April 29, 1969

Time	Place
May 9 - 9:30 a.m. - 5:00 p.m. May 10 - 9:00 a.m. - 4:00 p.m.	State Bar Building 601 McAllister Street San Francisco

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco — May 9 and 10, 1969

1. Approval of Minutes of April 10-11 meeting (sent 4/24/69)

2. 1969 Legislative Program

   Memorandum 69-59 (to be sent)

3. Study 65 - Inverse Condemnation

Uhler — Water Damage

   Memorandum 69-62 (enclosed)
   Draft Statute (attached to Memorandum)

Wolford — Interference With Land Stability

   Memorandum 69-51 (sent for April meeting--another copy enclosed)
   First Supplement to Memorandum 69-51 (enclosed)

4. Study 52 - Sovereign Immunity

Arnebergh — Damage From Use of Agricultural Chemicals

   Memorandum 69-64 (sent 4/28/69)
   Tentative Recommendation (attached to Memorandum)
   Research Study (attached to Memorandum)

5. Study 36 - Condemnation Law and Procedure

Yale — Litigation Expenses

   Memorandum 69-66 (sent 4/28/69)

Uhler — Excess Condemnation

   Memorandum 69-56 (sent 3/20/69)
   Draft Statute (attached to Memorandum)

April 29, 1969

Miller — Substitute Condemnation (Condemnation for Exchange Purposes)

Memorandum 69-61 (sent 3/20/69)
Draft Statute (attached to Memorandum)
Research Study (attached to Memorandum

6. Administrative Matters

Stanton — Function of Law Revision Commission

Memorandum 69-65 (sent 4/28/69)

Stanton — New Topics

First Supplement to Memorandum 69-43 (sent 3/20/69)
Second Supplement to Memorandum 69-43 (sent 4/24/69)

7. Study 52 - Sovereign Immunity

Arnebergh — Repeal of Unnecessary Claims Provisions

Memorandum 69-63 (enclosed)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

MAY 9 AND 10, 1969

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco May 9 and 10, 1969.

Present: Sho Sato, Chairman
Thomas E. Stanton, Jr., Vice Chairman
John D. Miller
Lewis K. Uhler

Absent: Alfred H. Song, Member of the Senate
Carlos J. Moorhead, Member of the Assembly
Roger Arnebergh
Richard H. Wolford
William A. Yale
George H. Murphy, ex officio

Messrs. John H. DeMoully, Clarence B. Taylor, Jack I. Horton, and John L. Cook, members of the Commission's staff, also were present.

The following observers also were present:

Donald L. Clark, San Diego County Counsel's Office
Norval Fairman, Department of Public Works
Eugene Hill, California Attorney General's Office
James T. Markle, Department of Water Resources
Willard A. Shank, California Attorney General's Office
Terry C. Smith, Los Angeles County Counsel's Office
Gerald J. Thompson, Assistant County Counsel, Santa Clara County

NEW TOPIC - NONPROFIT CORPORATIONS

The Commission directed the staff when time permits to prepare a statement requesting authority to study revision of the law relating to nonprofit corporations. When such a statement is prepared, the Commission will determine whether to request authority to study this topic.

RESEARCH CONTRACTS

The Commission discussed the standard compensation that should be paid for a research study involving the usual amount of work required to produce a research study. It was determined that $1,500 should be the standard compensation for research studies unless the study involves a topic of more than normal difficulty or of substantial scope.

A motion was made and adopted unanimously that the Chairman and Executive Secretary be authorized to select research consultants for five of the topics listed in SCR 17 and that the compensation for such studies be fixed at $1,500 each. No study was considered necessary on the topic relating to the rule against perpetuities. It was noted that Professor Friedenthal has already been selected as the consultant on two of the topics (joinder of causes of action and counterclaims and cross-complaints) if he has the time to prepare the background research studies on these topics. The Executive Secretary was directed to execute the contracts with the consultants so selected.

STUDY 36.40 - CONDEMNATION (EXCESS CONDEMNATION)

The Commission considered Memorandum 69-56 and the attached draft statute (pink pages). The following suggestions are to be taken into account in preparing a revised draft statute for consideration at a future meeting.

Condemnation of by-roads

It was suggested that the staff give consideration to revising Section 1238.8 to include such matters as drainage and utilities as well as "byroads."

Excess acquisition where negotiated purchase

A separate section is to be included to authorize the acquisition of the entire parcel where a portion is needed for a public use and the purchase is negotiated. In such a case, the rule should be fairly liberal in permitting the public entity to acquire the entire parcel. Where, however, the entire parcel is being taken over the objection of the owner, a strict test should be provided in another section.

The new section on negotiated purchases might read substantially as follows:

> Whenever a part of a parcel of property is to be acquired by negotiated purchase by a public entity for public use and the remainder is to be left in such shape or condition as to be of little value to its owner or to give rise to claims or litigation concerning severance or other damages, the condemnor may purchase the whole parcel.

This section would continue the authority provided by Section 104.1 of the Streets and Highways Code insofar as negotiated purchases are concerned and extend such authority to all condemnors.

Excess acquisition where acquisition by eminent domain

In preparing the section on excess acquisitions by eminent domain, the following suggestions should be considered:

(1) The phrase "the remainder would be left in such shape or condition as to be of little value to its owner" should be revised to substitute "little market value" for "little value to its owner."

(2) The phrase "excess severance damages" should be defined. It was suggested that the term be defined to mean that the amount to be paid for the part taken and the severance damages to the remainder would be substantially equal to the market value of the entire parcel.

(3) Consideration should be given to substituting for "sell" the phrase "sell or lease or otherwise dispose of."

(4) A cost standard might be provided on the physical solution as an alternative to excess condemnation. The word "reasonable" was not considered adequate by the Department of Public Works to make clear that a physical solution is to be utilized only where such solution would be economically reasonable under the circumstances of the particular case.

(5) To acquire more that the part needed, the condemnor must adopt a resolution of the type described in subdivision (3). The words "of necessity" are to be omitted in describing the resolution.

(6) The phrase "burden of proof to establish" was changed to "burden of proof as to."

(7) The effect of the finding in the resolution is to place the burden on the condemnee to go forward with the evidence rather than to place on the condemnee the burden of proving the use is not a public use.

(8) In a case where the condemnor seeks to acquire the entire parcel and the condemnee raises the issue of public use as to the taking of the excess, the matter is to be referred to the jury to determine the information necessary so that the judge can determine whether the case is a proper one for an excess taking. Also, the property owner should be permitted to waive such an amount as makes the taking an excess taking. It should be noted that the condemnor may be acquiring all of a larger parcel on one side of a freeway but not the remainder of the larger parcel on the other side of the freeway. In such a case there is an excess taking, but not a taking of the entire parcel. This should be taken into consideration in drafting the statute. (In such case, the property owner would claim severance damages as to the portion not taken and the question would be as to the public use issue in the taking of excess on the other side of the freeway.)

(9) The suggestion was made that the resolution should be permitted to be based on the test for acquiring the entire parcel by purchase or the likelihood of the property owner making claims for excess severance damages. Such resolution should not be brought to the attention of the jury.

(10) The need for a provision authorizing the disposal of the part not needed for the public use should be considered in preparing the next draft.

STUDY 36.40 - CONDEMNATION (PROTECTIVE ACQUISITIONS)

The Commission considered Memorandum 69-56 and the attached draft statute (yellow pages).

The following suggestions were made for consideration in preparing a revised statute for consideration at a future meeting.

The question was raised whether there is a need to provide in the statute a procedure for sale of the interest in the land not needed.

The broad power to acquire property to maintain, improve, protect, or limit the future use of or otherwise conserve open space, and to acquire the fee and convey or lease the property subject to such limitations as will preserve the open space, was noted.

After considerable discussion, it was concluded that the taking of property for protective purposes should be declared to be a public use.

If there is to be any limitation on the right to acquire property for protective acquisitions, it should be in the form of a general statute that limits the right to dispose of property acquired by eminent domain unless the former owner is given the right of first refusal or some other priority in obtaining the interest that is to be sold, leased, or otherwise disposed of. The staff should attempt to draft such a statute. It was recognized that drafting such a statute involves many problems. For example, what if several parcels are combined in the parcel offered for sale or lease. It may be that it is not possible to draft a comprehensive statute of this type. The Urban Renewal Law should be checked in drafting a statute on this problem.

STUDY 36.60 - CONDEMNATION LAW AND PROCEDURE (MOVING EXPENSES)

The Commission considered Memorandum 69-67 and the tentative recommendation attached to Memorandum 69-55.

Section 1270.01(a) was revised to read:

> "Acquirer" means a person who acquires real property for public use and exercises or could have exercised the right of eminent domain to acquire such property.

The Commission then determined that consideration of the tentative recommendation should be deferred until a later date in view of the possibility that similar legislation on this subject may be enacted and in view of the time it would take to review the statute in detail.

STUDY 50 - LEASES (SENATE BILL 101)

The Commission considered the Second Supplement to Memorandum 69-59. The Executive Secretary reported that the Assembly Judiciary Committee approved Senate Bill 101 subject to the requirement that a provision be added to the bill that the lessee be given notice of the terms and conditions of any new lease of the property in any case where he has made a payment that he may be entitled to recover.

The Commission approved the following amendments to Senate Bill 101 as amended in Senate March 3, 1969. The draft of the Report prepared for the Assembly Committee on Judiciary (set out following the amendments) was also approved.

AMENDMENTS TO SB 101 AS AMENDED IN SENATE MARCH 3, 1969

AMENDMENT 1

In the line of the title of the printed bill as amended in Senate March 3, 1969, after "1951.6," insert:

1951.7,

AMENDMENT 2

On page 3, between lines 40 and 41, insert:

Sec. 5.5. Section 1951.7 is added to the Civil Code, to read:

1951.7. (a) As used in this section, "advance payment" means moneys paid to the lessor of real property as prepayment of rent, or as a deposit to secure faithful performance of the terms of the lease, or any other payment which is the substantial equivalent of either of these.

(b) If the lessee has made an advance payment and the lease is terminated pursuant to Section 1951.2, the lessor shall send a written notice to the lessee if he relets the property. The notice shall be sent by first class mail to the last known address of the lessee not later than 30 days after the new lessee takes possession of the property.

(c) The notice shall state:

(1) That the property has been relet;

(2) The name and address of the new lessee; and

(3) The terms and conditions of the reletting.

(d) Where the property is relet under a written lease, the lessor may comply with paragraph (3) of subdivision (c):

(1) By attaching a copy of the lease to the notice;

(2) If the lease has been recorded, by stating in the notice the date and place of recording, including the volume and page or other identification of the record; or

(3) By stating in the notice that the lessee or his representative may examine and make copies of the lease at such reasonable times and places as are specified in the notice.

AMENDMENT 3

On page 4, line 23, after "Where" insert:

a lease or

REPORT OF ASSEMBLY COMMITTEE ON JUDICIARY ON

SENATE BILL 101

In order to indicate more fully its intent with respect to Senate Bill 101, the Assembly Committee on Judiciary makes the following report.

Senate Bill 101 was introduced to effectuate the Recommendation of the California Law Revision Commission Relating to Real Property Leases (October 1968). Except for the new Comment set out below, the Comments contained under the various sections of Senate Bill 101, as set out in the Commission's recommendation, as revised by the Report of Senate Committee on Judiciary on Senate Bill 101 as printed in the Senate Journal for March 3, 1969, reflect the intent of the Assembly Committee on Judiciary in approving the various provisions of Senate Bill 101.

The following new Comment to Section 1951.7 also reflects the intent of the Assembly Committee on Judiciary in approving Senate Bill 101.

Section 1951.7 (new)

Comment. Section 1951.7 does not in any way affect the right of the lessor to recover damages nor the right of a lessee to recover prepaid rent, a security deposit, or other payment. The section is included merely to provide a means whereby the lessee may obtain the information concerning the reletting of the property when his lease has been terminated under Section 1951.2.

STUDY 52 - SOVEREIGN IMMUNITY (CLAIMS STATUTE)

Senate Bill 100

The Commission considered the First Supplement to Memorandum 69-59. The Commission determined that Senate Bill 100 should be amended as set out on the following pages and that, if the bill fails to pass the Legislature as so amended, the Commission will give further study to the claims statute with a view to submitting a new recommendation to the 1970 Legislature. The Commission also approved the draft of the Committee report which follows the approved amendments.

AMENDMENTS TO SENATE BILL 100

AMENDMENT 1

In the second line of the title of the printed bill as amended in Assembly April 22, 1969, after "910.8" insert:

911.4,

AMENDMENT 2

On page 2, after line 27, insert:

Sec. 2.5. Section 911.4 of the Government Code is amended to read:

911.4. (a) When a claim that is required by Section 911.2 to be presented not later than the 100th day after the accrual of the cause of action is not presented within such time, a written application may be made to the public entity for leave to present such claim.

(b) The application shall be presented to the public entity as provided in Article 2 (commencing with Section 915) of this chapter within a reasonable time not to exceed one year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim. The proposed claim shall be attached to the application.

(c) The application shall be accompanied by one or more affidavits or declarations under penalty of perjury stating in detail those facts upon which the application is based of which the affiant or declarant has personal knowledge.

AMENDMENT 3

On page 2, lines 38 and 39, strike out "or because of lack of knowledge of the requirement that a claim be presented"

AMENDMENT 4

On page 2, after line 41, insert:

(2) The person who sustained the alleged injury, damage or loss failed to present the claim within the time specified in Section 911.2 because he did not have actual knowledge within such time of the requirement that a claim be presented, the public entity had actual notice within such time of the incident giving rise to the alleged injury, damage or loss and that such incident caused injury, damage or loss and the public entity was not prejudiced by the failure to present the claim within such time; or

AMENDMENT 5

On page 3, line 1, strike out "(2)" and insert:

(3)

AMENDMENT 6

On page 3, line 4, strike out "(3)" and insert:

(4)

AMENDMENT 7

On page 3, line 9, strike out "(4)" and insert:

(5)

AMENDMENT 8

On page 5, lines 21 and 22, strike out "or because of lack of knowledge of the requirement that a claim be presented"

AMENDMENT 9

On page 5, after line 25, insert:

(2) The person who sustained the alleged injury, damage or loss failed to present the claim within the time specified in Section 911.2 because he did not have actual knowledge within such time of the requirement that a claim be presented and the public entity had actual notice within such time of the incident giving rise to the alleged injury, damage or loss and that such incident caused injury, damage or loss unless the public entity establishes that it would be prejudiced if the court relieves the petitioner from the provisions of Section 945.4; or

AMENDMENT 10

On page 5, line 26, strike out "(2)" and insert:

(3)

AMENDMENT 11

On page 5, line 29, strike out "(3)" and insert:

(4)

AMENDMENT 12

On page 5, line 34, strike out "(4)" and insert:

(5)

REPORT OF ASSEMBLY COMMITTEE ON JUDICIARY ON SENATE BILL 100

In order to indicate more fully its intent with respect to Senate Bill 100, the Assembly Committee on Judiciary makes the following report.

The Comments contained under the various sections of Senate Bill 100 as set out in the Recommendation of the California Law Revision Commission Relating to Sovereign Immunity: Number 9--Statute of Limitations in Actions Against Public Entities and Public Employees (September 1968), printed in the Annual Report of the Law Revision Commission (December 1968) at page 49 reflect the intent of the Assembly Committee on Judiciary in approving the various provisions of Senate Bill 100.

The following new Comments to sections contained in Senate Bill 100 also reflect the intent of the Assembly Committee on Judiciary in approving Senate Bill 100.

Government Code Section 911.6 (amended)

Comment. Paragraph (2) has been added to subdivision (b) of Section 911.6 and paragraph (2) has been added to subdivision (c) of Section 946.6 to require the board to accept a late claim under the circumstances therein specified. In addition to the requirements stated in the new paragraphs, the application for leave to present a late claim must be made "within a reasonable time not to exceed one year after the accrual of the cause of action." See Section 911.4. See also Martin v. City of Madera, 265 Adv. Cal. App. 84, 70 Cal. Rptr. 908 (1968)(application to present late claim not made within "reasonable time").

Whether a public entity has "actual notice" of the accident and injury is determined under the ordinary agency rules of imputed knowledge that would be applicable to a private person. This is the same test as is used in Section 835.2 ("actual notice" of dangerous condition of property).

Government Code Section 946.6 (amended)

Comment. See the Comment to Section 911.6.

STUDY 52.30 - SOVEREIGN IMMUNITY: NO. 11--IMMUNITY FOR PLAN OR DESIGN OF PUBLIC IMPROVEMENT

The Commission considered the staff's draft of a tentative recommendation (revised May 2, 1969) on this subject. In particular, the Commission discussed whether the proposed limitation (a new subdivision (b) to Government Code Section 830.6) to be imposed upon the existing plan or design immunity should involve (1) fact finding by the court alone, (2) fact finding by the jury, or (3) a preliminary determination by the court of the sufficiency of the evidence to submit the question to the jury. The Commission noted that the existing immunity (Government Code Section 830.6) is an affirmative defense and that the relevant facts are found, and the necessary determination made, by "the trial or appellate court." Logically, therefore, the facts necessary to make applicable the proposed exception ((1) prior injuries which demonstrate the existence of a dangerous condition, and (2) knowledge of these injuries on the part of the entity) would also be determined by the court. However, these additional facts might also be substantial parts of the plaintiff's "plan or design" case, and therefore their preliminary determination by the court (for the purpose of the plan or design immunity) might involve a duplication of fact-finding effort.

After discussion, the Commission concluded to revise proposed Government Code Section 830.6(b) to make it clear that the court finds all facts necessary to permit it to determine whether (1) the immunity or (2) the newly created exception to that immunity applies in the case. But even if the court determines that the exception, rather than the immunity, applies, it would still be necessary for the plaintiff to persuade the fact-finder of the existence of all requisites to liability, including the existence of

a dangerous condition (Government Code Section 835), notice on the part of the entity (Government Code Section 835.2), and the absence of reasonableness (Government Code Section 835.4). As thus revised, Section 830.6(b) is to read:

> (b) Nothing in subdivision (a) exonerates a public entity or public employee from liability for an injury caused by the plan or design of a construction of, or an improvement to, public property if the trial court determines that:
>
> (1) The plan or design actually created a dangerous condition at the time of the injury;
>
> (2) Prior to such injury and subsequent to the approval of the plan or design, or the standards therefor, other injuries had occurred which demonstrated that the plan or design resulted in the existence of a dangerous condition; and
>
> (3) The public entity or the public employee had knowledge that such injuries had occurred.

The Comment to the section is to be revised accordingly. The attention of persons to whom the tentative recommendation is distributed is to be invited to this problem of court or jury determination of the facts necessary to support the exception to immunity, and their suggested solutions are to be requested.

The proposed new Section 6254.5 of the Government Code (the California Public Records Act) was revised to read:

> 6254.5. Notwithstanding Section 6254, any person who suffers an injury while using public property is entitled to inspect public records to obtain information needed for the purposes of subdivision (b) of Section 830.6.

Various editorial changes were made in the preliminary part of the recommendation.

STUDY 52.60 - SOVEREIGN IMMUNITY (INJURIOUS AGRICULTURAL CHEMICALS)

The Commission considered Memorandum 69-64 and the attached tentative recommendation and research study.

After an extended discussion, the Commission determined that this subject should be placed on the Agenda for the June 6-7 meeting.

It was agreed that a provision should be added to the draft statute to make clear nothing in the statute qualifies, limits, or affects any liability that may be imposed under any other statute. Concern was expressed that enactment of the draft statute might give the impression that other mandatory provisions elsewhere in the codes are not applicable to public entities. The recommendation should state that it is merely to make clear what is otherwise believed to be the law.

Considerable concern was expressed that public entities will be made exempt from the requirements established by regulation in order that they will not be liable for damage resulting from their failure to comply with regulations. This concern was the primary reason why the tentative recommendation was not approved for distribution; instead, the Commission determined that it would take another look at the tentative recommendation (or a revised tentative recommendation) at the June 6-7 meeting.