#36.50 1/30/73

Memorandum 73-18

**Subject:** Study 36.50 - Condemnation Law and Procedure (Just Compensation and Measure of Damages)

Attached to this memorandum is a draft statute of the whole compensation chapter. The only areas not included in the draft are: (1) special purpose properties, which will be discussed in connection with evidence, (2) litigation costs, which will be dealt with in the procedure chapter, and (3) business losses, discussed in Memorandum 73-22. This memorandum analyzes selected portions of the draft statute.

§§ 1245.210-1245.220. Structures and Improvements on the Property Taken

Where structures and improvements are located on property acquired by eminent domain, the condemnor is normally required to take those structures and improvements along with the property even though it may not require them for public use. The federal fair acquisition policies statute provides, for example:

> 302(a). Notwithstanding any other provision of law, if the head of a Federal agency acquires any interest in real property in any State, he shall acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and which he determines will be adversely affected by the use to which such real property will be put.

Code of Civil Procedure Section 1248(1) requires the award of compensation for the property taken "and all improvements thereon pertaining to the realty." Likewise, Code of Civil Procedure Section 1249.1 provides:

> 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 . . . .

Just what is an improvement "pertaining" to the realty is not clear. Because in the past the condemnee has had to bear the moving expense for

personal property himself, the courts have striven to classify borderline types of improvements as ones pertaining to the realty and hence compensable. See, e.g., People v. Klopstock, 24 Cal.2d 897, 151 P.2d 641 (1944)(trade fixtures that are personalty between landlord and tenant may be realty for purposes of condemnation); City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826 (1933)(trade fixtures that are personalty for tax purposes may be realty for purposes of condemnation). Likewise, the Legislature has provided in Code of Civil Procedure Section 1248b that certain types of improvements should be compensated whether or not they pertain to the realty:

> § 1248b. Equipment designed for manufacturing or industrial purposes and installed for use in a fixed location shall be deemed a part of the realty for the purposes of condemnation, regardless of the method of installation.

Even under these liberal trade fixture tests, however, there is some personalty that is not required to be taken in eminent domain, notably equipment, supplies, and stock in trade of commercial enterprises. See, e.g., Town of Los Gatos v. Sund, 234 Cal. App.2d 24, 44 Cal. Rptr. 181 (1965)(supplies of television repair shop); City of Los Angeles v. Siegel, 230 Cal. App.2d 982, 41 Cal. Rptr. 563 (1964)(restaurant equipment and supplies); City of Los Angeles v. Allen's Grocery Co., 265 Cal. App.2d 274, 71 Cal. Rptr. 88 (1968) (inventory of grocery store).

Under the terms of the relocation assistance act, effective July 1, 1972, a public entity or public utility acquiring property must fully compensate the condemnee for the relocation of his personalty required by the acquisition. Government Code Section 7262 reads in part:

> 7262. (a) As a part of the cost of acquisition of real property for a public use, a public entity shall compensate a displaced person for his:

(1) Actual and reasonable expense in moving himself, family, business, or farm operation, including moving personal property.

(2) Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the public entity.

* * * * *

The effect of this provision combined with the requirement of acquisition of improvements pertaining to the realty is to fully compensate a displaced person for his personal property either in replacement costs, relocation costs, or both.

Where a person in business discontinues the business, however, and if he takes a loss on the sale of his equipment and inventory, he is compensated for the loss only to the extent of the approximate moving expense of the equipment and inventory. The federal guidelines for the implementation of the moving expense statute issued by the Office of Management and Budget, Circular No. A-103 (1972), make this clear:

3.5 Actual direct losses by business or farm operation. When the displaced person does not move personal property, he should be required to make a bona fide effort to sell it, and should be reimbursed for the reasonable costs incurred.

a. When the business or farm operation is discontinued, the displaced person is entitled to the difference between the fair market value of the personal property for continued use at its location prior to displacement and the sale proceeds, or the estimated costs of moving 50 miles, whichever is less.

In the draft statute prepared by Mr. Spencer (Exhibit I), this gap is partially filled. The draft provides that personal property used in a business, except stock in trade, shall be acquired and paid for by the condemnor if the business is discontinued without limitation as to the amount. Mr. Spencer points out, however, that the Department of Public Works would probably oppose this expansion.

Under Mr. Spencer's approach, where the stock in trade of a discontinued business is involved, the owner will be compensated for his liquidation loss only to the amount of what it would have cost to move the stock. Other personal property used in the business will be compensated fully.

The staff can see no reason for limiting compensation for inventory, an item which may be subject to severe losses on liquidation. Rather than to adopt Mr. Spencer's approach, the staff recommends that the moving expense statute be simply amended to make clear that the limitation on recovery applies only to losses in moving and not to losses on discontinuance. The provision would read:

> 7262. (a) As a part of the cost of acquisition of real property for a public use, a public entity shall compensate a displaced person for his:
>
> (1) Actual and reasonable expense in moving himself, family, business, or farm operation, including moving personal property.
>
> (2) Actual direct losses of tangible personal property necessarily suffered as a result of moving or discontinuing a business or farm operation, but where such losses are a result of moving, not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the public entity.
>
> (3) Actual and reasonable expenses in searching for a replacement business or farm.
>
> * * * * *
>
> Comment. Subdivision (a)(2) of Section 7262 is amended to provide for full compensation for losses of personal property used in a discontinued business.

This approach will require full compensation in all acquisition cases, not merely in eminent domain trials. Since it also goes beyond the federal relocation expense statute, the amount of any losses over the amount that would have been required to relocate the property will have to be borne by

the state or local condemnor. One way to limit this amount is to expand the types of business property that are deemed "part" of the realty and, hence, compensable under federal funding. This would involve basically expanding the trade fixture definition of Code of Civil Procedure Section 1248b, thereby leaving only purely personal business property losses over and above what it would cost to relocate the property to state and local condemnors. The staff draft of expanded Section 1248b appears as Section 1245.220.

§ 1245.230. Risk of Loss

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).

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.

§ 1245.240. Subsequent 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 to utilize only a general test of balancing hardships, thereby leaving discretion in the court. Compensation would thus be allowed if the improvements are made with the consent of the condemnor or if the court finds that the equities require it. The Comment to the statute would 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.

§ 1245.330. Enhancement and Blight

Section 1245.330 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 occurred 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 1245.330 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.

§ 1245.610. Expense of Plans Rendered Unusable

A condemnation proceeding may hit a property owner prior to commencement of construction on the property, or it may hit him in the midst of construction. However, even where summons is served before construction is commenced, the property owner may have spent quite a bit of money on such preliminaries as architects' plans, and the like. If the plans are rendered unusable for any other location by the condemnation, the staff feels it is only fair that the property owner be compensated for his expense in obtaining them. The only jurisdiction we have been able to discover that makes such provision is Wisconsin:

> 32.19(4)(c). In addition to amounts otherwise authorized by this chapter, the condemnor shall reimburse the owner of real property acquired for a project for all reasonable and necessary expenses incurred for:
>
> * * * * *

5. Expenses incurred for plans and specifications specifically designed for the property taken and which are of no value elsewhere because of the taking.

* * * * *

The staff has modeled Section 1245.610 after this provision but has added the requirement that the expenses be made at a time when it was not reasonably believed that the property would be taken for the project.

§ 1245.620. Rental Losses

Klopping v. City of Whittier, 8 Cal.3d 29, ___ P.2d ___, ___ Cal. Rptr. ___ (1972), held that a person whose property is taken by eminent domain may recover his actual rental loss on the property caused by the unreasonable delay of the condemnor in acquiring the property. Whether the delay is reasonable or unreasonable, however, the owner of income property is bound to suffer some loss because a higher vacancy rate after it becomes known the property will be taken by eminent domain is likely to occur. The staff believes that the property owner should be compensated for such losses in all cases, not merely where the delay is unreasonable. Wisconsin has such a provision:

32.19(4)(c). In addition to amounts otherwise authorized by this chapter, the condemnor shall reimburse the owner of real property acquired for a project for all reasonable and necessary expenses incurred for:

* * * * *

6. Reasonable net rental losses where (a) the losses are directly attributable to the public improvement project and (b) such losses are shown to exceed the normal rental or vacancy experience for similar properties in the area.

* * * * *

Section 1245.620 is modeled after this provision.

§ 1245.630. Improvements to Protect Public From Injury

Despite the general provision allowing compensation for improvements subsequent to service of summons only upon prior approval, there may be situations where the property owner should be encouraged to act promptly to make an improvement. Foremost among these situations is the case of danger to the public presented by a partially completed structure. This may appear in the form of an unbarricaded excavation, a framework that constitutes an attractive nuisance, and the like. Section 1245.630 is designed to provide compensation to the owner whose construction is interrupted by eminent domain in the amount of his reasonable expenditures to protect the public against injury caused by the partially completed improvement. Note that the type of work involved here may not increase the fair market value of the property, and thus--absent Section 1245.630--would not be recoverable in an eminent domain proceeding.

§§ 1245.710-1245.730. Proration of Taxes

The existing statutory scheme of allocation of taxes between the property owner and the condemnor on the basis of passage of title or change of possession appears equitable and no problems have been raised. The staff has recodified the existing scheme as Section 1245.710 et seq. making only minor changes in structure and wording to conform to the scheme of the remainder of the Eminent Domain Law.

Construction Contracts

Where a partially completed improvement is under construction at the time of service of summons in eminent domain, the defendant is in a difficult position. The law relating to subsequent improvements requires that he not

be compensated for improvements to property after service of summons; however, if he terminates the construction contract, he may be liable for damages for breach. Either way, he is out of pocket a considerable amount of money.

There may be relief for the defendant in such a situation under the contract theory of excuse for impossibility or frustration of purpose. There are very few cases from any jurisdiction relating to excuse of performance due to eminent domain. Generally, where an act of the government destroys the object of a contract or renders performance impossible, performance is excused. There are several wartime seizure cases to this effect. See, e.g., 20th Century Lites v. Goodman, 64 Cal. App.2d Supp. 938, 149 P.2d 88 (1944) (in the case of lease of a neon advertising sign, governmental blackout order frustrated the primary purpose of the lease, thereby justifying termination). However, this result only applies where the frustrating event was not reasonably foreseeable by the parties. See, e.g., Lloyd v. Murphy, 25 Cal.2d 48, 153 P.2d 47 (1944)(lease for purpose of selling automobiles was not terminated by war priorities cutting down automobile sales). In addition, performance will not be excused if the contract may be useful for other purposes even though the main purpose of the contract is frustrated. See, e.g., Brown v. Oshiro, 68 Cal. App.2d 393, 156 P.2d 976 (1945)(lease of hotel to Japanese manager was not frustrated by governmental exclusion order since non-Japanese tenants were available); Grace v. Croninger, 12 Cal. App.2d 603, 55 P.2d 940 (1936)(lease for saloon and cigar store not frustrated by Prohibition since some uses of premises still possible).

These general principles have been applied where frustration is attributed to a taking by eminent domain in the few cases we have discovered. Thus, a railroad successfully argued that it could not be held liable for breach of

a shipping contract where its line was taken by eminent domain for reservoir purposes. Kansas, Oklahoma & Gulf R.R. v. Grand Lake Grain Co., 434 P.2d 153 (Oklahoma 1967). But, where the parties to the lease of sign space on a building were aware that the building might be taken by eminent domain, the lessor could not escape liability on the ground of impossibility of performance. Walton Harvey, Ltd. v. Walker & Homfrays, Ltd. (Eng.), 1 Ch. 274, 16 BRC 866 (1931). And finally, the temporary occupancy of leased property by the government did not excuse the lessee's performance since the lease would retain some utility following the government's relinquishment of the premises. Leonard v. Autocar Sales & Service Co., 392 Ill. 182, 64 N.E.2d 477 (1945), cert. denied, 327 U.S. 804, rehearing denied, 328 U.S. 878.

The foregoing cases relate primarily to leases and not to construction contracts. The same general rules that apply to contract frustration in other areas apply to construction contract frustration. Where a construction contract is terminated for impossibility or frustration, the party performing the construction is generally entitled to compensation for his part performance on a quantum meruit basis, i.e., the actual value of the performance rendered.

Where does all this leave our defendant who is served with summons while work is being performed pursuant to a construction contract on the property required for public use? He can, of course, permit construction to continue on the assumption that he will be able to defeat the right to take or that he will get some useful life out of the completed improvement before it is finally taken. In either case, of course, he will not receive compensation for the additional work. Alternatively, the defendant can terminate the construction contract and, when sued, defend on the basis of frustration of purpose. If his defense prevails, he will be liable to the contractor only

for actual expenditures which presumably he will recoup as compensation in eminent domain; and the contractor will lose his anticipated profit on the construction. If his defense does not prevail, he will be liable to the contractor for full damages for breach only part of which he will recoup as compensation in eminent domain.

Given this state of affairs, is it necessary or desirable to provide for the frustration situation by statute? The staff does not believe a statute would serve any useful purpose in this situation. Regardless whether or not the court finds frustration, the contractor will never lose badly--he will always be compensated either for his actual expenditures or for the lost benefit of the bargain. The defendant will end up out of pocket only in the situation where no frustration is found, and this situation can only arise because the defendant foresaw the possibility of condemnation but did not provide for it in the construction contract or because the object under construction will have some utility either because it is removable or is only being partially taken, and the like. Where frustration would be denied because of the utility of the improvement, a statute would only serve to hinder the flexibility of the courts by supplying a standard that was not sufficiently broad to encompass the multifarious situations that could arise.

Expenses Incident to Transfer of Title to Public Entity

The moving expense statute provides reimbursement to the property owner for expenses he bears for recording fees, transfer taxes, and the like. See Govt. Code § 7265.4:

> 7265.4. In addition to the payments required by Section 7262, as a cost of acquisition, the public entity, as soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of compensation in a condemnation

proceeding to acquire real property, whichever is the earlier, shall reimburse the owner, to the extent the public entity deems fair and reasonable, for expenses the owner necessarily incurred for recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the public entity.

The staff believes this provision is a good one and recommends no change.

Respectfully submitted,

Nathaniel Sterling
Staff Counsel

Memorandum 73-18 EXHIBIT I

STATE OF CALIFORNIA—BUSINESS AND TRANSPORTATION AGENCY RONALD REAGAN, Governor

DEPARTMENT OF PUBLIC WORKS
LEGAL DIVISION
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January 19, 1973

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

Dear Mr. DeMoully:

Re: Proposed change in C.C.P. 1248 b

The section proposed below is suggested as a means of meeting the expressed desires of the Law Revision Commission. However, this proposal is sent to the Commission with the express understanding that the Department of Public Works would probably oppose this, or any other expansion in the payment for what is essentially personal property.

In trying to draft this section, I soon came to the conclusion that a mere addition to existing 1248 b of commercial enterprises and a modification of the fixed location rule would probably lead to more arguments over whether a particular item should or should not be included. At the same time, my understanding that the Commission wished to somehow broaden the rule to include more items led to my conclusion that an entirely new approach was needed. Therefore, the following is offered as a suggested statute:

> Personal property, which is not stock in trade, but which is presently used in a business conducted on the part taken or remainder, shall be paid for by the condemnor if:
>
> 1. The business will be discontinued, as determined by the rules and regulations pertaining to moving expenses, or
>
> 2. The condemnor determines that the cost of moving the personal property (as provided in the rules and regulations pertaining to moving expenses) exceeds its value.
>
> Such personal property to be paid for shall be valued by its replacement cost less depreciation.

Basically what this statute would do would be to leave the fixture rule alone. In other words if an item is a fixture then it would be part of the realty and paid for accordingly.

On the other hand it basically provides that all personal property will be moved unless its "cost" is less than the moving expenses. Such a rule, while partly covered by existing moving cost statutes, provides an explicit means of payments where the property will be "purchased" by the condemnor. It also will, in general, put the property owner in the same position he was in as before the move, in that he would have the same type of facility as existed before condemnation. If, on the other hand, he wishes to upgrade his equipment he would be free to do so but such costs to upgrade should not be borne by the condemnor.

The other problem which the above statute solves is that of a discontinued business. In such a situation the condemnor would "pay" for the personal property. The phrase "as determined by the rules and regulations pertaining to moving expenses" is meant to incorporate such rules and regulations which define a "discontinued" business. Without such a definition there could be claims of discontinuance and, after payments for the property, the immediate restarting of the business in a new location. This would also tie in with the payments made for "discontinued" businesses.

If this approach meets with the Commission's approval I will be happy to attempt to refine any procedural problems remaining with the statute. If another approach to the problem is desired by the Commission I will be happy to try and draft a statute meeting the Commission's desires.

Again, I would like to make clear that the above statute was drafted to attempt to meet the desires of the Commission and is not an indication of approval of the intent or content of the statute by the Department.

Very truly yours,

Joseph A. Montoya
Deputy Chief Counsel

By Charles E. Spencer, Jr.
Charles E. Spencer, Jr.
Attorney

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## CHAPTER 5. COMPENSATION

### Article 1. General Provisions

#### § 1245.010. Right to compensation

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

(b) Nothing in this chapter affects any rights the owner of property acquired by eminent domain may have under any other statute.

Comment. This chapter, relating to compensation, supersedes various provisions formerly found in the eminent domain title of the Code of Civil Procedure. In connection with compensation, see also Chapter 6 (commencing with Section 1250.010)(apportionment of award among owners); Section 1260.000 (litigation costs). See also Section 1230.070 (defining "property" to include any right or interest in property).

Subdivision (b) of Section 1245.010 makes clear that this chapter 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, this chapter 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 not require payments as great as those provided in this chapter does not limit the compensation required by this chapter.

## 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. See Pub. Util. Code § 1411 (date of valuation is date of filing petition); cf. Citizen's Util. Co. v. Superior Court, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963), and Marin Municipal Water Dist. v. Marin Water & Power Co., 178 Cal. 308, 173 P. 469 (1918).

§ 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 domain 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). To avoid injustice to the condemnee in a typical rising market, Section 1245.140 changes the result of 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. Under the language formerly contained in Section 1249, the effect, if any, of a mistrial upon the date of valuation was uncertain. Section 1245.150 clarifies the law by adopting the principle established by Section 1245.140 which governs the date of valuation when a new trial is ordered. For the distinction between a retrial following a mistrial and a new trial following an appeal or a mortion for new trial granted under Code of Civil Procedure Section 657, see 3 B. Witkin, California Procedure Attack on Judgment in Trial Court § 24 at 2072 (1954).

## Article 3. Compensation for Improvements

### § 1245.210. Compensation for improvements pertaining to the realty

1245.210. (a) Except as otherwise provided by statute, all improvements pertaining to the realty shall be taken into account in determining compensation.

(b) Subdivision (a) applies notwithstanding the right or obligation of a tenant, as against the owner of any other interest in real property, to remove such improvement at the expiration of his term.

Comment. Section 1245.210 continues the substance of 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 1245.210, see Sections 1245.230 (improvements removed or destroyed) and 1245.240 (improvements made after service of summons). Cf. Section 1245.250 (growing crops).

Subdivision (b) of Section 1245.210, which adopts the language of Section 302(b)(1) of the Uniform Relocation Assistance and Real Property Acquisition Act of 1970, continues prior California law. People v. Klopstock, 24 Cal.2d 897, 151 P.2d 641 (1944); Concrete Service Co. v. State, 274 Cal. App.2d 142, 78 Cal. Rptr. 124 (1969). Cf. City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826 (1933).

§ 1245.220. Business equipment

1245.220. Equipment designed for business purposes and installed for use in a fixed location shall be deemed to be improvements pertaining to the realty for the purposes of compensation regardless of the method of installation.

Comment. Section 1245.220 requires that business equipment installed for use in a fixed location be taken into account in determining compensation. See Section 1245.210.

Section 1245.220 supersedes the more restrictive provisions of former Section 1248b, which applied only to equipment designed for manufacturing or industrial purposes. Section 1245.220 thus may change the result of such cases as People v. Church, 57 Cal. App.2d Supp. 1032, 136 P.2d 139 (1943)(gas station fixtures), and City of Los Angeles v. Siegel, 230 Cal. App.2d 982, 41 Cal. Rptr. 563 (1964)(restaurant equipment).

Losses on personal property used in a discontinued business may be recovered under Government Code Section 7262.

§ 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.

§ 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

made to enhance the amount of compensation payable. Instances 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) Subject to subdivisions (b) and (c), 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.

Note. The problem of compensating for "special purpose" properties will be dealt with later.

Note. Section 1245.320 will be reviewed in connection with the "special purpose" property problem and the evidence provisions in the Evidence Code.

§ 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. Changes in property value due to imminence of project

1245.330. 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 1245.330 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 1245.330 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 1245.330 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 1245.330 does not continue the requirement that the property owner suffer the effects of any physical deterioration within his reasonable control. (3) Section 1245.330 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 1245.330(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 1245.330(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 1245.330 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 1245.330(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 1245.330 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 1245.330 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. If the amount of the benefit to the remainder exceeds the amout of damage to the remainder, such excess 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 or not the damage is caused by a portion of the project located on the part taken.

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 or not the benefit is caused by a portion of the project located on the part taken.

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 1245.330.

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), relating to the cost of fencing, cattle guards, and crossings. 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).

## Article 6. Interest

### § 1245.510. Date interest commences to accrue

1245.510. The compensation awarded in an eminent domain proceeding shall draw legal interest from the earliest of the following dates:

(a) The date of entry of judgment.

(b) The date the plaintiff takes possession of the property or the damage to the property occurs.

(c) The date after which the plaintiff is authorized to take possession of the property as stated in an order for possession.

(d) If the amount determined to be probable compensation upon motion of a defendant made under Section 1255.260 is not deposited on or before the date specified in the notice of motion, the date specified.

Comment. Section 1245.510 is the same in substance as subdivision (a) of former Code of Civil Procedure Section 1255b except that subdivision (d) has been added to reflect the effect of Section 1255.260 (deposit for relocation purposes on motion of certain defendants).

§ 1245.520. Date interest ceases to accrue

1245.520. The compensation awarded in an eminent domain proceeding shall cease to draw interest at the earliest of the following dates:

(a) As to any amount deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 7, the date such amount is withdrawn by the person entitled thereto or, if not withdrawn, the date that judgment is thereafter entered.

(b) As to any amount deposited pursuant to Section 1255.260, the date of such deposit.

(c) As to any amount deposited pursuant to Article 3 (commencing with Section 1255.310) of Chapter 7, the date of such deposit.

(d) As to any amount paid to the person entitled thereto, the date of such payment.

Comment. Section 1245.520 supersedes subdivision (c) of former Section 1255b.

Subdivision (a) has been revised to make reference to the appropriate statutory provisions and to provide that interest terminates, on entry of judgment, upon an amount deposited before judgment. After entry of judgment, such a deposit may be withdrawn pursuant to Section 1255.070. See the Comment to that section. Under prior law, it was uncertain when interest ceased on a deposit made prior to entry of judgment if the amount was not withdrawn. Cf. People v. Loop, 161 Cal. App.2d 466, 326 P.2d 902 (1958). Under subdivision (a), interest on the amount on deposit terminates on entry of judgment even though the amount is less than the award.

Subdivision (b) has been added to conform to Section 1255.260, which permits certain defendants to obtain an order determining probable compensation for relocation purposes.

Subdivision (c) has been changed to make reference to the appropriate statutory provisions.

Subdivision (d) replaces former Section 1255b(c)(4), which referred to the practice of payment into court pursuant to former Section 1252, which practice has been eliminated. All postjudgment deposits are now made under Article 3 (commencing with Section 1255.310) of Chapter 7 and, hence, are covered by subdivision (c).

§ 1245.530. Offsets against interest

1245.530. (a) If, after the date that interest begins to accrue, the defendant:

(1) Continues in actual possession of the property, the value of such possession shall be offset against the interest.

(2) Receives rents or other income from the property attributable to the period after interest begins to accrue, the net amount of such rents and other income shall be offset against the interest.

(b) This section does not apply to interest accrued under Section 1255.260.

Comment. Section 1245.530 supersedes subdivision (b) of former Code of Civil Procedure Section 1255b. Revisions have been made to clarify the meaning of the former language. See also Govt. Code § 7267.4 ("If the public entity permits an owner or tenant to occupy the real property acquired on a rental basis for a short term, or for a period subject to termination by the public entity on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier."). Subdivision (b) has been added to conform to Section 1255.260 (deposit for relocation purposes on motion of certain defendants).

§ 1245.540. Interest to be assessed by court

1245.540. Interest, including interest accrued due to possession of or damage to property by the plaintiff prior to the final order in condemnation, and any offset against interest as provided in Section 1245.530, shall be assessed by the court rather than by jury.

Comment. Section 1245.540 is new. It clarifies former law by specifying that the court, rather than the jury, shall assess interest, including interest required to satisfy the defendant's constitutional right to compensation for possession or damaging of his property prior to conclusion of the eminent domain proceeding. See Metropolitan Water Dist. v. Adams, 16 Cal.2d 676, 107 P.2d 618 (1940); City of North Sacramento v. Citizens Util. Co., 218 Cal. App.2d 178, 32 Cal. Rptr. 308 (1963); People v. Johnson, 203 Cal. App.2d 712, 22 Cal. Rptr. 149 (1962); City of San Rafael v. Wood, 144 Cal. App.2d 604, 301 P.2d 421 (1956). Section 1245.540 also resolves a further uncertainty by specifying that the amount of the offset against interest provided by Section 1245.530 is likewise assessed by the court, thus requiring that any evidence on that issue is to be heard by the court rather than the jury. Compare People v. Giumarra Vineyards Corp., 245 Cal. App.2d 309, 53 Cal. Rptr. 902 (1966), and People v. McCoy, 248 Cal. App.2d 27, 56 Cal. Rptr. 352 (1967), with City of North Sacramento v. Citizens Util.Co., supra.

## Article 7. Incidental Losses

### § 1245.610. Expense of plans rendered unusable

1245.610. The compensation for property acquired by eminent domain for a particular project shall include expenses reasonably incurred for plans and specifications specifically designed for the property at a time it was reasonable to believe the property would not be taken for the project if such plans are of no value elsewhere because of the taking.

Comment. Section 1245.610 is new; it is modeled after Wisconsin Statutes Section 32.19(4)(c)(5).

§ 1245.620. Rental losses

1245.620. The compensation for property acquired by eminent domain shall include reasonable net rental losses occurring after service of summons where both of the following are established:

(a) The losses are directly attributable to the project for which the property is taken.

(b) The losses exceed the normal rental or vacancy experience for similar properties in the area.

Comment. Section 1245.620 provides compensation for rental losses after service of summons. For a comparable provision, see Wisconsin Statutes Section 32.19(4)(c)(6). Compare Klopping v. City of Whittier, 8 Cal.3d 39, ___ P.2d ___, ___ Cal. Rptr. ___ (1972)(rental losses prior to service of summons may be recovered in cases of unreasonable delay).

§ 1245.630. Improvements to protect public from injury

1245.630. Where the owner of property acquired by eminent domain abandons construction of an improvement due to the imminence of the eminent domain proceeding, the compensation for the property taken shall include expenses reasonably incurred for work necessary to protect persons or other property against the risk of injury created by the partially completed improvement.

Comment. Section 1245.630 provides that the owner of property on which construction is interrupted by eminent domain may be compensated for work reasonably done to protect the public against injury without requirement of prior approval by the plaintiff or the court. Cf. Section 1245.240 (improvements made after service of summons).

## Article 8. Proration of Property Taxes

### § 1245.710. Liability for taxes

1245.710. As between the plaintiff and defendant, the plaintiff is liable for any ad valorem taxes, penalties, and costs upon property acquired by eminent domain that would be subject to cancellation under Chapter 4 (commencing with Section 4986) of Part 9 of Division 1 of the Revenue and Taxation Code if the plaintiff were a public entity and if such taxes, penalties, and costs had not been paid, whether or not the plaintiff is a public entity.

Comment. Section 1245.710 is the same in substance as the first paragraph of former Section 1252.1.

§ 1245.720. Application for separate valuation of property

1245.720. If property acquired by eminent domain does not have a separate valuation on the assessment roll, any party to the eminent domain proceeding may, at any time after the taxes on such property are subject to cancellation pursuant to Section 4986 of the Revenue and Taxation Code, apply to the tax collector for a separate valuation of such property in accordance with Article 3 (commencing with Section 2821) of Chapter 3 of Part 5 of Division 1 of the Revenue and Taxation Code notwithstanding any provision in such article to the contrary.

Comment. Section 1245.720 is the same in substance as former Section 1252.2.

§ 1245.730. Reimbursement for taxes

1245.730. (a) If the defendant has paid any amount for which, as between the plaintiff and defendant, the plaintiff is liable under this article, the plaintiff shall pay to the defendant a sum equal to such amount.

(b) The amount the defendant is entitled to be paid under this section shall be claimed in the manner provided for claiming costs and at the following times:

(1) If the plaintiff took possession of the property prior to judgment, at the time provided for claiming costs.

(2) If the plaintiff did not take possession of the property prior to judgment, not later than 30 days after the plaintiff took title to the property.

Comment. Section 1245.730 is the same in substance as the final two paragraphs of former Section 1252.1.

Article 9. Performance of Work to Reduce Compensation

§ 1245.810. Performance of work to reduce compensation

1245.810. (a) A public entity may agree with the owner of property acquired by eminent domain to:

(1) Relocate for the owner any structure if such relocation is likely to reduce the amount of compensation otherwise payable to the owner by an amount equal to or greater than the cost of such relocation.

(2) Carry out for the owner any work on property not taken, including work on any structure, if the performance of the work is likely to reduce the amount of compensation otherwise payable to the owner by an amount equal to or greater than the cost of the work.

(b) The cost of any work or relocation performed pursuant to this section shall be deemed a part of the acquisition cost of the property taken.

Comment. Section 1245.810 is generalized from former Section 970 of the Streets and Highways Code, which related to certain types of work in connection with an acquisition for opening or widening a county highway. As to the authority of the Department of Public Works to contract for relocation of structures outside the State Control Act, see Streets and Highways Code Sections 135 and 136.5.

The phrase "any work" is used without qualification so as to have the broadest possible meaning. It would include any physical or structural

operation whatsoever. Thus, it would cover such things as screening off roads or canals or soundproofing buildings adjacent to highways as well as constructing rights of way, fences, driveways, sidewalks, retaining walls, and drainage or utility connections, all of which latter operations were specifically listed in former Section 970.

Nothing in Section 1245.810 precludes the public entity from including features in the design of the public project that will have the effect of mitigating damages. See Section 1245.450.