Horton
Associate Counsel

Memo 69-80

EXHIBIT I

Draft Statute

(Provisions Added to Part 2 of Division 3.6 of

Title 1 of the Government Code)

Chapter 20. Inverse Condemnation

Article 1. General Provisions

(to be drafted later)

Article 2. Water Damage

(Memorandum 69-79)

Article 3. Interference with Land Stability

Section 875. Definition

875. As used in this article, "land stability disturbance damage" means damage to property caused by the removal of subjacent or lateral support or by any other disturbance of soil stability.

Comment. Section 875 defines "land stability disturbance damage" to emphasize the result or impact on the property affected rather than the particular cause of damage. See Comment to Section 875.2.

Section 875.2. Liability for interference with land stability

875.2. Except as provided by this chapter, a public entity is liable for any land stability disturbance damage proximately caused by its improvement as designed and constructed.

Comment. Section 875.2 states the basic conditions of liability of public entities for damage to property resulting from the disturbance of soil stability by public improvements as deliberately designed and constructed. The section complements the existing statutory liability for dangerous conditions of public property and for negligence generally in the same fashion as Section 870.4. See the Comment to Section 870.4. Similarly, this section is qualified by the rule of offsetting benefits stated in Section 871 and by the duty of a property owner to take all reasonable steps available to him to minimize his loss. See Section 870.8 and the Comment thereto.

Subject to the exception stated in Section 875.4, Section 875.2 is intended to cover all forms of interference with land stability. Included therefore are situations of removal of both lateral and subjacent support, imposition of fill or other overloads on public property, as well as concussion and vibration. In each of these areas, subject only to the owner's duty to minimize his damage and to the exception provided in Section 875.4, this section imposes liability on the public entity without regard to fault for damage to property proximately cuased by the disturbance of the existing soil stability conditions by a public improvement. The section simply restates former law with respect to the removal of subjacent support (Porter v. City of Los Angeles, 182 Cal. 515, 189 Pac. 105 (1920)); and the imposition of fill (Albers v. County of Los Angeles, 62 Cal.2d 510, 42 Cal. Rptr. 89, 398 P.2d 129 (1965); Reardon v.

San Francisco, 66 Cal. 492, 6 Pac. 317 (1885)). Similarly, at least with regard to developed areas, strict inverse liability for concussion and vibration damage appeared to be the former rule. See, e.g., Los Angeles County Flood Control Dist. v. Southern Cal. Bldg. & Loan Ass'n, 188 Cal. App.2d 850, 10 Cal. Rptr. 811 (1961). While California appears generally to require a showing of negligence as a basis of liability where blasting occurs in a remote or unpopulated area (see Houghton v. Loma Prieta Lumber Co., 152 Cal. 500, 93 Pac. 82 (1907)), the issue of inverse liability for damage resulting from such concussion and vibration seems never to have arisen and has, therefore, never been answered. Section 875.2 makes clear that there is to be no distinction made in the rules governing liability for damage caused by concussion or vibration whether the public improvement be located in a remote or unpopulated area or in a populated, developed area; in both instances, the public entity is liable for direct physical damage proximately caused by the public improvement as deliberately designed and constructed.

Where lateral support is disturbed by a public improvement, Section 875.2 provides a rule of strict inverse liability except where Civil Code Section 832 is applicable. See Section 875.4 and the Comment thereto.

Section 875.4. Exception to liability for removal of lateral support; application of Civil Code Section 832

875.4. Notwithstanding Section 875.2, in any situation governed by Section 832 of the Civil Code, a public entity is liable to the same extent as a private person.

Comment. Section 875.4 states a limited exception to the rule of strict inverse condemnation liability provided by Section 875.2. There appears to be no sound reason why a public entity should be held to any stricter standard of care than a private person in making the "proper and usual excavations" embraced by Section 832 of the Civil Code. Therefore in situations where Section 832 modifies the absolute common law duty of lateral support and requires only that "ordinary care and skill shall be used and reasonable precautions taken," the liability of a public entity is similarly limited.

PROBLEMS BEYOND OUR CONTROL?

Lloyd D. Hanford, Jr. 1969 National President of the Institute of Real Estate Management is Vice President of the San Francisco, California realty firm of Hanford-Freund & Co, specialists in management, sales, leasing, appraisal, and consultation for all types of commercial and investment real estate. Mr. Hanford, in addition to the professional Certified Property Manager designation holds the M.A.I. and C.R.E. designations awarded by the Appraisal and Counseling groups respectively. Mr. Hanford is a nationally recognized lecturer and has authored numerous works on management and appraisal subjects.

By LLOYD D. HANFORD, JR.

Acknowledgement with thanks is made to The Institute of Real Estate Management to re-print this article.

We as professional real estate managers are charged by our clients with a responsibility to enhance the value of their holdings over the term of our management.

We have all spent long years of study and work to develop the necessary analytical and executive skills to accomplish our assigned tasks of managing efficiently, aggressively and profitably for our owner clients. In the majority of cases we are able to realize our goal of enhancing value provided that we are not hamstrung by the operation of adverse legal problems or by a lack of communication and decisionary action on the part of our clients.

There is little we can do to overcome the problem of ownership apathy. Legal problems too often are beyond our control. Yet, within the last twenty or so years we as managers have all faced eminent domain action and some of us have faced it many times.

The taking of property by a public agency or the threat of taking represents legal or quasi legal action that has great effect on property value. Many of us have ended up in a court of law to protect value by contesting the settlement offers made by public agencies. While this legal fight is a noble one it only succeeds in the momentary arrest of a system that altogether too often works to the detriment of the property owner.

We as managers should be devoting a substantive amount of time to the task of modernizing eminent domain procedures to protect property values and stop, for once and for all, the adverse effect on value caused by well intentioned public laws.

No one can criticize the theory or soundness of granting certain governmental subdivisions a power of condemnation over property for the public benefit or good. No one can argue the expediency or wisdom of governmentally sponsored redevelopment requiring the exercise of eminent domain authority since it is obvious that private capital, without this power, could not hope to acquire adequate contiguous property and in the open market to initiate

re-use. We can only criticize the method of exercising this power in light of its adverse effect on value.

To understand the problem let us examine briefly some of the detrimental factors involved in the area of redevelopment.

1. A local redevelopment agency studies the region and makes a public report identifying certain areas for potential redevelopment. This news breaks before the project area is approved and funds are made available for acquisition. Areas so designated can remain "unofficial" redevelopment areas for years. Once the announcement is made value is artificially frozen. The demand for property becomes very slack as buyers knowing of pending redevelopment are hesitant to purchase for fear that they may be purchasing a law suit or may not sell at a break even price. A property owner having to sell is forced to accept a lower than market price in order to offset the buyers ownership risks. The longer the area lingers the more value suffers. Value not only fails to reflect changes in the general economy through inflation but it also may deteriorate as demand wanes. We as managers of property within such an area are forced to sit helplessly by knowing we are powerless to protect value.

2. Local agencies employ various practices in appraising properties under redevelopment. Most will solicit proposals from various appraisers. While the proposal solicitations indicate that the submittal of a proposal does not constitute bidding the award of the work too often is made to the proposer with the lowest price. These appraisals are often cranked out on a mass basis using a short form and fail to exhibit the quality encouraged by our professional appraisal groups. The method of initiating appraisal work does not assure the property owner that every care is being exercised to be certain that he is offered the highest price.

In the conduct of mass appraisal where one or two appraisers independently do the entire job it seems that the attempt to maintain a value uniformity outweighs the understanding that each parcel of property is unique. We the managers are helpless to avoid this problem.

3. The costs of appraisal and litigation are often too high in relation to the value difference involved

to justify our advising a client to fight a value offer.

4. Tenants in properties under impending redevelopment tend to move and relocate as soon as their leases expire particularly if a new lease would also include a new investment in plant equipment or fixtures. If tenants don't move they renew on their terms knowing that we know a vacancy will be hard to fill while condemnation is pending.

5. The appraisals used to acquire property are often over one year old and may, in some cases be over two years old. The property owner then does not get an offer from the public agency based on a current appraisal.

6. The laws of evidence in some states are very detrimental to the property owners case since they arbitrarily preclude certain types of testimony even though these items would be of paramount importance in making a market value decision.

Unquestionably, we cannot fight all of these inequities by merely attacking on specific properties or by blaming our public agencies and their personnel. After all these inequities are built into the system and thus to eliminate them we as managers must fight for a change in the system in our respective jurisdictions. If we, as a group, become more aware of the value erosion caused by external forces now beyond our control we can present a uniform front to bring about equitable change in the system and protect the values we are charged with enhancing.

The following few specific suggestions only scratch the surface of the problem but they may, with the added benefit of your constructive thought and action, begin a philosophy of change.

1. Once a public announcement is made, officially or unofficially, designating an area as a redevelopment area the public agency should have a period of two years in which to commence acquisition or the area should have the blanket of condemnation lifted by precluding any public action, official or otherwise, for a period of at least five years. This type of restriction would force action within a reasonable time and if such action is not commenced the properties would have a normal market restored.

Further, during the two year period a property owner is almost totally precluded from refinancing if cash is needed. The federal government must initiate some form of loan guarantee program to assure property owners in redevelopment areas of the ability to refinance even though the property is under a blanket of condemnation. This program should protect against outrageous loan fees and interest rates approaching usury.

These same principles could be applied to an announced highway or freeway route or power easements, etc.

2. In awarding appraisal contracts the specifications for proposal should require the proposer to detail the type of appraisal report that will be submitted and the approaches that will be taken to solve any specific appraisal problems. The quality of the proposal and the competence of the proposer, not the price, should be the criteria of awarding the contract.

An entire area should not be awarded to one or two appraisers.To avoid uniformity and to assure that market value, not uniform price, is the result of appraisal, the area under appraisement should be broken up on a grid pattern into groups of parcels so that each appraiser assigned a group of properties will be appraising on the same street or blocks as the others. No appraiser should do ten or twenty contiguous parcels. For example, he might do every third or fourth parcel depending on the number of appraisers to be used. This method of appraisal would give broader thinking to the agency and would tend to point out errors in thinking if any occur.

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 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.

4. Rents costs because of the threat of eminent domain are not compensable in most jurisdictions.

The law should be changed to allow as compensable damages any revenue loss from the date of announcement of pending condemnation to the date of taking and where no action is ever taken the property owner should be entitled, after five years, to file a claim.

5. No agency should be permitted to commence acquisition based on an appraisal over twelve months old. If the appraisal is not current it should be updated before offering a price to the property owner.

6. The laws of evidence should be changed to assure that the property owner could submit every type of testimony that would form a part of market thinking. In some jurisdictions testimony about offers or listings is barred even though in an open market transaction this information would be critical to buyer and seller in arriving at a decision. The evidence laws should not be allowed to create an artificial market but rather must assure the citizen that the rules of evidence will parallel actual market phenomena.

The U. S. Constitution guarantees every American that his property will not be confiscated without due process of law and just compensation. The system built around these rights of eminent domain often precludes real just compensation. Rather, an artificial form of compensation is developed. With the start of a new governmental administration we, as managers, have a great opportunity to sponsor the type of changes necessary to permit us to manage and realize the continuing reward of value enhancement without interference of inequitable laws or systems.

We should take these few isolated remarks as only a part of our problems for we have many other areas where government, attempting to be benevolent, has seriously injured the values we must preserve. We, as managers, should critically examine zoning laws, building codes and methods of property taxation as other areas of influence that can adversely affect value. Each of us, in our own areas can study and offer constructive thinking as a means of initiating change. It is our job and our challenge to think creatively and constructively to bring about beneficial change. ★