#36.300 3/18/75

Memorandum 75-23

Subject: Study 36.300 - Eminent Domain (AB 11)

This memorandum presents for Commission consideration comments concerning AB 11 which were not covered at the March 1975 meeting. Exhibit I (green) is another copy of the letter from the Department of Transportation; we will commence at page 9 of the letter and continue to the end. Exhibit II (yellow) is a letter from the Southern California Edison Company; we have not considered the comment at pages 3-4 of the letter. Exhibit III (white) is the letter from the City of Los Angeles which includes the page that was previously missing. This letter contains some new points not previously considered by the Commission and suggests some compromise solutions and, hence, should be read with particular care.

The staff in this memorandum will restrict itself to indicating those matters on which the Commission made decisions at the March 1975 meeting which are also covered in the attached letters.

§ 1240.220. Acquisitions for future use

The City of Los Angeles (Exhibit III--white--pp.14-15)) is concerned about the future use sections. At the March meeting, the Commission determined to amend Section 1240.220 to provide a 10-year future use period for acquisitions under the Federal Aid Highway Act of 1973.

§ 1240.340. Substitute condemnation where owner of necessary property lacks power to condemn property

The City of Los Angeles (Exhibit III--white--p.16) indicates its belief that this section may be unconstitutional. The Commission considered a similar comment from the State Bar Committee but declined to make any change in its recommendation.

§ 1240.410. Condemnation of remnants

The City of Los Angeles (Exhibit III--white--pp.17-18) would delete subdivision (c) of this section. The Commission considered the same proposal from the Department of Transportation but declined to make any change in its recommendation.

§ 1255.420. Stay of order of possession for hardship

The City of Los Angeles (Exhibit III--white--pp.28-29) would delete this section or limit its operation. The Commission considered the similar proposal of the Department of Transportation to delete the section but declined to make any change in its recommendation.

§ 1263.205. Improvements pertaining to the realty

Both the Department of Transportation (Exhibit I--green--p.10) and the City of Los Angeles (Exhibit III--white--pp.30-31) would like to see this section narrowed. The Commission previously considered the State Bar Committee's proposal to broaden the section but declined to make any change in its recommendation.

§ 1263.510. Compensation for loss of goodwill

Both the Department of Transportation (Exhibit I--green--pp.13-14) and the City of Los Angeles (Exhibit III--white--pp.34-36) would delete this section. The State Bar Committee had previously proposed expansion of the section but, at the March 1975 meeting, informed the Commission that it now supports the section as drafted.

§ 1265.310. Unexercised options

The Department of Transportation (Exhibit I--green--pp.14-15) opposes this section. While the Commission did not consider this section at the March 1975 meeting, the staff notes that a recent California Supreme Court case,

County of San Diego v. Miller, holds that the owner of an unexercised option to purchase real property has a constitutional right to compensation. A copy of the case is attached as Exhibit IV (buff). The staff believes that the Comment to Section 1265.310 should be adjusted to reflect this case and will present a draft of a revised Comment in Memorandum 75-3.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Memorandum 75-23 EXHIBIT I

STATE OF CALIFORNIA—BUSINESS AND TRANSPORTATION AGENCY EDMUND G. BROWN JR., Governor

DEPARTMENT OF TRANSPORTATION
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February 6, 1975

California Law Revision Commission
School of Law
Stanford University
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Gentlemen:

In re: AB 11

The State Department of Transportation is greatly interested in and concerned with the above bill as introduced by Assemblyman McAlister. During the past five or more years while the Commission has been engaged in studies in this field, the Department has provided representatives from its legal division to provide advice and assistance to the Commission. Many of the following comments synthesize comments of those representatives made verbally at those past proceedings of the Commission. The Department has recently had the opportunity to review AB 11 and would now like to offer our analysis of this proposed legislation. We had previously commented on July 1, 1974, on the tentative recommendations relating to condemnation law and procedure and this letter is an update of our previous comments to reflect legislative changes. Our comments on AB 11 are as follows:

THE RIGHT TO TAKE

The Commission has recognized our previous suggestions regarding the Department of Aeronautics and AB 11 has incorporated our recommendations in this area.

Article 3. Future Use

The basic concept expressed in Article 3 is sound, however, we believe that certain safeguards should be included in this proposed article in order to protect against an irrational court decision that may jeopardize the timing of a project. We believe that the addition of a provision that proof that the project for which the property is being acquired has

EG	
AW	
AC	

been budgeted by the condemnor raises a conclusive presumption that the acquisition is not for a future use will create an adequate safeguard. The following proposed addition to Article 3 is submitted accordingly:

> "Notwithstanding any other provision of this Article, where the condemnor proves that funds have been budgeted by it for construction of the project for which the property is being acquired, such proof shall create a conclusive presumption that the acquisition is not for a future use."

Previously the Commission's recommendation had made it clear that the seven-year period set forth in proposed Section 1240.220 was based on the period provided in the Federal Aid Highway Act of 1968 within which actual construction must commence on right of way purchased with Federal funds. This period was extended to ten years by the Federal Aid Highway Act of 1973. A ten-year period is more realistic under current conditions and the Department suggests that the period of ten years be substituted for the seven-year period in proposed Section 1240.220.

Article 5. Excess Condemnation

Proposed Article 5 (Excess Condemnation) introduces a new concept in condemnation proceedings. Section 1240.410 allows the condemnee to defeat the condemnation of a "remnant" upon proving that the condemnor has a sound means to prevent the property from becoming a remnant.

Although this provision may appear to be relatively insignificant, it will undoubtedly lead to extensive litigation in those few cases where excess condemnation is proposed by the condemnor without the concurrence of the condemnee. The test provided by the proposed statute creates a labyrinth of speculative inquiry regarding feasibility of a particular plan of mitigation. In order to determine feasibility of any such plan, it will be necessary to first determine damages that would otherwise occur if the remnant were not acquired. Any such inquiry will undoubtedly add several days of trial time to an already overburdened judicial system. The Department believes that the extent of judicial inquiry should be limited to the question of whether the remnant is of "little market value." Furthermore, it is our recommendation that

the presumption created by proposed Section 1240.420 should be a presumption affecting the burden of proof. Such a provision should discourage spurious issues from being raised by the condemnee yet allow full adjudication where a truly meritorious case exists.

Section 1240.510	"Property Appropriated To Public Use May Be Taken For Compatible Public Use"
Section 1240.530	"Terms And Conditions Of Joint Use"
Section 1240.630	"Right Of Prior User To Joint Use"

These proposed sections by the California Law Revision Commission may have great effect not only on highway rights of way but also on other State lands and rights of way such as tidelands and other publicly owned lands under the jurisdiction of the State Land Commission, park lands, etc. The prior Code of Civil Procedure sections dealing with this subject were hardly models of clarity. As a result, a rather complex scheme of special statutory provisions and master agreements between various public users grew up to handle problems of joint use and related problems, such as removal when one use is expanded, equitable spreading of maintenance costs, etc. Specifically, State highways are covered by Sections 660-670 of the Streets and Highways Code which provide for permit provisions for encroachments by other users in State highways. These permits contained provisions for relocation of utilities, railroads, electric power, gas and water facilities so placed. In most cases the permit will not be issued where there is an inconsistency with either the present or future use of the highway or the safe use thereof by the public. The Commission's proposal has "clarified" the former law and specifically provides that matters of consistency and adjustment of terms and conditions of joint use are to be left to the courts. It seems to the Department that this cannot help but have an effect on prior statutory and contractual arrangements concerning these matters. Further, the criteria which the judiciary is to apply in determining these complex matters are not specified. It must be recognized that a right of way, where joint use issues may arise, may extend through several judicial jurisdictions. The criteria applied by one court may not be followed by another. Specifically in the area of future use, most large utilities and public entities, in the interest of judicious and economic future planning, acquire sufficient

right of way to provide for future needs, even though at the time of actual acquisition it could be argued that the time and place of the actual application of such right of way to the public use is at best uncertain and at worst speculative. For many years it has been the sound policy of the California Highway Commission to acquire sufficient rights of way on freeway projects (generally located in the area of a center divider strip) to provide for addition of an additional lane in each direction when and if the need arises. No criteria for handling such a situation is set forth in the Commission's proposed statutory provisions as to consistent public use either as to whether a use claiming consistency should be allowed to utilize such area of right of way or, if so, as to which entity must pay the considerable cost of relocation in the event the future need lying behind the original acquisition materializes.

Chapter 6. Deposit and Withdrawal of Probable Compensation - Possession Prior to Judgment

For many years the California Law Revision Commission's staff and the Commission itself has advocated a liberalization of the right of public agencies to take possession of property needed for various public purposes prior to entry of final judgment in a condemnation action. This policy was based on the general feeling that if procedures were established providing for exchange of money for property as soon as possible after the filing of an action in eminent domain, the property owner in particular would greatly benefit (tentative recommendation of the California Law Revision Commission relating to Condemnation Law and Procedures, January 1974, pp. 54-55).

This policy was greatly forwarded when the California voters at the November 1974 general election repealed Article 1, Section 14 of the California Constitution which had for many years restricted the right of immediate possession to those agencies taking for reservoirs or right of way purposes and enacted new Section 19 which provides as follows:

> "Section 19. Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. 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."

While, of course, the Department accepts the wisdom of the electorate in providing for the expansion of the right of immediate possession to virtually all public agencies taking property for virtually any legitimate public purpose, it is concerned with the administrative and judicial load such expanded legal procedures will place on public agencies and the courts. Other authorities in response to other and different schemes propounded by the Law Revision Commission to liberalize the provision for attack on amounts deposited as probable just compensation as well as withdrawal procedures have expressed similar concerns. For example, Mr. Richard Barry, Court Commissioner for the Superior Courts in Los Angeles County by letter to the Commission dated November 24, 1970, urged the Commission as follows: "... do not recommend legislation that will burden the courts..."

The Department feels that certain sections proposed as a portion of Assembly Bill 11 do threaten to increase the administrative and judicial burden without any significant real benefit to owners whose property is subject to eminent domain proceedings.

Section 1255.030. Specifically, proposed Section 1255.030 would appear to induce the property owner to challenge the amount deposited by the agency since such an owner may move at any time, and successively apparently, for increases in deposits of the probable amounts of just compensation.

Section 1255.030 then goes further by way of making this invitation even more attractive by providing that if the amount of such an increased deposit is not actually deposited within thirty days it will be treated as an abandonment, entitling the defendant to litigation expenses and damages as provided further in Sections 1268.610 and 1268.620. The Department believes that the number and the time frame within which challenges to an agency's deposit of probable just compensation may be made should be more limited. Such a limitation would better serve the property owner as well as the agencies and the judicial branch of government.

The Department also questions the wisdom of proposed Section

1255.030 which encourages the owner who wishes to challenge the amount of just compensation to immediately withdraw any such increased amount deposited. Upon such withdrawal the Commission's proposal would preclude the court from redetermining the amount of probable just compensation to be less than the amount withdrawn but no such countervailing constraint is provided in the court as to a determination that said amount is greater than the amount previously withdrawn by the owner.

The Department thinks that the net results of these proposals cannot help but greatly encourage owners to attempt to obtain increases in the probable just compensation deposited by agencies. This in turn will greatly increase agency and judicial costs.

As a result of such pretrial activities on the part of owners, in many cases the resultant amounts will reflect determinations made by overburdened courts operating under severe evidentiary and time constraints. It may be expected that in a significant number of cases the property owners will have available to them for withdrawal amounts in excess to that which the court upon more considered determination determines he is entitled. Such a result would seem to call for a strengthening rather than a weakening of the previous statutory safeguards concerning protection of tax funds deposited to secure necessary orders of possession, but the recommendation appearing under Article 2 of Chapter 6 would appear to weaken rather than strengthen preexisting safeguards.

Sections 1255.040 - 1255.050. The Department next objects to proposed Sections 1255.040 and 1255.050 which allows a defendant in an eminent domain action to require a deposit of reasonable just compensation with the provision of sanctions if such a deposit is not made. The Law Revision Commission suggested a limited tryout of similar legislative experiments from other states and apparently justified this on some theory that classes of cases selected to be covered represent areas of legitimate hardship. The Department, however, feels that since the enactment of the Brathwaite Bill (Government Code Sections 7260 and 7274), relating to relocation assistance, the incidence of litigation on the acquisition of such properties as covered by the classification written into proposed Section 1255.040 has diminished to a point of practically nil. This is because these provisions

as to relocation assistance, as applied to such properties, have removed all the "hardship" aspects of such acquisitions. The lack of litigation as to acquisition of such properties demonstrates complete lack of justification for legislative action. Insofar as the small proprietor is concerned, a similar effect is evidenced in relation to the acquisition of property covered by the terms of proposed Section 1255.050. Insofar as such proposal covers more valuable proprietorships of rental property, these owners, with their large resources to support litigation, may be expected to seize on the terms of proposed Section 1255.050 as a method of seeking, by motions for increase of deposit before trial, to expose the agency unable to meet such high levels of deposits as an individual judge may determine to be appropriate (in the limited time and on the limited evidence available to him) to payment of the additional amounts provided in such proposal for failure to make such increased deposits. In summary, the Department respectfully suggests that there is simply no demonstrated need on any "hardship" basis for the provisions currently forwarded in proposed Sections 1255.040 or 1255.050, allowing owners of these classes of property to demand high prejudgment deposits of probable just compensation from condemnors which are subject to severe penalties if such demands cannot be met.

Sections 1255.230 - 1255.240. The Department urges a continuation of the current provisions of Code of Civil Procedure Section 1243.7(e) to the effect that if personal service of an application to withdraw a deposit cannot be made on a party having an interest in the property, the plaintiff may object to the withdrawal on that basis. The deletion of this provision under the current law deprives the agency of all of its power to protect the public funds entrusted to it. Without the unserved party before the court, the "ease" which the Law Commission's tentative recommendation purports to find in demonstrating his lack of interest in the property is, in reality, of small protection for such funds. Any protection by way of the court's discretionary power to provide a bond or to limit the amount of withdrawal likewise may provide no real protection to these funds in the event such party later appears with substantial claims on the amount of just compensation. There is a lack of any concrete evidence that the presence of currently provided statutory protections acted in any significant manner to obstruct or delay legitimate requests for withdrawal by owners. Indeed, the Department's

experience has been that the very presence of such statutory protections has tended to limit property owners' demands for withdrawal to a reasonable basis, which in the great majority of cases can be handled by stipulation rather than necessitating the utilization of court time and resources.

Section 1255.280. The changes in present law proposed in Section 1255.280 to delete the requirement that a withdrawee pay interest on the excess of probable just compensation withdrawn over the final determination on this amount after trial, as well as to provide up to a year's stay on such return to the condemnor, simply enhances the invitation extended to owners to both seek increased deposits of probable just compensation and to encourage withdrawal. The Department objects to such changes in present statutory provisions, which provisions tend to restrict the utilization by owners of such procedures to a reasonable and prudent basis and level.

Section 1255.420. The Department has strong objections to proposed Section 1255.420, which allows a trial court to stay an order of possession on the basis of substantial hardship to the owner unless the plaintiff "needs" possession of the property as scheduled in the order of possession. This provision, in addition to the expansion of the time which must elapse between the service of an order for possession and the date of actual possession from 20 to 90 days (proposed Section 1255.450) all act in concert to make extremely unpredictable whether or not the real property necessary for construction will actually be available on the date required under the construction contract. If it is not, damages may be claimed by the contractor, resulting in a wastage of public funds. More often than not, such claims by the contractor are not ascertainable by the condemnor until near the end of the construction activity. Thus, evidence of the agency's "need" for possession of the property within the time specified in the order for possession may well not be available, in a form sufficiently satisfactory to the particular trial court involved, at the time the owner moves for a stay under proposed Section 1255.420. The Department's experience under present law has been that it provides both predictability as to when the property necessary for the construction of the project can be reasonably expected to be available to the contractor, as well as sufficient flexibility to take care of the rare and unusual hardship situation sought to be cured by the Commission's recommendation.

Under current law an order of immediate possession is not self-executing. To actually displace an owner from the property requires return to the court for a Writ of Assistance. It is the experience of the Department's counsel that at the hearing on application for this writ the trial court invariably explores any legitimate hardship being experienced by the reluctant owner and utilizes its judicial discretion in alleviating any such hardship to the maximum extent practicable under the situation presented to it. It seems unwise to the Department to attempt to alter the entire legal fabric relating to the power of courts to vacate orders of possession, with all of the advantages of predictability inherent therein, for the purpose of remedying the rare and unusual case of undue hardship to the property owner, especially where there is no evidence that the present law cannot accommodate to such unique and unusual situations.

Section 1255.450. The lack of balance in this area becomes evident when proposed Section 1255.450 would delete that portion of present law provided to remedy unnecessary wastage of public funds in those cases where the agency, on noticed motion, presents a cogent case for possession within as short a period as three days from service of the order for immediate possession (Code of Civil Procedure Section 1243.5 (c)). Certainly, in areas where complex land titles are involved and where immediate possession of unoccupied land, or even occupied land, will cause little if any hardship to the owner, the court should continue to have discretion to allow possession on less than 90 days' notice where the lack of ability to provide the contractor with the necessary property could expose taxpayers' funds to substantial wastage by way of contract claims.

Chapter 8 - Article 3.
Compensation Including Procedures For Determining Compensation

Section 1260.210. "Order of Proof and Argument; Burden of Proof" Subsection (a) continues existing law while subsection (b) changes existing procedural law regarding the burden of proof on the issue of compensation. Existing California law on the burden of proof is contained in BAJI 11.98, which is consistent with the majority rule in the United States. In other parts of the bill the burden of proof is placed on the property owner where he contests the right to

take (Section 1240.620) where he asserts the loss of goodwill (Section 1263.510(a)). It would appear to be just as difficult to prove the loss of goodwill and to defeat the right to take as it is to prove the value of the property; nor is it any more difficult to prove compensation in an eminent domain case than it is to prove compensation in a personal injury case, yet in the latter case the burden of proof remains on the person seeking to be compensated. Therefore, it would appear to be practical and logical to continue the present procedural law which places the burden of persuasion on value and damages on the owner and special benefits on the condemnor. Such a rule is consistent with subdivision (a) of the section which gives the defendant the opportunity to proceed first and to commence and conclude the argument. The Department recommends, therefore, that the present rule be maintained, and that Section 1260.210 (b) be deleted.

Section 1263.205. This section replaces 1263.220 proposed by the Law Revision Commission, and defines improvements pertaining to the realty to include any "facility, machinery or equipment installed for use on property taken, etc." The Department had objections to 1263.220 as being vague and unduly expansive. This section has the same defects. For example, the term "facility" is quite broad and will doubtless require judicial clarification. Also the language "cannot be removed without a substantial economic loss" leaves uncertain what kind of loss is to be considered: loss to the property and equipment or economic loss to the owner-operator? The Department considers that the current definition of improvements as equipment designed for manufacturing or industrial purposes (CCP Section 1248(b)) should be retained as the starting point and that any modification thereof be left to a case by case application of the statutory and decisional law of fixtures.

Section 1263.250. Harvesting and Marketing of Crops. This is a modification of 1263.250 proposed by the Law Revision Commission, as to which the Department previously had no comments. The Department does, however, now object to the following language in subsection (b) for vagueness as to the type of "loss" intended to be compensated:

> "... in which case the compensation awarded for the property taken shall include an amount sufficient to compensate for loss caused by the limitation on the defendant's right to use the property."

Section 1263.330. Changes in Property Value Due to Imminence of the Project. The Department considers that the rationale of this section is basically sound and that uniform treatment of increases or decreases in value attributable to a pending public improvement would appear to be desirable, within the limits of the Woolstenhulme decision. However, the Department considers that use of the language "any increase or decrease in value" is objectionable in that it may sanction a purely mathematical analysis of alleged beneficial or detrimental effects on property values. Thus, an appraiser in considering sales in a so-called blighted area may simply adjust mathematically for the sales using an arbitrary percentage such as 20 or 25 percent and carry through to his valuation of the subject property accordingly. To avoid any such mathematical approach and to clarify the manner in which such sales are to be considered, the Department suggests that the language of the section be amended as follows:

> "In determining the fair market value of the property taken, there shall be disregarded any effect on the value of the property that is attributable to any of the following:" [Continue with the language as presently proposed; that is, subitems a, b and c]

Section 1263.410. New Trial; Section 1263.150. Mistrial

These sections change the existing law with respect to the date of valuation following granting of a new trial, reversal on appeal and proceedings subsequent to a mistrial. Under existing law enunciated by the Supreme Court in People v. Murata, 55 Cal. 2d 1, a premium is placed on the condemnor to bring the case to trial within a year under existing Section 1249 of the Code of Civil Procedure. However, once the date of valuation is fixed it cannot be changed by subsequent proceedings since to do so would cause the court or jury to retry another issue not before the original tribunal. The existing law has the advantage of predictability and does not penalize either party, especially the condemnor, from taking measures to set aside an unjust

verdict either by a motion for new trial or by appeal. The bill does provide that "in the interest of justice" the court ordering the new trial can order a different date of value; in other words, the date of value at the first trial. This appears to be vague and indefinite, with no clear standards for the court to follow, and does not have the advantage of predictability which the existing law has. The Department, therefore, recommends continuation of the existing rule which provides for the retrial of the same issue, and which has worked well in the past without any apparent injustice or hardship on the property owner.

Section 1263.420. Damage to Remainder. This proposed section in abrogating the Symons rule will, of course, expand the liability of the Department and other public agencies for severance damage. The Department feels that without some clarification or limitation on damages emanating from that portion of the project off the part taken, the section is unduly broad. It will allow an open-end consideration of so-called proximity damage, i.e., nuisance factors such as noise, dust, dirt, smoke and fumes, whether generated on or off the part taken. The impact of such factors on the remaining property could, under the section be much less or, at least, the same as that on the general public. In highway taking cases, the landowners could try to prove proximity damages for alleged detriment hundreds of feet, or even hundreds of yards, away from the part taken. This, the Department feels, will encourage testimony of damage based on little more than speculation and conjecture.

The Department also opposes an allowance of damages based on the use by the public of the improvement. Existing Section 1248, subsection 2, of course provides for damages accruing by reason of the severance and the construction of the public improvement in the manner proposed. Injurious effect caused by the public's use of an improvement, i.e., such as a highway, is shared by property owners in general whether or not a part of their property is taken and is not really special to an owner. It is recognized that the Court of Appeals in the Volunteers of America case (21 Cal. App. 3d, 111) expressed strong policy reasons for allowing recovery of proximity damages "if established by proper proof." The Court did not elaborate on what would constitute proper proof. Proximity damage from sources

off the part taken and considering the use of the facility [illegible] n to imaginative appraisers and property owners to claim high or large severance damages without a basis in fact or experience. The Department considers that if proximity damages are to be broadened, there should be some physical or geographic limitation to prevent open-ended speculation circumscribed only by the length and breadth of a project.

Section 1263.440. Computing Damage and Benefit to Remainder. The Department opposes adoption of this section. To many judges and triers of fact assessment of just compensation using the present three or four step process is involved enough. This provision is certain to introduce additional complexities, if not confusion, into the assessment of damages and benefits. If the time lapse in construction is to be considered, the appraiser must estimate the period of delay, which may be little more than guesswork, and then discount the future damages to present worth. A similar procedure would apply to the assessment of special benefits. It is more than likely that this phase of the valuation testimony will be difficult for the trier of fact to follow.

The Department opposes the section for the additional reason that the issue of when the public improvement will in fact be constructed would be injected into the case. The timing of construction of any public improvement depends on such variables as availability of funds, priority of the project in relation to other public improvements and similar matters as to which an engineer, right of way agent or appraiser could give no more than a guess. Additionally, such testimony would not be binding on the condemning body, so that if the public improvement is not in fact built at the estimated time, the public agency could be subject to further claims of damages. The present concept of assuming the public improvement will be built, as proposed, on the applicable date of value is easily understood by the trier of fact, avoids speculation and has been judicially approved in numerous cases as working a substantial justice to both condemnor and condemnee. The Department considers that the present rule should be retained.

Section 1263.510. Compensation for Loss of Goodwill. As indicated previously to the Law Revision Commission, the Department is opposed in principle to the allowance of loss

of goodwill damages in eminent domain actions. Decisions of both the California and United States Supreme Courts have held that detriment to this form of property is not required to be compensated for under the "just compensation" clauses of the Constitution (United States v. Powelson, 319 U.S. 266; Oakland v. Pacific Coast Lumber Co., 171 Cal. 392, 398). In contrast to tangible property interests, goodwill is not directly appropriated in condemnation nor does the public entity obtain for its use either the fruits of the goodwill built up by the operator of a business, or the operator's covenant not to compete. Where goodwill damages are claimed, the property owner's attempt to prove such losses and the agency's attempt to rebut or prove mitigation thereof will probably increase trial-time estimates to double that of the present.

In addition, proof of such losses will doubtless require introduction of another level of expert testimoney, i.e., an accountant, C.P.A. or business broker. These experts will serve either as a foundation to the appraiser's opinion of goodwill damages, or as independent evidence of such damages. This, of course, will increase trial costs for both sides.

Compensation under this section will have to be based on loss of future patronage and hence profits. Considering the wide variety of factors upon which continuation of patronage depends, this may well qualify as the most speculative of evaluation assignments. Further, the estimated loss may realistically be based on the cost of taking steps which the prudent property owner would adopt in preserving the goodwill, thus predicating loss of an item expressly made noncompensable under subsection (2).

In sum, compensation for loss of goodwill is unsound in principle and highly uncertain in measure of proof.

Chapter 10. Divided Interests

Article 4. Options

Section 1265.310. Unexercised Options. Under present law an option holder has the right to protect himself after an eminent domain proceeding is filed by exercising the option if he determines that he can get more for the property than the

option price. Present law, however, does not allow him to sit back and gamble on the outcome of the lawsuit. Unless he converts the option to an interest in the property he is not entitled to compensation. The bill in its present form artificially terminates the option with the filing of the complaint. The Department sees no reason to provide an artificial, contrived destruction of the option right for the purpose of creating a compensable interest in property. Existing law seems to have worked no hardship on either the owner or the option holder and should be continued in the future.

The section also raises problems where the option holder does not exercise his option but the options expire prior to any taking by the condemnor. In a situation where a lease expires prior to a taking by the condemnor the lessee is not entitled to any compensation even though his lease was in existence as of the time of the filing of the complaint. Also, problems may be raised where the condemnor abandons the proceeding after the filing of the complaint since the filing of the complaint terminates the option. The option holder would not be entitled to exercise his option after the filing of the complaint even though the term of the option would allow him to do so but for the condemnation action. It would seem that this problem could be well left to the development of the common law by the courts of this State.

Article 5. Future Interests

Section 1265.410. Contingent Future Interests. This section appears to define what property interests should be entitled to compensation when there is a restriction as to the vesting of the interest. There appears to be no need for this section since the courts have developed a consistent policy regarding such future interest. The section also raises some confusion as to the definition of property which is contained in Section 1235.170. The courts have always held that certain contingent future interests are property rights but have held that in certain situations they have only a nominal value because of the remoteness in the vesting of possession. It appears that the case law is very clear on this point and does not need modification at this time from the legislature.

Chapter 11. Post Judgment Procedure

Section 1268.010. While not greatly affected thereby the Department questions the wisdom of the deletion by proposed Code of Civil Procedure Section 1268.010 of the current provision in Code of Civil Procedure Section 1251 which allows the State or public corporation condemnor a year to market bonds to enable it to pay judgment. Such deletion may threaten many needed public projects proposed to be funded by responsible local and State agencies which do not have immediately available to them unlimited funding. It is unlikely that local governments could reasonably prevail on their electorates to authorize bond issues high enough to cover the worst result that could possibly ensue from condemnation litigation which might be necessary to acquire the land for an otherwise worthy and needed local project. However, under the proposed deletion of the current statutory provision for bonding to cover an increase in estimated land costs after trial, this would seem to be the only protection such a condemnor would have against exposure to implied abandonment and the considerable penalties involved therein (see proposed Section 1268.610 and Section 1268.620) following such a result. Since a judgment in condemnation draws interest at 7 percent from date of entry, the plight of the owner having to wait as long as a year to actually receive the judgment amount plus 7 percent interest appears not quite as onerous as represented in that portion of the California Law Revision Commission's recommendation which recommends deletion of the one-year period to sell bonds to cover the cost of an unanticipated high award.

Section 1268.620. The Department objects to proposed Section 1268.620 as a total, unlimited, open-ended indemnity provision for owner recovery of damages caused by possession of the condemnor in the event a proceeding is either voluntarily or involuntarily dismissed for any reason or there is a final judgment that the plaintiff cannot acquire the property.

It would not appear to be in the public interest to provide such a measure of compensation which could well exceed the amount of just compensation which would have been awarded the owner had the action proceeded under the complaint in eminent domain filed. The items for which the owner be recompensed under the situation sought to be covered by

proposed Section 1268.620 should be carefully defined and limited. Such would be a responsible approach to the problem and carry with it the advantage of predictability, allowing public agencies to make reasonable judgments as to the costs of various alternatives available to them, such as the voluntary abandonment of a proposed acquisition under the provisions of proposed Section 1268.010 or under present law as embodied in Code of Civil Procedure Section 1253.

Section 1268.710. The Department objects to that portion of Section 1268.710 which deletes the provision of present Section 1254(k), providing that where a defendant obtains a new trial and does not obtain a result greater than that originally awarded, the costs of the new trial may be taxed against him. The basis of this objection is that it removes all constraint encouraging the exercise of prudence on behalf of the property owner and his attorney in seeking judicial remedy.

Section 1268.720. The Department objects to the complete removal of discretion from the appellate court in awarding costs on appeal as proposed in Section 1268.720. While the Department agrees that in recent years the trend has been to award the property owner his costs on appeal, whether appellant or respondent, and whether he prevails or does not prevail in the appellate court, it feels that the legislative branch of government should not invade the province of the judicial branch by attempting to destroy the use of judicial discretion in individual cases to apportion appellate costs as justice in that particular case may warrant.

This concludes the comments of the Department of Transportation on AB 11 as introduced by Assemblyman McAlister on Decembember 2, 1974. The Department continues to stand ready to render any assistance requested by the Commission or the Legislature in its efforts to advise on condemnation law and procedure to protect the rights of all parties to such proceedings.

Very truly yours,

Harry S. Fenton

HARRY S. FENTON
Chief of Division

Memorandum 75-23

EXHIBIT II

Southern California Edison Company

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March 4, 1975

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

Re: AB 11 and AB 278 v. AB 486

Dear Mr. DeMoully:

I am pleased to see that the Commission intends to consider AB 11 and AB 486 together at its March meeting. Receipt of the comparable provision material sent out with the February mailing is appreciated and has been most helpful in comparing the different treatment of the same subject matter by the two bills. Overall, there is no question but what the Commission-sponsored legislation is much more thoughtful and thorough than AB 486. My review of this material has, however, prompted the following comments which may be useful in supporting AB 11 and AB 278 over AB 486.

There is still much confusion remaining about AB 486. This is compounded by the Legislative Counsel's Digest in the bill which contains some misleading and inaccurate information. For example, one need go no further than point (1) on page 1 of AB 486 to find a statement to the effect that "existing law contains no provisions establishing pre-condemnation property acquisition policies for a condemnor". Apparently, Legislative Counsel have overlooked the extensive procedures contained in the Relocation Assistance Act. Nothing but chaos will result if the sections dealing with this subject (Sections 1231.01 et seq.) are enacted without an attempt to reconcile them with the provisions of the Relocation Assistance Act.

Also, AB 486 contains provisions which apparently are intended to extend a right of early possession to condemnors but in fact do not. That is, as you know, Chapter 6 of AB 11 contains three distinct articles dealing respectively with

Deposit of Probable Compensation, Withdrawal of Deposit and Possession Prior to Judgment. AB 486's comparable chapter, on the other hand, (Chapter 7) only contains proceedings relative to making the deposit. In other words, although there is an implication from AB 486's Chapter 7 that a right of early possession is being extended to condemnors under certain circumstances of making a deposit, etc., there is no specific provision such as AB 11's Article 3 which in fact establishes a procedure for possession prior to judgment.

It also appears that AB 486 would treat in one bill not only the matters recommended by the Commission in the form of AB 11 but also the Commission's procedural and "legal issue" recommendations as set forth in AB 278. For this reason, it would seem to be difficult for the Commission to consider AB 486 and AB 11 at its March 15 meeting without also discussing AB 278. In this regard, AB 486 does have, in my judgment, some pluses over AB 278 that it may be useful for the Commission to consider.

First, AB 486 will not repeal CC §1001 (which extends a general right to condemn so long as the condemnation is for a public purpose) as would AB 278. This seems to me to be preferable because of the difficulty encountered in any attempt to enumerate every specific public use for which a condemnor may condemn. That is, while I can appreciate the Commission's concern with Linggi v. Gavoloti type situations, it is questionable whether or not any one person or commission is farsighted enough to be able to specifically enumerate all of the various public purposes or uses for which the Legislature may wish to authorize a condemnation.

As you know, Article 7 of AB 278 is an attempt to do just that, but already matters are developing that may cause the specific enumeration to fall short of what, in the public interest, the right to condemn ought to be extended to include. For example, Section 612 under Article 7 provides that "an electrical corporation may condemn any property necessary for the construction and maintenance of its electric plant." It is at least questionable whether this section, even when read with Sections 217 and 218, extends the right to condemn for a new fuel source should it be developed from an unexpected and now unforeseen source. Yet such a condemnation could, depending on how matters develop in the future, be generally acknowledged to be in the public interest. The point is, of course, that if AB 278 is enacted in its present form, a public utility would have difficulty in stating a prima facie case for such purpose in its Complaint, let alone presenting the question of public

use to a trial court to decide. For this reason, it is respectfully suggested that AB 278 either be so amended as to eliminate that part which would repeal CC §1001 or that a new omnibus paragraph be added that would generally extend the right to condemn to governmental or public utility type condemnors for any purpose or use it can in fact prove is public and necessary.

AB 486 also gives more favorable treatment than does AB 278 to the effect in condemnation actions of a public body's approval of a project. I refer to Section 1232.11 of AB 486 which states that any project "authorized by a legislative or administrative body of a public entity which is to review the matter" conclusively establishes the need for the taking. This gets back to a matter about which I have previously written; i.e., the question of what effect a court should give to an order of the California Public Utilities Commission approving a project. AB 278 would, as now drafted, give no effect to such an order whereas the above language in AB 486 would give the order the same effect as a resolution of necessity adopted in a public agency condemnation proceedings. The failure of AB 278 to give an order this same conclusive effect is bound to be a future source of hopeless dilemmas for trial courts. For example, an order of the Public Utilities Commission (such as an order issuing a certificate of public convenience and necessity for a project) is appealable only to the California Supreme Court. This being the case, what happens if the PUC determines the necessity for a project and orders it constructed and later the same issue is raised in a condemnation action. Does the trial court have jurisdiction to retry an issue the PUC has already decided. If it undertakes to do so, isn't this in effect a collateral attack on an order that can only be directly appealed to the Supreme Court?

Aside from this consideration, however, it seems reasonable and proper for a certificate from the PUC to have at least the same effect as a resolution adopted by a public agency. While a quasi-public entity probably should have more of a burden to establish the issue of necessity than a completely public entity, isn't this additional burden satisfied by the review and authorization proceedings conducted by a public body such as the Public Utilities Commission? Such a hearing in fact provides more of an opportunity to oppose a proposed project than what is available to a property owner opposed to a public project for which a public condemnor need only adopt a resolution of necessity.

Thank you for the opportunity to provide these comments.

Very truly yours,

Tom P. Gilfoy

TPG:bjs

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March 7, 1975

California Law Revision Commission
School of Law
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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
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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

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."

Section 1263.270

This section affects the right and power of a public entity to take only a portion of a building. At this time where a right of way boundary goes through an improvement, the City often determines to acquire only the portion within the right of way, and cut that portion from the balance of the building. Thereafter, the remainder outside of the right of way is supported by shoring.

Generally, however, the City seeks to have the owner remodel the building, with the City paying the cost.

Where not economically feasible the City will seek the right to take the entire building rather than only the portion within the right of way.

This section gives the power to the court to determine whether all or a part of the building shall be taken. It does so with an instruction that the determination be based upon a finding "that justice so requires."

This section therefore removes some of the discretion City Officials previously had to determine

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

cc to: Claude Hilker
James Pearson
Roger Weisman

Memorandum 75-23

EXHIBIT IV

C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

COUNTY OF SAN DIEGO, Plaintiff and Respondent, v. JOHN M. MILLER, Defendant and Appellant.	L.A. 30371 Super. Ct. No. 339813

We determine whether the owner of an unexercised option to purchase real property has a right to compensation when the optioned property is taken through the power of eminent domain.

For valuable consideration, appellant acquired an option to purchase property. However, before the option had been exercised, respondent county filed a condemnation action to acquire the land. (Code Civ. Proc., § 1237 et seq.)[1/] Appellant filed an answer

1/ After summons issued, appellant attempted to exercise his option, giving notice to the optionor. However, his attempt was of no material legal effect. Section 1249 of the Code of Civil Procedure provides in pertinent part: "For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of the issuance of summons.

(Fn. 1 continued.)

in the action (Code Civ. Proc., § 1246), alleging the existence of his option and seeking compensation to the extent the land's fair market value exceeds the option exercise price.

Respondent's motion for summary judgment was granted on the ground appellant had no compensable interest in the property. In reaching this decision Judge Froehlich thoughtfully declared: "[I] am having a little trouble here because we all know that people who obtain options on property think they have an interest in the property. As a matter of fact, sometimes the acquisition of an option to acquire real property can be an alternative way of purchasing it."

"I think an option should be a compensable interest in land, but that doesn't appear to be the law of the State . . . .

"Motion for summary judgment will be granted."

I

Eminent domain is the power of government

. . ." Because appellant's attempted exercise followed the issuance of summons in this action, his interest in the property must be deemed solely that of a holder of an unexercised option. (Compare, State v. New Jersey Zinc Co. (1963) 40 N.J. 560 [193 A.2d 244].)

to take private property for public use. While it is a power inherent in the state as sovereign (Bauer v. County of Ventura (1955) 45 Cal.2d 276, 282 [289 P.2d 1]), its exercise is not without restrictions in both the California and United States Constitutions. "Private property may be taken or damaged for public use only when just compensation . . . has first been paid . . . ." (Cal.Const., art. I, § 19.) In its original form this prohibition was included in the sentence enumerating man's other personal rights.[2/] Similarly, the Fourteenth Amendment to the United States Constitution mandates that the state shall not take property without due process of law, including the requirement the state make just compensation to the owner of property taken. (People ex rel. Dept. Pub. Wks. v. Lynbar, Inc. (1967) 253 Cal.App.2d 870, 880 [62 Cal.Rptr. 320].)

To be constitutionally entitled to compensation, the claimant customarily must show he owned

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2/ "No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." (Cal.Const. of 1849, art. 1, § 8; see also Lynch v. Household Finance Corp. (1972) 405 U.S. 538, 552 [92 S.Ct. 1113, 31 L.Ed.2d 424].)

a property interest taken by the state. Interests held to constitute property for condemnation compensation purposes include: fee interests (Brick v. Cazaux (1937) 9 Cal.2d 549 [71 P.2d 588]); leaseholds (San Francisco Bay Area Rapid Transit Dist. v. McKeegan (1968) 265 Cal.App.2d 263 [71 Cal.Rptr. 204]); easements (People ex rel. Dept. Pub. Wks. v. L.A. County Flood etc. Dist. (1967) 254 Cal.App.2d 470 [62 Cal.Rptr. 287]); rights-of-way (City of Long Beach v. Pacific Elec. Ry. Co. (1955) 44 Cal.2d 599 [283 P.2d 1036]); and, most recently, building restrictions (Southern California Edison Company v. Bourgerie (1973) 9 Cal.3d 169 [107 Cal.Rptr. 76, 507 P.2d 964]).

An option, when supported by consideration, is a contract by which an owner gives another the exclusive right to purchase his property for a stipulated price within a specified time. (Caras v. Parker (1957) 149 Cal.App.2d 621, 626 [309 P.2d 104].) It is a right acquired by contract to accept or reject a present offer within a limited time in the future. (Brickell v. Atlas Assur. Co., Ltd. (1909) 10 Cal. App. 17, 22 [101 P. 16].)

This right to purchase created by an option is a substantial one. It is irrevocable by the

optionor (Adams v. Williams Resorts, Inc. (1962) 210 Cal.App.2d 456, 462 [26 Cal.Rptr. 656]), and may be exercised against his successors following his death (Bard v. Kent (1942) 19 Cal.2d 449, 452 [122 P.2d 8, 139 A.L.R. 1032]). Further, when recorded, the option creates a cloud on the optionor's title for one year following expiration. (Civ. Code, § 1213.5.) Finally, unless the agreement provides to the contrary, an option is generally assignable (Mott v. Cline (1927) 200 Cal. 434, 450 [253 P. 718]; see generally, Cal. Real Estate Sales Transactions (Cont.Ed.Bar 1967) § 7.16, p. 263, and cases cited therein); and for tax purposes, the assignment is treated as a sale of the land by the optionee. (See, I.R.C., § 1234(a); and Fed. Tax Reg. § 1.1234-1.)

II

Historically, courts have taken the position that compensation shall not be granted the holder of an unexercised option to purchase. Thus, in Taggarts Paper Co. v. State of New York (1919) 187 App.Div. 843, 847-849, the court held that the holder of a bare option to purchase "had no interest in the land itself and no claim against the State for its condemnation." (Id. at p. 848; see also, Carroll v. City

of Louisville (Ky. 1942) 354 S.W.2d 291; Cravero v. Florida State Turnpike Authority (Fla. 1956) 91 So.2d 312.) Similarly, in Cornell-Andrews Smelting Co. v. Boston & P.R.R. (1911) 209 Mass. 298 [95 N.E. 887], where the option to purchase was created in conjunction with the optionee's lease of the property, the court concluded the option created no compensable property interest in the lessee-optionee. "[A]lthough the insertion in a lease of an option giving to the lessee at his option a right to buy the fee adds to the value of the lessee's rights under the lease, it is no part of the lessee's estate in the land. It is a contract right and nothing more . . . ." (Id. at pp. 306-307.)

California Courts of Appeal have followed this early view denying compensation for an option to purchase. Thus, in East Bay Municipal Utility Dist. v. Kieffer (1929) 99 Cal.App. 240 [278 P. 476], it was stated that the holder of a mere option to purchase land being condemned was not entitled to any part of the award. (See also, People v. Ocean Shore R.R. Co. (1949) 90 Cal.App.2d 464 [203 P.2d 579].)[2/]

2/ In Kieffer, the defendant was the owner of the condemned land and the holder of an unexercised

(Fn. 2 continued.)

Similarly, dicta in Shaeffer v. State of California (1972) 22 Cal.App.3d 1017, 1021-1022 [99 Cal.Rptr. 861], suggests the lessee-optionee should be denied compensation.

Despite this early view throughout the country denying compensation, substantial exceptions allowing compensation have been recognized in recent years. A majority of courts has departed from the rule enunciated in Cornell-Andrews Smelting Co., now awarding damages to the holder of an option to purchase when the option was created in conjunction with a leasehold estate. (See, e.g., Sholom, Inc. v. State Roads Commission (Md. 1967) 229 A.2d 576; Nicholson v. Weaver (9th Cir. 1952) 194 F.2d 804; 23 Tracts of Land v. United States (6th Cir. 1949) 177 F.2d 967; Cullen & V. Co. v. Bender Co. (1930) 122 Ohio St. 82 [170 N.E. 633]; cf.: City of Ashland

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option to purchase land adjacent to it. In addition to the award for the condemned land, defendant sought severance damages for the optioned property. The Court of Appeal concluded he was not entitled, as an optionee, to any part of the condemnation award when the optioned property was taken. (99 Cal.App. at p. 246.) This broad conclusion was followed with little discussion in People v. Ocean Shore R.R. Co., supra, 90 Cal.App. 2d 464, 469.

v. Kittle (Ky. 1961) 347 S.W.2d 522; Phillips Petroleum Co. v. City of Omaha (1960) 171 Neb. 457 [106 N.W.2d 727].)

Similarly, courts now allow compensation to the holder of an option to renew a lease. (See, e.g., Canterbury Realty Co. v. Ives (1966) 153 Conn. 377 [216 A.2d 426]; Land Clearance for Redevelop. Corp. v. Doernhoefer (Mo. 1965) 389 S.W.2d 780; United States v. Certain Land (M.D.Ala. 1963) 214 F.Supp. 148; State v. Carlson (1958) 83 Ariz. 363 [321 P.2d 1025]; United States v. 70.39 Acres of Land (S.D.Cal. 1958) 164 F. Supp. 451.)

In at least one state the holder of a bare option to purchase land has been held entitled to share in the condemnation proceeds. (See Synes Appeal (In re Petition of Governor Mifflin Joint School Authority) (1960) 401 Pa. 387 [164 A.2d 221].)

Recent California cases have also demonstrated increased recognition of certain option holder's rights to compensation. Thus, in State of California v. Whitlow (1966) 243 Cal.App.2d 490 [52 Cal.Rptr. 336], it was held that compensation should be awarded to a lessee for his unexercised option to renew his lease (see also People ex rel. Dept. of Water Resources v.

Gianni (1972) 29 Cal.App.3d 151 [105 Cal.Rptr. 248]; San Francisco Bay Area Rapid Transit Dist. v. McKeegan, supra, 265 Cal.App.2d 263, 272 [71 Cal. Rptr. 204]); and in Cinmark Investment Co. v. Reichard (1966) 246 Cal.App.2d 498 [54 Cal.Rptr. 810], it was decided that when a portion of land subject to an unexercised option was condemned, the optionee was entitled to offset the award against the purchase price.

III

Important changes have occurred in eminent domain law weakening the legal foundation of the Court of Appeal cases denying recovery to the optionee and eroding their authority. The decision in Kieffer--consistent with decisions of other jurisdictions at that time--turned on application of the so-called "property interest-contractual right" test which in turn depended on common law concepts of property. (Humphries, Compensability in Eminent Domain of Lessee's Option to Purchase (1968) 25 Wash. & Lee L.Rev. 102; Waldman, Rights of Optionee to Compensation in a Condemnation Proceeding When Option is Exercised After the Taking (1968) 14 Wayne L.Rev. 660, 666.) Because the Kieffer court concluded an option created

no traditional property interest in the land--only contractual rights--it held there could be no compensation. (99 Cal.App. at pp. 246-247.)[3/]

We do not dispute the technical correctness of the Kieffer court's conclusion that--applying traditional common law concepts of property--the option creates in the optionee no estate as such in the land. (Cf. Leslie v. Federal Finance Co., Inc. (1939) 14 Cal.2d 73, 80 [92 P.2d 906].) However, this test is no longer conclusive.

Recent decisions, both of this and of the federal courts, have held the property-contract labelling process is not necessarily determinative in questions of due process compensation. Instead, compensation issues should be decided on considerations of fairness and public policy. "The constitutional requirement of just compensation derives as much content

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3/ Similarly, the Ocean Shore decision depends on application of this property-contract labelling test: "'The primary question here is the nature and extent of Middleton's interest in the property at the time of the taking by the state. If the agreements here constituted merely an option to purchase, then the exact date of the taking by the state becomes unimportant, as "The holder of an option to purchase land being condemned has no interest in the land which will entitle him to compensation . . . ." [Citations.]'" (90 Cal.App.2d at p. 469.)

from the basic equitable principles of fairness . . . as it does from technical concepts of property law." (United States v. Fuller (1973) 409 U.S. 488, 490 [93 S.Ct. 801, 35 L.Ed.2d 16].) "[T]he right to compensation is to be determined by whether the condemnation has deprived the claimant of a valuable right rather than by whether his right can technically be called an 'estate' or 'interest' in land." (United States v. 53 1/4 Acres of Land (2d Cir. 1943) 139 F.2d 244, 247, italics added.)

In 1973, following the lead of the federal courts, this court expressly rejected the much criticized[4/] property-contract labelling process, concluding that compensability depends instead on considerations of fairness and public policy. (Southern California Edison Company v. Bourgerie, supra, 9 Cal.3d 169, 173-175; cf. Dillon v. Legg (1968) 68 Cal.2d 728, 734 [69 Cal.Rptr. 72, 441 P.2d 912].)

We must therefore analyze the respective positions of the government, the optionor and the optionee in the condemnation setting to determine if

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4/ See, e.g., Waldman, supra, 14 Wayne L. Rev. 660, 666; Stoebuck, Condemnation of Rights the Condemnee Holds in Lands of Another (1970) 56 Iowa L.Rev. 293, 306.

appellant has been deprived of a property right compensable by article I, section 19.

CONDEMNOR

There is no discernible detriment to the condemnor--whatever our holding--because appellant seeks only that portion of the total award exceeding his optioned purchase price. Because this excess otherwise goes to the optionor, no increase in the total condemnation award will result from allocating compensation to the optionee. This decision will affect only the apportionment of the eventual award for the total taking among those incurring loss. Similarly, while in some instances concern may be justified from fear the condemnees may increase the eventual condemnation award by collusive action, the limited scope of the relief sought in this case precludes such concern.

OPTIONOR

During the life of the option, the optionor can have no reasonable expectation of receiving a purchase price exceeding that specified in the option. His sale of the option--freezing the maximum sale price of the land to the optioned price--has extinguished any such expectation.

OPTIONEE

The optionee, pursuant to his acquired right, clearly expects to realize any value in excess of the optioned price and often--as here--will expend considerable time and expense in furthering this expectation.[5/] To deny the optionee participation in the condemnation award under such circumstances provides the optionor an inequitable and unjustifiable windfall. It strips the optionee of the expected benefit of his bargained right, while relieving the optionor of his bargained duty at a profit. A paramount purpose of eminent domain law is to do substantial justice. (United States v. Miller (1943) 317 U.S. 369, 375 [63 S.Ct. 276, 87 L.Ed. 336].) Because considerations of fairness with respect to the competing interests of the optionor and optionee fall heavily in favor of compensating the optionee, denying compensation to the optionee would defeat this purpose.

Finally, considerations of public policy dictate the optionee share in the condemnation award. Although the option has long been recognized in the marketplace, increased complexity and severity of

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5/ Appellant alleges he has spent in excess of $30,000 seeking governmental approval of construction of a planned unit development on the optioned property.

land use laws and procedures have substantially enhanced the importance of its use. The option has become a prevalent method for securing to a potential land buyer the ability to ultimately purchase the land--while affording him the opportunity to undertake and complete the often expensive and lengthy process of determining whether his intended use of the land will be permitted. (Cal. Real Estate Sales Transactions (Cont.Ed.Bar 1967) § 7.1, p. 253.) Such efforts by the optionee frequently increase the value of the optioned property, although legal title remains in the optionor. Given this increased importance of the option in the marketplace, frustration of the process appears unwise.

CONCLUSION

We conclude that the owner of an unexercised option to purchase land possesses a property right which--if taken by government--is compensable under article I, section 19. The measure of damage to the optionee shall be the excess--if any--of the total award above the optioned purchase price.

To the degree they are contrary to this opinion, the following cases are disapproved: East Bay Municipal Utility Dist. v. Kieffer, supra, 99 Cal.App.

240; People v. Ocean Shore R.R. Co., supra, 90 Cal.App.2d 464; Shaeffer v. State of California, supra, 22 Cal.App.3d 1017.

The judgment is reversed.

CLARK, J.

WE CONCUR:

WRIGHT, C.J.
McCOMB, J.
TOBRINER, J.
MOSK, J.
SULLIVAN, J.
RICHARDSON, J.