#36.31 8/25/70

Memorandum 70-78

Subject: Study 36.31 - Condemnation (Procedure for Raising Right to Take Issues)

One of the recurring problems the Commission has encountered in its consideration of the right to take aspect of the eminent domain study has been that of devising a suitable procedure for raising and resolving challenges to the condemnor's right to take. What is sought is a procedure that provides administrative expediency without sacrificing adequate protection for the rights of the property owner. What now exists is a procedural framework based on the rules applicable to civil actions generally with judicial adaptations to deal with matters peculiar to condemnation proceedings. The result is workable and indeed appears vastly superior to the complicated and diverse procedures burdening condemnation proceedings in many other jurisdictions. See generally Nichols, Eminent Domain (attached Exhibit I). However, there are areas in need of either modification or clarification, and codification itself should be of great assistance to the nonspecialist--whether judge or attorney.

Existing Law. Briefly, in California, a condemnation proceeding is initiated by the filing of a complaint and the issuance and service of summons. Code of Civil Procedure Section 1243. The condemnee may either demur or answer or do both. The general law on demurrers applies. See Code of Civil Procedure Sections 472-472c; Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955). Code of Civil Procedure Section 1246 requires the condemnee in his answer to set forth his "interest in each

parcel of property described in the complaint and the amount, if any, which he claims for each of the several items of damage specified in section 1248 [of the Code of Civil Procedure]." No statutory provisions cover the pleading requirements for raising the right to take issues. However, case law requires the condemnee who asserts that a particular use is not a public use or that the condemnor does not intend to use the property sought for the proposed public use to raise these issues in his answer. See Department of Public Works v. Superior Court (Rodoni), 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); People ex rel. Dept. of Public Works v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959). Specifically, the condemnee must apparently affirmatively allege how or in what manner the proposed use will not be public or facts indicating the condemnor's fraud, bad faith, or abuse of discretion in the sense that the condemnor does not actually intend to use the property as it resolved to use it. The issue of future use has been too often confused with and treated as an issue of necessity--hence, not justiciable. See Anaheim Union High School Dist. v. Vieira, 241 Cal. App.2d 169, 51 Cal. Rptr. 94 (1966); County of San Mateo v. Bartole, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960). However, it should properly be treated as a public use issue and prudence would dictate that a condemnee desiring to challenge a taking on the ground that the condemnor has no intention of devoting the property to a public use within a reasonable period of time would affirmatively allege this defense. Finally, where the property sought is already appropriated to a public use, the condemnor is required to allege that the taking is for a more necessary public use. See Woodland School Dist. v. Woodland Cemetery Ass'n, 174 Cal. App.2d 243, 344 P.2d 326 (1959). A general denial would appear to be sufficient to controvert this allegation.

Having raised the issue, when and how is it resolved at the trial level? The cases present a variety of procedures--for example, a hearing held on a motion to strike a portion of the complaint (Rodoni); prior, separate trial as a special defense not involving the merits (Bartole) (see Code of Civil Procedure Section 597); trial in conjunction with the issue of compensation (Vieira). Whatever the timing may be, it is clear that these issues are to be resolved by the court. See People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943). Practically speaking, the burden of proof (persuasion) is, for the most part, on the condemnee. A legislative declaration of public use is accorded substantial judicial deference; where not clearly unreasonable, such declaration is considered binding. See County of Los Angeles v. Anthony, 224 Cal. App.2d 103, 36 Cal. Rptr. 308 (1964). Hence, the property owner challenging a specific legislative declaration has the burden of proving that such declaration lacks a reasonable foundation. The condemnor, as any plaintiff, must plead and prove the elements of his cause of action; hence, must show that the taking is for a public use. However, it appears that the condemnor generally need only introduce its condemnation resolution to establish its prima facie case. The property owner then has the burden of persuasion to establish fraud, bad faith, or abuse of discretion to challenge the taking successfully. "If the property already is appropriated to a public use, the condemnor has the burden of proving that the proposed use is a more necessary public use than the existing public use . . . . Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 115, 159 P. 992, 998 (1916). If the property's existing appropriation to a public use is disputed, the burden is on the existing user to prove that the property is devoted to a public use. Los Angeles v. Los Angeles Pac. Co." CEB, California Condemnation Practice, § 8.32 at 150 (1960).

Appellate review takes a variety of forms. Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955)(writ of prohibition following overruling of demurrer; city lacked power to condemn property outside its corporate limits); San Bernardino County Flood Control Dist. v. Superior Court, 269 Cal. App.2d 514, 75 Cal. Rptr. 24 (1969)(writ of prohibition following overruling of demurrer and denial of motions for summary judgment and dismissal based on lack of authority to condemn property already appropriated to public use); Department of Public Works v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968)(writ of mandate following preliminary order striking portion of complaint condemning allegedly excessive amount of property); People ex rel. Dept. of Public Works v. Jarvis, 274 Adv. Cal. App. 243, 79 Cal. Rptr. 175 (1969)(appeal from condemnation judgment as to denial of motion made prior to pretrial to amend complaint to add remnant). However, no special statutory procedures govern when or how review should be sought.

Discussion. Consideration of the procedural aspects of the right to take issue necessarily involves to some degree consideration of condemnation procedure generally. For the most part, however, the discussion which follows attempts to keep the focus solely on the right to take issue. As noted above, some improvement in the present makeshift procedures adopted and adapted from procedures governing civil actions generally could be achieved by supplementing the Code of Civil Procedure with statutory statements of decisional rules thereby making them more accessible. However, far preferable would be a comprehensive codification of all aspects of condemnation procedure from start to finish. Appropriate references to general rules can and should be made, but the emphasis should be on a complete comprehensive system.

A condemnation proceeding is a special proceeding. It seems probable that recognition of this fact and careful review and consideration of procedural reform might be assisted by certain changes in form as well as substance. The staff, therefore, proposes the following changes in the nomenclature of the pleadings filed in a condemnation proceeding. The complaint should be replaced by a "petition for condemnation;" the summons, by a "notice of condemnation;" the answer, by two separate pleadings--a "notice of appearance" and "preliminary objections."

In relation to the right to take issue, the petition in condemnation should contain a designation of the purpose or use for which the property is sought and a statement of the authority for the taking. The latter statement should refer specifically to the applicable statute(s) which provide the legislative declaration of public use, as well as the authorization for excess, substitute, future, and perhaps protective takings. After the condemnee has been properly served with a notice of condemnation, he should be required to file a notice of appearance. This would include merely an identification of the condemnee, a description of the property in which the condemnee claims an interest, and the nature and extent of the interest claimed. Thereafter, the condemnee would receive notice of all further proceedings affecting his property. Failure to file a notice of appearance should, in some manner, preclude the condemnee from further participation in the proceeding. However, this is more a matter of general procedure. Failure to file a notice of appearance could itself constitute a waiver of any interest in the property or could permit the condemnor to take a default. Appropriate provisions for relief from such effect or action should, of course, be considered.

A condemnee desiring to object to or defend against the taking of his property should be required to file so-called preliminary objections, and this should be the exclusive method for raising the right to take issues. A condemnee may be motivated to challenge the taking for a variety of reasons. There may be tactical advantages in delaying the proceedings. The condemnor may not have the right to immediate possession; threatened delay in taking possession may cause the condemnor to be more generous in settlement. Postponement of the valuation trial may advance the valuation date, hence, increase the value of the property in a rising market. Time may be sought to make suitable arrangements for moving. The property may have special, irreplaceable or noncompensable values for the owner. The owner may sincerely believe that the use contemplated is not an appropriate one or he may be simply obstinate and litigious. The motivations to object to the taking may be reduced in many ways--e.g., broadening the right to immediate possession; providing broader and increased compensation and relocation assistance--but, there will still remain challenges and challengers. These must be handled at some stage of the proceeding. It would seem desirable that this be as early as possible, consistent with a reasonable opportunity for both sides to fully prepare and present their respective positions. Where the property sought is to be put to immediate use, the need for prompt resolution seems obvious. Delay in construction can be immensely expensive and the public will be deprived of the benefit of the project in the interim. Even where immediate use is not contemplated, early resolution will permit the parties either to avoid the considerable expense of preparing for a valuation trial (where the condemnee is successful)

or to prepare with some certainty concerning the nature and scope of the proposed use and the character and extent of the property to be taken.

With the foregoing in mind, the staff suggests that the condemnee desiring to raise any defense to the taking of his property be required to file preliminary objections to the petition for condemnation within thirty days after the service of the notice of condemnation upon him or within such longer period of time as the court may allow upon a showing of good cause. We indicated above that the condemnor in its petition for condemnation must specify its statutory authority for the taking. This should, in most cases, provide notice to the condemnee of the existence of issues of future use, excess and substitute condemnation, not to mention the basic declared public use. We did not consider what would follow from an incorrect or totally omitted specification. One alternative would be to completely deny the condemnor the right to rely on the necessary statute, thereby causing him in some cases to abandon the taking, dismiss the proceeding, and commence over again. This, however, seems wasteful and quite possibly harmful to the rights and reasonable expectations of other litigants. On the other hand, to permit amendment too freely would fail to discourage careless or deliberately misleading pleading or at least scarcely encourage careful, conscientious draftsmanship. Perhaps a middle ground could be attained in some way through permitting a condemnee to raise otherwise untimely preliminary objections without any greater showing than a showing that the condemnor actually intended a use other than that specified--e.g., excess, future, substitute, where these uses and sections were not specified. Unfortunately, the showing required to bring the condemnee within the suggested exception, is essentially the same showing that he would be required to make on the merits.

Hence, the potential for delay would remain practically the same. In the absence of any clearcut solution, the staff simply raises these issues for your consideration, without any definite statutory proposal.

It seems some leeway should be permitted beyond the 30-day time period. In certain cases, the condemnee will require additional time for discovery purposes. For example, a sound decision whether to contest an excess taking requires the expert opinion of an appraiser. To secure an informed opinion may well take more than 30 days. However, the length of time granted will be in control of the court, thereby preventing unreasonable delay.

By way of detail, it seems all defenses should be raised at one time and in one document. They may be inconsistent. For example, the condemnee may assert that the designated use is not a "public" use, or, alternatively, that the condemnor does not intend to devote the property to such designated use. The grounds for each defense should be specifically stated.

Having raised the issue, the next step is resolving it. As noted above, existing procedures permit resolution at various stages and in varying ways. There is, of course, one constant. The issue is always determined by the court. (This is true not only in California but also, as far as we know, in all other jurisdictions and in the federal courts.) There seems to be no good reason and no impetus to change this. It does, however, seem desirable to attempt to provide some guidelines as to when and how the matter should be heard. As noted above, in connection with the timing for raising these issues, there are distinct advantages in an early disposition of these issues. Nevertheless, some flexibility should be retained to provide both sides (especially the condemnee) with

an adequate opportunity to prepare. The difficulty lies in achieving the proper balance between these two considerations. The Pennsylvania statute (26 Pa. Stat. Ann. § 1-406(e)) and the Draft ABA Model Code on Eminent Domain (§ 307E) merely state that "the court shall determine promptly all preliminary objections." There is no indication how in fact the matter is set for hearing. Perhaps upon the filing of preliminary objections, the Pennsylvania court immediately sets the matter for hearing. If so, presumably the parties then may request additional time.

In an earlier attempt to cover this problem in connection with excess condemnation, the Commission tentatively approved the following:

> Upon motion of either the condemnor or the condemnee, made not later than 20 days prior to the day set for trial of the issue of compensation, the court shall determine whether the remainder, or portion of the remainder, may be taken . . . .

This tentative provision is similar to Code of Civil Procedure Section 597 which provides, on motion of either party, for a preliminary trial of special defenses in civil actions generally. However, we have already received criticism of the tentative provision from Commissioner Barry of the Superior Court in Los Angeles County. (See attached Exhibit II.) Briefly, he believes that the provision permits undue interference with the court's control of its calendar. He suggests that the motion be timely only if made before the court sets the date for the valuation trial. This would apparently work satisfactorily under the special procedures used in Los Angeles Court, but the staff has some doubt whether this method of timing would work throughout the state. Probably, Commissioner Barry would also favor a solution similar to that suggested by the Pennsylvania statute.

The staff is reluctant to defer problems; however, in this case, the matter seems too bound up with pretrial procedure generally to be amenable to complete solution now. The statute should reflect a policy that public use issues be resolved promptly in order that either the proceeding may be aborted or the way be made clear for resolution of the compensation issue. Further detail can await development of suitable pretrial procedures.

With respect to problems of burden of proof and the effect, if any, of the resolution of necessity, the staff believes that these matters are best handled in connection with the specific right to take issue. We have accordingly covered these issues in Memoranda 70-79, 70-80, and 70-81.

No special rules apply to appellate review of condemnation cases, at least insofar as we are concerned here, and the staff has no suggestions for change. Obviously, immediate review of preliminary orders in certain cases could avoid a great amount of wasted time and money for both parties, as well as the court. Presumably, in the most deserving situations, such review will be sought and obtained through the general writ procedure. Beyond this, we see no need for special statutory handling.

The foregoing provides the basic outline; however, certain matters remain. Obviously, the preliminary hearing will be held and concluded prior to the valuation trial. For the most part, there would be no occasion or reason to refer to the earlier proceeding. However, where the issue involves the right to take a remnant (excess condemnation), a problem does arise. To defeat the taking, the property owner will contend that the remainder is usable and valuable; to sustain the taking, the condemnor will emphasize the severity of the damage to the remainder

and the substantial risk of near total severance damages. If the property owner wins (i.e., the taking of the remnant is defeated), the parties will attempt to reverse their positions on value. The property owner will attempt to obtain maximum severance damages, and the condemnor will attempt to minimize the damage. (Where the taking is sustained, the issue of severance will generally be eliminated; the owner's entire parcel will be taken and, hence, valued as such.) The Commission tentatively decided earlier that the fact that the condemnor previously sought to take under the excess condemnation statute should not be referred to at the valuation trial. The rule seems sound and should be continued. It is a point of such narrow concern, however, that the staff believes that it should be retained in Comprehensive Statute Section 421, which deals specifically with excess condemnation. The more general question whether specific evidence introduced at the preliminary hearing may be used for impeachment or other purposes at the valuation trial should be determined under the usual rules of evidence. This matter could, it seems, be simply covered by Comment.

We have prepared two draft sections incorporating our suggestions above concerning the notice of appearance and preliminary objections. (See attached Exhibit III--Comprehensive Statute Sections 901 and 902.) At the September meeting, we hope the Commission will be able to review these sections and tentatively approve them with any necessary modifications for inclusion in the Comprehensive Statute.

Respectfully submitted,

Jack I. Horton
Associate Counsel

EXHIBIT I

6 Nichols, Eminent Domain, pp. 273-289

§ 26.3 Adjudication of right to condemn.

It is the usual practice in the states in which condemnation is effected by judicial proceedings for a hearing to be held at which the petitioner is called upon to establish its right to condemn the land described in the petition, before any action is taken toward appointing commissioners, or sending the case to a jury to determine the compensation or damages to be awarded.[62] Such a hearing, as it involves only questions of law, is held by the court sitting without a jury.[63] The owners of the land which it is sought to condemn have no constitutional right to be heard at this stage of the proceedings,[64] and in some states the adjudication of the right to condemn is *ex parte* and more of the nature of an inquest than a trial.[65] In such case, of course, the owner is not bound by the adjudication and, unless he can reopen the question at a later stage in the proceedings, may attack the validity of the condemnation in collateral actions.[66] In its more characteristic form, however, the adjudication of the right to condemn is made only after a hearing at which the owner is entitled to be represented, and is the appropriate, and, if the court has jurisdiction of the subject matter, the only occasion for contesting the validity of the taking.[67]

At such hearing the petitioner has the burden of establishing the truth of the allegations of its petition, so far as they are not purely formal. It accordingly must show that it has strictly complied with every condition to the exercise of eminent domain prescribed by the constitution and the statutes of the state;[68] that the use for which the land is sought to be taken is public;[69] that the petitioner has been authorized by the legislature to exercise the power of eminent domain or falls within the class authorized to exercise the power;[70] and, in such jurisdictions as treat the necessity of the use as a judicial question, that the land sought to be taken is necessary for the public use, to the extent, at least, of making out a *prima facie* case.[71] It has been held, however, that when the municipal authorities have declared that it is necessary that a public way be opened, the burden of proof that it is not in the public interest is on the landowner.[72]

At such hearing, also, if the statute so provides, it may be permitted to determine the susceptibility of the property to the power of eminent domain,[73] whether the proposed use is permissible,[74] whether there has been a bona fide attempt to agree on the purchase price prior to the institution of the proceeding,[75] and whether the authorizing act is constitutional.[76] The burden is on the condemnor to show a good faith effort to purchase and an inability to agree.[76.1]

§ 26.31 Waiver of objections.

An owner may waive the right to contest the validity of the

taking.[76.2] Generally, where the owner of the property fails to interpose objections to the petition and proceeds with the hearing on the question of compensation, he is deemed to have waived any objections which might properly have been asserted and he may not thereafter assert such objections.[77]

§ 26.32 Appeal from adjudication of right to condemn.[77.1]

It has been held in some jurisdictions that, as a petition to take land by eminent domain is a special proceeding, the general provisions of statute in regard to appeals in civil actions have no application to such a case, and in the absence of special provisions of the constitution or statutes, the adjudication of the trial court upon the petitioner's right to condemn is final, even as to matters of law.[78] In most states, however, either by statute or otherwise, the right to appeal in such cases to the highest court of the state is firmly established, but there is a conflict of authority upon the time when such an appeal should be taken. Of course if the decision upon the petitioner's right to condemn is adverse to the petitioner, no further proceedings can be had in the trial court, the judgment is a final one, and the petitioner may take the case at once on points of law by appeal, writ of error, bill of exceptions or other appropriate means to the highest court of the state,[79] except in such jurisdictions as deny the right of appeal in eminent domain proceedings altogether.[80]

When, however, the trial court adjudges that the petitioner has established its right to condemn the designated land, the order does not finally dispose of the proceedings, because there can be no judgment of condemnation until damages have been assessed. The rule at common law is that a writ of error does not lie except to a judgment which determines the entire controversy between the parties, and the courts have generally in accordance with this principle discouraged the review of a cause piecemeal. For this reason it is held in some jurisdictions that, unless it comes within some special statute,[81] an order adjudging that the petitioner has the right to condemn is interlocutory only and not subject to appeal, and so the points of law involved in the adjudication cannot be heard by an appellate court until there has been a final judgment of condemnation.[82] The right of the owner to be heard by an appellate court upon the points of law involved in the adjudication of the right to take is, of course, not lost, but merely deferred until there is a decision of the trial court on the merits, confirming the award of compensation. Such a decision is a final judgment and may be reviewed as such, both upon the validity of the taking and

upon the questions of law arising at the trial in which the amount of compensation was determined.[83]

The final decree in a condemnation proceeding is the order or decree which includes the amount of the awards and the names of the owners to whom payable.[84]

There is no constitutional right to an appeal in proceedings to take property for public use.[85] Notice and hearing constitute due process or a compliance with the constitutional provisions. The legislature may or may not allow an appeal, and when it does the courts are bound by the conditions, if any.[86]

The tendency of modern jurisprudence is to extend the right of appeal in interlocutory matters when the public interests require it; that is, when the economic loss to the public by compelling the appellate courts to waste their time over points of law which may never be necessary to a final decision of a litigated case is less than will be caused by compelling trial courts and parties litigant to waste their time over the trial of issues of fact which may be rendered nugatory by an adverse decision of the appellate court on points of law, public policy requires that the appellate courts must run the risk of wasting their time. The long drawn out trial of a land damage case is a serious economic waste, if, after the verdict is reached, the appellate court decides that the petitioner had no right to condemn the land in question at all; and consequently it is held in some jurisdictions that an order of condemnation may be appealed from at once, and the questions of law upon which the validity of the taking depends finally determined before the trial upon the measure of compensation.[87] As one case put it:[87.1]

> "There is a recognized exception to this rule where a fundamental jurisdictional question as to the sufficiency of the petition is presented prior to joinder of issue * * * or where a distinct triable issue of fact is presented the determination of which after a trial would render the petition fatally defective * * *."

The appeal does not, however, necessarily act as a stay of the proceedings for the assessment of damages.[88]

It almost goes without saying that an objection to the petitioner's right to condemn cannot be taken on appeal for the first time, and, as in other judicial proceedings generally, points of law of which it is sought to take advantage must be raised in the trial court.[89]

Memorandum 70-78

EXHIBIT II

The Superior Court

111 NORTH HILL STREET

LOS ANGELES, CALIFORNIA 90012

RICHARD BARRY
COURT COMMISSIONER

July 6, 1970

John H. DeMoully, Esq.
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear John:

The following refers to your study 36.40 and your Memorandum 70-68 (The Right to Take--Excess Condemnation).

I should like to particularly refer to the procedure that has been tentatively adopted as set forth in subdivision (c) of Section 421 of your Comprehensive Statute on condemnation.

(I also note from your agendas that the Right to Take issue is being studied in eight other aspects. Therefore, I assume the suggestions I am now offering may be material to each of the other studies, although I have not yet received the other Memoranda).

The said subdivision (c) requires that the right-to-take issue be raised in the answer of the condemnee and if it is to be a contested issue a motion for determination by the court must be made by either the condemnor or the condemnee not later than twenty days prior to the date set for the trial of the issue of compensation. The issue is deemed to be waived unless such a motion is timely made. If timely made, the court is required to make a determination of the right-to-take in a preliminary trial. As presently worded, if a motion is noticed to be heard ten days after it is made then the preliminary trial would have to be set within ten days of the date set for the valuation trial.

For the reasons set forth in your Comments, I agree that the right-to-take issue should be tried separately and in advance of the valuation trial. Having such a separate trial

on such short notice, however, would make it very difficult for the court to accommodate its calendar for the purpose of such preliminary trials and therefore because one side could upset the timetable of the other side, it does not appear to be a practical solution of the problem discussed in your Comments.

On page 20 of your Comments you point out that remnant-elimination condemnation inevitably raises the problem of requiring both condemnor and condemnee to assume one position as to the right-to-take issue and an opposing position in the valuation trial. You point out that either party might have to reverse his position as to the extent of damages after the right-to-take and the size of the remainder is resolved. That would seem to be so, but if a party must reverse his position, then he should have an opportunity to do so before he incurs final appraisal costs and other trial preparation costs. It would seem that the most appropriate deadline for setting a trial on the right-to-take issue would be at the time of a setting conference or a pretrial conference and, in any event, when the case is also being set for the valuation trial.

As you know, in Los Angeles we have a bifurcated pre-trial in eminent domain proceedings. At time of first pretrial, the case is calendared for a trial of non-jury issues, if there are any, so that they will be resolved in advance of the dates that are also set for final pretrial and valuation trial. From our experience, it has been particularly important to resolve issues such as the right-to-take issue or larger parcel issues before the appraisers' reports are prepared. Our purpose is to see that each appraiser receives the same instructions as to all legal matters.

Speaking broadly, if the property cannot be taken, then there is no point in having it appraised. In any case, the extent of the taking permitted by the court has a very important impact on the appraiser's approach to valuation.

As you have pointed out in your Comment, decisional law recognizes that the right-to-take issue has been disposed of at various stages. Frequently such an issue is a hang-up for settlement negotiations but once it is resolved, then the parties are often able to agree on valuation matters.

The various stages at which we have been able to dispose of the right-to-take issue have been as follows: At time of a first pretrial conference the issue can often be disposed of by agreement. For example, the condemnor may agree to reduce the size of the acquisition or may agree to substitute access if that is the problem. Or, the condemnee may withdraw the issue upon becoming convinced that in a particular case he does not have a justiciable issue. If there is no agreement, then dates are fixed for filing of briefs in advance of a non-jury trial. The investigation and research that is required for a brief brings about a more informed approach that often results in the issue being conceded. If it is not conceded then the non-jury trial is had and the appraisal reports are thereafter prepared on the basis of the court's determination. Because of the mutuality that has been achieved in that respect, settlements often follow --usually when the valuation data is exchanged at time of final pretrial.

The procedures we follow are not being recited in this letter for the purpose of urging their adoption on a statewide basis but simply as an illustration of how we solve the problem you have referred to with reference to the right-to-take issue and why it is logical that such an issue be disposed of in the early stages of the proceedings. I think if we are to have a legislative right to have a preliminary trial on the right-to-take issue, it would be a mistake to permit a motion for a trial of such an issue to be made so close to the valuation trial.

I would urge that you strike that portion of subsection (c) that provides for a motion "made not later than twenty days prior to the date set for trial of the issue of compensantion, . . ." and add language to the follcwing effect at the end of the subsection:

> "Such a motion is timely if it is noticed so that the motion may be heard on or before the date on which the court sets a date for trial of the compensation issue. If granted, the court may thereupon set a date for a non-jury trial sufficiently far in advance of the trial of the issue of compensation to allow for a determination of the non-jury issue under this section and also allow an adequate interval of time thereafter as may be required in the premises for preparation of and exchange of valuation data and without prejudice to priorities as provided by law."

However the provision may ultimately be phrased the important point is that the court should not be required to grant sudden priority for a trial which could have been calendared months before; which would have been more consistent with orderly administration of justice and a more efficient management of civil trial settings.

I am aware that either side may make the motion and if the issue is seriously raised we can probably depend on one side making it early in the proceedings. However, for a number of reasons that would not necessarily occur. The court would then be mandatorily required to have preliminary trials and make determinations within a very limited period and without any reasonable opportunity to plan or control its calendar for such trials.

I also am aware of the fact that under proposed section 421 the issue may be more a matter of economics than of law. If so, the preliminary trial might involve the testimony of engineers, architects and contractors as well as appraisers if costs are to be ascertained to determine economic feasibility. It might be that in some cases there would be some advantage in having the preliminary trial close to the compensation trial. In most cases that would not be so. Either way, the court should be fully advised before setting the case for trial for either purpose.

Please call or write if you have any questions.

Very truly yours,

Richard Barry

RB:jd

Memorandum 70-78

EXHIBIT III

COMPREHENSIVE STATUTE § 901

Staff recommendation

Procedure

DIVISION 8. PROCEDURE

Chapter 5. Response to Petition

§ 901. Notice of appearance

901. (a) Within 30 days of the service of notice of condemnation upon him a condemnee shall serve a notice of appearance.

(b) The notice of appearance shall state:

(1) The caption of the action.

(2) A description of the property in which the condemnee claims an interest and the nature and extent of the interest claimed.

(3) The name and address of the condemnee or the person designated as agent for service of notice of all proceedings affecting the condemnee's property.

Comment. Section 901 replaces in part former Section 1246 of the Code of Civil Procedure which stated certain requirements for an answer to a complaint in condemnation proceedings. Section 901 retains the requirement that the condemnee describe the property in which he claims an interest and the nature and extent of that interest. However, the former requirement that he set forth an itemization of the damages claimed has been eliminated. The notice of appearance provided by Section 901 is similar in form and effect to the notice of appearance provided in federal condemnation proceedings. See Rule 71A(e) of the Federal Rules of Civil Procedure.

COMPREHENSIVE STATUTE § 901

Staff recommendation

Note: Section 901 reflects a preliminary decision to change the form of the pleadings filed in a condemnation proceeding. The complaint is to be replaced by a "petition for condemnation;" the summons, by a "notice of condemnation;" the answer, by a "notice of appearance" and "preliminary objections."

COMPREHENSIVE STATUTE § 902

Staff recommendation

Procedure

§ 902. Preliminary objections

902. (a) A condemnee desiring to raise any defense to the taking of his property shall file and serve upon the condemnor preliminary objections to the petition for condemnation within 30 days after the service of the notice of condemnation upon him or within such longer period of time as the court may allow upon good cause shown. A condemnee who needs additional time to prepare preliminary objections, shall apply to the court for such time within the 30-day period.

(b) All defenses shall be raised at one time and in one document. They may be inconsistent. The grounds for each defense shall be specifically stated. Failure to raise a defense by a timely preliminary objection shall constitute a waiver thereof.

(c) The court shall promptly determine all preliminary objections and shall make such preliminary or final orders as are required.

Comment. Section 902 sets forth the procedure to be followed by a condemnee desiring to raise any defense to the taking of his property. The section makes significant changes in form but is similar in substance to former law. Formerly, the condemnee was required to raise objections

to the taking of his property by demurrer or answer. See Department of Public Works v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968)(answer); People ex rel. Dept. of Public Works v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959)(answer); Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955)(demurrer). These pleadings have been replaced in condemnation proceedings by the notice of appearance (see Section 901 and Comment thereto) and preliminary objections. As before, however, the condemnee is required to raise his objections early in the proceedings. Subdivision (a) of Section 902 requires preliminary objections to be filed and served by the condemnee upon the condemnor within 30 days after the condemnee has been served with the notice of condemnation. This time period may be extended for good cause--for example, to permit discovery or the acquisition of preliminary appraisal reports where this information would be vital to an informed decision (see Section 421). However, the condemnee must make some tentative decision within these 30 days for he is required to make an application for any additional time needed within this period.

Subdivision (b) requires the condemneee to raise his defenses at one time, in one document and to state specifically the grounds for each defense. These requirements are generally consistent with former decisional law that, for example, required the condemnee to affirmatively

allege how or in what manner a proposed use would not be public or specific facts indicating an abuse of discretion, i.e., an intention not to use the property as resolved. See People ex rel Dept. of Public Works v. Chevalier, supra. Failure to raise a defense by timely objection constitutes a waiver of that defense.

Where preliminary objections have been properly and timely raised, subdivision (c) directs the court to determine them promptly making any preliminary or final orders required. Subdivision (c) merely continues prior law insofar as it requires the issues raised by preliminary objections to be tried by the court. See People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).

[Note: Subdivision (c) reflects the policy decision that preliminary objections should be disposed of promptly--well in advance of the valuation trial, if the latter is necessary. Prompt disposition will permit the parties to either avoid the expensive preparations necessary for trial of the issue of compensation or at least plan with greater certainty concerning the issues that will be involved. Present law presents a variety of procedures--for example, a hearing held on a motion to strike a portion of the complaint, Department of Public Works v. Superior Court, supra; prior, separate trial as a special defense not involving the merits, County of San Mateo v. Bartole, 184 Cal. App.2d 422, 7 Cal. Rptr. 569

(1960); trial in conjunction with the issue of compensation, Anaheim Union High School Dist. v. Vieira, 241 Cal. App.2d 169, 51 Cal. Rptr. 94 (1966). It is anticipated that these will be replaced by special provisions which will be coordinated with pretrial procedures.]