

## Memorandum 72-73

Subject: Study 36.71 - Condemnation (Risk of Loss; Subsequent Improvements)

Risk of Loss

Section 1249.1 of the Code of Civil Procedure, relating to risk of loss, was enacted in 1961 upon recommendation of the Law Revision Commission. We are not aware of any problems in connection with this section, and recommend that it be codified without substantive change in the comprehensive statute. See Exhibit I attached.

Subsequent Improvements

The last sentence of Section 1249 of the Code of Civil Procedure provides:

No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

We recommend that the substance of this sentence be compiled in the comprehensive statute. See Exhibit II attached.

In Citizens Utilities Co. v. Superior Court, 59 Cal.2d 805, 382 P.2d 865, 31 Cal. Rptr. 316 (1963), it was held that, despite the sentence quoted above, a public utility condemnee is entitled to recover damages for subsequent improvements to its system. Pointing out that a public utility is required by law, whether or not a condemnation action is pending, to make necessary improvements, additions, and betterments to its system, the court stated:

Since the taking of property in eminent domain without the payment of just compensation is prohibited by our Constitution, it would be unconstitutional to take a utility's property valued as of the date of the summons and without compensating it for involuntary and compulsory

improvements installed by it after such date that result in an increase in the value of the system.

A provision should be included in the comprehensive statute to codify the special exception where property of a public utility is condemned. See Exhibit II attached.

Another exception to the general rule (no compensation for subsequent improvements) is provided for crops by Code of Civil Procedure Section 1249.2. We are not aware of any problems in connection with this section and recommend that it be continued without change in the comprehensive statute. See Exhibit II attached.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

EXHIBIT I

§ 1245.000. Risk of loss

1245.000. All improvements pertaining to the realty that are on the property at the time of the service of summons and which affect its value shall be considered in the assessment of compensation, damages, and special benefits unless they are removed or destroyed before the earliest of the following times:

- (a) The time the title to the property is taken by the plaintiff.
- (b) The time the possession of the property is taken by the plaintiff.
- (c) The time the defendant moves from the property in compliance with an order for possession.

Comment. Section 1245.000 continues without substantive change the provisions of former Code of Civil Procedure Section 1249.1. As to the authority of the State Department of Public Works to secure fire insurance, see Government Code Section 11007.1.

Note. This section retains the presently used phrase "improvements pertaining to the realty." When a phrase is developed to describe improvements that are a part of the realty, that phrase will be used here. Also, we do not know whether we will use the phrase "special benefits" in our statute. This too will be conformed to the terminology we decided to use generally in the statute.

EXHIBIT II

§ 1245.000. Subsequent improvements

1245.000. Except as otherwise provided by law, no improvements put on the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

Comment. Section 1245.000, which continues the substance of the last sentence of former Code of Civil Procedure Section 1249, is designed to prevent bad faith conduct by the property owner. City of Santa Barbara v. Petras, 21 Cal. App.2d 506, 511, 98 Cal. Rptr. 635, (1971)("Improvements to the property to be condemned made subsequent to notice to the property owner, via summons, of the condemnation action are obviously made in bad faith to increase the price the condemner must pay for the property. It is therefore fair, equitable and proper to prohibit such bad faith conduct.").

Exceptions to the general rule stated in Section 1245.000 are found in Sections 1245.000 (improvements to public utility system), 1245.000 (crops). As to the effect of an improvement made after service of summons pursuant to a preexisting lease obligation, see City of Santa Barbara v. Petras, supra.

§ 1245.000. Improvements to public utility system

1245.000. Improvements made by a public utility to its system subsequent to the date of the service of summons shall be included in the assessment of compensation and damages to the extent that they were beneficial to the system and reasonably and prudently made.

Comment. Section 1245.000 codifies a judicially recognized exception to the general rule state in Section 1245.000 (subsequent improvements not included in assessment of compensation or damages). Citizen's Util. Co. v. Superior Court, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963). The standard stated in Section 1245.000--"to the extent that they were beneficial to the system and reasonably and prudently made"--is taken from Public Utilities Code Section 1418, which relates to determination by the Public Utilities Commission of just compensation for acquisition of utility property.

§ 1245.000. Harvesting and marketing of crops

1245.000. (a) The plaintiff may permit the owner of the property sought to be taken to harvest and retain the financial benefit for crops planted before or after the service of summons if the owner in writing agrees to assume the responsibility for the completion of the growing process and the harvesting and marketing of the crops.

(b) If the plaintiff takes possession of the property sought to be taken at a time when such action prevents the defendant from harvesting and marketing crops planted before or after the service of summons, the value of such crops shall be included in the compensation awarded for the property taken.

Comment. Section 1245.000 continues without substantive change the provisions of former Code of Civil Procedure Section 1249.2.

JERROLD A. FADEN  
GIDEON KANNER  
MICHAEL M. BECKER  
WILLIAM STOCKER  
ALLEN J. KWANER

LAW OFFICES  
**FADEN AND KANNER**  
A PROFESSIONAL CORPORATION  
8363 WILSHIRE BOULEVARD  
BEVERLY HILLS, CALIFORNIA 90211

TELEPHONE  
851-3372  
AREA CODE 213

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

Re: Memorandum 72-73

Gentlemen:

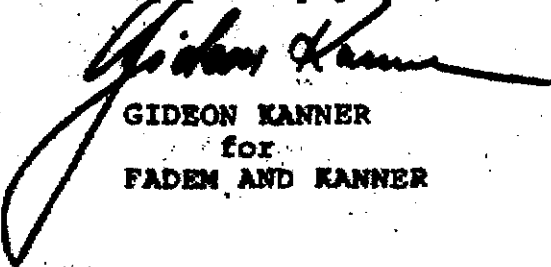
The proposed section 1245.000, and its underlying analysis, suffer from a serious omission.

They fail to consider the situation in which the owner is served while construction is actually in progress on the subject property. Under such circumstances, the owner may not be "required" to make additional improvements by affirmative compulsion of the law, in the sense that a utility may be (as in the Citizens Utilities case), but he is required to do additional work to keep the partially completed structure from being vandalized or destroyed by exposure to the elements, and to take various preventive measures (such as fencing or shoring) to protect others from injury and himself from liability.

Thus, the Petrus language notwithstanding, improvements made to the subject property after service of summons may not be "obviously" in bad faith. It would be most unfair to deny compensation to an owner caught in such a predicament.

The proposed language of §1245.000 relating to public utilities should therefore be changed to allow compensation for good faith work done after service of summons, to protect a partially completed structure or excavation and for good faith work done to promote safety.

Very truly yours,

  
GIDEON KANNER  
for  
FADEN AND KANNER

GK:ww