

7/31/70

## Memorandum 70-100

Subject: Study 65 - Inverse Condemnation (General Approach)

Since there are a number of newly appointed Commissioners, it should prove useful to review the background on the inverse condemnation study.

In 1965, the Legislature directed the Commission to study inverse condemnation. The Senate Judiciary Committee added this topic to our agenda on its own initiative because the public entities were concerned about the cost of inverse condemnation liability, primarily but not exclusively liability for water damage. The Committee wanted the Commission to draft a statute that would reduce such costs to a minimum consistent with constitutional requirements.

The Legislature has indicated a continuing interest in this study. Exhibit I (pink), attached, is a letter from the Chairman of the Assembly Interim Committee on Water (September 1965) indicating the extent of water damage liability resulting from the 1964 floods and indicating a desire that legislation be drafted to deal with water damage liability. Since 1965, the office of the Legislative Analyst has called me from time to time to find out what progress is being made on the inverse condemnation study. That office and the members of the Ways and Means Committee that review flood control project budget proposals want to have legislation to minimize liability in this area drafted as soon as possible. In addition, city attorneys have written to the Commission advising us that it is not possible to insure against inverse condemnation liability because the extent of such liability is unknown and the law is unclear. Their city attorneys believe that merely a clear statement of the existing law in statutory form would be an improvement although they hope that the extent of such liability also could be minimized.

The Commission retained the outstanding expert in the United States to prepare a series of background research studies on inverse condemnation. Professor Arvo Van Alstyne, the Commission's consultant, has already prepared five law review articles that have been published, one more article is substantially complete, and he hopes to prepare one additional article. (When he has completed all the articles in the series, we plan to collect them together in a Commission publication to be printed by offset printing from the law review pages so that the articles will be generally available in a useful form.)

We have assembled the published articles in a binder for members of the Commission, together with a detailed table of contents. Preserve this compilation. We will be making reference to it at the September and subsequent meetings. (Other persons receiving this memorandum will not receive this compilation, but we include references in this memorandum to the various law review articles so they can be examined by other interested persons.)

The first two law review articles provide valuable background for the entire inverse condemnation study. Members of the Commission should read these two law review articles for background before the September meeting. We do not plan to discuss them at the meeting, but the background the articles provide will be most useful to you in your work on this topic..

In the first article, Professor Van Alstyne considers whether it would be constitutional to attempt to state inverse condemnation liability and immunity in a statute. This presents a constitutional problem to the extent that such a statute might provide immunity in a case where the court, absent the statute, would find inverse condemnation liability. Professor Van Alstyne--and the Commission--believe that a reasonable statute would be upheld as constitutional. This article also contains general background on inverse condemnation generally and its

relationship to eminent domain and governmental tort liability. See Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 Stan. L. Rev. 727 (1967).

In his second article, Professor Van Alstyne discusses the general policy criteria that are helpful in resolving policy issues in the inverse condemnation field and suggests the general approach to be taken in covering the various aspects of inverse condemnation liability and the organization he will follow in the subsequent studies which cover particular aspects of the problem. In this article, he also reviews the various theories advanced in the cases and in the legal literature for dealing with inverse condemnation problems and concludes none offer a general solution but that each particular problem must be considered and rules developed using the criteria he identifies and discusses in the article. See Van Alstyne, Modernizing Inverse Condemnation: A Legislative Prospectus, 8 Santa Clara Lawyer 1 (1967).

The third article by Professor Van Alstyne deals with deliberately inflicted injury or destruction. See Van Alstyne, Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction, 20 Stan. L. Rev. 617 (1968). You need not read this article. This article deals first with denial destruction (destruction of property to protect the greater community from widespread or calamitous loss as, for example, destroying a house to prevent spread of a fire). Next, it deals with requisitioning by the government--taking property in time of emergency to carry out governmental responsibilities. Generally denial destruction is noncompensable and requisitioning is compensable. The Commission devoted some time to the consideration of these problems. A tentative recommendation was prepared and discussed. Finally, the Commission determined not to attempt to draft

legislation in this area because the problems were extremely difficult and the need for such legislation was unlikely to arise frequently enough to justify devoting Commission resources to this aspect of the law. The article next discusses the destruction of menaces to health and safety, such as, for example, diseased animals, rotten fruit, or infected trees. The law is a mess in this area, but the Commission concluded that the possibility of obtaining enactment of a sensible comprehensive statute was so unlikely that it would not be desirable to devote any resources to this aspect of inverse condemnation liability. Next the article considers confiscation and destruction as sanctions for (1) enforcement of regulatory policies (such as product standards) or discouraging illegal activities (such as seizing vehicles used in illegal activities) and (2) building and safety code enforcement. The Commission concluded that the possibility of obtaining enactment of legislation that made significant improvements in these areas was unlikely and, more important, that the problems were so complex and controversial that they would require a substantial portion of the Commission's resources for a significant period of time. Hence, the Commission concluded that it would not work on any of the problems discussed in the third article within the foreseeable future.

The fourth article covers what are perhaps the most important problems in inverse condemnation--unintended physical damage problems. See Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431 (1969). This article first discusses generally the basis of inverse condemnation liability for unintended physical damage and includes a good analysis of the Albers case (the leading case in this field) and the ramifications of that case. The article then discusses the following areas of inverse condemnation liability: (1) water damage, (2) interference with land stability, (3) loss of advantageous conditions (interference by governmental activities of advantageous conditions physically associated with property, such as an adequate supply of

potable water, (4) concussion and vibration, (5) escaping fire and chemicals (6) privileged entry upon property, and (7) physical occupation or destruction by mistake. The Commission has prepared and distributed for comment a tentative recommendation relating to water damage and interference with land stability. We will consider that tentative recommendation at the September meeting. See Memorandum 70-72. The Commission has deferred any consideration of loss of advantageous conditions. The Commission has considered concussion and vibration to some extent in the land stability tentative recommendation and also in the recommendation submitted to the 1970 Legislature on ultrahazardous liability. Escaping fire and chemicals has been deferred except to the extent that such problems are covered by the recommendation submitted to the 1970 Legislature on liability for use of pesticides and liability for ultrahazardous activities. Privileged entry on property is dealt with in the recommendation submitted to the 1970 Legislature in Senate Bill 91 (sent to Governor) and Senate Bill 94 (comprehensive governmental liability recommendation). Physical occupation or destruction by mistake was deferred for possible later consideration.

The fifth article on inverse condemnation covers just compensation for intangible detriment. See Van Alstyne, Just Compensation for Intangible Detriment: Criteria for Legislative Modifications In California, 16 UCLA L. Rev. 491 (1969). This article discusses (1) losses caused by highway and street improvements and (2) losses resulting from aircraft operations. The first subject is considered in Memorandum 70-83 (to be considered at the September meeting). The Commission devoted a substantial amount of time to the aircraft noise problem. After considering two Los Angeles Superior Court cases, the Commission decided to defer further consideration of the problem until the appellate courts have reviewed the Superior Court cases. The Commission concluded that

the Superior Court cases were generally sound and that legislation to deal with liability for aircraft noise would be unnecessary if the appellate courts generally followed the Superior Court decisions. Moreover, there is substantial legislative activity in the aircraft noise area, and the Commission felt that its resources could more profitably be devoted to other problems at this time.

Professor Van Alstyne is now completing the sixth article. This article will deal with what Professor Van Alstyne refers to in the first article as "financial harm imposed upon a property owner, ordinarily without physical harm to his property, by governmental regulatory prohibition against specified use or development of property." Typical examples include claims based upon restrictive zoning and land-use controls resulting in impairment of market value or loss of anticipated profits from commercial exploitation of the property. This is a topic of great current interest since government regulation of use is one means that is being considered to preserve open space and water areas. We hope that this study should be available for consideration by the Commission early in 1971.

The seventh, and last, article in the series will deal with procedural aspects of inverse condemnation, such as the claims presentation requirement, computation of interest, and the like. Professor Van Alstyne does not know when he will be able to commence work on this very important aspect of inverse condemnation law.

Inverse condemnation has proved to be an exceedingly difficult field of law and the Commission has found it next to impossible to draft legislation that would be generally acceptable in even those few areas where it has attempted to draft legislation. Nevertheless, the staff does not recommend that we discontinue our efforts in this area. On the contrary, we suggest that inverse

condemnation be given priority--at least water damage--because the legislative committees have indicated their desire that we prepare legislation to deal with the water damage problem as soon as possible.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

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Memo 70-100

EXHIBIT I

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# California Legislature

## Assembly Interim Committee

on  
**Water**

CARLEY V. PORTER  
 CHAIRMAN

SEP 20 1965

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

Dear Mr. DeMouilly:

House Resolution 635 of the 1965 Session of the Legislature, which requests a study of inverse condemnation, has been referred to this Committee for interim study. The principal reason behind a request for such a study was the inclusion of payment of a \$6, 300, 000 judgment against the State of California as the result of Adams v. California in the Budget Act of 1965. In addition, an estimated \$20, 000, 000 in damage claims have been filed with the Board of Control as a result of the floods of last Christmas.

We are advised now that the Law Revision Commission will study the entire matter of inverse condemnation during the next few years. This Committee is not desirous of conducting a study or engaging in activities which would duplicate the work of the Commission.

Therefore, in order to plan our interim activities, I would appreciate it very much if you would advise me of the nature and scope of the Commission's study of inverse condemnation, as well as a tentative schedule for its completion and a brief description of the procedures involved in the study.

I appreciate very much your assistance in this matter.

Sincerely yours,

*Carley V. Porter*  
 CARLEY V. PORTER  
 Chairman

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