

First Supplement to Memorandum 73-18

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

We have received two letters from Mr. Kanner, attached as Exhibits I and II, exposing defects in the draft compensation statute.

§ 1245.310. Compensation for Property Taken

One concern of the letter attached as Exhibit I is that, by tying compensation for property taken by eminent domain to market value, we have precluded damages for incidental losses. This concern is not wholly justified, for the scheme of the compensation chapter is to award compensation for property taken (Article 4), plus damages for injury to the remainder (Article 5), plus incidental losses that result from the condemnation (Article 7). In addition, Article 1 (commencing with Section 1245.010) makes clear that the owner of property taken by eminent domain is entitled not only to all the compensation he can get under the compensation chapter but also to any additional compensation required by the Constitution.

The other concern expressed in the Exhibit I letter is not clearly articulated, but the concern is generally that, in some situations, the market value concept is unworkable. We are unable to comment further on this concern without some more precise indication of the specific problems Mr. Kanner has in mind.

§ 1245.520. Date Interest Ceases to Accrue

The letter attached as Exhibit II makes a good point that interest should continue to accrue on the award until the property owner is authorized to draw down the award. The staff believes that the best way to implement this

concept is to make clear in the chapter dealing with deposit and withdrawal of the award that the defendants may draw down the award pending final apportionment in the same manner they may draw down the deposit prior to judgment. This will solve the constitutional problem without requiring a continuing accrual of interest while the defendants unduly delay the apportionment phase.

If this suggestion meets with the Commission's approval, the staff will prepare for the next meeting a revised draft of the chapter dealing with deposit and withdrawal of the award to accomplish this along with other changes previously approved by the Commission.

Respectfully submitted,

Nathaniel Sterling
Staff Counsel

EXHIBIT I

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February 13, 1973

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Stanford, California 94305

Re: Memorandum 73-18
(\$1245.310)

Dear John:

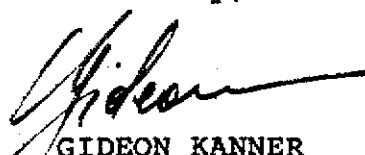
Notwithstanding the notation under \$1245.310, that "the problem of compensating for 'special purpose' properties will be dealt with later", the unqualified language of that section is just plain wrong because it is too restrictive.

"Special purpose" properties give rise to only one kind of situation in which the "market value" concept breaks down. See A Study Relating to Evidence in Eminent Domain Proceedings, 3 Cal. Law Rev. Comm'n., pp. A-15 et seq. (1961).

Moreover, under Klepping, the compensation for a taking may include incidental losses occasioned by "activity engaged in by the public agency prior to condemnation" 8 Cal 3d 39, 54, fn. 7. These losses - such as lost rents, or cost of carrying unproductive property - are no part of "fair market value", cannot be accommodated by adjustments to market value, and cannot be fitted into "injury to remainder", as there is no remainder.

\$1245.310 as presently drafted ignores these problems, thereby giving rise to constitutional infirmities.

Sincerely,



GIDEON KANNER

First Supplement to
Memorandum 73-18

EXHIBIT II

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Re: Memorandum 73-18
(\$1245.520)

Dear John:

The above section contains a serious flaw of constitutional dimension. It fails to take into account the situation where the award is deposited into court pursuant to judgment, but there remains an unresolved apportionment proceeding under CCP §1246.1.

Under such circumstances, there may ensue additional time-consuming proceedings among the owners of the various interests, during which the deposit cannot be withdrawn as there is a dispute as to the amounts to be disbursed to various claimants.

There is a relatively recent case on point, unfortunately an unpublished opinion. People v. Sunshine Canyon, Inc., 2d Civ. 36371. Sunshine Canyon holds that notwithstanding CCP §1255b, the deposit made into court pursuant to judgment, continues to draw interest until such reasonable time as the CCP §1246.1 proceedings are concluded and the award can be disbursed.

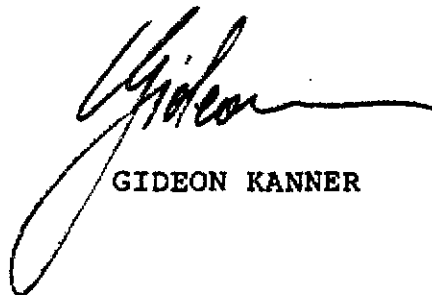
This is a sound conclusion because a monolithic body of California constitutional law requires that where there is a payment of an award into court "for the owner" it draws interest until such time as the owner can withdraw it. In other words, the money is not deemed paid into court for the owner within the meaning of Cal. Const., Art. 1, §14, until the owner can take it.

John H. DeMouilly, Esq.
February 13, 1973
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Steinhart v. Superior Court (1902)
137 Cal 575, 579,
Metropolitan Water Dist. v. Adams (1940)
16 Cal 2d 676, 680-683,
Heimann v. City of Los Angeles (1947)
30 Cal 2d 746, 758-759,
Mt. Shasta Power Corp. v. Dennis (1924)
66 Cal App 186, 191,
People v. Redwood Hotels Corp. (1969)
269 Cal App 2d 60, 62,
Burbank v. Nordahl (1962)
199 Cal App 2d 311, 320-321.

Thus, to comply with the constitutional mandate, \$1245.520 must provide for continued accrual of interest on the award until such time as each owner of each property interest taken or damaged can take his share of the award out of court.

Sincerely,



GIDEON KANNER

GK/ms