#36.300 3/10/75

Second Supplement to Memorandum 75-1

Subject: Study 36.300 - Condemnation Law and Procedure (AB 11)

Attached to this memorandum are two letters relating to eminent domain. Exhibit I (green) is a copy of a letter forwarded to our office by Assemblyman McAlister; it concerns the problems confronting a person whose business is taken by eminent domain and highlights, among other issues, the need for a statute compensating a business for loss of goodwill.

Exhibit II (white) is a letter from the City of Los Angeles that outlines the city's attitude toward AB 11. The city points out the major areas of support as well as the major areas of objection. Some of the objections are new to the Commission, so the letter should be read with care. The staff will comment on the objections orally at the meeting. Please note that we did not receive a page 32 of the city's letter, which apparently deals in part with condemnation of a whole structure where only a portion is in the line of taking (Section 1263.270).

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Second Supplement to
Memorandum 75-1

EXHIBIT I

Shirley Paradiso
2393 Woodthrush Way
Pleasanton, Calif.
94566

February 17, 1975

Dear Sir:

First of all I will introduce myself as Shirley Paradiso, former owner of "EL PEPE" Mexican Restaurant on 191 North Livermore Avenue, Livermore, California.

The city took the building and property under Eminent Domain to relocate the Southern Pacific railroad tracks for the Southern Pacific Shopping Center. I fought with the city they offered me $ 2,500.00, and after a struggle they offered me $ 6,200.00, although I still owed a balance of $ 2,000.00 on my remodeling in the restaurant. I couldn't have the $ 6,200.00 and have the city store my equipment. I had to take one or the other. I figured my equipment might be stored for a year or more and I would end up with nothing. The law states they have to relocate me, but they said they could not find suitable place so I had to take the $6,200.00. The building they found was going to cost $ 16,000.00 to $ 18,000.00 to fix before I could open the door for business.

I found a place that would cost me $ 40,000.00 for a down payment. I therefore went to the city and asked for help. I advised the city I would not put $ 18,000.00 into anyone's building and end up with nothing plus $ 750.00 a month for rent. They all agreed it wasn't worth it. So I went to the City Council meeting and asked for help to buy this piece of property; at least it would be my own. They said NO they could not help me.

I had to sell all of my equipment including the table and chairs for $ 400.00, it has made me sick. I had a seating for 62, plus I had started a Banquet Room which stayed unfinished till the city could make up it's mind. The city kept saying 1month, 3months, and finally after a year and a half I got my 90 day's notice.

I told them there must be some kind of a law to protect a Small Business person, and they said No because I do not own building or property. All I own is the business, so, they can just kick me out.and thats it. If I was a big Francise owner they wouldn't think of it.

I closed October 26, 1974 and still can't find a place which I can buy because of new law requirements on new equipment my going back into business would cost me $ 15,000.00 for equipment, chairs and tables.

I just cannot believe there isn't a law to make them re-establish me back into business, or give me a settlement for my inconvience and loss of time. I worked 16 hours a day, 6 days a week, and it took me 5 years to build up my business and buy my equipment and then it's out you go and nothing I can do about it. I don't care whether it's Eminent Domain or not, I know it's been 4 months and I still haven't found anything and this I should think is the City's fault. They should have to do something to put me back into business. I have a lot of customers that have written to the City and Chamber of Commerce complaining about what they have done to me, I get calls at home from concerned citizens.

I would appreciate it if you could help me. I am going into court June or July, but the City says there is nothing they will or can do because by law the (Eminent Domain Law) that's all they have to do. But I do believe they do and should owe me something till I get back into business. I didn't go out on my own I was forced out. I had a another year to go on my lease plus option for another 5 years or more.

Thanking you in advance for any help you can give me in this matter.

Sincerely yours,

Shirley Paradiso

Shirley Paradiso
2393 Woodthrush Way
Pleasanton, California
94566

OFFICE OF
CITY ATTORNEY
BURT PINES
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EDWARD C. FARRELL
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DEPARTMENT OF WATER AND POWER
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March 7, 1975

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: The Position of the City of Los Angeles Relative to Assembly Bill 11, An Act Relating to the Acquisition of Property for Public Use, and known as the "Eminent Domain Law".

Honorable Members:

I am enclosing a copy of the comments that the City of Los Angeles has submitted to our legislative analysts regarding A.B. 11.

Yours very truly,

BURT PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant
City Attorney for Water and Power

By Roger D. Weisman
ROGER D. WEISMAN
Deputy City Attorney

RDW:jp
Enclosure
Telephone: (213) 481-6367

cc: Denny Valentine
Alan Watts
W. A. Sells

Assembly Bill 11 is a proposal by Assemblyman McAlister, to amend the Law of the State of California relating to Eminent Domain. It is a proposal originated by the California Law Revision Commission. It is one of several proposals dealing with the subject of Eminent Domain, the others will be discussed in subsequent memorandums.

The Bill proposed a comprehensive revision of the Eminent Domain laws of the State of California. Some proposals are beneficial to public entities (such as provisions for immediate possession of property pending final acquisition, for all purposes, and not just rights of way). Other provisions are detrimental (such as the provision requiring payment for loss of value of business goodwill). Some provisions do not change substantive rights, but are merely procedural. Some are unclear, and may have an effect unintended by either the Commission, and in fact, opposite to the intent of the Commission (as a restriction on the right to acquire property outside of the municipal limits).

The balance of this memorandum concerns itself with particular provisions of Assembly Bill 11. Rather than analyzing the entire bill, we will point out those items which we believe should be opposed. In certain cases, where reforms are of great importance and beneficial, we will highlight the same and advise why we believe they should be adopted.

Section 1230.065

This section provides that A B 11 becomes effective on July 1, 1977. This delay on the effective date of the Bill was not included in the original staff recommendation, but was subsequently recommended to, and adopted by, the Law Revision Commission. It is the view of this office that the effective date of the Bill should not be delayed.

A delay in the effective date of legislation is often desirable, and necessary, when the bill deals with procedural matters. In such event, the rights of members of the public are not affected by the delay in

the legislation. The only result of delay is that a different, and perhaps obsolete, procedure is utilized until the effective date. In some cases only different code section numbers are utilized.

However, the Eminent Domain Law is not purely procedural. It is a substantive document. It gives additional rights to both the condemning agencies and the property owners. It takes certain rights from condemning agencies.

At the same time condemnation actions commenced prior to July 1, 1977 will become subject to the Eminent Domain Law when it becomes effective.

The benefits of the new Eminent Domain Law should not be deferred. If they are needed, they are needed now. For example, if it is important for public agencies to obtain possession prior to judgment, in order to build sewer treatment facilities, police stations, parks, and so forth, it is important that the reforms be made now, and not deferred until July 1, 1977. If it is finally determined that loss of business goodwill should be made compensable, we see no reason why such payments should be delayed, and made available only to persons who manage to delay acquisi-

tion beyond July 1, 1977. In fact, the delay in the effective date of the Eminent Domain Law could cause property owners to seek to delay the trial of eminent domain actions. This could enable them to receive the benefits of the changes in law. Thus, there would be an additional delay before certain public improvements can be constructed, during the interim period, by persons seeking delay to obtain greater condemnation benefits.

Certain provisions of the proposed Eminent Domain Law were dependent upon Constitutional Amendment. Primarily, the provision which permits the taking of possession prior to judgment for any use, required an amendment to Article I, Section 14 of the Constitution. That Amendment was passed by the people at the General Election of November 5, 1974. Article I, Section 19 of the Constitution now provides "The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation." The direction to the Legislature, to permit early possession for any public use should be implemented as soon as possible, and not delayed for eighteen months.

We recommend a revision to sub-section (d) which now provides that the Eminent Domain Law is effective as to cases filed prior to the effective date "to the fullest extent practicable." We do not believe that the rules should be changed in the middle of a lawsuit, whether the law is effective July 1, 1977 or whether effective at the end of this calendar year. We also recognize that condemning agencies should not be permitted to rush their cases to court, and thereby frustrate the rights of some owners to the greater benefits of A B 11.

In compromise, we would suggest that the Bill become effective January 1, 1976, but not as to cases filed prior to July 1, 1975. As to cases filed thereafter, "to the fullest extent practicable", as now specified.

Section 1235.140

Section 1235.140 defines litigation expenses. In part it defines such expenses as "reasonable attorneys' fees, appraisal fees, and fees for the services of other experts . . . whether such fees were incurred for services rendered before or after the filing of the complaint." We believe that such a definition permits the award of attorneys' fees, or other fees

paid to lobby against the initiation of a condemnation action.

This definition especially effects Section 1250.410 of the Eminent Domain Law. This provides for payment of attorneys, appraisers and experts' fees, when the condemnor does not make a reasonable pre-trial offer and the owner does, all measured by the results of trial. We believe it should be made clear that such costs do not include expenses incurred in attempting to stop the condemnation proceeding. Only the fees incurred to obtain just compensation should be recoverable if the loss is as to compensation.

Under statutes in force now, when a condemnation action is abandoned, the condemnees attorneys', appraisal and other expert fees are payable by the condemnor. However, case law has held that the amount of such fees recoverable from the condemnor include the fees payable in seeking to halt the condemnation. There have been examples where legal services have been furnished, and fees incurred, to have the legislative body stop a condemnation of a particular owner's property. These lobbying activities were successful. Thereafter, the condemnee recovered the fees he paid to the attorney to get the Legislative Body to drop its action.

We believe that this is improper. We suggest that effort be made to modify Section 1235.140 to provide that the fees do not include any fees incurred in causing or attempting to cause an abandonment of the condemnation proceedings.

Section 1240.050

We believe that this section is undesirable, and should be totally eliminated. It provides that a local entity may condemn only within its territorial limits unless statutory authority is found to condemn outside the limits of the entity, either implicit or express.

We believe this section will severely limit the ability of the city to provide services. For example, it may prevent acquisition to widen a roadway outside of the city limits, even though the other entity having jurisdiction consents, if the other entity does not wish to bring a condemnation action. It may prohibit obtaining land-fill sites outside of the city. In other words, for some acquisitions it confines the city to its municipal limits unless, as circumstances will require, the city pays the asking price for property.

The staff of the Law Revision Commission states, in its comment to the draft of the section, that the power of extraterritorial condemnation may be implied for certain essential services. "Implied Powers" is a weak ground upon which to base such essential services as sewage, electricity and water. The staff cites dictum in appellate cases as the authority for the implication. Such power should be expressly authorized, here or elsewhere in the Codes. Thereby, it will not be subject to "repeal" or other disapproval by the Court.

In order to avoid a Court made reversal of Court made law, which can occur at any time, we suggest that the power to engage in extraterritorial condemnation be specifically granted for certain essential services, or that Section 1240.050 be totally deleted.

Section 1240.030

This section states that before property may be taken for public use, the condemning agency must establish:

(1) That the public interest and necessity require the project;

(2) That the project is planned or located in the manner most compatible with the greatest public good and the least private injury;

(3) That the property is necessary for the project.

This is an expansion of the present law. Section 1241 of the Code of Civil Procedure now provides that before property can be taken it must appear (1) that the property is to be applied to a use "authorized by law", and (2) "that the taking is necessary to such use."

For most acquisitions by local public entities Section 1240.030 creates no problems. This is because Section 1245.250 creates a conclusive presumption that the three requirements are met. But this conclusive presumption applies only when the acquisition is within territorial limits.

As Section 1240.030 is now drafted, every public project requiring acquisition of real property outside of the City limits, may be defeated at any time during the condemnation process. For example,

assume the project is the construction of electrical power transmission lines from Northern California to Southern California. Most parcels needed for the project are acquired through negotiation, a small minority go to condemnation. Any of the judges trying the condemnation cases may decide that the City of Los Angeles has sufficient electrical power, and the public interest and necessity do not require the project. If such a decision is made, the project must be abandoned or the City must pay the owner's asking price for the right of way within his property.

Similarly, the court could decide that the right of way should have been located elsewhere to be more compatible with the public good and least private injury. The judge then refuses to permit the acquisition, even though the City may have acquired many, many miles of right of way for the project in that location.

Of course, private utilities, such as Southern California Edison or the gas company have even a greater problem because they must establish all three requirements in every project they have.

We would suggest that 1240.030 be modified by

eliminating the requirement that the court must find that the public interest and necessity require the project and that it is planned and located in the manner most compatible with greatest public good and least private injury. The only requirement should be that the property is necessary for the project.

If there is to be jurisdiction in the court to determine whether the project should be built, and how it should be located, such jurisdiction should be exercised long before the condemnation stage is reached. For example, suit could be brought within thirty days following the filing of the notice of determination relative to the environmental quality of the Environmental Impact Report (Public Resources Code §21.167(b)). The decision in such action should be conclusive as to the necessity for the project and the manner of its planning and location. If no action is brought, all parties should be foreclosed.

Section 1240.110

This section states that unless otherwise limited by statute, an action in Eminent Domain may be brought to acquire "any interest in property necessary for that use." This language can be construed to limit the acquisition to only the minimum property

interest which will permit the carrying out of the use for which the property is condemned. For example, under Section 1240.110, could the public acquire a fee simple absolute, in order to allow use of the property for unlimited future uses, when, at this time, an easement for public street purposes would be satisfactory?

To correct this problem we would suggest an amendment similar to that contained in Section 1239(4) of the Code of Civil Procedure so that the first sentence would read: "Except to the extent limited by statute, any person authorized to acquire property for a particular use by Eminent Domain may exercise the power of Eminent Domain to acquire the fee simple or any lesser interest in property necessary for that use including . . . ."

We believe this is desirable to avoid having to acquire a slightly different interest in property every time a new project is contemplated. Under the presently proposed language, if only a sewer line is to be built, we could condemn only a sewer easement. We would be prohibited from seeking to obtain rights to construct a storm drain at some undetermined time in the future.

Sections 1240.210 - 1240.240

It is our recommendation that these sections be opposed. Essentially, they place a substantial burden upon a condemnor if the condemnation is for "land banking" - for future use.

Generally the City of Los Angeles does not condemn without having an intent to use the property in the very near future for the public project. We do not condemn because we may have to build a high school fifteen years in the future, or expand a library in ten years, or extend a road if, at some time in the future, another public facility is built. However, we believe it is desirable that a public entity, within reason, have such a right. But it is not essential. Should we not be permitted to condemn for future use, or should future use condemnations be severely restricted, this City can survive with such restrictions.

The above comment is made on the assumption that a use beyond seven years from the date of taking will not prevent such a taking, if it is established that such a delay is, nevertheless, reasonable. Such delay may be inherent in very large right of way projects, or in large electrical generating plants, and

many other projects. So long as the opportunity exists to acquire notwithstanding a lengthy period for obtaining of financing, obtaining permits, and so forth, we have the opportunity to obtain the necessary real property.

Sections 1240.310 - 1240.350

It is the view of this office that these sections are highly desirable and very much needed. At this time the City of Los Angeles is constantly negotiating with the School District in order to extend streets through schools, or widen streets over school property. It is the District's position that money is relatively useless to them, and they require replacement of the land in order to maintain the quality of their educational program. We believe that it is absolutely essential in order to accommodate such conflicting public uses, as schools and streets, that cities be permitted to condemn for school purposes, and thereby satisfy all the needs of the constituents of the city.

Particularly are these sections needed if Civil Code 1001, permitting condemnation by any person for public use, is repealed, as the Bill proposes.

Though we do not oppose Section 1240.340, which is one of the sections relating to substitute condemnation, we do wish to comment to you that said section may be unconstitutional. It purports to authorize public entities to condemn private property, to give to another person for private use, when justice requires that such other person be compensated in land rather than money. A court could well construe this to be a condemnation for private use, and violative of the Constitutions of California and the United States. Of course, if properly applied, it may well be constitutional.

Sections 1240.410 - 1240.430

These sections authorize the acquisition by a public entity of a "remnant" left after the property needed for the public use has been taken, if that remnant is of such size, shape or condition as to be of little market value.

Up until November 5, 1974, such remnants were acquired under the authority of Article 1, Section 14-1/2 of the California Constitution, as "reservations." Section 14-1/2 was repealed during the election of November 5, 1974. Similar provisions

now exist in Sections 191 and 192 of the Government Code, so perhaps remnants can still be acquired, but the authority therefor is now substantially weakened. The repeal of Section 14-1/2 is one of the reasons why A B 11, and authority to acquire remnant properties, should become effective as soon as possible rather than July 1, 1977.

The City should oppose Section 1240.410(c). That section provides that the City may not acquire a remnant when "the defendant proves that the public entity has a reasonable, practicable, and economically sound means to prevent the property from becoming a remnant." As we construe this provision, the defendant may argue, and the court may find, that the public entity may modify its construction plans to prevent the remnant from being of little market value. For example, if the roadway is at a much lower grade than the "remnant", the public entity could build a ramp up to the "remnant". This becomes a question for the court, and it can overrule the decision of the engineers and/or the City Council. In that event, the City may be required to pay substantial damages for injury to the remainder or, the

section could be construed as requiring the City to build such a ramp.

We believe the manner in which a public improvement is to be constructed should be solely a question for the public entity, and not a court question. This is the law at this time, and it should not be changed.

Sections 1240.610 - 1240.700

These sections deal with taking of property already in public use for a more necessary public use. Basically, they follow the law as it is today. Any use by a public entity is more necessary than a use by a private entity. Any use by the State, subject to specified limitations, is considered more necessary than a use by a private public entity.

However, there has been a substantial change from the draft as originally presented to the Law Revision Commission. Section 1240.660 of the original draft provided that certain local public entities could not condemn the property of other local public entities. For example, a county could not condemn city property for a courthouse, and the city could

section could be construed as requiring the City to build such a ramp.

We believe the manner in which a public improvement is to be constructed should be solely a question for the public entity, and not a court question. This is the law at this time, and it should not be changed.

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These sections deal with taking of property already in public use for a more necessary public use. Basically, they follow the law as it is today. Any use by a public entity is more necessary than a use by a private entity. Any use by the State, subject to specified limitations, is considered more necessary than a use by a private public entity.

However, there has been a substantial change from the draft as originally presented to the Law Revision Commission. Section 1240.660 of the original draft provided that certain local public entities could not condemn the property of other local public entities. For example, a county could not condemn city property for a courthouse, and the city could

not condemn county property. In other words, each local agency's property was immune from a taking for a more necessary public use by some other local agency. This section is not included in A B 11.

We believe it should be included. Otherwise, we may be faced with a situation where the County seeks to condemn City property, or the City seeks to condemn County property. Particularly, could this happen if the Board of Supervisors decides that a particular public use by the City, such as a landfill, or some other use that the constituents oppose, should be defeated by a County acquisition for parks, open space, or what-have-you.

Though different public entities should not oppose each other on that level, we all should remember the annexation wars that occurred from ten to twenty years ago.

For this reason we suggest that 1240.660 be once again placed in the Eminent Domain Laws so that the law provides that one local public entity may not condemn property of another local public entity. Unseemly conflicts between governmental agencies will thereby be avoided.

Sections 1245.210 - 1245.260

These sections specify what must be contained in the resolution or ordinance authorizing the condemnation, which must be passed before a condemnation action may be commenced.

With respect to local public entities, such as this City, the resolution or ordinance must be passed by the governing body, the City Council. We suggest that an amendment be proposed to allow this authority to be delegated, within reasonable standards. For example, if the Council of the City of Los Angeles has approved the construction of a particular project, along a general alignment which requires the acquisition of private property, we do not believe it should be necessary for the Council to also approve the condemnation ordinance. We believe this could be done by a subsidiary body, or by an appointive officer, and the Legislative Body need not be faced with this problem in every case. This would allow more expeditious modification of acquisitions as the exigencies of the project, or its design, require. It would allow the public agency to better react to the desires of the property owner, by enlarging or reducing the size of the acquisition.

Section 1245.230

This section states the contents of the resolution or ordinance authorizing the condemnation. It specifies the particular things which must be in such a resolution or ordinance. Though this office believes the recitation is generally unnecessary, it is not of sufficient importance to make an issue of.

However, we do wish to call your attention to subdivision A, which provides that not only must the ordinance contain a statement of the use for which the property is to be taken, but also reference to a statute that authorizes such taking. At this time the proposed statute which we would cite would be Section 37350.5, to be added to the Government Code by Section 32 of Assembly Bill 278. Said section will read: "A city may acquire by Eminent Domain any property necessary to carry out any of its powers or functions." So long as 37350.5 reads as it is presently drafted in A B 278, this City, and cities in general, have no difficulty with the provision requiring us to refer to a statute authorizing us to acquire property by Eminent Domain. Should said section be modified, Section 1245.230(a) may be objectionable, depending upon the modification.

Section 1250.320

This section states what must be included in the answer of an owner, when he answers the condemnation complaint. According to the section, the owner need only state the nature and extent of his interest in the property described in the complaint. We believe the defendant should also be required to state the kind of damages - but not necessarily the amount - which he claims to be entitled to.

Under the wording of the section the plaintiff will have no idea, absent discovery proceedings or other information received voluntarily from defendant, of the claims which defendant has. We do not know whether he claims loss of business, severance damages, precondemnation damages, or what. We suggest 1250.320 should therefore require the answer to contain, among other matters, a general statement of the nature of the injuries suffered or damages sought to be recovered, but not the amount thereof.

Section 1250.360

This section refers to the grounds for objecting to the right to take. One of those grounds is that the property is not to be devoted to the pub-

lic purpose within seven years, or such longer period as is reasonable. In our comments to Section 1240.210-1240.240, we comment regarding the restrictions in acquiring property for future use. Should the Legislature modify the proposed provisions relating to future use, it should also modify 1250.360(d).

Section 1250.410

This section is the equivalent of California Code of Civil Procedure Section 1249.3. These sections essentially provide that the condemnor must make a written offer prior to trial (final offer) and the condemnee shall make a written demand prior to trial. If the court, following the judgment, finds that the condemnor's offer is unreasonable, and the condemnee's offer is reasonable, then the court awards actual attorneys' fees, appraisal fees, and other experts' fees to the condemnee, payable by the condemnor.

The object of this legislation is to encourage settlements. One way of encouraging such settlements is penalizing a condemnor which is unwilling to compromise.

The City of Los Angeles, and most other public agencies, opposed this Bill when it was proposed in 1974. It was nevertheless passed and signed by the Governor. There appears to be no likelihood that it can be reversed.

However, the procedure specified in A B 11 for making the final offer and demand is somewhat cumbersome in Los Angeles County. This is because Los Angeles County utilizes its own discovery procedure in Eminent Domain. In Los Angeles County there are two pretrials and an exchange of appraisal reports. There are also mandatory settlement conferences whereby the court aids the parties in settlement. The system spelled out in 1249.3, and proposed Section 1250.410, does not harmonize with the system utilized in Los Angeles County. Therefore, similar to the exception provided in Section 1258. 300, we suggest a subdivision (c) be added to 1250. 410 which reads: "The Superior Court in any county may provide by court rule a procedure for the making of offers and the making of demands which shall be used in lieu of the procedure specified herein if the Judicial Counsel finds that such procedure serves the same purpose and is an adequate substitute for the procedure provided by this Article."

Sections 1255.010 - 1255.020

These sections are part of the provisions relating to Orders of Immediate Possession. In general, Orders of Immediate Possession for all projects are authorized, not merely for rights of way and reservoirs. This is highly desirable. It is needed by the City in order that some projects requiring an accumulation of parcels not be stalled for a year or more because of an unreasonable demand by a property owner, or capitulation to him by paying an excessive price. In general, these sections are highly desirable, and there is support for this change by both public entities and private condemnors (public utilities). The objections which this office has to the sections are relatively minor, our major objections having been taken care of by the Law Revision Commission.

With respect to Section 1255.020, it proposed that a written statement or summary of the basis for the appraisal be filed with the deposit of probable just compensation, a prerequisite to obtaining possession prior to judgment. We feel this provision is unnecessary. First of all, the owner has already received "a written statement of,

and summary of the basis for, the amount it established as just compensation." This statement was furnished pursuant to Government Code 7267.2, and is a prerequisite to negotiation. We feel there is no necessity for filing duplicate copies or substitute copies of this summary with the court, particularly if the owner does not desire such a summary. Of course, the owner should have a right to demand a summary be furnished to him, but we do not believe it should be a requirement in every case, absent a request.

The modification we suggest should not adversely affect any person's rights to information or due process; it should merely reduce the amount of paper produced in Eminent Domain proceedings.

Section 1255.075

This section generally requires that the deposit made by the Plaintiff to obtain possession may be invested for the benefit of the Defendants, if so ordered by the court. If the Defendant moves for such an order and it is granted, this has the same effect as a withdrawal of the funds on deposit.

Frankly, it would appear that this Section is desirable for a condemnor, in that it provides an alternative procedure for cutting off interest payments by the condemnor. However, we understand the County authorities are quite disturbed about this section, because it allows the court to direct the Treasurer how to invest money in the Treasurer's possession, and further, a different type of investment may be required as to each condemnee, depending on what he asked for. The County is concerned about the bookkeeping problems this could cause. For example, the County believes it might be required to invest in Treasury Bills, U. S. Government Bonds, or various and sundry different types of bank or savings and loan accounts.

Perhaps, the section should specify the type of investment which could be demanded, or specify that all funds shall be invested in a particular type of investment, and limited as to the number of different types.

Section 1255.420

This is one of the sections in very important Article 3 of the proposed Act. Sections

1255.410-1255.480 grant the condemnors a right to take possession prior to judgment in any case where property is needed for public use. At this time the right of possession prior to judgment may be acquired only for rights of way and for reservoirs. This means that important public projects, such as sewer disposal plants, fire stations, schools, must be delayed until trial has been held in all cases.

We are advised that public agencies as well as private condemnors - public utilities - are in favor of A B 11 because it grants this right. They consider the right to immediate possession following the service of Summons and Complaint of great importance because public projects can commence sooner, allowing better service to be given, and preventing increases in cost due to the inflationary spiral.

The City of Los Angeles also needs this right.

However, there are some objectionable features in these sections, which should be corrected. One is in 1255.420 where the court may stay the Order of Immediate Possession if it will cause a substantial hardship to the Defendant, unless it finds that the

condemnor needs possession of the property, and that the condemnor would suffer a substantial hardship if the Order were stayed. The term "substantial hardship" is not capable of precise definition. For example, if the hardship to be suffered by the condemnor is that it cannot provide the right of way for the contractor, and hence will pay the contractor damages, is such hardship sub stantial? I do not believe this question can be answered categorically.

In order that condemnors can be assured of possession of the right of way by a definite date, the power to stay the Order of Immediate Possession because of the condemnee's hardship should be removed, or at the very least restricted as to time. Perhaps, for substantial hardship, a thirty to sixty day extension could be given. But it should be noted that under Section 1255.450 provides for not less than ninety days notice to require the vacation of a residence, or a business or a farm operation.

In short, we believe that condemnors require greater assurances that they can obtain the land needed for public projects, and, therefore, the right to stay the effective date of an Order of Possession should be limited.

Except as stated above, we believe these sections of A B 11 should be supported.

Section 1260.210

Section 1260.210 changes the existing law in subdivision (b) in that it provides that neither party in an Eminent Domain action has the burden of proof. Today, the court instructs that the burden of proof is upon the owner, and not the condemnor.

We believe that the burden of proof should remain upon the owner. Under subdivision (a) the owner commences and concludes the giving of evidence and the arguments. Because this effectively gives the owner twice the condemnor's opportunity to convince the court or jury, the cautionary instruction is warranted.

Section 1263.205

This section defines the meaning of the word "improvements" which the condemnor must pay for when land is taken for a public improvement. The section defines "improvement" as including "any facility, machinery, or equipment installed for use on property taken by Eminent Domain . . . that cannot be removed without a substantial economic loss or without sub-

stantial damage to the property on which it is installed, regardless of the method of installation." This section appears ambiguous to us. It appears to broaden the definition of "fixtures" which are generally considered to be items which are placed upon a property with intent that they remain in a fixed location so long as the owner of the fixture remains on the property. 1263.205 would seem to expand this definition to include any item of property which cannot be removed without "a substantial economic loss." For example, is an inventory of groceries, drugs, or other small value items an improvement under this definition? We would suggest that an attempt be made to have the section amended to provide either (1) that an improvement pertaining to the realty includes any facility, machinery or equipment installed for permanent use upon the property regardless of the method of installation; or (2) adding the phrase to the existing definition:

> "but not including any items placed on the property for the purpose of sale, or inducing the sale of similar items, to the public."

the nature of an acquisition for public use, whether the whole of a property or only a portion. It does so with standards which are extremely vague, and which will involve questions of personal preference of the owner, personal abilities of the owner, and many other factors aside from the economics of the situation and whether or not the remaining property will be usable following the acquisition and construction of the public improvement. We would suggest that the test should be whether the remainder of the building will be an "uneconomic remnant" and only in that case may the owner require the taking of the entire building. These words would make the provisions relative to a taking of the entirety of a building consistent with Government Code Section 7267.7 dealing with the taking of an entire parcel of land when only a small portion is required by the public.

Section 1263.420

This section defines "damage to the remainder," which the condemnor must pay. This type of damage is normally known as "severance damage." The section provides that it is the damage caused by the severance of the remainder from the part taken, and the

construction and use of the project in the manner proposed "whether or not the damage is caused by a portion of the project located on the part taken." The way this section is drafted, it could well expand present law. Today, damages resulting from construction and use of the project are not payable unless a portion of the property of the defendant is actually taken for the project. This qualification is not contained in 1263.420. Hence, it can be argued that where property is damaged by the "construction and use of the project" there is a taking in eminent domain, and the City is subject to suit for inverse condemnation. For this reason, 1263.420 should have a provision added following paragraph (b) as follows:

> "provided that a portion of the property is actually taken for the project."

Section 1263.510

This section adds to the compensation payable on eminent domain the "loss of goodwill" suffered by a businessman if he cannot relocate his business. We believe that this provision should be opposed. We believe it should be deleted.

The reason it should be deleted is that the definition of "goodwill" does not only include the expectation of patronage resulting from the business location, but also from the skill and management ability of the owner. We do not believe we should have to compensate the owner for a transitory loss of business goodwill, when by his skill and goodwill he could recover that.

Further, payment for loss of goodwill is not common in the United States. Under Federal Relocation Assistance Law, and California Relocation Assistance Law, a businessman who will lose his goodwill (cannot relocate without a substantial loss of patronage) is entitled to compensation measured by one year's net income from the business. This is the total reimbursement the State could obtain on projects where Federal assistance is forthcoming. We do not believe that the State should volunteer to pay more than the amounts payable under Relocation Assistance Laws.

If Section 1263.510 is adopted, it will substantially increase the award which must be paid whenever a business property is acquired, to the detriment of the general taxpayers. It will increase

the cost of litigation because valuation of goodwill is a complex matter. It is measured by the value of the expectancy of continued business, a thing which is difficult to appraise. Further, there are no comparables or other fixed guides for this appraisal, and it would be difficult to resolve conflicting opinions and settle litigation.

In our view the fixed standard in Government Code 7262 (Relocation Assistance) is far preferable to attempting to determine whether a business has goodwill, whether said goodwill is transferable to a new location, and then determining the value of it.

Section 1263.610

This section is a highly desirable section in that it allows the City to do remodeling work on a remainder of a building, if a portion of the building was required to be taken for the project. This will allow the City to reduce the cost of public projects - because only a portion instead of an entire building need be taken - and preserve needed housing or business properties.

However, the City may only do such work if the owner agrees. If the owner does not agree the

City may well be compelled to take the entire property because shoring the remainder may be impractical or may cause the remainder to become a nuisance to the area. Therefore, provision should be inserted to allow the City, at least in some cases, to do the remodeling work without the agreement of the owner.

Section 1268.030

This section provides for the issuance of a Final Order of Condemnation. We object, however, to the fact that the Order of Condemnation may not be issued until such time as there is a "final judgment." Final judgment is defined in Section 1235.120 as a judgment when there is no possibility of direct attack, including "by way of appeal." The effect, then, of 1268.030 is that the Final Order of Condemnation cannot be obtained until all appellate proceedings are completed. This could seriously inconvenience public entities, and could prevent them having the title necessary for the construction of a project, perhaps thereby requiring construction to await the conclusion of the case on appeal. For example, in a "substitute condemnation" situation without a final order of condemnation, the condemning agency may be unable to give good title to the owner of the

"necessary property." This may hold up the construction of the project for two to three years. This should not be permitted, especially when the owner of the "substitute property" is merely seeking additional compensation on appeal.

We believe that 1268.030 should be modified so that the final order may be obtained any time following judgment, when compensation has been paid or deposited into court.

Section 1268.130

We recommend that this section be deleted. It provides that the court, following judgment, may order an increase or decrease in the amount deposited with the court, and which was deposited after judgment for the purpose of obtaining possession pending appeal. We can see no occasion for having this provision in the law. Once judgment has been entered, the amount deposited should be the amount necessary to fully satisfy the judgment. Until that judgment is vacated, we do not see why the court should have power to either increase or decrease the amount of deposit.

Section 1268.430

We believe the Legislature should adopt a

new scheme for the refund of taxes paid by an owner when those taxes were subject to cancellation because of acquisition by Eminent Domain. We see no reason why such sum should be paid as cost, because generally by the time costs must be awarded the County Assessor has not made a determination of the assessed value applicable to a partial take. Therefore, the amount of taxes must be estimated by the parties, costs paid, and thereafter the condemning agency claims a refund under Revenue and Taxation Code Section 5096.3.

We would suggest that the costs not include the taxes which should have been cancelled but were paid. Rather, the owner should be given a right to claim a refund of those taxes, a thing he is precluded from doing by the terms of Revenue and Taxation Code Section 5096.3. Both proposed Section 1268.430 and Revenue and Taxation Code Section 5096.3 should be amended.

In conclusion, we believe that many of the provisions of A B 11 are desirable, but particularly the provision relating to possession prior to judgment in all cases. However, we believe the City should

oppose some of the provisions and seek modification of others, as set forth in this memorandum.

NLR:jm
485-5414

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