

Memorandum 73-41

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

Attached to this memorandum is the latest revised version of the compensation chapter of the Eminent Domain Law. It incorporates the decisions of the Commission at the April 1973 meeting as well as several changes made by the staff which are discussed in this memorandum. After the May meeting, we hope to be able to revise and send the compensation and divided interests chapters to the State Bar Committee for comment.

Section 1245.010. Right to Compensation

A provision to prevent double recovery has been added to subdivision (b) at the Commission's direction. The Comment has been adjusted to delete the reference to the definition of "statute."

Section 1245.020. Separate Assessment of Elements of Compensation

This provision is new but continues an existing Code of Civil Procedure section. The staff is not certain that it is an especially good provision, particularly since the trier of fact may have some difficulty in segregating damage to the remainder from business damage; this has been a continuing problem under the Vermont business loss statute.

Section 1245.030. Agreement to Compensate

This section is self-explanatory. It saves us the need to put the same authority in every section requiring compensation.

Section 1245.110. Date of Valuation Fixed by Deposit

Subdivision (b) has been added to cover a technical gap discovered in working over the possession prior to judgment chapter.

Section 1245.220. Business Equipment

The definition of the business equipment that must be taken and compensated has been tightened up so as to exclude such items as typewriters and furniture.

Section 1245.230. Improvements Removed or Destroyed

Subdivision (b) has been added at the Commission's direction.

Section 1245.250. Harvesting and Marketing of Crops

This section has been reworded to conform with the language used elsewhere in the Eminent Domain Law. In addition, the staff has changed subdivision (b) to permit the defendant to recover his costs up to the date the plaintiff is authorized to take possession rather than to the date of notice of future taking of possession. The reason for this change is that the concept of a "notice of future taking of possession" is unclear and does not conform with the general provisions on interest. See Section 1245.510.

Section 1245.260. Removal of Improvements

The Commission directed the inclusion of a provision such as this.

Section 1245.510. Date Interest Commences to Accrue

The provision formerly found in this section relating to plaintiff's failure to make an ordered deposit has been moved to the immediate possession chapter.

Section 1245.520. Date Interest Ceases to Accrue

The provision formerly found in this section relating to plaintiff's failure to make an ordered deposit has been moved to the immediate possession chapter.

Section 1245.610. Business Loss

This section has been drafted along the lines suggested by the Commission. Note that business loss has been defined in terms of net loss of profits, which will require a determination both as to what the profits would have been absent the taking and what they will be because of the taking. A seven-year period for losses has been selected primarily with the view to adequately compensating someone who is forced to discontinue his business due to the condemnation; projected profits for a seven-year period seems like a reasonable amount to award such a person.

It should be noted that, as this section is presently worded, the owner of the business is compensated for his business loss only where the property is taken by eminent domain and not where it is acquired for public use by other means. This may have the two-fold effect of denying a business tenant his loss where the landlord works out a voluntary acquisition with the public entity and stimulating litigation rather than settlement where the business owner is aware that he can get business losses by going through eminent domain. One way to cure this defect is to place the business loss provision in the relocation assistance chapter of the Government Code, making it applicable to all acquisitions for public use.

Section 1245.820. Partially Completed Improvements

Subdivision (b) has been added at the Commission's direction. Subdivision (c) has been added for funding purposes.

Respectfully submitted,

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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. In any case where two or more statutes provide compensation for the same loss, the person entitled to compensation may recover only once for that loss.

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. 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.

EMINENT DOMAIN LAW § 1245.020

Staff draft May 1973

§ 1245.020. Separate assessment of elements of compensation

1245.020. The trier of fact shall separately assess each element of compensation provided in this chapter.

Comment. Section 1245.020 continues the substance of former Section 1248(6).

EMINENT DOMAIN LAW § 1245.030

Staff draft May 1973

§ 1245.030. Agreement to compensate

1245.030. Subject to any other statute relating to the acquisition of property, any public entity may agree to compensate, or perform work... for, the owner of property acquired by grant, purchase, lease, gift, devise, contract, or other means for public use to the same extent as if the property were acquired by eminent domain.

EMINENT DOMAIN LAW

Tentatively approved March 1973

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).

EMINENT DOMAIN LAW § 1245.110

Tentatively approved March 1973
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§ 1245.110. Date of valuation fixed by deposit

1245.110. (a) Unless an earlier date of valuation is applicable under this article, if the plaintiff deposits the probable 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.

(b) Whether or not the plaintiff has taken possession of the property or obtained an order for possession, if the court determines pursuant to Section 1255.030 that the probable amount of compensation exceeds the amount previously deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 7 and the amount on deposit is not increased accordingly within 30 days from the date of the court's order, no deposit shall be deemed to have been made for the purpose of this section.

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

EMINENT DOMAIN LAW § 1245.110

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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, including subsequent retrial.

Although the making of a deposit prior to judgment establishes the date of valuation unless an earlier date is applicable, subdivision (b) denies that effect if the amount deposited is determined by the court to be inadequate and is not increased in keeping with the determination. Cf. Section 1255.030(c) (when failure to increase deposit may result in abandonment).

EMINENT DOMAIN LAW § 1245.120

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§ 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

EMINENT DOMAIN LAW § 1245.140

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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 motion 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 specially installed for use on the property acquired 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 on the particular property 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 continues the provision for compensation of such structures as pipelines (State v. Texaco, Inc., 25 Cal. App.3d 514, 101 Cal. Rptr. 923 (1972)), tanks (Concrete Service Co. v. State, 274 Cal. App.2d 142, 78 Cal. Rptr. 124 (1969)), and processing equipment (City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826 (1933)) while it 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 not compensable), and City of Los Angeles v. Siegel, 230 Cal. App.2d 982, 41 Cal. Rptr. 563 (1964)(restaurant equipment not compensable).

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

EMINENT DOMAIN LAW § 1245.230

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§ 1245.230. Improvements removed or destroyed

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

- (1) The time the plaintiff takes title to the property.
- (2) The time the plaintiff takes possession of the property.
- (3) The time the defendant moves from the property in compliance with an order for possession.

(b) Notwithstanding subdivision (a), where improvements pertaining to the realty are removed or destroyed by the defendant at any time, such improvements shall not be taken into account in determining compensation.

Comment. Subdivision (a) of 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.

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Subdivision (b) makes clear that, where the defendant removes or destroys improvements even after the time the risk of loss shifts to the plaintiff, compensation is not awarded for the improvements. Subdivision (b) does not preclude the plaintiff from bringing an independent action against the defendant for conversion where such removal or destruction occurs after valuation of the property.

§ 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 defendant of not permitting the improvement outweighs the hardship to the plaintiff of permitting the improvement. No order may be issued under this paragraph after the plaintiff has deposited the amount of probable 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

§ 1245.240

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 required 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. It permits the parties to

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to work out a reasonable solution rather than forcing them into court, and makes clear the condemnor has authority to make an agreement that will deal with the problem under the circumstances of the particular case.

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. (See also Section 1245.820)) (2) The work is necessary to protect a partially completed improvement 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.

EMINENT DOMAIN LAW § 1245.250

Tentatively approved April 1973
Staff revision May 1973

§ 1245.250. Harvesting and marketing of crops

1245.250. (a) Subject to subdivisions (b) and (c), the acquisition of property by eminent domain shall not prevent the defendant from harvesting and marketing 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 harvesting and marketing of the crops, the costs reasonably incurred in connection with the crops up to the date the plaintiff is authorized to take possession of the property shall be included in the compensation awarded for the property taken.

(c) In the case of crops planted after the service of summons, if the plaintiff takes possession of the property at a time that prevents the harvesting and marketing of the crops, the compensation specified in subdivision (b) shall be allowed if the plaintiff has previously consented to the planting and harvesting.

Comment. Section 1245.250 supersedes former Section 1249.2. Despite the contrary implication of the former section, subdivision (a) 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. Where possession is taken and the defendant is prevented from realizing the value of his crops, he is entitled to his costs incurred for the crops up to

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the date the plaintiff is authorized to take possession, provided they were planted prior to service of summons. Subdivision (b). The defendant is not entitled to compensation for unharvested crops planted after service of summons unless the plaintiff has agreed to planting and harvest. 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).

§ 1245.260. Removal of improvements

1245.260. Notwithstanding Section 1245.210, the owner of property pertaining to the realty may, if the plaintiff does not require the property for public use, elect to remove any or all such property by notice to the plaintiff within 60 days after service of summons. Upon such election, the owner shall be compensated for the reasonable cost of removal and relocation of the property, not to exceed the market value of the property.

Comment. Section 1245.260 is new. Where the owner of property pertaining to the realty makes the election provided in this section, compensation is not awarded for the property removed. Cf. Section 1245.230 (improvements removed or destroyed). For comparable provisions, see Pennsylvania Eminent Domain Code Sections 607-608.

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. Compensation for the property taken is only one element of the damages to which a property owner may be entitled under this chapter. See Section 1245.010 and the Comment thereto (right to compensation).

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§ 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 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. The fair market value of the property taken shall not include any increase or decrease in the value of the property that 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 is an adjustment to the basic definition of fair market value in Section 1245.320 and 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 similar to 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)), except that 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.

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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

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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

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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, and Annot., 14 A.L.R. Fed. 806 (1973).

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 amount 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. The phrase "damage to the remainder" is defined in Section 1245.420; "benefit to the remainder" is defined in Section 1245.430.

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§ 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). Section 1245.420 does not abrogate any court-developed rules relating to the compensability of specific elements of damage, nor does it impair the ability of the courts to continue to develop the law in this area. See Eachus v. Los Angeles Consol. Elec. Ry., 103 Cal. 614, 37 P. 750 (1894)(damage that causes "mere inconvenience" not compensable); People v. Ayon, 54 Cal.2d 217, 5 Cal. Rptr. 151 (1960)(impairment of access must be "substantial" to be compensable); City of Berkeley v. Von Adelung, 214 Cal. App.2d 791, 29 Cal. Rptr. 802 (1963)("general" damage not compensable); People v. Volunteers of America, 21 Cal. App.3d 111, 98 Cal. Rptr. 423 (1971)(test of compensability is whether the condemnee is obligated to bear more than his "fair share" of the burden of the public improvement).

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

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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 to the remainder caused by the project regardless of the precise location of the damage-causing portion of the project if the damages are otherwise compensable.

§ 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 1245.430 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). Section 1245.430 does not abrogate any court-developed rules relating to the offset of benefits, nor does it impair the ability of the courts to continue to develop the law in this area. See Beveridge v. Lewis, 137 Cal. 619, 70 P. 1083 (1902)(only "special" benefits may be offset); People v. Giumarra Farms, Inc., 22 Cal. App.3d 98, 99 Cal. Rptr. 272 (1971)(concentration and funneling of traffic a special benefit).

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).

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§ 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.

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§ 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.

Comment. Section 1245.510 is the same in substance as subdivision (a) of former Code of Civil Procedure Section 1255b. For an exception to the rules stated in Section 1245.510, see Section 1255.040.(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 Article 3 (commencing with Section 1255.310) of Chapter 7, the date of such deposit.

(c) 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. For an exception to the rule stated in subdivision (a), see Section 1255.040 (deposit for relocation purposes on motion of certain defendants).

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

Subdivision (c) 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 (b).

§ 1245.530. Offsets against interest

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

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

(b) 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.

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."). For an ~~ex~~ception to the rule stated in Section 1245.530, see Section 1255.040 (deposit for relocation purposes on motion of certain defendants).

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§ 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. Giunarra 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. Business Loss

§ 1245.610. Business loss

1245.610. (a) The owner of a business conducted on property acquired by eminent domain or on the remainder if such property is part of a larger parcel shall be compensated for the loss of net business profits for a period not exceeding seven years to the extent that such loss is caused by the acquisition of the property or the injury to the remainder and cannot reasonably be prevented by a relocation of the business and by taking those steps and adopting those procedures that a reasonably prudent person would take and adopt in preserving the business income.

(b) Compensation shall be allowed under this section only to the extent the business loss is not compensated under Section 7262 of the Government Code.

Comment. Section 1245.610 is new to California eminent domain law. Under prior court decisions, compensation for business losses in eminent domain was not allowed. See, e.g., City of Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392, 153 P. 705 (1915). Section 1245.610 provides for business losses in both a whole and a partial taking, regardless whether the injury to the business is permanent or temporary.

Subdivision (a) limits the business losses recoverable. The basic measure of damage is the diminution of net profits caused by the taking; in the case

of a partial taking, all damages and benefits conferred by the project will enter into the determination whether there will actually be a "net loss." The net loss is computed by comparing projected profits absent the taking with actual or projected profits following the taking. Cf., e.g., Shamban & Co. v. Commerce and Ind. Ins. Co., ___ F.2d ___ (9th Cir. 1973).

Under subdivision (a), compensation for projected or actual business losses caused by the taking is limited to a seven-year period and is allowed only to the extent it cannot reasonably be mitigated by relocation and the like. Under this test, if continuance of the business is not feasible, the measure of damages is the total profit of the business projected over a seven-year period.

Subdivision (b) makes clear that Section 1245.640 compensates for business losses only to the extent those losses are not compensated by Government Code Section 7262 (moving expense and moving losses for relocated business or farm operations; in lieu payments for business or farm operation that cannot be relocated without a substantial loss of patronage). See Section 1245.010 (no double recovery).

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.

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§ 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. Miscellaneous Provisions

§ 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

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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.

§ 1245.820. Partially completed improvements; performance of work to protect public from injury

1245.820. (a) Where construction of an improvement is in progress on property acquired by eminent domain at the time of service of summons and the owner of such property ceases the construction due to such service and the uncompleted improvement creates a risk of injury to persons or to other property, the owner shall be compensated for any expenses reasonably incurred for work necessary to protect against such risk.

(b) The plaintiff may agree with the owner as to the amount of compensation payable under this section. The plaintiff may agree with the owner to perform any work necessary for the purposes of this section.

(c) The compensation payable under this section, and the cost of any work performed under this section by the plaintiff, shall be deemed a part of the acquisition cost of the property taken.

Comment. Section 1245.820 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). In addition, Section 1245.820 authorizes public entities to agree with the owner to construct the improvements or to reimburse the owner for such construction.