#36.50 1/4/73

Memorandum 73-8

Subject: Study 36.50 - Condemnation (Just Compensation and Measure of Damages--Draft Statute)

Background

At the December 1972 meeting, the Commission made a start on the drafting of a compensation statute. Exhibit I is a redraft of the compensation statute along the lines indicated by the Commission. It should be carefully examined. This memorandum points out a few portions of the draft that are noteworthy and presents some additional material in areas where the Commission requested further information.

Enhancement and Blight

Section 1245.340 omits a subdivision to codify Woolstenhulme (the Constitution requires that a property owner receive enhancement in value caused by the imminence of the project for which the property is taken so long as the enhancement occured at a time when it was reasonably certain the property would not be taken for the project). The staff now sees no point in codifying a rule it does not believe is a good rule, thereby preventing the court from, in effect, reversing itself some time in the future. In addition, the staff has come to view Woolstenhulme as an elaboration of the "scope of the project" rule discussed in the Comment.

Section 1245.340 also omits a requirement that the property owner must suffer any depreciation in value that he might have prevented by proper mitigating actions. Government Code Section 7267.2, for example, reads in part:

> Any decrease or increase in the fair market value of real property to be acquired prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner or occupant, will be disregarded in determining the compensation for the property. . . . [Emphasis added.]

In principle, of course, physical deterioration of buildings and structures should be considered in determining market value. However, when the taking is imminent and the buildings are expected to be demolished, the owner should not be held to a high duty to take precautions to prevent waste and vandalism; yet the "reasonable control" test might produce that result. Omission of the emphasized phrase will avoid the risk of imposing an undue burden on the property owner in the form of an unrealistic duty of maintenance.

Time of Passage of Title

Title to property in an eminent domain proceeding passes from defendant to plaintiff at the time of recordation of the final order of condemnation:

> The title to the property described in the final order of condemnation vests in the plaintiff for the purposes described therein upon the date that a certified copy of the final order of condemnation is recorded in the office of the recorder of the county. [Code Civ. Proc. § 1253.]

Thus, the legal incidents that normally attend title transfer, such as liability for property taxes, depend upon recordation of the final order of condemnation. There are, however, special statutory provisions that modify this general rule to provide in substance that the proration of taxes, interest, and risk of loss shift when possession of the property is taken under an order of possession. Each of these special provisions is drafted in light of the particular problem. Thus, for interest purposes, interest accrues when the condemnor is entitled to take possession whether or not possession is taken. On the other hand, risk of loss shifts only when possession is taken or the property owner moves from the property in compliance with the order of possession.

In addition, it has been held that, where an assessment lien was levied upon property after possession was taken by the condemnor but prior to recordation of the final judgment, the property owner could not be held liable. See,

e.g., People v. Peninsula Title Guarantee Co., 47 Cal.2d 29 301 P.2d 1 (1956):

> There is no passage of title in condemnation proceedings until an award has been made and the final judgment in condemnation filed in the office of the county recorder. (Code Civ. Proc., § 1253; Metropolitan Water Dist. v. Adams, 16 Cal.2d 676 [107 P.2d 618].) However, as an exception to the strict application of the law, it is recognized that a "taking" of sufficient consequences is deemed to have the same effect of finality of transfer for specific purposes as does passage of title. [47 Cal.2d at 33.]

And again, if possession is taken prior to judgment, that is the time the right to the condemnation award accrues. People v. Joerger, 12 Cal. App.2d 665, 55 P.2d 1269 (1936); People v. Gianni (Ct. of Appeal, 1st Dist., Dec. 1972). We plan to draft a section to cover this matter at a later time.

Finally, where there is an early "taking" of property in the form of a physical invasion or direct legal restraint (inverse liability), losses due to a general decline in market value in the area or to the adverse consequences of a natural disaster would be borne by the condemnor since the taking of the property is said to have occurred at the earlier date. Klopping v. City of Whittier, 8 Cal.3d 39, ___ P.2d ___, ___ Cal. Rptr. ___ (1972)(dictum).

Risk of Loss

Consonant with the preceding discussion of passage of title, risk of loss to property is placed upon the condemnee until there is an actual taking of possession or of title by the condemnor. Redevelopment Agency v. Maxwell, 193 Cal. App.2d 414, 14 Cal. Rptr. 170 (1961). This rule is codified and made more precise in Code of Civil Procedure Section 1249.1 (enacted in 1961 upon Commission recommendation prior to the decision in the Maxwell case):

> 1249.1. 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 of possession.

This rule appears to work equitably and corresponds to the allocation of risk of loss normally in property sales transactions. And, since the condemnor is merely a plaintiff and may never obtain final judgment, it is appropriate that it not be put to the burden of insuring property it may never acquire. It is accordingly recodified as Section 1245.230.

However, where there is a "de facto" taking of property of the type described in Klopping, such as results from an actual "physical invasion or direct legal restraint," there are serious problems to applying a rule that the condemnor must bear the risk of loss. If the condemnor is to bear the burden of insuring, it should be able easily to determine when the burden commences rather than having to await the outcome of an inverse condemnation action after the property has been destroyed. To a limited extent, this consideration is mitigated by the fact that the condemnor may have adequate notice if the risk of loss shifts only where there is a physical invasion or a direct restraint on use of the property. In addition, even where the invasion or restraint is clear, the taking may be of such a limited nature as not to justify the shifting of the risk of loss for the whole property to the condemnor. For these reasons, the staff recommends that no language be added to the existing law to codify the situation mentioned in Klopping.

Partially Completed Improvements

The basic rule of compensation is that only improvements on the property at the time of service of summons are compensated; those placed on the property

at a later time are not compensated. The reason for this rule is clear: The public should not have to pay prices for property that are inflated by construction undertaken after the property owner has actual knowledge that the property will be taken by eminent domain.

The Commission has previously discussed the problems this rule creates where there is an improvement in the process of construction on the property. Here it may be equitable to allow compensation for some additional construction either to protect the improvement from injury pending determination of its value or to protect the public from injury caused by the existence of an incomplete structure or excavation. In addition, there may be other situations where it is fair to allow compensation for some additional work subsequent to service of summons--e.g., the improvement is nearly complete and will have a useful life prior to the time possession is transferred, or the improvement itself is required for public use. In these cases, it may be equitable to permit further construction.

There are other possible ways of handling some of these problems. For example, the problem of damage to the improvement prior to trial of valuation could be resolved by preventing jury view. However, this solution presents difficulties in that the improvement may only be a small part of the property taken, and it might not be wise to prevent a view of the whole premises because of the existence of a damaged improvement. The judge could, of course, exercise his judgment as to whether permitting the jury to view the property would be prejudicial to the property owner. Or a view by the jury could be allowed only with the consent of the property owner. Likewise, the solution of requiring immediate possession of property on which there is a partially completed improvement has serious drawbacks. The condemnor may well not have the money

for a deposit at hand at the time of service of summons. It would be economically better to halt construction by service of summons than to force the condemnor to allow completion of the improvement because it cannot afford to serve summons and take possession.

The most practicable solution, then, is to allow compensation for further construction in certain limited situations. Because the situations envisaged are so diverse, and because there are undoubtedly many others that would be appropriate but that are not described above, the staff believes that it would be best not to codify any standards in a statute. Rather, compensation would be allowed if the improvements are made with the consent of the condemnor, or if the court in its discretion allows them. The Comment to the statute would then indicate the general intent of the provision, giving examples of the types of situations the statute is intended to cover. A provision designed to accomplish this is set out in Section 1245.240.

Respectfully submitted,

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EXHIBIT I

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CHAPTER 5. COMPENSATION

Article 1. General Provisions

§ 1245.010. Right to compensation

1245.010. The owner of property acquired by eminent domain is entitled to compensation as provided in this chapter.

Comment. Section 1245.010 supersedes former Section 1248(1). See Section 1230.070 ("property" includes any right or interest in property). For apportionment of award among owners, see Chapter 6 (commencing with Section 1250.010).

§ 1245.020. Other statutes not affected

1245.020. Nothing in this chapter affects any right the owner of property acquired by eminent domain may have under any other statute.

Comment. Chapter 5 (commencing with Section 1245.010) does not affect any statutory provisions providing for additional compensation, such as compensation for relocation of public utility facilities. See discussion in A Study Relating to Sovereign Immunity, 5 Cal. L. Revision Comm'n Reports 1, 78-96 (1963). See also Govt. Code § 7260 et seq. (relocation assistance).

Likewise, Chapter 5 in no way limits additional amounts that may be required by Article I, Section 14, the "just compensation" clause of the California Constitution. See Section 1230.110 ("statute" includes constitution). On the other hand, the fact that the "just compensation" clause may require amounts less than are provided in Chapter 5 does not limit the compensation required by Chapter 5.

Article 2. Date of Valuation

Comment. Article 2 (commencing with Section 1245.110) supersedes those portions of Code of Civil Procedure Section 1249 that formerly specified two alternative dates of valuation. Article 2 provides a date of valuation for all eminent domain proceedings other than certain proceedings by political subdivisions to take property of public utilities. Decisions construing former Code of Civil Procedure Section 1249 held that its provisions governing the date of valuation and the making of subsequent improvements do not apply in proceedings by political subdivisions to take the property of public utilities brought either under the general eminent domain statutes or under the provisions of the Public Utilities Code. Citizen's Util. Co. v. Superior Court, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963); Marin Municipal Water Dist. v. Marin Water & Power Co., 178 Cal. 308, 173 P. 469 (1918). This construction is continued under Article 2 and under Section 1245.240.

§ 1245.110. Date of valuation fixed by deposit

1245.110. Unless an earlier date of valuation is applicable under this article, if the plaintiff deposits the probable just compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 7 or deposits the amount of the judgment in accordance with Article 3 (commencing with Section 1255.310) of Chapter 7, the date of valuation is the date on which the deposit is made.

Comment. Section 1245.110 permits the plaintiff, by making a deposit, to establish the date of valuation as of a date no later than the date the deposit is made. The rule under the language formerly contained in Section 1249 was to the contrary; neither the making of a deposit nor the taking of possession had any bearing on the date of valuation. See City of Los Angeles v. Tower, 90 Cal. App.2d 869, 204 P.2d 395 (1949). The date of valuation may be earlier than the date of the deposit, and subsequent events may cause such an earlier date of valuation to shift to the date of deposit. But a date of valuation established by a deposit cannot be shifted to a later date by any of the circumstances mentioned in the following sections.

§ 1245.120. Trial within one year

1245.120. If the issue of compensation is brought to trial within one year after the filing of the complaint, the date of valuation is the date of the filing of the complaint.

Comment. Section 1245.120 continues the substance of the rule provided in former Code of Civil Procedure Section 1249, but the date of the filing of the complaint--rather than the date of the issuance of summons--is used in determining the date of valuation. Ordinarily, the dates are the same, but this is not always the case. See Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924). As the issuance of summons is not essential to establish the court's jurisdiction over the property (see Harrington v. Superior Court, supra, and Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964)), the date of the filing of the complaint is a more appropriate date.

§ 1245.130. Trial not within one year

1245.130. If the issue of compensation is not brought to trial within one year after the filing of the complaint, the date of valuation is the date of the commencement of the trial unless the delay is caused by the defendant, in which case the date of valuation is the date of the filing of the complaint.

Comment. Section 1245.130 establishes the date of valuation where that date is not established by an earlier deposit (Section 1245.110) or by the provision of Section 1245.120. Section 1245.130, which continues in effect a proviso formerly contained in Section 1249, retains the date specified in Section 1245.120 as the date of valuation in any case in which the delay in reaching trial is caused by the defendant.

With respect to the date that a trial is commenced, see Evidence Code Section 12 and the Comment to that section.

If a new trial is ordered or a mistrial is declared and the new trial or retrial is not commenced within one year after the filing of the complaint, the date of valuation is determined under Section 1245.140 or Section 1245.150 rather than Section 1245.130. However, if the new trial or retrial is commenced within one year after the filing of the complaint, the date of valuation is determined by Section 1245.120

§ 1245.140. New trial

1245.140. (a) If a new trial is ordered by the trial or appellate court and the new trial is not commenced within one year after the filing of the complaint, the date of valuation is the date of the commencement of such new trial.

(b) Notwithstanding subdivision (a), the date of valuation in the new trial is the same date as the date of valuation in the previous trial if the plaintiff has deposited the amount of the judgment in accordance with Article 3 (commencing with Section 1255.310) of Chapter 7 within 30 days after the entry of judgment or, if a motion for new trial or to vacate or set aside the judgment has been made, within 30 days after disposition of such motion.

Comment. Section 1245.140 deals with the date of valuation where a new trial is ordered. Generally, the date of valuation is the date of valuation used in the previous trial if the deposit is made within 30 days after entry of judgment or, if a motion for a new trial or to vacate or set aside the judgment has been made, within 10 days after disposition of such motion. If the deposit is made thereafter but prior to the commencement of the new trial, the date of valuation is the date of deposit. See Section 1245.110. Section 1245.140 does not apply where an earlier date of valuation has been established by a deposit prior to judgment. See Section 1245.110.

Under the language contained in Section 1249 of the Code of Civil Procedure, the question arose whether the original date of valuation or the date

of the new trial should be employed in new trials in eminent doamin proceedings. The Supreme Court of California ultimately held that the date of valuation established in the first trial, rather than the date of the new trial, should normally be used. See People v. Murata, 55 Cal.2d 1, 357 P.2d 833, 9 Cal. Rptr. 601 (1960). Section 1245.140 reverses the result obtained by that decision unless the date of valuation has been established by the deposit of the amount of the judgment in accordance with Article 3 (commencing with Section 1255.310) of Chapter 7. The section applies whether the new trial is granted by the trial court or by an appellate court. However, if a mistrial is declared, further proceedings are not considered a "new trial," and the date of valuation is determined under Section 1245.150 rather than under Section 1245.140.

§ 1245.150. Mistrial

1245.150. (a) If a mistrial is declared and the retrial is not commenced within one year after the filing of the complaint, the date of valuation is the date of the commencement of the retrial of the case.

(b) Notwithstanding subdivision (a), the date of valuation in the retrial is the same date as the date of valuation in the trial in which the mistrial was declared if the plaintiff deposits the probable just compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 7 within 30 days after the declaration of mistrial.

Comment. Section 1245.150 deals with the date of valuation where a mistrial is declared. The section adopts the principle established by Section 1245.140 which governs the date of valuation when a new trial is ordered. See the Comment to Section 1245.140.

Under the language formerly contained in Section 1249, the effect, if any, of a mistrial upon the date of valuation was uncertain. An unpublished court of appeal decision held that the abortive trial proceeding was of no consequence in this connection and that, if the retrial began more than one year after the date of issuance of summons, the date of valuation was the date of the retrial if the delay was not caused by the condemnee. People v. Hull, 2 Civil No. 29159 (2d Dist. 1965).

For the purpose of Section 1245.150, a "retrial" following a mistrial is distinguished from a new trial following an appeal or a motion for new

trial granted under Code of Civil Procedure Section 657. See Section 1245.140 and the Comment to that section. As to the distinction, see 3 B. Witkin, California Procedure Attack on Judgment in Trial Court § 24 at 2072 (1954).

Article 3. Compensation for Improvements Pertaining to Realty and Crops

§ 1245.210. Improvements pertaining to realty

(Will include equipment installed for use in fixed location.)

[Not yet drafted.]

§ 1245.220. Compensation for improvements pertaining to the realty

1245.220. Except as otherwise provided by statute, all improvements pertaining to the realty shall be taken into account in determining compensation.

Comment. Section 1245.220 supersedes portions of former Sections 1248 (compensation shall be awarded for the property taken "and all improvements thereon pertaining to the realty") and 1249.1 ("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 . . . ."). For exceptions to the rule provided in Section 1245.220, see Sections 1245.230 (improvements removed or destroyed), 1245.240 (improvements made after service of summons). Cf. Section 1245.250 (growing crops).

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.

§ 1245.230. Improvements removed or destroyed

1245.230. Improvements pertaining to the realty shall not be taken into account in determining compensation for the property taken to the extent that they are removed or destroyed before the earliest of the following times:

(a) The time the plaintiff takes title to the property.

(b) The time the plaintiff takes possession of the property.

(c) The time the defendant moves from the property in compliance with an order for possession.

Comment. Section 1245.230 continues the substance of former Section 1249.1. See also Redevelopment Agency v. Maxwell, 193 Cal. App.2d 414, 14 Cal. Rptr. 170 (1961). See also Section 0000.00 (title to property acquired by eminent domain passes upon the date that a certified copy of the final order of condemnation is recorded). Cf. Klopping v. City of Whittier, 8 Cal.3d 39, 46, ___ P.2d ___, ___, ___ Cal. Rptr. ___, ___ (1972) (dictum)(risk of loss in inverse condemnation).

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.

§ 1245.240. Improvements made after service of summons

1245.240. (a) Improvements pertaining to the realty made subsequent to the date of service of summons shall not be taken into account in determining compensation.

(b) Subdivision (a) does not apply in any of the following cases:

(1) The improvement is one required to be made by a public utility to its utility system.

(2) The improvement is one made with the written consent of the plaintiff.

(3) The improvement is one authorized to be made by a court order issued after a noticed hearing and upon a finding by the court that the hardship to the plaintiff of permitting the improvement is clearly outweighed by the hardship to the defendant of not permitting the improvement. No order may be issued under this paragraph after the plaintiff has deposited the amount of probable just compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 7 unless the work authorized by the order is necessary to protect persons or other property against the risk of injury created by a partially completed improvement.

Comment. Section 1245.240 in no way limits the right of the property owner to make improvements on his property following service of summons; it simply states the general rule that the subsequent improvements will not be

compensated and specifies those instances in which subsequent improvements will be compensated. If a property owner discontinues work on a partially completed improvement following service of summons, the losses he suffers as a result of the discontinuance may be compensable upon abandonment by the plaintiff or upon defeat of the right to take. See Section [ ].

Subdivision (a), which continues the substance of the last sentence of former Section 1249, requires that, as a general rule, subsequent improvements be uncompensated regardless whether they are made in good faith or bad. See City of Santa Barbara v. Petras, 21 Cal. App.2d 506, 98 Cal. Rptr. 635 (1971), and El Monte School Dist. v. Wilkins, 177 Cal. App.2d 47, 1 Cal. Rptr. 715 (1960). For exceptions to the rule stated in subdivision (a), see subdivision (b) and Section 1245.250 (harvesting and marketing of crops).

Subdivision (b)(1) codifies a judicially recognized exception to the general rule stated in subdivision (a). Citizen's Util. Co. v. Superior Court, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963). The standard of necessary improvements is more stringent than that utilized by the Public Utilities Commission in a determination of compensation for the acquisition of utility property. Cf. Pub. Util. Code § 1418 (improvements "beneficial to the system and reasonably and prudently made").

Subdivision (b)(2), allowing compensation for subsequent improvements made with the consent of the plaintiff, is new.

Subdivision (b)(3) is intended to provide the defendant with the opportunity to make improvements that are demonstrably in good faith and not

intended solely to enhance the amount of compensation payable. Instances contemplated by subdivision (b)(3) where subsequent improvements might be compensable under the balancing of hardships test include: (1) The work is necessary to protect persons or other property against the risk of injury created by a partially completed improvement. (2) The work is necessary to protect a partially completed improvement that enhances the value of the land from being damaged by vandalism or by exposure to the elements. (3) An improvement is near completion and the date of use of the property is distant, additional work enabling profitable use of the property pending dispossession.

§ 1245.250. Harvesting and marketing of crops

1245.250. (a) The owner of property acquired by eminent domain may harvest and retain the financial benefit for crops planted before or after the service of summons.

(b) In the case of crops planted before service of summons, if the plaintiff takes possession of the property at a time that prevents the defendant from the harvest and marketing of the crops, the value of the crops and the cost of any improvements made for their cultivation shall be included in the compensation awarded for the property taken. Where the plaintiff gives the defendant notice that it will take possession of the property at a time that will prevent the harvest of the crops, the value of the crops at the time of the notice and the cost of any improvements made for their cultivation before that time shall be included in the compensation awarded for the property taken.

(c) In the case of crops planted after the service of summons, the compensation specified in subdivision (b) shall be allowed if the plaintiff has previously consented to the planting and harvest.

Comment. Section 1245.250 supersedes former Section 1249.2. Despite the contrary implication of the former section, Section 1245.250 makes clear that the defendant has the right to grow and harvest crops and to retain the profit for his own benefit up to the time the property is actually taken.

Subdivision (a). Where possession is taken and the defendant is prevented from realizing the value of his crops, he is entitled to their value at that time, along with the cost of improvements made for their cultivation, provided they were planted prior to service of summons. Subdivision (b). Otherwise, the defendant is not entitled to compensation for unharvested crops unless the plaintiff has agreed to permit their growth. Failure of the plaintiff to agree, where there will be an unreasonable delay in acquisition, may subject the plaintiff to liability in inverse condemnation. See Klopping v. City of Whittier, 8 Cal.3d 39, ___ P.2d ___, ___ Cal. Rptr. ___ (1972).

Article 4. Measure of Compensation for Property Taken

§ 1245.310. Compensation for property taken

1245.310. Compensation shall be awarded for the property taken. The measure of this compensation is the fair market value of the property taken.

Comment. Section 1245.310 provides the basic rule that compensation for property taken by eminent domain is the fair market value of the property. Cf. Section 1245.330 (special purpose properties).

§ 1245.320. Fair market value

1245.320. The fair market value of the property taken is the price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, dealing with each other in the open market and with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

Comment. Section 1245.320 is new. It codifies the definition of fair market value that has developed through the case law. See, e.g., Sacramento etc. R.R. v. Heilbron, 156 Cal. 408, 409, 104 P. 979, 980 (1909), and Buena Park School Dist. v. Metrim Corp., 176 Cal. App.2d 255, 263, 1 Cal. Rptr. 250, ___ (1959). Although the phrase "the highest price estimated in terms of money" has been utilized in the case law definitions of fair market value, Section 1245.010 omits this phrase because it is confusing. No substantive change is intended by this omission.

The standard provided in Section 1245.320 is the usual standard normally applied to valuation of property whether for eminent domain or for any other purpose. The evidence admissible to prove fair market value is governed by the provisions of the Evidence Code. See especially Evid. Code § 810 et seq. Where comparable sales are used to determine the fair market value of property, the terms and conditions of such sales may be shown in an appropriate case. See Evid. Code § 816.

§ 1245.330. Measure of compensation for special purpose property

[Not yet drafted.]

§ 1245.340. Changes in property value due to imminence of project

1245.340. Any change in the value of the property taken that occurred prior to the date of valuation shall be excluded from the determination of compensation if the change in value is attributable to any of the following:

(a) The project for which the property is taken.

(b) The eminent domain proceeding in which the property is taken.

(c) Any preliminary actions of the plaintiff relating to the taking of the property.

Comment. Section 1245.340 requires that the compensation for property taken by eminent domain be determined as if there had been no enhancement or diminution in the value of property due to the imminence of the eminent domain proceeding or the project for which the property is taken. The test provided in Section 1245.340 is the same as that applied by state and federal law to offers for voluntary acquisition of property (Govt. Code § 7267.2 and Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, § 301(3)), with three exceptions: (1) Section 1245.340 requires that changes in value be "excluded" from the determination of compensation since the term "disregarded" is sufficiently ambiguous to mean that changes in value are to be either excluded or included in the determination. (2) Section 1245.340 does not continue the requirement that the property owner suffer the effects of any physical deterioration within his reasonable control. (3) Section 1245.340 lists several causes of value change that must be excluded from consideration rather than the general factor of the "public improvement" for which the property is acquired.

The first factor for which value changes must be excluded is the project for which the property is taken. Prior case law held that, in general, increases in the value of the property caused by the project as proposed may not be included in the compensation. Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971); cf. United States v. Miller, 317 U.S. 369 (1943). The effect of Section 1245.340(a) is to codify this rule. It should be noted that Merced Irr. Dist. v. Woolstenhulme stated an exception to the rule of exclusion of enhancement from market value where the property was not originally included within the scope of the project; this exception is discussed below under the "scope of the project" rule.

Prior case law is uncertain respecting the treatment of any decrease in value due to such factors as general knowledge of the pendency of the public project. Several decisions indicate that the rules respecting enhancement and diminution are not parallel and that value is to be determined as of the date of valuation notwithstanding that such value reflects a decrease due to general knowledge of the pendency of the public project. See City of Oakland v. Partridge, 214 Cal. App.2d 196, 29 Cal. Rptr. 388 (1963); People v. Lucas, 155 Cal. App.2d 1, 317 P.2d 104 (1957); and Atchison, T. & S.F. R.R. v. Southern Pac. Co., 13 Cal. App.2d 505, 57 P.2d 575 (1936). Seemingly to the contrary are People v. Lillard, 219 Cal. App.2d 368, 33 Cal. Rptr. 189 (1963), and Buena Park School Dist. v. Metrim Corp., 176 Cal. App.2d 255, 1 Cal. Rptr. 250 (1959). The Supreme Court case of Klopping v. City of Whittier, 8 Cal.3d 39, ___ P.2d ___, ___ Cal. Rptr. ___ (1972), cited the Lillard and Metrim

approach while disapproving the Partridge, Lucas, and Atchison approach in the inverse condemnation context. The case cast doubt, however, on what approach the court would take in a direct condemnation case. 8 Cal.3d at 45 n.1; cf. Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d at 483 n.1.

Section 1245.340(a) is intended to make the rules respecting appreciation and depreciation parallel by codifying the views expressed in the Lillard and Metrim decisions. See Anderson, Consequences of Anticipated Eminent Domain Proceedings--Is Loss of Value a Factor?, 5 Santa Clara Lawyer 35 (1964).

Subdivision (a) of Section 1245.340 is also intended to codify the proposition that any increase or decrease in value resulting from the use which the condemnor is to make of the property must be eliminated in determining compensable market value. See Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d at 490-491. If, however, the condemnor's proposed use is one of the highest and best uses of the property, the adaptability of the property for that purpose may be shown by the property owner. See San Diego Land & Town Co. v. Neale, 78 Cal. 63, 20 P. 372 (1888).

While Section 1245.340(a) provides that changes in value caused by the project for which the property is taken may not be included in the compensation, this exclusionary provision is not intended to apply to value changes that are beyond the scope of the "project." Thus, where changes in value are caused by a project other than the one for which the property is taken, even though the two projects may be related, the property owner may enjoy the benefit or suffer the detriment caused by the other project. See, e.g., People v. Cramer, 14 Cal. App.3d 513, 92 Cal. Rptr. 401 (1971). Likewise, if property

is affected by a project but is not to be taken for that project and subsequently the scope of the project is changed and the property is acquired for the changed project, the property should be valued as affected by the original project up to the change in scope. See, e.g., People v. Miller, 21 Cal. App.3d 467, 98 Cal. Rptr. 539 (1971), and Merced Irr. Dist. v. Woolstenhulme, supra ("[W]e now hold that increases in value attributable to a project but reflecting a reasonable expectation that property will not be taken for the improvement, should properly be considered in determining 'just compensation.'"[4 Cal.3d at 495]); cf. United States v. Miller, supra.

The second factor listed in Section 1245.340 requires that value changes caused by the fact that the property will be taken by eminent domain must be excluded from fair market value. Changes based on conjecture of a favorable or unfavorable award are not a proper element of compensation. See Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d at 491-492, 483 P.2d at ___, 93 Cal. Rptr. at ___.

The third factor listed in Section 1245.340 requires preliminary actions on the part of the condemnor related to the taking of the property should not be allowed to affect the compensation. See Buena Park School Dist. v. Metrim Corp., supra.

Article 5. Compensation for Injury to Remainder

§ 1245.410. Compensation for injury to remainder

1245.410. (a) Where the property acquired is part of a larger parcel, in addition to the compensation awarded pursuant to Article 4 (commencing with Section 1245.310) for the part taken, compensation shall be awarded for the injury, if any, to the remainder.

(b) Compensation for injury to the remainder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder. If the amount of the benefit to the remainder equals or exceeds the amount of the damage to the remainder, no compensation shall be awarded under this article, but the amount of the benefit to the remainder shall not be deducted from the compensation required to be awarded for the property taken or from the other compensation required by this chapter.

Comment. Section 1245.410 provides the measure of damages in a partial taking. It supersedes subdivisions 2 and 3 of former Code of Civil Procedure Section 1248.

§ 1245.420. Damage to remainder

1245.420. Damage to the remainder is the damage, if any, caused to the remainder by either or both of the following:

(a) The severance of the remainder from the part taken.

(b) The construction and use of the project in the manner proposed by the plaintiff whether located on the part taken or elsewhere.

Comment. Section 1245.420 continues prior law as to the damage to the remainder compensable in an eminent domain proceeding. See former Section 1248(2). Prior law was not clear whether damage to the remainder caused by the construction and use of the project were recoverable if the damage-causing portion of the project was not located on the property from which the remainder was severed. Compare People v. Symons, 54 Cal.2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960), and People v. Elsmore, 229 Cal. App.2d 809, 40 Cal. Rptr. 613 (1964), with People v. Ramos, 1 Cal.3d 261, 460 P.2d 992, 81 Cal. Rptr. 792 (1969), and People v. Volunteers of America, 21 Cal. App.3d 111, 98 Cal. Rptr. 423 (1971). Subdivision (b) abrogates the rule in Symons by allowing recovery for damages caused by the project to the remainder regardless of the precise location of the damage-causing portion of the project.

§ 1245.430. Benefit to remainder

1245.430. Benefit to the remainder is the benefit, if any, caused by the construction and use of the project in the manner proposed by the plaintiff whether located on the part taken or elsewhere.

Comment. Section 1240.430 codifies prior law as to the benefit to the remainder that may be offset against damage to the remainder in an eminent domain proceeding. See former Section 1248(3). As with damage to the remainder (Section 1240.420 and Comment thereto), benefits created by the construction and use of the project need not be derived from the portion of the project located on property from which the remainder was severed. This continues existing law. See People v. Hurd, 205 Cal. App.2d 16, 23 Cal. Rptr. 67 (1962).

§ 1245.440. Computing damage and benefit to remainder

1245.440. The amount of the damage to the remainder and the benefit to the remainder shall:

(a) Reflect any delay in the time when the damage or benefit caused by the construction and use of the project in the manner proposed by the plaintiff will actually be realized; and

(b) Be determined based on the value of the remainder on the date of valuation excluding prior changes in value as provided in Section 1245.340.

Comment. Section 1245.440 embodies two rules for computing the damage and benefit to the remainder that represent departures from prior law. It has been held that damage and benefit must be based on the assumption that the improvement is completed. See, e.g., People v. Schultz Co., 123 Cal. App.2d 925, 268 P.2d 117 (1954). Subdivision (a) alters this rule and requires that compensation for damage to the remainder (and the amount of benefit offset) be computed in a manner that will take into account any delay in the accrual of the damage and benefit under the project as proposed. If there is a subsequent change in plans so that the damage and benefit do not occur as the plaintiff proposed, the property owner may recover any additional damage in a subsequent action. See, e.g., People v. Schultz Co., supra. Whether changes in the value of the remainder caused by imminence of the project prior to the date of valuation should be included in the computation of damage and benefit to the remainder was unclear under prior law. Subdivision (b) adopts the position that the damage and benefit to the remainder must be computed on the basis of the remainder unaffected by any enhancement or blight.

§ 1245.450. Compensation to reflect project as proposed

1245.450. Compensation for injury to the remainder shall be based on the project as proposed. Any features of the project which mitigate the damage or provide benefit to the remainder, including but not limited to easements, farm or private crossings, underpasses, access roads, fencing, and cattle guards, shall be taken into account in determining the compensation for injury to the remainder.

Comment. Section 1245.450 makes clear that any "physical solutions" provided by the plaintiff to mitigate damages are to be considered in the assessment of damages. Section 1245.450 supersedes former Section 1248(5): The cost of fencing, cattle guards, and crossings is an element of damage only if lack of fencing, cattle guards, or crossings would damage the remainder; if the fencing, cattle guards, or crossings are to be supplied by the plaintiff as part of its project as designed, this fact should be taken into consideration in determining the damage, if any, to the remainder. Cf. former Section 1251 (plaintiff may elect to build fencing, cattle guards, and crossings in lieu of payment of damages).