65 12/3/71

First Supplement to Memorandum 71-96

Subject: Study 65 - Inverse Condemnation (Compulsory Dedications)

Attached is a letter from Mr. Kanner, commenting on the importance of a study of the problem of compulsory dedications. With all the other pressures on the Commission to give particular topics priority, and taking into account the fact that it is unlikely that the Legislature would reverse its present trend (which is to expand rather than restrict statutory authority to require compulsory dedications), the staff suggests that this matter not be given a priority at this time.

Respectfully submitted,

John H. DeMoully
Executive Secretary

1st Supp. Memo 71-96 EXHIBIT I

LAW OFFICES
FADEM AND KANNER
A PROFESSIONAL CORPORATION
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211

TELEPHONE
651-3372
AREA CODE 213

JERROLD A. FADEM
GIDEON KANNER
MICHAEL M. BERGER
WILLIAM STOCKER
ALBERT ROSEN

OF COUNSEL
ROBERT S. FINCK

December 1, 1971

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

Re: Compulsory Dedication
Memorandum 71-96

Gentlemen:

As your consultant, I must take issue with the staff recommendation responding to Judge Lawrence's letter.

Coercion - whether in the form of overreaching involuntary dedication ordinances or phony assessment districts - is currently one of the most odious problems associated with governmental land acquisition. Perhaps more than anything else in this field, it is productive of feelings of anger and outrage on the part of the citizenry.

While the boundaries of permissible involuntary dedication have been delineated by the courts (see, Mid-Way Cabinet, etc. Mfg. v. County of San Joaquin (1967), 257 Cal. App 2d 181 and Scrutton v. County of Sacramento (1969), 275 Cal App 2d 412), the constitutionally objectionable schemes continue to be employed by local entities. People whose proposed private improvements in no way impose any burden on public facilities are being denied building permits unless they first make a gift of a piece of their land to the local

entity. Since usually these cases involve strips of land worth only a few thousand dollars, life's realities in today's inflationary economy compel these owners to knuckle down to the coercion, as the cost of administrative appeals and court action is prohibitive.

You have no idea how brazen this practice is. I currently represent ITT in a case in which the Division of Highways right-of-way agent simply walked up to a plant manager and demanded an outright gift of about 2,800 square feet of land for a street widening. When ITT refused, a condemnation action was brought in which the condemnor seeks to take that land for "a nominal amount". See People v. International Telephone & Telegraph Corp., Santa Clara Superior Court No. 260181 (Parcel 1).

If that is the treatment afforded to a large corporation able to defend itself, you can well imagine the treatment to which ordinary citizens of limited means are subjected.

Even worse, is the bogus assessment district racket. There, the right-of-way agent walks up to an owner and says something like this: "If you give us your land for free, we'll call it quits. But if you insist on being paid for your land, we will bring a condemnation action and whatever you are awarded by the court will later be assessed

against you, and on top of that we will also assess against you the pro rata share of the costs of construction and administrative costs."

Notwithstanding that the U.S. Supreme Court has held such practice to be unconstitutional (Norwood v. Baker, (1898) 172 U.S. 269, 278-279) and that the California Supreme Court has condemned the practice in incensed language (Spring Street Co. v. City of Los Angeles (1915), 170 Cal 24), this is being done all the time.

The current fad in the Los Angeles area is to create phony assessment districts to widen local streets - sometimes residential ones - into secondary highways. This may speed up through traffic, but it surely confers no benefits on the local ownership. Where single-family residential neighborhoods are subjected to such street widening, the owners suffer partial loss of front yards, severe degradation of amenities of living and safety of their children, and diminution in value of their homes. Yet, they also find themselves assessed for the "benefits" which have thus been supposedly conferred on them.

The culprit underlying these practices is the 1911 Improvement Act which is misused as a springboard for these schemes. The Act sets up a procedure whereby an owner who wants to avail himself of his rights must first hire counsel

and appraisers in a condemnation action, then undertake an administrative appeal from the assessment, and then bring an action for a writ of mandate in which he is supposedly denied a right to a trial on the merits, but is limited to review under the "substantial evidence" rule.

Bear in mind that the right to an administrative review does not purport to accrue until after the project is actually built and the entity's obligation to pay for it irrevocably established. Thus the owner who has to follow this absurd procedure is confronted with a fait accompli, with the project literally cast in concrete, before he can seek relief. It seems plain that such a procedure lends itself to abuses whereby it becomes an obstacle course designed to prevent rather than permit rational adjudication on the merits.

In cases where the parcel in question is worth, say $3,000, as is often the case when private residences are subjected to this outrageous practice, the cost of such double litigation will necessarily consume more than the value of the land. This is clearly a scheme that in its operation denies the owners their constitutional guarantees of due process, equal protection, and just compensation:

> "When the legislature, in an effort to prevent any inquiry of the validity of the particular statute, so burdens any challenge

> thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws." Ex Parte Young (1908) 209 U.S. 123, 146.

It is bitter irony to recall that in criminal cases the accused - even in the face of overwhelming evidence of guilt - is assiduously protected from being placed in a position where it can be said that a price is being put on the assertion of his constitutional rights. See, e.g., Griffin v. California (1965) 380 U.S. 609, 614, where the court held it impermissible for a prosecutor to comment on a defendant's failure to testify, on the rationale that such comment ". . .is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."

I am not unmindful of the powerful policy factors underlying such rules in criminal cases, but this policy is also applied to civil litigation. See e.g., Bagley v. Washington Township Hospital Dist. (1966), 65 Cal. 2d 499, 504-505, and Parrish v. Civil Service Commission (1967), 66 Cal 2d 260, 271. And at the U.S. Supreme Court level, see Nash v. Florida Industrial Com. (1967) 389 U.S. 235, 239.

Yet, perfectly innocent citizens whose property taxes support the operation of courts - at least at the

trial court level - are being effectively denied the benefit of that policy; the courts are for all practical purposes closed to them.

I therefore recommend and urge that coercive governmental land acquisition, whether by means of involuntary dedication ordinances or by abuse of assessment district legislation, be made the subject of the Commission's current efforts on eminent domain. The constitutional criteria have already been articulated by the courts. What is needed now is legislation which will cut through the present procedural jungle and will provide effective relief to property owners who are being abused by their local government.

I hope to be able to discuss this matter further with the Commission at the next meeting.

Very truly yours,

GIDEON KANNER

GK;gc

cc: The Hon. J. B. Lawrence