#36.300 9/26/74

Memorandum 74-53

Subject: Study 36.300 - Condemnation Law and Procedure (Revisions Made as a Result of Decisions at Previous Meetings)

This memorandum presents for Commission review provisions of the Eminent Domain Law that the Commission requested revised and brought back to it. It also contains additional information on a few matters not previously reviewed by the Commission--goodwill, attorney's fees, and nonprofit hospitals.

§ 1240.410. Condemnation of remnants

In response to a letter from Professor Merryman critical of the excess condemnation discussion in the preliminary portion of the tentative recommendation, the Commission requested the staff to prepare a revised version of the discussion. The staff draft appears below; it is basically the same discussion as before, expanded to include illustrations of the application of the Commission's proposed test, drawn from the Comment to Section 1240.410. Also attached as Exhibit I (pink) is another letter from Professor Merryman reemphasizing his concern with the quality of the discussion.

> Acquisition of physical and financial remnants. The acquisition of part of a larger parcel of property for public use will on occasion leave the remainder in such size, shape, or condition as to be of little market value. The elimination of such remnants may be of substantial benefit to the community at large as well as to the owners of such property. Generally speaking, California's condemnors with any substantial need therefor have been granted specific statutory authority to condemn the excess for the purpose of remnant elimination.[54] Some of these statutes are so broadly drawn that they literally authorize exercise of the power of eminent domain to acquire remnants in circumstances not constitutionally permitted.[55]

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54. E.g., Code Civ. Proc. § 1266 (city and county highway authorities); Sts. & Hwys. Code § 104.1 (Department of Transportation); Water Code §§ 254 (Department of Water Resources), 43533 (water districts). These statutes, however, vary from agency to agency, often with little or no apparent reason for the difference.

55. See People v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

The Commission has concluded that all public entities should be granted the authority to condemn excess property for the purpose of remnant elimination,[56] whether the remnant be physical or financial. Under existing law, a public entity may acquire a remainder if the acquisition would be justified to avoid "excessive" severance or consequential damages to the remainder.[56a] The Commission recommends that a more meaningful test be used to determine whether the remainder may be taken--that it be left in such size, shape, or condition as to be of little market value. Under this test, for example, if the taking of part of a larger parcel of property would leave a remainder, regardless of size, in such a condition that it is landlocked and no physical solution will be practical, the taking of the remainder would be authorized.[56b]

Remainders that are of little market value should be subject to acquisition by both voluntary means and by condemnation but, to safeguard against the abuse of such authority, the property owner should always be able to contest whether the remainder will be "of little market value." The property owner should also be permitted to show that the condemnor has available a reasonable and economically feasible means to avoid leaving a remnant; if he is successful in demonstrating such a "physical solution," condemnation of the excess should not be allowed.

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56. Nongovernmental condemnors have no statutory authority to acquire excess property. No change in this regard is recommended.

56a. People v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

56b. This was the situation in People v. Superior Court, supra. Other instances where the taking of the remainder would be permitted are where the remainder (1) will be reduced below the minimum zoning limits for building purposes and it is not reasonably probable that there will be a zoning change, (2) will be of significant value to only one or few persons (such as adjoining landowners), or (3) will be landlocked and have primarily a speculative value dependent upon access being provided when adjacent land is developed and the time when the adjacent land will be developed is a matter of speculation.

On the other hand, a usable and generally salable remainder could not be taken even though its highest and best use has been downgraded by its severance or a serious controversy exists as to its best use and value after severance. Likewise, the remainder could not be taken (1) to avoid the cost and inconvenience of litigating the issue of damages, (2) to preclude the payment of damages, including damages substantial in amount in appropriate cases, (3) to coerce the condemnee to accept whatever price the condemnor offers for the property actually needed for the public project, or (4) to afford the condemnor an opportunity to "recoup" damages or unrecognized benefits by speculating as to the future market for the property not actually devoted to the public project.

§ 1245.260. Remedies if eminent domain proceeding not commenced within six months from adoption of resolution

Below is a revised version of the section permitting an inverse condemnation action if the public entity has not commenced an eminent domain proceeding within six months after adoption of its resolution of necessity.

§ 1245.260. Remedies if eminent domain proceeding not commenced within six months from adoption of resolution

1245.260. (a) If a public entity has adopted a resolution of necessity but has not commenced an eminent domain proceeding to acquire the property within six months after the date of adoption of the resolution, the property owner may, by an action in inverse condemnation, do either or both of the following:

(1) Require the public entity to take the property and pay compensation therefor.

(2) Recover damages from the public entity for any interference with the possession and use of the property resulting from adoption of the resolution.

(b) No claim need be presented against a public entity under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code as a prerequisite to commencement or maintenance of an action under subdivision (a), but any such action shall be commenced within one year and six months after the date the public entity adopted the resolution of necessity.

(c) A public entity may commence an eminent domain proceeding or rescind a resolution of necessity as a matter of right at any time before the property owner commences an action under this section and, upon such commencement or recission, the property owner may not thereafter bring an action under this section.

(d) After a property owner has commenced an action under this section, the public entity may rescind the resolution of necessity and abandon the taking of the property only under the same circumstances and subject to the same conditions and consequences as abandonment of an eminent domain proceeding.

(e) Commencement of an action under this section does not affect any authority a public entity may have to commence an eminent domain proceeding, take possession of the property pursuant to Article 3 (commencing with Section 1255.410) of Chapter 6, or abandon the eminent domain proceeding.

(f) In lieu of bringing an action under subdivision (a), the property owner may obtain a writ of mandate to compel the public entity,

within such time as the court deems appropriate, to rescind the resolution of necessity or to commence an eminent domain proceeding to acquire the property.

Comment. Section 1245.260 continues the substance of former Section 1243.1 but makes a number of clarifying changes:

(1) Subdivision (a) of Section 1245.260 makes clear that the owner of the property may bring an inverse condemnation action seeking the various types of relief specified. In addition, subdivision (f) provides for relief by way of a writ of mandate as an alternative to bringing an inverse condemnation action. Former Section 1243.1 was unclear as to the nature of the relief that might be obtained in an inverse condemnation action and did not contain any provision relating to relief by way of a writ of mandate.

(2) Subdivision (b) eliminates the claims presentation requirement and specifies a statute of limitations that is comparable to the time within which a claim would have had to be presented to the public entity, assuming that the cause of action accrued upon the expiration of six months from the adoption of the resolution of necessity. See Govt. Code §§ 901 (date of accrual of cause of action), 911.2 (time for presentation of claims). Under former Section 1243.1, it was not clear whether a claim was required to be presented to the public entity.

It should be noted that the statute of limitations provided in subdivision (b) applies only to commencement of an inverse condemnation action under subdivision (a). The provision for a writ of mandate in subdivision (f) remains operative despite the expiration of the limitations period.

(3) Subdivision (c) makes clear that the public entity can commence an eminent domain proceeding or rescind the resolution of necessity at any time prior to the commencement of the action and thereby avoid liability under subdivision (a). This provision does not, however, affect the owner's right to bring an inverse condemnation action based on Article I, Section 14, of the California Constitution. See Klopping v. City of Whittier, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972). Former Section 1243.1 was silent on the consequences of commencing a proceeding or rescinding the resolution.

(4) Subdivision (d) makes clear that the public entity may rescind the resolution and abandon the taking after commencement of an action under this section only under the circumstances and subject to the same conditions and consequences as abandonment of an eminent domain proceeding. See Sections 1268.510, 1268.610, and 1268.620. Former Section 1243.1 did not deal with this matter.

(5) Subdivision (e) continues the substance of the last portion of former Section 1243.1.

§§ 1250.310-1250.370. Pleadings

The Commission requested the staff to review the logic and order of the pleading provisions, particularly their relationship to the general rules of civil procedure governing pleadings. Having made such a review, the staff proposes the following changes in the pleading article:

(1) A Comment should be added at the beginning of the article, as follows:

> Comment. The rules of pleading provided in this article are special rules peculiar to eminent domain proceedings. They supplement the general rules of civil procedure governing pleadings and replace only those general rules that may be inconsistent with them. See generally Section 1230.040 and Comment thereto (rules of practice in eminent domain proceedings).

(2) Following the example of the Uniform Eminent Domain Code, the introductory phrase of Section 1250.310 (contents of complaint) should be revised to read:

> ~~The~~ In addition to other allegations required or permitted by law, the complaint shall contain all of the following:

(3) The following cross-reference should be made at the end of the second paragraph of the Comment to Section 1250.310:

> See generally Section 1230.040 and Comment thereto (rules of practice in eminent domain proceedings).

(4) Following the example of the Uniform Eminent Domain Code, Section 1250.320 (contents of answer) should be revised to read:

> § 1250.320. Answer to state defendant's interest in property
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> 1250.320. ~~The~~ In addition to other matters required or permitted by law, the answer shall include a statement of the interest of the defendant claims in the property described in the complaint.

(5) The Commission requested that a section providing for disclaimer of any interest in the proceeding be incorporated, modeled on the Uniform Eminent Domain Code provision:

§ 1250.325. Disclaimer

1250.325. (a) A disclaimer need not be in any particular form, shall contain a statement that the defendant claims no interest in the property or in the compensation that may be awarded, and notwithstanding Section 1250.330 may be signed either by the defendant or his attorney.

(b) A defendant may file a disclaimer at any time, whether or not he is in default, and the disclaimer supersedes an answer previously filed by the defendant.

(c) Subject to subdivision (d), a defendant who has filed a disclaimer has no right to participate in further proceedings or to share in the compensation awarded.

(d) The court may implement the disclaimer by appropriate orders, including where justified awarding costs and litigation expenses.

Comment. Section 1250.325 provides a simplified method for a defendant to disclaim any interest in the property or compensation awarded in the proceeding.

Under subdivision (a), the disclaimer may be an informal document which merely states that the defendant claims no interest in either the property or the award. A defendant wishing to make only a partial disclaimer may do so by filing an answer describing only the limited interest claimed by him. See Section 1250.320.

Subdivision (b) permits a disclaimer to be filed "at any time," even after an answer has been filed or after the defendant's right to respond has been terminated by his default. The disclaimer supersedes any earlier response.

The disclaimer, in effect, removes the defendant from the action and may result in a dismissal as to him. See subdivisions (c) and (d). The power to implement a disclaimer, as provided in subdivision (d), is intended to assure that the court has full authority to enter a dismissal, with award of costs and litigation expenses where appropriate or to enter other implementing orders calculated to facilitate use of the disclaimer as an aid to settlement. Adequate flexibility in this regard may be particularly useful, for example, in disposing of claims having relatively slight value.

§ 1255.010. Deposit of amount of estimated compensation

The Commission revised this section to read as follows, requesting the staff to bring it back for further review as revised:

§ 1255.010. Deposit of amount of estimated compensation

1255.010. (a) At any time before entry of judgment, the plaintiff may deposit with the court the full amount indicated by an appraisal which the plaintiff reasonably estimates to be the compensation that will be awarded in the proceeding for the taking of all or a specified part of the property. The appraisal upon which the deposit is based shall be one that satisfies the requirements of subdivision (b). The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so.

(b) Before making a deposit under this section, the plaintiff shall have an expert qualified to express an opinion as to the value of the property (1) make an appraisal of the property and (2) prepare a written statement of, and summary of the basis for, the appraisal.

(c) On noticed motion, or upon ex parte application in an emergency, the court may permit the plaintiff to make a deposit without prior compliance with subdivision (b) if the plaintiff presents facts by affidavit showing that (1) good cause exists for permitting an immediate deposit to be made, (2) an adequate appraisal has not been completed and cannot reasonably be prepared before making the deposit, and (3) the amount of the deposit to be made is not less than the full amount of compensation that the plaintiff, in good faith, estimates will be awarded for the taking of all or a specified part of the property. In its order, the court shall require that the plaintiff comply with subdivision (b) within a reasonable time, to be specified in the order, and also that any additional amount of compensation shown by the appraisal required by subdivision (b) be deposited within that time.

In connection with this provision, we note that, under subdivision (b), the condemnor is required to make only "a written statement of, and summary of the basis for, the appraisal." With this limited information requirement, it will now be less burdensome for a condemnor to give the appraisal summary to the condemnees. Accordingly, the staff recommends that the option of the condemnor to send the condemnee the summary or indicate a place where it may be inspected be eliminated; the condemnor should be required to send the condemnee the appraisal summary in every case.

§ 1255.040. Deposit on notice of homeowner

The Commission deleted the requirement that the deposit on motion of the owner of residential property be used for relocation purposes and deleted the requirement of a court hearing to determine the reasonably estimated compensation. With these two changes, a motion by the residential defendant is

no longer necessary, and the staff proposes to revise Section 1255.040 to simply permit the defendant to serve a notice on the plaintiff requiring the deposit.

§ 1255.040. Deposit on notice of homeowner

1255.040. (a) Where the plaintiff has not made a deposit that satisfies the requirements of this article for all the property to be taken, and the property includes a dwelling containing not more than two residential units and the dwelling or one of its units is occupied as his residence by a defendant, such defendant may serve notice on the plaintiff requiring a deposit of the reasonably estimated compensation that will be awarded in the proceeding. The notice shall specify the date on which the defendant desires the deposit to be made. Such date shall not be earlier than 30 days after the date of service of the notice and may be any later date.

(b) If the plaintiff deposits the reasonably estimated compensation, determined or redetermined as provided in this article, on or before the date specified by the defendant, the plaintiff may, upon ex parte application to the court, obtain an order for possession that authorizes the plaintiff to take possession of the property 30 days after the date for the deposit specified by the defendant or such later date as the plaintiff may request.

(c) Notwithstanding Section 1268.310, if the deposit is not made on or before the date specified by the defendant, the compensation awarded in the proceeding to the defendant shall draw legal interest from that date. The defendant is entitled to the full amount of such interest without offset for rents or other income received by him or the value of his continued possession of the property.

(d) If the proceeding is abandoned by the plaintiff, the interest under subdivision (c) may be recovered as costs in the proceeding in the manner provided for the recovery of litigation expenses under Section 1268.610. If, in the proceeding, the court or a jury verdict eventually determines the compensation that would have been awarded to the defendant, then such interest shall be computed on the amount of such award. If no such determination is ever made, then such interest shall be computed on the amount of reasonably estimated compensation.

(e) The serving of a notice pursuant to this section constitutes a waiver by operation of law, conditioned upon subsequent deposit by the plaintiff of the reasonably estimated compensation, of all claims and defenses in favor of the defendant except his claim for greater compensation.

(f) Notice of a deposit made under this section shall be served as provided by subdivision (a) of Section 1255.020. The defendant may withdraw the deposit as provided in Article 2 (commencing with Section 1255.210).

(g) No notice may be served by a defendant under subdivision (a) after entry of judgment unless the judgment is reversed, vacated, or set aside and no other judgment has been entered at the time the notice is served.

§ 1255.245. Withdrawal for investment

Below is a draft of a provision to permit prejudgment withdrawal of the whole deposit for investment purposes. There are many unresolved problems in the draft, such as whether an individual may withdraw his share from the investment in appropriate cases; these matters are left to the court to prescribe by setting terms and conditions on a case-by-case basis. The primary effect of this provision is to permit an expeditious means for the defendants to obtain interest or to obtain a high rate of interest without the need for determining and drawing down individual shares.

§ 1255.245. Withdrawal for investment

1255.245. (a) Prior to entry of judgment, a defendant who has an interest in the property for which a deposit has been made under this chapter may, upon notice to the other parties to the proceeding, move the court to have all of such deposit withdrawn and invested for the benefit of the defendants.

(b) At the hearing of the motion, the court shall consider the interests of the parties and the effect that withdrawal and investment would have upon them. The court may, in its discretion, if it finds that equity will be promoted thereby, grant the motion subject to the following terms and conditions and such additional terms and conditions as are appropriate under the circumstances of the case:

(1) The withdrawal is subject to the same consequences as any other withdrawal under this article.

(2) The investment remains at the risk of the person who moved for withdrawal, upon such security, if any, as the court may require.

(3) The investment shall be specified by the court and shall be limited to United States Government obligations or secure interest-bearing accounts in an institution whose accounts are insured by an agency of the federal government.

Comment. Section 1255.245 provides a method whereby a defendant may have a prejudgment deposit drawn down and invested for the benefit

of all defendants. For a comparable postjudgment provision, see Section 1268.150. The primary use for this section is to supply an expeditious means for the defendants to obtain interest on the deposit in cases where the plaintiff has not taken possession or to obtain a higher rate of interest than the legal rate in cases where the plaintiff has taken possession without the need for a hearing on the respective rights of the parties.

Under subdivision (a), one defendant may require the whole deposit drawn down and invested. The return on the investment, however, is for the benefit of all defendants and will be apportioned according to their interests as finally determined in the eminent domain proceeding.

Subdivision (b) makes clear that the granting of a motion under this section is in the discretion of the court. The court should determine whether any of the parties would be prejudiced by the withdrawal. Factors that might be taken into consideration include the resistance of a defendant who is an occupant of the property because withdrawal of the deposit will subject him to dispossession under Section 1255.460, or the resistance of a defendant who has a bona fide objection to the right to take that would be waived by withdrawal under Section 1255.260.

Under subdivision (b), the court must tailor its order for withdrawal and investment to fit the circumstances of the particular case. Factors the court might take into consideration in making its order include length of commitment of investment, e.g., in certificates of deposit in anticipation of either lengthy or speedy conclusion of trial, or provision for withdrawal by individual defendants from the lump-sum investment where necessary for relocation, and the like.

Subdivision (b)(1) makes clear that a withdrawal under this section carries with it the same consequences as any other withdrawal of a prejudgment deposit. Among these consequences are waiver of defenses (Section 1255.260), subjection to possession (Section 1255.460), and cessation of interest (Section 1268.320).

Subdivision (b)(2) provides that the funds withdrawn and invested are at the risk of the person who sought the withdrawal. Liability under this subdivision includes interest yield below the legal rate where the defendants would otherwise have been entitled to interest at the legal rate, and extends to loss of the principal, or part thereof.

Under subdivision (b)(3), the lump sum may be invested in amounts greater than are insured by an agency of the federal government so long as the institution in which it is invested does carry such insured accounts and provided the investment made is actually secure.

§ 1255.410. Order for possession prior to judgment

The Commission directed the staff to draft a provision permitting the plaintiff to take possession of unoccupied property on short notice in cases

where there is accute need for such prompt possession. The staff would add subdivision (c) to Section 1255.410 to accomplish this:

> (c) Where the plaintiff has shown by clear and convincing proof its urgent need for possession of unoccupied property, the court may, notwithstanding Section 1255.450, order possession of such property on such notice as it deems appropriate under the circumstances of the case.
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> Comment. [Substitute following for last two paragraphs of Comment:]
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> Subdivision (b) is limited by the requirement of a 30-day or 90-day period following service of the order before possession can by physically assumed. See Section 1255.450. Subdivision (c), however, permits possession of property that is unoccupied on lesser notice in cases where the plaintiff is able to make an adequate showing of need.
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> It should be noted that, under both subdivisions (b) and (c), the court may authorize possession of all, or any portion or interest, of the property sought to be taken by eminent domain.

§ 1263.410. Compensation for injury to remainder

At the September meeting, the Commission declined to define "larger parcel" but requested the staff to prepare a Comment explaining why it was left undefined. The following paragraph would be added to the Comment to Section 1263.410:

> It should be noted that the term "larger parcel" is not defined in the Eminent Domain Law, just as it was not defined in the former eminent domain provisions of the Code of Civil Procedure. The legal definition of the larger parcel is in the process of judicial development. See, e.g., City of Los Angeles v. Wolfe, 6 Cal.3d 326, 491 P.2d 813, 99 Cal. Rptr. 21 (1971)(contiguity not essential). Leaving the larger parcel definition uncodified permits continued judicial development of the concept.

§ 1263.510. Loss of goodwill

Attached as Exhibit II (yellow) is the case of Community Redevelopment Agency of Los Angeles v. Abrams (Sept. 1974), holding that compensation for loss of goodwill is constitutionally required. This interesting court of appeal case is not yet final, and we assume that it will go to a hearing before the Supreme Court; nonetheless, we attach it for your information.

Also attached are letters from Henry A. Babcock (Exhibit III--green) and Dexter D. MacBride (Exhibit IV--buff) of the American Society of Appraisers urging that, when a business is destroyed or damaged by a taking in an eminent domain proceeding, the condemnee should be compensated for this loss or damage. The other points in their letters concerning evidence we will defer until we receive the comments we have solicited from the College of Fellows. We note that one other point in their letters, that compensation for severance damage to personal property be allowed, is addressed by the Abrams case.

Attorney's Fees

Memorandum 74-45 describes AB 3925, which would permit the defendant to recover his litigation expenses in eminent domain cases where the plaintiff's offer was unreasonable. The bill has now passed both houses of the Legislature and is before the Governor. A copy of the bill in its final amended form is attached as Exhibit V (blue). We of course have no knowledge of the Governor's intentions with respect to this bill, but we should know if it has been signed or vetoed by the time of the October meeting.

Health & Safety Code § 1427. Nonprofit hospitals

The Governor has signed a bill that requires the Department of Health to conduct a public hearing before it may certify that the exercise of eminent domain by a nonprofit hospital to acquire particular property is necessary. The bill also requires that written notice of the hearing be provided to the voluntary area health planning agency if one exists and allows recommendations to be received from the agency within 90 days from the receipt of notice of the public hearing.

The staff will amend these changes into our nonprofit hospital section; they are consistent with the Commission's prior proposals in this area.

Respectfully submitted,

Nathaniel Sterling
Staff Counsel

EXHIBIT I

STANFORD LAW SCHOOL
STANFORD, CALIFORNIA 94305

September 4, 1974

Professor Gideon Kanner
Loyola University
School of Law
1440 West Ninth Street
Los Angeles, California 90015

Dear Professor Kanner:

I am grateful for your thoughtful letter of August 27 and am delighted to have an opportunity to discuss the points that concern me with someone who is so knowledgeable about the law of excess condemnation.

However, I should emphasize that your letter does not really address my primary concern. What the Law Revision Commission decides to recommend is one kind of question; how it does it is another. I intended in my letter to address the second question. It seemed to me that the Tentative Recommendation simply omitted discussion of very significant issues. You assure me that these matters were exhaustively discussed. Unfortunately, there is nothing in the Tentative Recommendation to indicate the nature of the discussion or the reasons for the conclusions arrived at. In this way, all but the expert in the field must fail to realize that there are alternatives backed by respectable authority and that the position taken by the Commission is in fact a controversial one.

The early Roman kings first refused to publish the laws and then published them in small characters on tall pedestals so that they were unreadable. A public agency charged with the obligation of making disinterested suggestions for law reform, which omits from its recommendations the documentation and argument that would demonstrate the significance of what it proposes, is in the same tradition.

Since you do discuss the merits, I might add a word or two. To call a problem "semantic" does not make it go away. Lawyers deal in words. All problems of the interpretation and application of statutes and precedents, all problems of the construction of documents, are "semantic" problems. To argue as you do that excess condemnation is a matter of "public use"

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rather than "necessity" is fully as "semantic". In addition, it is contrary to the most respectable authority (which, to return to my first point, is neither cited nor discussed; one would never know from the Tentative Recommendation that an alternative position existed).

As to the severance damages case, it is not my hypothetical; it is part of the law of California, enacted in 1941 as CCP §1226, which the Commission's Tentative Recommendation would, in effect, repeal. Whether it should or should not be repealed is a separate and interesting question, complicated by the peculiar California law on severance damages (particularly the rule that limits the extent to which betterment may be offset under CCP §1248). It is also complicated by our experience in real cases in which severance damages are awarded by real juries who seem unconcerned about the first law of thermodynamics or Judge Mosk's opinion of their economics.

You may be correct in your conclusion that the Division of Highways has been led to the sorry state you describe by observing CCP §1266; I am not in a position to argue the point. I will continue to argue, however, that it is unfortunate that these complex questions and the reasons for the decisions made by the Commission with respect to them are completely submerged in the Tentative Recommendation.

The law of excess condemnation operates at the boundary between private property and public power. There is a constant temptation for the public authority to try to recoup betterment (i.e., unearned value increases due to public works--what Ricardo calls "pure rent") through "excess" condemnation. Some oppose this as a dangerous extension of state power into an important private area; others oppose it for other reasons. The questions are fundamental and interesting. They should be openly and fully exposed and discussed. There are many possible approaches to their solution. They should be fully considered. The Tentative Recommendation, which should fulfill these functions, fails utterly to do so. This would be understandable (although regrettable) if the Commission were simply ignorant. You assure me, however, that these questions were "the subject of far-reaching discussions among the Commissioners, the staff, consultants and observers." If so, the character of the Tentative Recommendation gives cause for concern of a more serious kind.

Yours truly,

John Henry Merryman

JHM/mk
cc: John de Moully

Memorandum 74-53

CERTIFIED FOR PUBLICATION

EXHIBIT II

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES, Plaintiff, Appellant and Respondent, vs. ARTHUR J. ABRAMS, Defendant, Respondent and Appellant.	2D CIVIL NO. 42058 Sup.Ct.No. 997 068

- 1974

Clerk

APPEALS from a judgment of the Superior Court of Los Angeles County. Robert W. Kenny, Judge. Reversed with directions.

Eugene B. Jacobs, Agency Counsel, Robert J. Hall and Oliver, Stoever & Laskin, Special Counsel, by Thomas W. Stoever and C. Edward Dilkes, for appellant Community Redevelopment Agency.

Fadem, Kanner, Berger & Stocker, a professional corporation, by Gideon Kanner, for appellant Abrams.

Arthur Abrams has been a pharmacist for 40 years. For the past 28 years he operated a pharmacy in an area embraced by the Watts Redevelopment project. He was the owner in fee simple of the real property on which the pharmacy was located. At the time of the commencement of this action Mr. Abrams was 64 years of age and suffered from rheumatoid arthritis.

On February 24, 1971, the Community Redevelopment Agency of the City of Los Angeles (the Agency), in the course of implementing the Watts Redevelopment Plan, filed an action in eminent domain to acquire the real property on which Mr. Abrams' pharmacy was situate. This parcel was part of an area of approximately 20 square blocks falling under the sweep of the Agency's proposed condemnation. The total condemnation not only took Abrams' pharmacy but eliminated the neighborhood from which his clientele came.

By his answer Mr. Abrams specifically prayed that the value of two types of personal property should be included in any determination of "just compensation" for the Agency's taking of his property. These two types of personal property were (1) a quantity of "ethical drugs"[1] which were in inventory on the premises, and (2) the business or "goodwill." He alleged that the value of the drugs was $60,000 and the value of the business or goodwill was $25,000.

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1. "Ethical Drugs" are those drugs which cannot be sold without a prescription.

In support of his contention Mr. Abrams alleged that because of State imposed restrictions on the sale of "ethical drugs" his stock thereof were rendered valueless by the elimination of his place of business and that because of his own particular situation and the circumstances of this particular "taking"[2] he is incapable of relocating his business.

The trial court, on the basis of substantial evidence, found that (1) by reason of his age and physical condition, Mr. Abrams in unemployable, and must rely for a livelihood on his own business, and for that reason his business constitutes his only present and potential source of livelihood, and his principal asset, and (2) Mr. Abrams is incapable of starting a new business located in a new area.

The evidence established that because of State requirements the inventory of ethical drugs could not be sold to another pharmacist without a certification as to purity. The cost of such testing and certification would exceed the value of the drugs. It was stipulated that the value of the drugs was $10,000.

As a result the trial court concluded that the good will of Mr. Abrams' business was "taken, damaged, and destroyed" and that the market for the drugs had been "destroyed" by the condemnation action.

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2. It is claimed by Abrams and not denied by the Agency that the Watts Redevelopment plan contemplates that the area acquired by the Agency will eventually be turned over to private interests for the purpose of establishing various commercial enterprises which could include a drug store.

On the basis of these findings and conclusions the trial court awarded Mr. Abrams $10,000, the stipulated value of the drugs, in addition to the value which the jury placed on the real property and fixtures but denied any award for the goodwill of the business on the grounds that as a matter of law it was non-compensable. Both the Agency and Mr. Abrams have appealed.

Since on appeal we do not reweigh the evidence, our starting point is the well supported findings of the trial court that the two forms of personal property at issue were taken, damaged or destroyed by the condemnation action. Their value has been reduced to zero.

From this base we proceed to determine who should bear the loss. The essential question to be answered is whether a failure to compensate for these items would result in the owner of private property being asked to bear a disproportionate share of the cost of a public improvement. (Clement v. State Reclamation Board, 35 Cal.2d 628.)

On this appeal the Agency suggests an issue which was not raised below,[3] that is that Mr. Abrams did not mitigate the

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3. During pretrial proceedings the Agency's position was that compensability per se of the contested items of personal property was at issue. It did not challenge Abrams' claim of inability to relocate the business or dispose of the ethical drugs. The final pretrial order states as follows: "Plaintiff and defendant can now stipulate and agree that the legal issue is as follows: Whether on the facts at bar, defendant A.J. ABRAMS is entitled to be compensated for business good will, if any, and his stock of ethical drugs, if any, pursuant to Article I, §14 of the California Constitution and the Fifth and Fourteenth Amendments of the U.S. Constitution."

damages. This claim is based on two different notions.

As to the inventory of drugs the Agency contends that Mr. Abrams made no effort to dispose of the drugs but instead continued to keep his inventory current. The Agency did not seek an order for immediate possession, hence Mr. Abrams continued in business until conclusion of the trial. It appears that he conducted that business with his inventory at normal levels.

Administrative Code section 1710 requires the owner of a pharmacy to maintain an adequate supply of drugs and chemicals. Be that as it may, the Agency is really suggesting that we reweigh the evidence since the trial court found that Mr. Abrams could not otherwise dispose of the drugs he had on hand. Mr. Abrams was not required, prior to judgment, to allow his business to atrophy.

Concerning the loss of the business the Agency contends that Mr. Abrams should have availed himself of certain relocation assistance afforded by provisions of the Government Code.

Government Code section 7262 provides that as a cost of the acquisition of real property for a public use, a public entity shall compensate a displaced person for (1) expense of moving the business, (2) expense in searching for a replacement of the business, (3) actual direct loss of tangible personal property as a result of moving or discontinuing a business.

In lieu of such compensation a business man who is displaced by a condemnation action may elect to accept a lump sum

payment based on annual average net earnings not to exceed $10,000. This latter option is conditioned on the public agency being satisfied that the business cannot be relocated without substantial loss of patronage.

This statute appears to us to be legislative recognition of the need to compensate for loss of business as a result of a condemnation action but contemplates that such compensation be independent of the condemnation proceedings. The relocation assistance contains a certain amount of "hedging" by the Legislature in giving the Agency the fact-finding power on the issue of relocability and in limiting absolutely the amount of compensation available.

Further, section 7270 of the Government Code provides that nothing in these provisions shall be construed as creating in any condemnation proceedings any element of damages not in existence on the date of the enactment. Section 7274 specifically provides that these provisions create no rights or liabilities. Thus these provisions are not an adequate substitute for the constitutional requirement of just compensation.

We discuss the Legislature's power to limit compensation infra. At this point for the reasons stated and because the issue was not raised at trial we reject the Agency's contention that Mr. Abrams failed to mitigate damages.

The remaining contention of the Agency is essentially that personal property is, as a matter of law, non-compensable in an action for condemnation of real property.

Article I, section 14 of the California Constitution provides that "Private property shall not be taken or damaged for public use without just compensation . . . ." That very simple statement of one of the most fundamental tenets of our tradition and culture has resulted in volumes of case law and text material dealing, under varying circumstances, with the issues of what has been "taken or damaged" and what are the ingredients of "just compensation."

The Constitution refers to "property" without distinction as to its character as real or personal. (See Sutfin v. State of California, 261 Cal.App.2d 50, where in an inverse condemnation action it was held that plaintiff could be compensated for damage to a number of automobiles on plaintiff's property caused by flooding from state flood control works.) Contrary to the Agency's contention here, if the state takes or damages personal property in the exercise of its power of eminent domain it is obligated to pay just compensation to the owner. (Sutfin, supra; also see Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 Stanford L.Rev. 727; 1 Nichols, The Law of Eminent Domain (rev.3d ed. 1973) § 1.13[3], pp. 1-18.) We see no difference between the damaging

of automobiles in Sutfin and the destruction of the personal property here.

In determining whether property, real or personal, has been taken or damaged the test is the loss to the owner and not benefit to the taker. (People v. La Macchia, 41 Cal.2d 738; U. S. v. General Motors Corp., 323 U.S. 373.)

Thus in the case at bench it matters not that the Agency does not intend to operate a drug store on the premises or make use of Abrams' inventory or business. (Boston Chamber of Commerce v. Boston, 217 U.S. 189; United States v. Fuller, 409 U.S. 488; Almota Farmers Elevator & Whse. Co. v. U.S., 409 U.S. 470.)

The fundamental issues for the courts in these cases are simply whether a property right has been taken or damaged and the value of that private property right as of the time of the taking or damaging. Just compensation means the full and perfect equivalent in money of the property taken or damaged. Its owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken or damaged. (United States v. Miller, 317 U.S. 369, 373.)

The determination of these issues is purely a judicial function and that function cannot be circumscribed by the Legislature. When the state through its executive arm takes or damages private property it cannot through its legislative arm

limit the price it will pay or the manner of its payment. (Monongahela Navigation Co. v. United States, 148 U.S. 312; United States v. New River Collieries, 262 U.S. 341; Beals v. City of Los Angeles, 23 Cal.2d 381; County of Los Angeles v. Ortiz, 6 Cal.3d 141.)

The law in California and elsewhere has long recognized compensable consequential damage to property rights which, while not actually "taken", are damaged or destroyed by the physical appropriation of a portion of the owner's property. (See People v. Giumarra Vineyards Corp., 245 Cal.App.2d 309; Southern Calif. Edison Co. v. Railroad Com., 6 Cal.2d 737; 4A Nichols, Eminent Domain, § 14.1.) There seems to be no logical reason why that principle should not apply with equal force where, in condemning real property, personal property, though not "taken", is damaged or destroyed.

Of course, if personal property which is located on the real property can simply be picked up and moved without loss to the property owner then the condemning agency takes and pays for only the land and fixtures. In the latter situation the condemning agency has not taken or damaged the personal property. But that is not the same as saying that such personal property is never compensable when it has been taken or damaged as a result of condemning the underlying real property.

Where the removal or relocation of either tangible or intangible personal property, under the circumstances of the particular case, is impossible, then the owner's just compensation should not be limited by an arbitrary notion that in eminent domain any particular form of recognized property right is non-compensable.

"This is so because, as was said in People v. Superior Court, 145 Cal.App.2d 683, 690, hearing denied, the constitutional concept of just compensation expresses a principle of fairness. If any compensable constituent element of value, . . . is omitted in arriving at just compensation this constitutional mandate has not been met. [Citations.] Every rule of condemnation law, be it statutory or decisional, for determining the value of land taken in condemnation, must in its every application conform to this constitutional mandate. [Citations.]" (People Ex Rel. Dept. Pub.Wks. v. Lynbar, Inc., 253 Cal.App.2d 870, at 883.)

The Agency relies heavily on City of Los Angeles v. Allen's Grocery Co., 265 Cal.App.2d 274, where it was stated ". . . the taking of real estate does not affect the ownership of personal property kept on the premises taken, but not permanently affixed thereto. The owner of the personal property is entitled to remove said personal property, and evidence of the value of the unsold and removed stock in trade retained . . . is not a proper element

of damage under the circumstances." (Page 279.) (Emphasis added.)

The circumstances in the Allen case were that real property upon which a grocery store was located was being condemned. The owner sought compensation for his inventory of grocery items, however, there was nothing in the Allen case to indicate that the grocery items were in any way different than the usual inventory of a grocery store nor was there any special problem in removal and resale. This is markedly different from the situation of Mr. Abrams' inventory of ethical drugs. Since the state itself through its regulation or the transfer of these drugs made the transfer impossible it may not be heard to say that Mr. Abrams could or should have somehow disposed of them.

We turn now to the issue of whether Abrams should be compensated for the loss of his business. Of course the good will of a business is property and recognized as compensable in both contract and tort actions between private litigants. (Civ. Code, §§ 654, 655; Bus. & Prof. Code, § 14102; Carrey v. Boyes Hot Springs Resort, Inc., 245 Cal.App.2d 618.) It is recognized as community property in cases of dissolution of marriage. (Golden v. Golden, 270 Cal.App.2d 401; In re Marriage of Fortier, 34 Cal.App.3d 384.)

The California Supreme Court in Oakland v. Pacific Coast Lumber etc. Co., 171 Cal. 392, held that Code of Civil Procedure section 1248 limited compensation to the value of the property

taken and/or severance damages accruing to property not condemned. Thus the court declared that damage to business situated on the condemned real estate was not recognized by the statute as an element of compensation.

The court in Oakland, supra, at p. 398, stated: "It is quite within the power of the Legislature to declare that a damage to that form of property known as business or the goodwill of a business shall be compensated for, but unless the constitution or the legislature has so declared, it is the universal rule of construction that an injury or inconvenience to a business is damnum absque injuria, and does not form an element of the compensating damages to be awarded." (Emphasis added.)

This rule enunciated in 1915 has been widely criticized. (20 Hastings Law Journal, p. 673, The Unsoundness of California's Noncompensability Rule as Applies to Business Losses In Condemnation Cases; 67 Yale Law Journal, pp. 62-74, Eminent Domain Valuations in an Age of Redevelopment.)

The Oakland court itself took the pains to state that it did not wish to be understood as saying that the rule should not be otherwise.

The California Law Revision Commission, as recently as January of 1974, at page 45, of its tentative recommendations relating to condemnation law and procedure pointed out that eminent domain frequently works a severe hardship on owners of businesses

affected by public projects and recommend that steps be taken to compensate for the loss of goodwill of a business that has been taken or damaged.

There has been considerable development in the law since the Oakland decision. Of course, the Constitution still does not say that a property right in a business is compensable. On the other hand, the Constitution does not say that it is not compensable, and it is now well established that since the mandate for payment of just compensation comes from the Constitution itself, the courts need not await legislative authorization in order to determine the ingredients of such compensation.

The private ownership of property is fundamental to our system of government and its protection against governmental intrusion is constitutionally guaranteed, hence the requirement that the government pay for its taking should be liberally construed in favor of the property owner. An arm's length bargain-seeking posture on behalf of a condemning agency in dealing with a property owner is really contrary to the spirit of our Constitution.

"The Constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, [citations] as it does from technical concepts of property law." (United States v. Fuller, supra, 409 U.S. 488, at 490.)

In 1936, Oakland v. Pacific Coast Lumber, etc. Co., supra, 171 Cal. 392, was distinguished and found inapplicable

in Southern Calif. Edison Co. v. Railroad Com., 6 Cal.2d 737. The City of Tulare intending to operate its own municipal electrical system condemned Edison transmission lines which had previously served electrical customers within the City of Tulare. The Supreme Court approved an award of severance damages to Edison based upon a reasonable return on capital investment, and rejected the condemnor's contention that, based on Oakland v. Pacific Coast Lumber, etc., Co., no damages for interference with business should be allowed. The distinction which the court found to exist was in a 1917 amendment to the Public Utilities Act providing for severance damages, stating "The deficiency in the law in 1915 (the time of the Oakland decision) was thus supplied in 1917 and the contention of the city is no longer available." (Southern Calif. Edison Co. v. Railroad Com., at pages 750-751.)

Another distinction which is sometimes advanced as a reason for denying compensation for goodwill of a business was that in Edison the condemnor intended to operate the business, while in Oakland the condemnor did not so intend or desire. This distinction loses its significance in light of the "loss to owner" test of La Macchia, U. S. v. General Motors and U. S. v. Fuller, supra, and the Oakland decision in light of Edison as well as those cases appears to have lost some of its vitality. At least it does not appear to stand as an insurmountable barrier to compensation in hardship cases such as the one at bar.

Furthermore, since there are many readily available formulae for evaluating the worth of a business (see In re Marriage of Fortier and Southern Calif. Edison Co. v. Railroad Com., supra) it cannot be earnestly suggested that compensation should be denied on the basis that it is too speculative or difficult to ascertain.

The most recent and persuasive language pointing to an abandonment of the former rigid rule is to be found in Klopping v. City of Whittier, 8 Cal.3d 39, where our Supreme Court in an inverse condemnation action approved compensation for loss of rental income occasioned by an announcement of future condemnation action.

The court in Klopping quoted with approval the following at pages 53-54, from a decision of the Wisconsin Supreme Court in Luber v. Milwaukee County, 177 N.W.2d 380:

"'The importance for allowing recovery for incidental losses has increased significantly since condemnation powers were initially exercised in this country. During the early use of such power, land was usually undeveloped and takings seldom created incidental losses. Thus the former interpretation of the "just compensation" provision of our constitution seldom resulted in the infliction of incidental losses. The rule allowing fair market value for only the physical property actually taken created no great hardship. In modern society, however, condemnation proceedings are necessitated by numerous needs of society and are

initiated by numerous authorized bodies. Due to the fact that people are often congregated in given areas and that we have reached a state wherein redevelopment is necessary, commercial and industrial property is often taken in condemnation proceedings. When such property is taken, incidental damages are very apt to occur and in some cases exceed the fair market value of the actual physical property taken. . . . The rule making consequential damages damnum absque injuria is, under modern constitutional interpretation, discarded . . . ." (Emphasis added.)

In State v. Sauser, 169 N.W.2d 37, the Supreme Court of Minnesota also discarded the rule that consequential damages are damnum absque injuria by holding that where a condemnee is unable to transfer his business from the condemned real property to a new location the loss of the business is compensable.

Following the lead of Minnesota and Wisconsin, the California Supreme Court has pointed the way toward a more logical approach and to eliminating hardship in these types of cases. We follow along that path by affording Mr. Abrams the relief for which the circumstances here cry out.

The judgment is reversed and the matter is remanded to the trial court for the sole purpose of determining the value of

the business that was destroyed by the condemnation. When that value is determined it shall be added to the judgment

Defendant Abrams to recover costs on both appeals.

CERTIFIED FOR PUBLICATION

CONRICK, J.

I concur:

BEACH, J.

DISSENT

I dissent.

In my view the trial court correctly determined that business goodwill is not a compensable item of damages in the condemnation of real property for public use. The Supreme Court of California has consistently held such damages noncompensable, (Oakland v. Pacific Coast Lumber etc. Co. (1915) 171 Cal. 392, 398-399; People v. Ricciardi (1943) 23 Cal.2d 390, 396; People v. Ayou (1960) 54 Cal.2d 217, 223; Breidert v. Southern Pac. Co. (1964) 61 Cal.2d 669, 667), and the California Legislature has repeatedly rejected attempts to make business goodwill a generally compensable item in condemnation proceedings.

The Federal Constitution does not require that such forms of intangible property as contingent rights, future interests, privileges, servitudes, expectancies, permits, and licenses be made compensable in eminent domain. (Mitchell v. United States (1925) 267 U.S. 341, 345 (Brandeis, J.); U.S. ex rel. T.V.A. v. Powelson (1943) 319 U.S. 266, 283-284 (Douglas, J.); United States v. Fuller (1973) 409 U.S. 488, 493-494 (Rehnquist, J.).) Business goodwill is merely a shorthand term for expectation of future business profits. (Bell v. Ellis, 33 Cal. 620, 625.) The extent of compensation for such expectancies has been left to the good judgment of the

Congress and the state legislatures, bodies well-equipped to evaluate to what extent such speculative interests should be compensated in the condemnation of real property for public use.

In California the line between compensable and noncompensable property has been consistently drawn to exclude business goodwill as a generally compensable item of damages. While in certain cases a forceful argument can be made for the inclusion of business goodwill as a compensable item, in others it can be argued with equal force that future business profits, that is to say business goodwill, are inherently speculative and should be excluded as items of cost in the acquisition of real property for public use. A measured and temperate evaluation of the extent to which such expectancies should be recognized in eminent domain is particularly needed today when a myriad of environmental problems presses upon us, including protection of coastline, preservation of scenic areas, slum clearance, purification of urban atmosphere, rectification of surface waters, mass transit, urban renewal (as at bench), and reformation of suburban sprawl, each accompanied by its inseparable auxiliary of limited available means to achieve unlimited ends. In the equation between private expectancies and public use a balance must be struck which will allow the private owner adequate compensation for what he has irretrievably

and categorically lost even at the same time permit the public to move against critical environmental problems without being saddled with exorbitant costs that could foreclose effective action. The need for reasonable accommodation between private expectancies and the public interest may be seen from the facts of such cases as California v. Superior Court (Vega Co.), ___ Cal.3d ___, filed August 2, 1974 (coastal preservation); Candlestick Properties, Inc. v. San Francisco Bay Conservation Etc. Com., 11 Cal.App.3d 557 (tidelands preservation); Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 110 (compulsory dedication for public use); Friends of Mammoth v. Board of Supervisors, 8 Cal.3d 247 (controlled use of private property); Gion v. City of Santa Cruz, 2 Cal.3d 29 (prescriptive rights in shoreline).

In this equilibrium between private expectancy and public outgo, business goodwill is a critical factor, for its monetary value may be inflated to whopping amounts. 1/

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1. Unlimited acceptance of future business profits as a compensable item of damages in eminent domain could multiply the costs of public improvements many-fold. Compare, for example, the value of the real property condemned with the amounts sought for loss of future business profits in the following cases:

Cases	Real Estate	Future Business Profits Claimed
Oakland v. Pacific Coast Lumber etc. Co., 171 Cal. 392, 397	$49,000	$304,000

The degree of recognition to be given in condemnation proceedings to such open-ended claims presents a problem that has always been considered in California a matter for legislative solution. (Oakland v. Pacific Coast Lumber etc. Co., 171 Cal. 392, 399.) The same is true elsewhere, for in the absence of statute general compensation for business goodwill has been consistently denied. (U.S. v. General Motors Corp. (1945) 323 U.S. 373, 377-380; Nichols on Eminent Domain (3d ed.) §§ 5.76, 13.3, 13.3[2], 13.31, 13.31[1].) The Community Redevelopment Agency's brief asserts that only two states, Vermont and Florida, compensate for loss of general business goodwill in condemnation, and both of these do so by statute. A third state, Pennsylvania, formerly compensated by statute for business goodwill, but repealed its law in 1971.

The California Legislature has not been oblivious to the difficulties encountered by persons displaced by condemnation of real property for public improvements, and in the Relocation Assistance Act it provided, among

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1. (Cont'd.)

Mitchell v. United States, 267 U.S. 341, 343	76,000	100,000
U.S. ex rel. T.V.A. v. Powelson, 319 U.S. 266, 275	976,000	6,524,000

alternative benefits, compensation up to $10,000 for a displaced person who has discontinued a business that cannot be relocated (Gov. Code, §§ 7260, 7262(c); see also the federal Uniform Relocation Assistance Act, 42 U.S.C. §§ 4601, 4622(c).) Even now, the legislature is reviewing the entire field of eminent domain, including compensation for loss of business goodwill, and it has before it the recommendation of the California Law Revision Commission that loss of business goodwill be made compensable to the extent the loss is not preventable and not compensated for elsewhere. ("Tentative Recommendation Relating to Condemnation Law and Procedure," Jan. 1974.) Whether the Legislature will accept or reject the tentative recommendation of the Law Revision Commission on business goodwill, or adopt it with limitations on maximum amounts payable, I have no way of knowing. But I do know that compensability of business goodwill involves a legislative decision which affects basic fiscal policy and requires evaluation of other competing interests seeking recognition from the public purse. In view of the long state history consistently holding that compensation for loss of business goodwill involves a legislative determination, I think it inappropriate for this court to preempt a basic legislative function under the guise of constitutional decision and impose upon the state a policy of unlimited, unrestricted compensation for loss

of future business profits, a policy that would remain frozen against any change short of constitutional amendment.

Required here is a legislative scalpel, not a constitutional meat ax. (Cf. Michelman, Property, Utility, and Fairness: Comments On The Ethical Foundations Of "Just Compensation" Law, 80 Harv.L.Rev. 1165, 1253-1256 (1967).) The Legislature still remains our best-equipped agency of government to wrestle with hard, intractible problems and arrive at workable solutions which will bring about an acceptable equilibrium among competing interests.

I would affirm the judgment.

FLEMING, Acting P.J.

Memorandum 74-53

EXHIBIT III

MAILING ADDRESS
1525 ARD KEVIN AVENUE
GLENDALE, CALIFORNIA 91202

TELEPHONE
(213) 242-6184

HENRY A. BABCOCK
CONSULTING ENGINEER
VALUATOR AND REAL ESTATE CONSULTANT

August 12, 1974

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

Dear Mr. DeMoully:

Thank you for your letter of July 31st. The material prepared by the California Law Revision Commission relating to proposed changes in Eminent Domain proceedings, which you enclosed, has been forwarded to the College of Fellows of the American Society of Appraisers and I hope that its opinion will be prepared and forwarded to you at an early date.

In the meantime, and speaking only for myself, I do not think the existing law can be patched up -- I think the law of Eminent Domain should be rewritten de novo after a thorough study of the fundamental principles involved. In this connection I am sending you under separate cover a copy of my book, Appraisal Principles and Procedures - I refer you particularly to:

Chapter 3, on the meaning of the word property,

Chapter 5, on the classification of properties for the purpose of selecting the apposite valuation method in each case,

Chapter 6, on concepts, characteristics, and measurement of property value.

Further, it is my opinion that:

1) Judicial rulings which deny the appraiser the

use of forecasts of expected monetary returns on the grounds that such forecasts are hypothetical, speculative, and remote and not a proper basis for the determination of market value, should be changed, otherwise the investment analysis method of valuation cannot be applied to the valuation of an investment property;

2) The judicial ruling that "comparable sales are the best evidence of value" or, more precisely, "the prices at which comparable properties have sold are the best evidence of the value of a subject property" is by no means universally applicable.

3) In many cases in which real property is condemned, there is severance damage to personal property which is left in the hands of the condemnee and compensation for this severance damage should be awarded;

4) When a business is destroyed or damaged by a taking in an Eminent Domain proceeding, the condemnee should be compensated for this loss or damage.

While we are awaiting the opinion of the College of Fellows, I will elaborate on some of these points if you wish me to do so.

Thank you for letting me speak at the July 26th meeting. I shall look forward to continuing to work with you on this vitally important matter.

Sincerely,

Henry A. Babcock
(Immediate past Chancellor of The College of Fellows of the American Society of Appraisers).

HAB.sm

P.S. Please send me six more copies of the material you enclosed with your letter of July 31, 1974.

Memorandum 74-53

EXHIBIT IV

AMERICAN SOCIETY OF APPRAISERS

INTERNATIONAL HEADQUARTERS / Dulles International Airport / P.O. Box 17265 / Washington D. C. 20041 / (703) 620-3838

ASA

September 9, 1974

DEXTER D. MacBRIDE, F.A.S.A.
Executive Vice President

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

Re: Proposed Changes
Eminent Domain Proceedings

Dear Mr. DeMoully:

Dr. Henry Babcock (Glendale) has sent copies of August 12 and August 16 correspondence exchange with you.

Dr. Babcock urges a "thorough study of the fundamental principles involved" in any restructure of condemnation proceedings, and suggests this requires a de novo approach.

He lists (not as a representative of the College of Fellows, but in his own capacity) four substantive areas which he believes demand serious, in-depth study by the Commission.

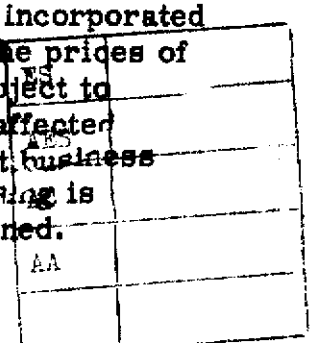
Dr. Babcock, nationally recognized for his expertise and experience in Appraising, needs no support -- and the four issues in his August 12 letter speak eloquently for themselves.

Nonetheless, the principles involved and related condemnation procedures are so significant, that I feel compelled to add my voice to the Babcock recommendations.

As a member of the Bar (Virginia) for some 25 years, and a Public Works Appraiser (California) for some 10 years, my work in condemnation cases has brought me to identical conclusions so well described by Dr. Babcock.

The (1) use of forecasts of expected monetary returns should be incorporated within the parameters of admissable evidence, (2) concept that the prices of comparable property sales are the "best evidence" should be subject to question, (3) the relationship of allowable severance damage to affected remaining personal property should be extended, (4) concept that business destruction or damage consequent to an Eminent Domain proceeding is beyond the purview of just compensation should be further examined.

* * *



Please be assured that the American Society of Appraisers and the College of Fellows will cooperate in any way possible with the efforts of the Law Revision Commission and its staff. Your work has a profound impact upon the public, the several professions (legal, appraisal, engineering, right of way, public administration), and practitioners in our particular realm of valuation expertise. Do not hesitate to call upon our Society and its members if you feel we can be of assistance.

Sincerely,

Dexter D. MacBride, FASA, JD
Executive Vice President

cc: Dr. Henry Babcock, FASA - Immediate past Chancellor, College of Fellows
Edmund Leet, FASA, Chancellor, College of Fellows

Memorandum 74-53

EXHIBIT V

AMENDED IN ASSEMBLY JUNE 24, 1974

CALIFORNIA LEGISLATURE—1973-74 REGULAR SESSION

ASSEMBLY BILL No. 3925

Introduced by Assemblymen McAlister, Z'berg, Ray E. Johnson, Knox, Boatwright, Maddy, and Murphy

April 18, 1974

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Section 1249.3 to the Code of Civil Procedure, relating to eminent domain; ~~and making an appropriation therefor~~.

LEGISLATIVE COUNSEL'S DIGEST

AB 3925, as amended, McAlister (Jud.). Eminent domain.

Authorizes court in awarding costs to the parties in condemnation actions to allow condemnee under certain circumstances all expenses reasonably and necessarily incurred in preparing for and conducting condemnation trial, including, among other expenses, attorney's fees, appraisal fees, surveyor's fees, and fees of other experts.

~~Appropriates an unspecified amount to the State Controller for allocation and disbursement to local agencies for costs incurred by them pursuant to this act.~~

Provides that, for specified reasons, there shall be no reimbursement of, nor any appropriation for, costs incurred by local governmental entities by this act.

Vote: ~~2/3~~ *majority*. Appropriation: ~~yes~~ *no*. Fiscal committee: ~~yes~~ *no*. State-mandated local program: ~~yes~~ *no state funding*.

The people of the State of California do enact as follows:

SECTION 1. Section 1249.3 is added to the Code of Civil Procedure, to read:

1249.3. At least 30 days prior to the date of trial, plaintiff shall file with the court and serve a copy thereof on defendant its final offer to the property sought to be condemned and defendant shall in like manner, file and serve a copy thereof on plaintiff his final demand for the property sought to be condemned. Service shall be accomplished in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the condemnor was unreasonable and that the demand of condemnee was reasonable, all viewed in the light of the determination as to the value of the subject property, the costs allowed pursuant to Section 1255 shall include all expenses reasonably and necessarily incurred in preparing for and in conducting the condemnation trial including, and not limited to, reasonable attorney's fees, appraisal fees, surveyor's fees, and the fees for other experts, where such fees are reasonably and necessarily incurred to protect defendant's interest prior to trial, during trial and in any subsequent judicial proceedings in the condemnation action.

In determining the amount of attorneys fees and expenses to be awarded under this section, the court shall consider written, revised or superseded offers and demands served and filed prior to or during the trial.

~~SEC. 2. The sum of / / / / dollars ($/ / / / /) is hereby appropriated from the General Fund to the State Controller for allocation and disbursement to local agencies pursuant to Section 2231 of the Revenue and Taxation Code to reimburse such agencies for costs incurred by them pursuant to this act.~~

SEC. 2. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be an appropriation made by this act because duties,

obligations, or responsibilities imposed on local governmental entities by this act are such that related costs are incurred as a part of their normal operating procedures.

O