36.390, 36.400 9/28/73

Memorandum 73-86

Subject: Study 36.390 and 36.400 - Condemnation (Comprehensive Statute: Chapters 9 and 10--Compensation and Divided Interests)

Attached to this memorandum are two copies of the compensation and divided interests chapters of the Eminent Domain Law. Please mark any editiorial changes you may have on one copy and return that copy to the staff at the October meeting. These are the only chapters not previously approved for printing; both should be approved for printing at the October meeting.

The attached draft of the chapters incorporates decisions made at the September meeting. Significant new language not previously reviewed by the Commission is noted below.

§ 1263.010. Right to compensation. The Comment to this section has been expanded to indicate the relation of the eminent domain statute to inverse condemnation. In this connection, a statement relating to inverse condemnation has been prepared for the Comment to Section 1230.020 (law governing exercise of eminent domain power). See Exhibit I.

§ 1263.220. Business equipment. The Comment to this section has been expanded to indicate that the section creates a new category of improvements pertaining to the realty.

§ 1263.270. Removal of improvements for storage. This previously approved section has been split out and made a separate section and a provision added that, where the defendant removes and stores and is successful on his claim that the improvements pertain to the realty, he may recover the reasonable costs of removal and storage.

§ 1263.280. Improvements whose removal will damage structure. This section is new and has been added at the Commission's direction to cover the situation where removal of an improvement will damage the building in which it is located.

§ 1265.010. Scope of chapter. This section is new and has been added at the Commission's direction to make clear that the divided interests chapter is a piecemeal approach to problems in the case law and that the chapter is not intended to affect the law relating to particular interests not specifically covered.

§ 1265.200. "Lien" defined. This section has been added to simplify the language required in the succeeding sections.

§ 1265.310. Unexercised options. The Comment to this section has been expanded to refer to the fact that an option in a lease cannot be compensated twice and to indicate that the price at which an option may be exercised is admissible to show the value of the option even though it may not be admissible to show the value of the property to which the option relates.

Separate assessment of elements of compensation. In connection with compensation and divided interests, Exhibit II contains Section 1260.250, drafted to implement the Commission's decision to reinstate the separate assessment requirement.

Respectfully submitted,

Nathaniel Sterling
Staff Counsel

Memorandum 73-86

EXHIBIT I

Add to Comment to Section 1230.020:

The provisions of the Eminent Domain Law are intended to supply rules for eminent domain proceedings. Whether any of its provisions may also be applicable in inverse condemnation actions is a matter not determined by statute, but left to judicial development. Cf. Section 1263.010 and Comment thereto (right to compensation).

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EXHIBIT II

§ 1260.250. Separate assessment of elements of compensation

1260.250. As far as practicable, the trier of fact shall assess separately each of the following:

(a) Compensation for the property taken as required by Article 4 (commencing with Section 1263.310) of Chapter 9.

(b) Where the property acquired is part of a larger parcel:

(1) The amount of the damage, if any, to the remainder as required by Article 5 (commencing with Section 1263.410) of Chapter 9.

(2) The amount of the benefit, if any, to the remainder as required by Article 5 (commencing with Section 1263.410) of Chapter 9.

(c) Compensation for loss of goodwill, if any, as required by Article 6 (commencing with Section 1263.510) of Chapter 9.

Comment. Section 1260.250 continues the separate assessment requirement of subdivisions 3 and 7 of former Section 1248. The section does not affect the right of a party to request special interrogatories to the jury where a separate finding on an element of compensation not listed in Section 1260.250 would be useful. For example, a party may desire a special finding on the amount of compensation required under Section 1263.620 for performance of work to protect the public from injury from a partially completed improvement.

Tentatively approved April 1973
Revised June 1973

CHAPTER 9. COMPENSATION

Article 1. General Provisions

§ 1263.010. Right to compensation

1263.010. (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. The elements of compensation provided in this chapter include compensation for property taken (Section 1263.310), injury to the remainder (Section 1263.410), and loss of goodwill (Section 1263.510). In connection with compensation, see also Chapter 10 (commencing with Section 1265.010) (divided interests), Section 1268.610 (litigation costs). See also Section 1235.170 (defining "property" to include any right or interest in property). For related provisions, see Article 1 (commencing with Section 1245.010) of Chapter 4 (damages from preliminary location, survey, and tests) and Section 1268.620 (damages caused by possession when proceeding dismissed or right to take defeated).

Subdivision (b) of Section 1263.010 makes clear that this chapter does not affect any statute 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. This chapter is intended to provide rules of compensation for eminent domain proceedings; whether any of its provisions apply in inverse condemnation actions is a matter for court decision. See Section 1230.020 and Comment thereto (law governing exercise of eminent domain power).

The second sentence of subdivision (b), prohibiting double recovery for the same loss, applies only to statutes that purport to compensate for the same loss. Thus, for example, a person who suffers a business loss would not be entitled to compensation for that loss under both Section 1263.510 (loss of goodwill) and Government Code Section 7262(c)(relocation or in lieu payment). This prohibition on double recovery in no way limits compensation under different statutes for different losses such as the fair market value of property taken, injury to the remainder, rental losses, moving expense, court costs, and the like.

Tentatively approved June 1973
Revised September 1973

§ 1263.020. Accrual of right to compensation

1263.020. Except as otherwise provided by law, the right to compensation shall be deemed to have accrued at the date of filing the complaint.

Comment. Section 1263.020 continues the substance of a portion of former Section 1249, but the date of filing the complaint rather than the date of issuance of summons is used to determine the accrual of the right to compensation since the filing of the complaint is the factor that establishes the jurisdiction of the court over the property. See Section 1250.110 and Comment thereto (complaint commences proceeding).

The rule stated in Section 1263.020 is subject to exceptions created by law. See Section 1235.140 (defining "law"). Thus, for example, if an interest in existence at the time of filing the complaint (such as a lease) is extinguished or partially dissipated before entry of judgment (such as by expiration or partial expiration of the term of the lease), the owner of the interest may not have a right to compensation to the extent of such extinction or dissipation. See, e.g., People v. Hartley, 214 Cal. App.2d 378, 29 Cal. Rptr. 502 (1963). And, the right of the owner of an interest may accrue even if a complaint is never filed. See, e.g., Concrete Service Co. v. State, 274 Cal. App.2d 142, 78 Cal. Rptr. 923 (1969)(lessee entitled to compensation for fixtures where public entity acquired lessor's interest and terminated lease). See also Redevelopment Agency v. Diamond Properties, 271 Cal. App.2d 315, 76 Cal. Rptr. 269 (1969).

Article 2. Date of Valuation

Comment. Article 2 (commencing with Section 1263.110) supersedes those portions of former Section 1249 that 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).

§ 1263.110. Date of valuation fixed by deposit

1263.110. (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 6, 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 6 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.

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Comment. Section 1263.110 permits the plaintiff, by making a deposit, to establish the date of valuation no later than the date the deposit is made. The rule under the language contained in former 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 (see Section 1263.120), and subsequent events may cause such an earlier date of valuation to shift to the date of deposit (see Section 1263.130). 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(b) (when failure to increase deposit may result in abandonment).

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§ 1263.120. Trial within one year

1263.120. If the issue of compensation is brought to trial within one year after commencement of the proceeding, the date of valuation is the date of commencement of the proceeding.

Comment. Section 1263.120 continues the substance of the rule provided in former Section 1249, but the date of commencement of the proceeding--rather than the date of the issuance of summons--is used in determining the date of valuation. See Sections 411.10 and 1250.110 (filing of complaint commences proceeding). 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 commencement of the proceeding is a more appropriate date.

§ 1263.130. Trial not within one year

1263.130. If the issue of compensation is not brought to trial within one year after commencement of the proceeding, 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 commencement of the proceeding.

Comment. Section 1263.130 establishes the date of valuation where that date is not established by an earlier deposit (Section 1263.110) or by the commencement of the proceeding (Section 1263.120). See Sections 411.10 and 1250.110 (filing of complaint commences proceeding). Section 1263.130, which continues in effect a proviso contained in former Section 1249, retains the date specified in Section 1263.120 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 1263.140 or Section 1263.150 rather than Section 1263.130. However, if the new trial or retrial is commenced within one year after commencement of the proceeding, the date of valuation is determined by Section 1263.120.

§ 1963.140. New trial

1263.140. (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 commencement of the proceeding, 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 either of the following is shown:

(1) The plaintiff deposited the amount of the judgment in accordance with Section 1268.110 within 30 days after the entry of judgment.

(2) A motion for new trial or to vacate or set aside the judgment was made and the plaintiff deposited the probable compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 6 within 30 days after disposition of such motion.

Comment. Section 1263.140 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 30 days after dispositon 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 1263.110. Section

1263.140 does not apply where an earlier date of valuation has been established by a deposit prior to judgment. See Section 1263.110.

Under the language contained in former Section 1249, 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 1263.140 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 Section 1268.110. 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 1263.150 rather than under Section 1263.140.

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§ 1263.150. Mistrial

1263.150. (a) If a mistrial is declared and the retrial is not commenced within one year after the commencement of the proceeding, 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 compensation in accordance with Article 2 (commencing with Section 1255.010) of Chapter 6 within 30 days after the declaration of mistrial.

Comment. Section 1263.150 deals with the date of valuation where a mistrial is declared. Under the language contained in former Section 1249, the effect, if any, of a mistrial upon the date of valuation was uncertain. Section 1263.150 clarifies the law by adopting the principle established by Section 1263.140 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

§ 1263.210. Compensation for improvements pertaining to the realty

1263.210. (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 1263.210 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 1263.210, see Sections 1263.230 (improvements removed or destroyed) and 1263.240 (improvements made after service of summons). Cf. Section 1263.250 (growing crops).

Subdivision (a) requires that the property taken by eminent domain be valued as it stands improved. If the improvements serve to enhance the value of the property over its unimproved condition, the property receives the enhanced value; if the improvements serve to decrease the value of the property below its unimproved condition, the property suffers the decreased value.

See, e.g., City of Los Angeles v. Sabatasso, 3 Cal. App.3d 973, 83 Cal. Rptr. 898 (1970)(lessee may recover severance damages for reduction of value of his equipment used in place of remainder).

Subdivision (b) of Section 1263.210, which adopts the language of Section 302(b)(1) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4652(b)(1)(1971), 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).

§ 1263.220. Business equipment

1263.220. Equipment designed for business purposes that is installed for use on the property taken or damaged and cannot be removed without a substantial loss in value shall be deemed to be an improvement pertaining to the realty for the purposes of compensation regardless of the method of installation.

Comment. Section 1263.220 requires that business equipment installed for use on the particular property be taken into account in determining compensation. See Section 1263.210. Section 1263.220 creates a special category of improvements pertaining to the realty for certain equipment regardless whether the equipment would otherwise be classified as improvements pertaining to the realty under the general provisions of Section 1263.210.

Section 1263.220 supersedes the provisions of former Section 1248b which applied only to equipment designed for manufacturing or industrial purposes. Section 1263.220 applies to equipment designed for "business purposes" in its most general sense and thus applies to commercial as well as to manufacturing and industrial enterprises.

The basic test under Section 1263.220 of whether business equipment installed for use on the property taken or damaged must be taken into account for purposes of determining compensation is whether the equipment can be removed without a substantial loss in value. If the equipment can be removed without substantial impairment of its value but removal will damage the structure

in which it is installed, the equipment is not classified as an improvement pertaining to the realty under this section; in such a case it may, however, be classified as an improvement pertaining to the realty under Section 1263.210.

The effect of classification of equipment as an improvement pertaining to the realty is that the equipment must be taken and paid for by the condemnor of the realty. As a consequence, the condemnor acquires title to the equipment rather than merely paying for loss of value on removal and has the right and the burden to realize any salvage value the equipment may have.

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

§ 1263.230. Improvements removed or destroyed

1263.230. (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) 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 1263.230 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 1268.030 (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, 500 P.2d 1345, 1351, 104 Cal. Rptr. 1, 7 (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

The removal or destruction of improvements at the times indicated in Section 1263.230 has the effect of requiring valuation of the realty to which

they pertained in its unimproved state. If removal or destruction serves to decrease the value of the property below its improved condition, the property suffers the decreased value; if removal or destruction serves to increase the value of the property over its improved condition, the property receives the increased value.

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.

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§ 1263.240. Improvements made after service of summons

1263.240. Improvements pertaining to the realty made subsequent to the date of service of summons shall be taken into account in determining compensation only in the following cases:

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

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

(c) 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 subdivision after the plaintiff has deposited the amount of probable compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 6 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. A deposit of probable compensation subsequent to issuance of an order under this subdivision shall operate neither to preclude the defendant from completing the authorized improvement nor to deny compensation based thereon.

Comment. Section 1263.240 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.

The introductory portion of Section 1263.240, which continues the substance of the last sentence of former Section 1249, requires that, as a general rule, subsequent improvements be uncompensated regardless of whether they are made in good faith or bad. See City of Santa Barbara v. Petras, 21 Cal. App.3d 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 this rule, see subdivisions (a)-(c) and Section 1263.250 (harvesting and marketing of crops).

Subdivision (a) codifies a judicially recognized exception to the general rule. Citizen's Util Co. v. Superior Court, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963).

Subdivision (b), allowing compensation for subsequent improvements made with the consent of the plaintiff, is new. It permits the parties 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 (c) 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 1263.620.) (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 public use of the property is distant, additional work enabling profitable use of the property pending dispossession.

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§ 1263.250. Harvesting and marketing of crops

1263.250. (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 possessisn of the property at a time that prevents the defendant from harvesting and marketing the crops, the reasonable value of the material and labor reasonably expended 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 defendant from harvesting and marketing the crops, the compensation specified in subdivision (b) is required only if the plaintiff has previously consented to the planting and harvesting.

Comment. Section 1263.250 supersedes former Section 1249.2. Despite the contrary implication of former Section 1249.2, 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 the reasonable value of his labor and material reasonable incurred in connection with the crops up to 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, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

§ 1263.260. Removal of improvements pertaining to realty

1263.260. Notwithstanding Section 1263.210, the owner of improvements pertaining to the realty may elect to remove any or all such improvements by serving on the plaintiff within 60 days after service of summons written notice of such election. If the plaintiff fails within 30 days thereafter to serve on the owner written notice that the improvements are required for public use, the owner may remove such improvements and shall be compensated for their reasonable removal and relocation cost not to exceed the market value of the improvements.

Comment. Section 1263.260 is new. It provides a means whereby the defendant may convert realty to personalty and receive the moving cost for such personalty. Cf. Govt. Code § 7262 (moving expense of personal property). Where the owner of improvements pertaining to the realty makes the election provided in this section, compensation is not awarded for the property removed. Cf. Section 1263.230 (improvements removed or destroyed). For comparable provisions, see Pennsylvania Eminent Domain Code § 1-607.

§ 1263.270. Removal of improvements for storage in case of dispute

1263.270. If there is a dispute between plaintiff and defendant whether particular improvements are improvements pertaining to the realty, the defendant may serve on the plaintiff written notice that he claims such improvements are improvements pertaining to the realty and that he intends to remove and store such improvements pending determination of the issue. If, within 30 days after such service the plaintiff serves on the defendant notice of refusal to allow removal for storage, the defendant may not remove and store the improvements and the plaintiff's refusal shall be deemed an admission that the improvements are improvements pertaining to the realty. If the plaintiff does not serve such notice on the defendant within the time specified, the defendant may remove and store the improvements; upon a subsequent determination that the improvements are improvements pertaining to the realty, the defendant shall promptly restore the improvements to the plaintiff and may recover the reasonable cost of removal and storage. In such a case, the improvements pertaining to the realty shall be taken into account in determining compensation as if they had not been removed.

Comment. Section 1263.270 provides a method whereby the defendant can protect property from damage in a situation where it is not clear whether the property must be taken by the plaintiff as part of the realty or salvaged by the defendant as part of his personalty. Section 1263.270 permits the defendant, upon following the prescribed procedures, to remove and store the property;

and, if it subsequently appears that the property is an improvement pertaining to the realty, have the property taken into account in determining compensation as if it had not been removed.

§ 1263.280. Improvements whose removal will damage structure

1263.280. In any case where the removal of improvements will damage the structure in which the improvements are located, the defendant may serve on the plaintiff written notice that he intends to remove such improvements and that the removal may cause damage to the structure. If, within 30 days after such service, the plaintiff serves on the defendant notice of refusal to allow removal, the defendant may not remove the improvements and the plaintiff's refusal shall be deemed an admission that the improvements are improvements pertaining to the realty. If the plaintiff does not serve such notice on the defendant within the time specified, the defendant may remove the improvements causing no more damage to the structure than is reasonably necessary, and the structure shall be valued as if the removal had caused no damage to the structure.

Comment. Section 1263.280 is new. Where the removal of improvements will damage the structure in which they are located, Section 1263.280 provides a means whereby the defendant may accomplish the removal without being charged with the damage to the structure reasonably incurred in effecting the removal. Should the plaintiff refuse to allow removal under the procedures of this section, the refusal is deemed an admission that the improvements are improvements pertaining to the realty, and the plaintiff must compensate the defendant for their taking. See Section 1263.210.

Article 4. Measure of Compensation for Property Taken

§ 1263.310. Compensation for property taken

1263.310. Compensation shall be awarded for the property taken. The measure of this compensation is the fair market value of the property taken.

Comment. Section 1263.310 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, however, is only one element of the damages to which a property owner may be entitled under this chapter. See Section 1263.010 and the Comment thereto (right to compensation). See also Section 1263.410 (injury to remainder) and Section 1263.510 (goodwill).

§ 1263.320. Fair market value

1263.320. 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, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

Comment. Section 1263.320 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, 256 (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 1263.320 omits this phrase because it is confusing. No substantive change is intended by this omission. Likewise, the phrase "in the open market" has been omitted because it is misleading in that there may be no open market for some types of transactions; no substantive change in law is thereby intended.

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.

For an adjustment to this basic fair market value standard in case of changes in value prior to the date of valuation, see Section 1263.330.

§ 1263.330. Changes in property value due to imminence of project

1263.330. 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 1263.330 is an adjustment to the basic definition of fair market value in Section 1263.320 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. For related provisions of state and federal law that apply to offers for voluntary acquisition of property, see Government Code Section Section 7267.2 and Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4651(3)(1971)(excluding from consideration the effect 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 1263.330(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 was 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 indicated that the rules respecting enhancement and diminution were not parallel and that value was 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 were 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, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972), cited the Lillard and Metrim

approach while disapproving the Partridge, Lucas, and Atchison approach in the inverse condemnation context. The Klopping case, however, does not make clear the 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 1263.330(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 1263.330 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 1263.330(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 or expanded and the property is acquired for the changed or expanded 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 ("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 1263.330 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 841-842.

The third factor listed in Section 1263.330 requires that 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

§ 1263.410. Compensation for injury to remainder

1263.410. (a) Where the property acquired is part of a larger parcel, in addition to the compensation awarded pursuant to Article 4 (commencing with Section 1263.310) 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 1263.410 provides the measure of damages in a partial taking. It supersedes subdivisions 2 and 3 of former Section 1248. The phrase "damage to the remainder" is defined in Section 1263.420; "benefit to the remainder" is defined in Section 1263.430.

§ 1263.420. Damage to remainder

1263.420. 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 1263.420 continues prior law as to the damage to the remainder compensable in an eminent domain proceeding. See former Section 1248(2). Section 1263.420 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);

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

was severed. Compare People v. Symons, 54 Cal.2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960), 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.

§ 1263.430. Benefit to remainder

1263.430. 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 1263.430 codifies prior law by defining 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 1263.430 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); but see People v. Ayon, 54 Cal.2d 217, 5 Cal. Rptr. 151 (1960)(increased or decreased traffic not a proper item of damage).

As with damage to the remainder (Section 1263.420 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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§ 1263.440. Computing damage and benefit to remainder

1263.440. (a) The amount of any damage to the remainder and any benefit to the remainder shall 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.

(b) The value of the remainder on the date of valuation, excluding prior changes in value as prescribed in Section 1263.330, shall serve as the base from which the amount of any damage and the amount of any benefit to the remainder shall be determined.

Comment. Section 1263.440 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 it is the value of the remainder in the before condition unaffected by any enhancement or blight that is to be used as the basis in computing damages and benefits that will be caused by the project. See Section 1263.330 and the Comment thereto.

§ 1263.450. Compensation to reflect project as proposed

1263.450. 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 1263.450 makes clear that any "physical solutions" provided by the plaintiff to mitigate damages are to be considered in the assessment of damages.

Section 1263.450 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).

If the plaintiff has no specific proposal for the manner of construction and use of the project, damages will be assessed on the basis of the most injurious lawful use. People v. Schultz Co., 123 Cal. App.2d 925, 268 P.2d 117 (1954).

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Article 6. Loss of Goodwill

§ 1263.510. Loss of goodwill

1263.510. 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 goodwill 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 goodwill.

Comment. Section 1263.510 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 1263.510 provides compensation for loss of goodwill in both a whole or a partial taking. See Bus. & Prof. Code § 14100 (goodwill is the expectation of continued public patronage). Goodwill loss is recoverable under Section 1263.510 only to the extent it cannot reasonably be prevented by relocation or other efforts by the owner to mitigate.

Section 1263.510 compensates for goodwill loss only to the extent such loss is 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 1263.010 (no double recovery).

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Article 7. Miscellaneous Provisions

§ 1263.610. Performance of work to reduce compensation

1263.610. A public entity and the owner of property to be acquired for public use may make an agreement that the public entity will:

(a) 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.

(b) 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.

Comment. Section 1263.610 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 1263.610 precludes the public entity from including features in the design of the public project that will have the effect of mitigating damages. See Section 1263.450.

§ 1263.620. Partially completed improvements; performance of work to protect public from injury

1263.620. (a) Where construction of an improvement is in progress on the property taken or damaged 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.

(c) The plaintiff may agree with the owner that the plaintiff will perform work necessary for the purposes of this section.

Comment. Section 1263.620 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 1263.240 (improvements made after service of summons). In addition, Section 1263.620 authorizes public entities to agree with the owner to construct the improvements or to reimburse the owner for such construction.

CHAPTER 10. DIVIDED INTERESTS

Article 1. General Provisions

§ 1265.010. Scope of chapter

1265.010. Although this chapter provides rules governing compensation for particular interests in property, it does not otherwise limit or affect the right to compensation for any other right, title, or interest in property.

Comment. Section 1265.010 makes clear that this chapter is intended to deal only with particular aspects of compensation for divided interests and is not intended to deal with the subject in a comprehensive manner. The law generally applicable to compensation for particular interests under California Constitution, Article I, Section 14 and Section 1263.010 (owner of property entitled to compensation) remains unaffected absent a specific provision in this chapter to the contrary. Thus, for example, compensation for such interests in property as easements and restrictive covenants remains unaffected by this chapter. See, e.g., Southern Cal. Edison Co. v. Bourgerie, 9 Cal.3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973).

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Article 2. Leases

§ 1265.110. Termination of lease in whole taking

1265.110. Where all the property subject to a lease is acquired for public use, the lease terminates.

Comment. Section 1265.110 codifies the rule that the taking of the entire demised premises for public use by eminent domain or agreement operates to release the tenant from liability for subsequently accruing rent. See, e.g., City of Pasadena v. Porter, 201 Cal. 381, 387, 257 P. 526, 528 (1927); Carlstrom v. Lyon Van & Storage Co., 152 Cal. App.2d 625, 313 P.2d 645 (1957). This section does not affect the right of a lessee, if any, to compensation for the impairment of his leasehold interest. See Section 1265.150.

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§ 1265.120. Partial termination of lease in partial taking

1265.120. Except as provided in Section 1265.130, where part of the property subject to a lease is acquired for public use, the lease terminates as to the part taken and remains in force as to the remainder, and the rent reserved in the lease that is allocable to the part taken is extinguished.

Comment. Section 1265.120 abrogates the rule in City of Pasadena v. Porter, 201 Cal. 381, 257 P. 526 (1927), and numerous cases following it that required continuation of the lessee's full rental obligation for the duration of the lease in cases of a partial taking of property subject to a lease. Section 1265.120 requires a pro rata abatement of the rental obligation. For a comparable provision, see W. Va. Code § 37-6-29 (1966). The requirements of Section 1265.120 do not apply where there is a provision to the contrary in the lease. See Section 1265.160. Nor does this section affect the right of a lessee, if any, to compensation for the impairment of his leasehold interest. See Section 1265.150.

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§ 1265.130. Termination of lease in partial taking

1265.130. Where part of the property subject to a lease is acquired for public use, the court may, upon petition of any party to the lease, terminate the lease if the court determines that an essential part of the property subject to the lease is taken or that the remainder of the property subject to the lease is no longer suitable for the purposes of the lease. Upon such termination, compensation shall be determined as if there were a taking of the entire leasehold.

Comment. Section 1265.130 is new to California law. It provides for termination of a lease in a partial taking case where the taking in effect destroys the value or utility of the lease for either of the parties and requires compensation by the condemnor accordingly. Section 1265.130 is not applicable in cases where there is a provision in the lease covering the situation. See Section 1265.160.

§ 1265.140. Time of termination or partial termination

1265.140. The termination or partial termination of a lease pursuant to this article shall be at the earlier of the following times:

(a) The time title to the property is taken by the person who will put it to the public use.

(b) The time the plaintiff is authorized to take possession of the property as stated in an order for possession.

Comment. Section 1265.140 makes clear the time of partial termination (Section 1265.120) or termination (Sections 1265.110 and 1265.130) of a lease.

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§ 1265.150. Remedies of parties not affected

1265.150. Nothing in this article affects or impairs any right a lessee may have to compensation for the taking of his lease in whole or in part or for the taking of any other property in which he has an interest.

Comment. Section 1265.150 is added to assure that partial termination or termination of a lease pursuant to this article does not preclude a lessee's recovery of compensation for the value of his leasehold interest, if any, and any of his property taken in the eminent domain proceeding. See Sections 1263.010 (right of owner of property to compensation) and 1263.210 (improvements pertaining to realty).

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§ 1265.160. Rights under lease not affected

1265.160. Nothing in this article affects or impairs the rights and obligations of the parties to a lease to the extent that the lease provides for such rights and obligations in the event of the acquisition of all or a portion of the property for public use.

Comment. While this article provides rules that govern the rights of parties to a lease of property taken by eminent domain, Section 1265.160 makes clear that these rules apply only absent a provision in the lease covering the situation.

Article 3. Encumbrances

§ 1265.200. "Lien" defined

1265.200. As used in this article, "lien" means a mortgage, deed of trust, or other lien.

§ 1265.210. Acquisition of property subject to encumbrances

1265.210. Where property acquired by eminent domain is encumbered by a lien, and the indebtedness secured thereby is not due at the time of the entry of judgment, the amount of such indebtedness may be, at the option of the plaintiff, deducted from the judgment and the lien shall be continued until such indebtedness is paid; but the amount for which, as between the plaintiff and the defendant, the plaintiff is liable under Article 5 (commencing with Section 1268.410) of Chapter 11 may not be deducted from the judgment.

Comment. Section 1265.210 is the same in substance as former Section 1248(8).

§ 1265.220. Allocation of award among encumbrancers in partial taking

1265.220. (a) As used in this section, "impairment of security" means the security of the lienholder remaining after the taking, if any, is of less value in proportion to the remaining indebtedness than the value of the security before the taking was in proportion to the indebtedness secured thereby.

(b) This section applies only if there is a partial taking of property encumbered by a lien and the part taken or some portion of it is also encumbered by a junior lien that extends to only a portion of the property encumbered by the senior lien.

(c) The total amount of the award that will be available for payment to the senior and junior lienholders shall be allocated first to the senior lien up to the full amount of the indebtedness secured thereby and the remainder, if any, to the junior lien.

(d) If the allocation under subdivision (c) is sufficient to pay in full both senior and junior liens, or if such allocation would not cause an impairment of the junior lienholder's security, such shall be the allocation.

(e) If the allocation under subdivision (c) would cause an impairment of the junior lienholder's security, the junior lien shall be allocated an amount sufficient to preserve the junior lienholder's security to the extent that the remaining amount allocated to the senior lien, if paid to the senior lienholder, would not cause an impairment of the senior lienholder's security.

(f) The amounts allocated to the senior and junior liens by this section are the amounts of indebtedness owing to such senior and junior lienholders which are secured by their respective liens on the property taken, and any other indebtedness owing to the senior or junior lienholders shall not be considered as secured by the property taken. If the plaintiff makes the election provided in Section 1265.210, the indebtedness that is deducted from the judgment is the indebtedness so determined, and the lien shall continue until that amount of indebtedness is paid.

Comment. Section 1265.220 continues the substance of former Section 1248(9), designed to meet the problems that arise when a parcel is encumbered with a first trust deed or other senior lien and a portion is encumbered with a subordinate lien as well. In this situation, condemnation of all or part of the smaller portion may result in an award inadequate to satisfy both liens. Section 1265.220 prescribes a procedure for allocating eminent domain awards between senior and junior lienholders of condemned property.

Both senior and junior lienors may be entitled to assignment of any condemnation award in accordance with contract terms. Under terms providing for automatic assignment of a condemnation award, the award may be appropriated to pay the entire remaining indebtedness of the first lien, with the remainder going to the beneficiary of the second. After condemnation, the security of

the junior lien creditor may have become nearly or totally inadequate to cover the outstanding indebtedness. If the debt secured by the junior lien is a purchase money obligation, for which there is no personal recourse under anti-deficiency judgment legislation (Code Civ. Proc. § 580b), the debtor may default with impunity. Under former law, default of the debtor may leave the purchase money lienholder without remedy, despite the fact the condemnation award would have been ample to satisfy both his claim in full and a part of the senior lien proportional to the reduction of the senior lienor's security. The debtor's remaining interest in the parcel condemned may be of far less value than the outstanding debt the parcel formerly secured.

The allocation procedure of Section 1265.220 is designed to allow adjustment of the condemnation award so that both the senior and junior lienholders will retain security interests proportionate to those existing before the taking. When the award is sufficient, both will be paid in full. If the award is not sufficient, it will be tentatively allocated to pay the full amount of the senior lien with any balance to the junior. At that time, the court will determine the adequacy of the remaining property to secure the junior lien. If it determines that the junior lienholder's security is disproportionately low, the court may make adjustments to the tentative allocation to place the junior in the same relative position as before the taking. The adjustment, made by reducing the allocation to the senior and adding to that of the junior, is permissible only if it preserves the proportional security of the senior lienholder.

Section 1265.220 is not intended to affect any rules precluding recovery by an encumbrancer of any part of the award where there is no impairment of security. See, e.g., Sacramento etc. Drainage Dist. v. Truslow, 125 Cal. App.2d 478, 270 P.2d 928 (1954).

§ 1265.230. Prepayment penalty

1265.230. Where the property acquired for public use is encumbered by a lien, the amount payable to the lienholder shall not include any penalty for prepayment.

Comment. Section 1265.230 continues the substance of former Section 1246.2.

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Article 4. Options

§ 1265.310. Unexercised options

1265.310. Unless the option expressly provides otherwise, an unexercised option to acquire an interest in property taken by eminent domain is terminated as to that property, and the option holder is entitled to compensation for its value, if any, as of the time of the filing of the complaint in the eminent domain proceeding.

Comment. Section 1265.310 reverses prior case law that the holder of an unexercised option to purchase property has no right to share in the award when that property has been condemned. People v. Ocean Shore R.R., 90 Cal. App.2d 464, 203 P.2d 579 (1949); East Bay Mun. Util. Dist. v. Kieffer, 99 Cal. App. 240, 278 P. 476 (1929). The measure of compensation for the loss of the option is the fair market value of the option. See Section 1263.310. Section 1265.310 applies to options other than options in a lease; options in a lease are considered in determining the value of the lease. Such options may not be compensated both under this section and as part of a lease. See Section 1263.010(b)(no double recovery).

It should be noted that, while the price at which the option may be exercised is admissible to show the value of the option, it may not be admissible to show the value of the property to which it relates. See Evid. Code § 822(b)(option price inadmissible to show value of property except as an admission).

Article 5. Future Interests

§ 1265.410. Contingent future interests

1265.410. (a) Where property acquired for public use is subject to a use restriction enforced by a contingent future interest and the use restriction is violated by such acquisition but violation of the use restriction was otherwise reasonably imminent, the contingent future interest shall be compensated as a present interest.

(b) Where property acquired for public use is subject to a use restriction enforced by a contingent future interest and the use restriction is violated by such acquisition but violation of the use restriction was not otherwise reasonably imminent:

(1) If the benefit of the use restriction is appurtenant to other property, the contingent future interest shall be compensated to the extent violation of the use restriction damages the dominant premises to which the restriction was appurtenant, but in no event shall such compensation exceed the value the contingent future interest would have as a present interest.

(2) If the benefit of the use restriction is not appurtenant to other property and if the use restriction is that the property be devoted to a particular charitable or public use, the compensation for the property shall be devoted to the same or similar use subject to the same contingent future interest.

Comment. Section 1265.410 makes clear that, where there are contingent future interests in property acquired by eminent domain, such interests may

be entitled to compensation despite any implications to the contrary in such cases as Romero v. Department of Public Works, 17 Cal.2d 189, 109 P.2d 662 (1941); People v. City of Fresno, 210 Cal. App.2d 500, 26 Cal. Rptr. 853 (1962); People v. City of Los Angeles, 179 Cal. App.2d 558, 4 Cal. Rptr. 531 (1960); City of Santa Monica v. Jones, 104 Cal. App.2d 463, 232 P.2d 55 (1951).

The test stated in subdivision (a)--"reasonably imminent"--is derived from 1 Restatement of Property § 53 (c) (1936). The reference to "public use" in subdivision (b)(2) is intended to include all uses for which the power of eminent domain might be exercised, including public utility purposes. See Section 1240.010 (public use limitation).

§ 1265.420. Property subject to life tenancy

1265.420. Where property acquired for public use is subject to a life tenancy, upon petition of the life tenant or any other person having an interest in the property, the court may order any of the following:

(a) An apportionment and distribution of the award based on the value of the interest of life tenant and remainderman.

(b) The compensation to be used to purchase comparable property to be held subject to the life tenancy.

(c) The compensation to be held in trust and invested and the income (and, to the extent the instrument that created the life tenancy permits, principal) to be distributed to the life tenant for the remainder of the tenancy.

(d) Such other arrangement as will be equitable under the circumstances.

Comment. Section 1265.420 provides the court express statutory authority to devise an equitable solution where property subject to a life tenancy is taken and an outright division of the award would not result to substantial justice under the circumstances of the particular case. See Estate of Giacomelos, 192 Cal. App.2d 244, 13 Cal. Rptr. 245 (1961)(trust imposed on proceeds).