

June 25, 1970

Time

July 10 - 10:00 a.m. - 4:00 p.m.
July 11 - 9:00 a.m. - 1:00 p.m.

Place

Bahia Motor Hotel
998 West Mission Bay Drive
San Diego 92109

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Diego

July 10-11, 1970

1. Minutes of June 5-6 meeting (sent 6/15/70)
2. Administrative Matters
3. 1970 Legislative Program
4. Study 71 - Joinder of Causes; Counterclaims and Cross-Complaints
Memorandum 70-65 (enclosed)
Tentative Recommendation (attached to Memorandum)
Research Study (sent for June meeting; another copy attached to Memorandum)
5. Study 71 - Joinder of Parties
Memorandum 70-71 (to be sent)
Memorandum 70-66 (enclosed)
First Supplement to Memorandum 70-66 (sent 6/18/70)
Second Supplement to Memorandum 70-66 (enclosed)
6. Study 36.20(2) - Condemnation (Tentative Statute)
Memorandum 70-67 (sent 6/18/70)
Tentative Statute (attached to Memorandum)
7. Study 36.42 - Condemnation (The Right to Take--Future Use)
Memorandum 70-73 (sent 6/18/70)
8. Study 36.40 - Condemnation (The Right to Take--Excess Condemnation)
Memorandum 70-68 (sent 6/15/70)
Tentative Recommendation (attached to Memorandum)
9. Study 36.24 - Condemnation (The Right to Take--"More Necessary" Public Use)
Memorandum 70-49 (sent 5/13/70)
Research Studies (attached to Memorandum)

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10. New Topic - General Corporation Law

Memorandum 70-70 (enclosed)

11. New Topic - The Collateral Source Rule

Memorandum 70-69 (sent 6/22/70)

12. Study 36.35 - Condemnation (Possession Prior to Final Judgment and Related Problems)

Memorandum 70-59 (to be sent)

Printed Tentative Recommendation and Study (sent 6/18/70)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JULY 10 AND 11, 1970

San Diego

A meeting of the California Law Revision Commission was held in San Diego on July 10 and 11, 1970.

Present: Thomas E. Stanton, Jr., Chairman
John D. Miller, Vice Chairman
G. Bruce Gourley
Noble K. Gregory
Joseph T. Sneed

Absent: Alfred H. Song, Member of the Senate
Carlos J. Moorhead, Member of the Assembly
Marc W. Sandstrom
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Jack I. Boston, Nathaniel Sterling, and E. Craig Smay, members of the Commission's staff, also were present.

The following observers were present:

William M. Bitting, Hill, Farrer & Burrill
Donald L. Clark, San Diego County Counsel
Paul F. Dauer, Dept. of Water Resources
Norval Fairman, State Dept. of Public Works
Gideon Kanner, Fadem & Kanner
John N. McLaurin, Hill, Farrer & Burrill
Robert Nibley, Hill, Farrer & Burrill (July 10 only)
Willard A. Shank, Attorney General's Office
Charles E. Spencer, State Dept. of Public Works
Gerald J. Thompson, Santa Clara County Counsel

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ADMINISTRATIVE MATTERS

Approval of Minutes of June 5 and 6, 1970, Meeting. The Minutes of the June 5 and 6, 1970, meeting were approved as submitted.

1970 Legislative Program. The Commission received the report of the Executive Secretary and discussed the progress of its 1970 legislative program. The only action taken was with respect to Senate Bill 92 (plan or design) and is set out in these Minutes under that study.

Schedule for Future Meetings. The Commission considered its autumn schedule and adopted the following modified schedule:

September 3	10:00 a.m. - 5:00 p.m.	State Bar Building
September 4	9:00 a.m. - 5:00 p.m.	601 McAllister St.
September 5	9:00 a.m. - 4:00 p.m.	San Francisco 94102
October 8	7:00 p.m. - 10:00 p.m.	School of Law
October 9	9:00 a.m. - 5:00 p.m.	Stanford University
November 6	10:00 a.m. - 5:00 p.m.	State Bar Building
November 7	9:00 a.m. - 4:00 p.m.	601 McAllister St.
		San Francisco 94102
December 3	7:00 p.m. - 10:00 p.m.	State Bar Building
December 4	9:00 a.m. - 5:00 p.m.	1230 West Third St.
December 5	9:00 a.m. - 4:00 p.m.	Los Angeles 90017

New Topic - General Corporation Law. The Commission considered Memorandum 70-70 and directed the staff to advise the State Bar Committee on Corporations that obviously the revision of the general corporation law would be a major undertaking and that the Commission would accordingly appreciate the Committee's views as to the principal areas of immediate concern.

New Topic - The Collateral Source Rule. The Commission considered Memorandum 70-69 and determined that it should not request the authority at this time to study the issues raised by the collateral source rule.

STUDY 36.20(2) - CONDEMNATION (THE RIGHT TO TAKE--TENTATIVE STATUTE)

The Commission considered Memorandum 70-67 and the attached tentative statute. The Commission took the following action with respect to the following provisions of the tentative statute (additional sections were considered in connection with separate memoranda, and the actions taken with respect to these sections are set out in these Minutes under the particular topic):

(1) Section 300. The second sentence of the third paragraph (starting on line 5, page 2) of the Comment was revised to read: "Nevertheless, the Legislature's declaration that the particular use is a public use will be accepted as controlling unless clearly erroneous and without reasonable foundation." The staff was further directed to supplement this Comment with material indicating the general trend in this century towards broadening the concept of public use.

(2) Section 410. The Comment should be revised to refer to compensation by an interest in real property.

(3) Section 412. Paragraph (2) of subdivision (a) was revised to provide:

(2) The property to be exchanged is to be exchanged for property needed for a proposed public improvement and is in the vicinity of such improvement; and

The staff was directed to prepare a memorandum providing a reexamination of the area of substitute condemnation and suggesting possible substantive and procedural limitations upon such authority. Included should be consideration of (a) stronger limitations on the right to condemn where B does not have

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the power to condemn (e.g., require a showing of extreme hardship); (b) a procedure whereby B can be joined at the court's discretion in the action against C; (c) an owner's right to attorney's fees where the right to take is defeated; and (d) an expeditious procedure to raise and resolve all right to take problems.

(4) Section 415. The word "existing" was deleted from the phrase "existing public road" in subdivision (a). The Comment was revised to make clear that the access road need not be open to the general public. The third sentence in this Comment should be revised as follows: "Under former law, the right to exercise the power of eminent domain for such purpose probably would have been implied from the right to take property for the public improvement itself."

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STUDY 36.24 - CONDEMNATION (THE RIGHT TO TAKE--"MORE
NECESSARY" PUBLIC USE)

The Commission considered Memorandum 70-49, the attached background materials, and proposed Sections 450 through 455 of the Comprehensive Statute relating to "more necessary" public use (Exhibit II to Memorandum 70-49).

The following action was taken:

(1) Section 450. Approved as drafted. The staff was directed to revise the Comment to indicate more fully under what circumstances property shall be deemed already appropriated to public use. It should include reference to Section 300, examples of appropriation by a private owner to public use, and previous authority.

(2) Section 451. Approved as drafted. In connection with the Comment to this section, the staff was directed to add a new section or an appropriate reference dealing with the proper procedure for raising the issue of "more necessary" public use.

(3) Section 452. Subdivision (a) was revised to read:

(a) Where property has been appropriated to a public use by any person other than a public entity, the use thereof by a public entity for the same use or any other public use is a more necessary use than the use to which such property has already been appropriated.

The remainder of the section was approved as drafted. The Comment was revised to correct the reference to condemnation of privately owned golf courses to secure public ownership.

(4) Section 453. Subdivision (a) was revised to read:

(a) Where property has been appropriated to a public use by any person other than the state, the use thereof by the state for

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the same use or any other public use is a more necessary use than the use to which such property has already been appropriated.

The remainder of the section was approved as drafted.

The staff was directed, however, to prepare a memorandum when time permits dealing with those specific exemptions under existing law which should be reviewed to determine whether they appear sound in light of present conditions, e.g., the cemetery exemption of Health and Safety Code Section 8560 (see Eden Memorial Park).

(5) Section 454. The staff was directed to restudy the problem of consistent uses and redraft Section 454. It should be made clear that Section 454 provides a grant of authority to condemn for consistent uses. The term "consistent" should either be defined or substitute language used that clearly expresses the concept of compatible use, without undue or unreasonable interference with existing uses. The section should clearly prohibit displacement of existing uses; displacement should only be permitted subject to the general rules on more necessary use. The staff should consider (1) making the section applicable only to public entities, (2) simply codifying existing law, and (3) the need for and the effect of any action on privately owned public utilities.

(6) Section 455. The staff was directed to reexamine this section to determine whether it properly codifies existing law.

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STUDY 36.40 - CONDEMNATION (THE RIGHT TO TAKE--EXCESS CONDEMNATION)

The Commission considered Memorandum 70-68, the attached materials, and the tentative recommendation relating to excess condemnation. The recommendation was approved for distribution for comment with the following modifications:

(1) Section 421. The last sentence of subdivision (b) was moved to the end of subdivision (d). The last sentence of subdivision (e) was deleted, and the term "economically feasible" was changed to "economically sound." The staff was directed to make conforming changes in the Comment to Section 421.

(2) Section 422. The introductory clause was deleted. A second sentence was added to provide in substance:

Nothing in this section relieves a public entity from complying with any applicable statutory procedures governing the disposition of property.

The staff was directed to consider presenting the possibility of compelling acquisition of remnants in connection with the owner's rights and noncompensation remedies generally.

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STUDY 36.42 - CONDEMNATION (THE RIGHT TO TAKE--FUTURE USE)

The Commission considered Memorandum 70-73 and discussed at length the problem of takings for a future use. The staff was directed to prepare for a future meeting a memorandum dealing with future use which provides additional background materials as well as a statutory provision incorporating the following features:

(1) The basic substantive test should remain that property may be taken for future use only if there is a reasonable probability that it will be used for the public use for which it is taken within a reasonable time.

(2) The term "used" should be defined to require that construction on such property actually be commenced or that the property be put to the use for which taken (for example, in situations where no construction is contemplated--scenic easements, preservation of historical monuments, wilderness areas--actual use would seem to merely require formal dedication).

(3) The issue of future use--i.e., the defense that the taking in question is not for a public use because the substantive requirements of a taking for a future use have not been met--must be raised in the property owner's answer or be deemed waived.

(4) Takings for use within a relatively short period (e.g., three years) should not be considered future takings at all. Where the resolution authorizing the taking declares that the property will be used for the purpose for which it is taken within three years, such declaration should be given conclusive effect as to the probability of use within such period (subject, perhaps, to an exception for fraudulently making such statement).

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(5) Seven years should be declared to be a reasonable time in all situations. Thus, a showing that there is a reasonable probability that the property will be used for a particular public use within seven years satisfies Section 400 (authorization to acquire property for public use). The property owner should bear the burden of either producing sufficient evidence to justify a finding or proving by a preponderance of the evidence that there is no reasonable probability of use within seven years. However, declarations in the resolution of the condemning body relating to this issue should have no bearing on the matter.

(6) Where property is not to be used within seven years, the condemnor should bear the burden of justifying the reasonableness of the longer time period as well as the burden of showing that there is a reasonable probability of use within such period.

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STUDY 52.30 - SOVEREIGN IMMUNITY (PLAN OR DESIGN--S.B. 92)

The Commission considered the report of the Executive Secretary concerning the progress of Senate Bill 92 and reviewed the language of a draft prepared by its Executive Secretary together with Assemblymen Waxman and Z'berg and the representative of the State Bar. The draft reads as follows:

(b) Nothing in subdivision (a) exonerates a public entity from liability for an injury caused by a dangerous condition of public property if the condition arose subsequent to the construction of, or an improvement to, the property, the entity knew or should have known of the condition and had a reasonable time to protect against the dangerous condition and the action of the public entity to protect against the risk of injury created by the condition, or its failure to take action to protect against such risk, was unreasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of the potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

The Commission authorized the Executive Secretary to convey its approval of the draft. In addition, the Commission determined that, as a matter of good public policy, no exception for streets and highways should be provided.

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STUDY 71 - JOINDER OF CAUSES; COUNTERCLAIMS AND CROSS-COMPLAINTS

The Commission considered Memorandum 70-65 and the tentative recommendation (dated 6/23/70) and research study attached thereto. The Commission carefully reviewed the Proposed Legislation and took the following action with respect to these sections (the staff was directed to make conforming changes as required in the preliminary portion of the recommendation and the Comments to the proposed legislation):

Civil Code Section 1692, Code of Civil Procedure Sections 117h, 117r, 396.

Conforming amendments to these sections were approved as drafted.

Section 422. Repeal approved.

Sections 422.10, 422.20, 422.30, 422.40. Approved as drafted.

Sections 425, 426, 426a, 426c, 427. Repeal approved.

Section 425.10. The first sentence of subdivision (b) was revised to read:
"A demand for judgment for the relief to which the pleader claims he is entitled."

Section 425.20. This section was revised to read:

425.20. Causes of action, whether alleged in a complaint or cross-complaint, shall be separately stated.

The staff was directed to make conforming changes to the Comment and preliminary portion of the recommendation and to add a note specifically requesting comments on the issue of separately stating causes of action.

Section 426.10. The phrase "or series of transactions or occurrences" was added to subdivision (c).

Section 426.20. Approved as drafted. However, the staff was directed to add a section to this article which preserves or conforms to the existing law

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with regard to the effect upon an assignee of suit upon the assigned cause of action or a related cause of action by his assignor subsequent to the assignment. The staff was further directed to prepare a memorandum reviewing this problem and the effect upon compulsory cross-complaints of personal jurisdiction over either the assignor or assignee (Section 426.30) for consideration when this recommendation is next studied.

Sections 426.30 and 426.40. Approved as drafted.

Section 426.50. The staff was directed to draft a new subdivision (b) which provides in substance that, where a party fails to plead a cause of action that he is required to plead under Section 426.20 and a cross-complaint is filed against him, he can nevertheless file a cross-complaint without obtaining leave of court stating that cause of action that he failed to plead earlier.

Section 427.10. Subdivision (a) was revised to read:

427.10. (a) A plaintiff who in a complaint, alone or with coplaintiffs alleges a cause of action against one or more defendants may unite with such cause any other causes which he has either alone or with any coplaintiffs against any of such defendants.

Section 428.10. Approved as drafted. The Comment to Section 427.20 was revised to refer the reader to the compulsory cross-complaint provisions and to make clear that the phrase "same transaction or occurrence, or series of transactions or occurrences" has the same meaning here as in Section 426.10.

Section 428.20. Substance approved as drafted.

Section 428.30. Approved as drafted. The Comment was revised to note the compulsory joinder of causes requirement and to change the term "outsider" to "stranger."

Section 428.40. Section 428.40 was revised to read:

428.40. The cross-complaint shall be a separate document.

Section 428.50. Section 428.50 was revised to read:

428.50. A party shall obtain leave of court to file any cross-complaint except one filed before or at the same time as his answer to the complaint or cross-complaint. Such leave may be granted in the interest of justice at any time during the course of the action.

Sections 428.60, 428.70, 428.80, 429.10, 429.20, 429.30. Approved as drafted.

Sections 430, 431, 431.5. Repeal approved.

Section 430.10. Subdivision (f) was revised to read:

(f) Several causes of action have not been separately stated as required by Section 425.20.

Sections 430.20, 430.30, 430.40, 430.50, 430.60, 430.70, 430.80, 431.10, 431.20, 431.30, 431.40, 431.50, 431.60, 431.70. Approved as drafted.

Sections 432, 433, 434. Repeal approved.

Section 435. Approved as drafted.

Sections 437, 437a, 437b. Repeal approved.

Section 437c. Approved as drafted.

Sections 437d, 438, 439, 440, 441, 442, 443, 444, 462, 463. Repeal approved. The staff was directed to review the first proviso of Section 438 to determine whether it should be retained in Section 428.10 or elsewhere.

Sections 471.5, 581, 626, 631.8, 666. Approved as drafted.

Section 871.2. Add section to proposed legislation revised as follows:

871.2. As used in this chapter, "person" includes an unincorporated association.

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Sections 871.3, 871.5. Approved as drafted.

Section 1048.5. The word "solely" in the second line of the section was deleted, and the staff was directed to review this matter with Professor Friedenthal to determine the effect of the change.

Commercial Code Section 1201. No adjustment desired.

Government Code Section 995. No adjustment desired.

Revenue and Taxation Code Section 3522. Approved as drafted. The Comment to this section was revised to include a reference to the operative date of the recommendation.

Revenue and Taxation Code Section 3810. Approved as drafted.

Water Code Sections 26304, 26305, 37161, 37162, 51696. Approved as drafted.

Operative Date (Section 52). Approved as drafted.

STUDY 71 - JOINDER OF PARTIES

The Commission considered Memorandum 70-71 and Memorandum 70-66 and the First and Second Supplements thereto. The Commission approved the preliminary material (see Exhibit I attached to Memorandum 70-71) relating to joinder of parties for inclusion in the comprehensive tentative recommendation subject to revisions necessary to conform this material to changes made to the related statutory provisions. The Commission took the following action with respect to the draft statute proposed by the staff:

Section 378. Approved as drafted (Exhibit II, Memorandum 70-71).

Section 379. Approved as drafted (Exhibit II, Memorandum 70-71).

Sections 379a, 379b, 379c. Repealed as proposed.

Section 379.5. The first clause was revised to read:

When parties have been joined under Section 378 or Section 379,
the court may make

The remainder of the section was approved as drafted (Exhibit II, Memorandum 70-71). The Comment was revised to refer to the federal counterpart--Federal Rule 20(b).

Section 381. Repealed as proposed.

Section 382. Approved as drafted (Exhibit II, Memorandum 70-71). The Comment was revised by adding a note that the portion of Section 382 dealing with class actions was not reviewed by the Commission, that the Commission was not authorized to study the area of class actions, and that reenactment of this portion of the section neither indicated approval of this portion nor made any changes in this area.

Sections 383, 384. Repealed as proposed.

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Section 389. Approved as drafted (Exhibit III, Memorandum 70-66). The Comment was revised to provide examples of joinder causing the court to lose subject matter jurisdiction and to include the explanatory note prepared by the Advisory Committee for Federal Rule 19.

The Commission again considered Senate Bill 847 introduced by Senator Grunsky and determined that the policy reflected therein relating to joinder of defendants would more appropriately be considered in conjunction with revision of the Contribution Between Joint Tortfeasors Act. Accordingly, no further action was taken in this regard. The staff was directed to draft a letter to Senator Grunsky stating the action taken and the reasons therefore. This letter should be presented for Commission approval at the next meeting.

June 9, 1970

1970 LEGISLATIVE PROGRAM--LAW REVISION COMMISSION

Adopted or Enacted (8)

Bills (5)

- Ch. 41 (SB 266)(proof of foreign documents)
- Ch. 45 (AB 123)(rule against perpetuities)
- Ch. 69 (SB 129)(res ipsa loquitur)
- Ch. 89 (AB 171)(leases)
- Ch. 104 (AB 126)(public entity--statute of limitations)

Resolutions (3)

- Res. Ch. 45 (SCR 7)(inverse condemnation study)
- Res. Ch. 46 (SCR 8)(general authority to study topics)
- Res. Ch. 54 (SCR 6)(nonprofit corporation study)

Sent to Floor in Second House (4)

- AB 124 (quasi-community property)
- AB 125 (arbitration in eminent domain)
- SB 90 (representations as to credit)
- SB 98 (fictitious business names)(newspapers decided not to present their amendment)

Passed First House (1)

- SB 91 (entry for survey)(to be set for hearing)

Sent to Floor in First House (1)

- SB 94 (governmental liability)(approved by Senate Finance Committee after plan or design immunity section deleted)

In Fiscal Committee in First House (1)

- SB 92 (plan or design immunity)(to be set for hearing only if all objections can be eliminated to bill in its present form)

Defeated (1)

- SB 95 (general evidence bill)
This bill passed the Senate after two sections (psychotherapist-patient privilege) were deleted. The Assembly deleted two more sections (marital testimonial privilege), leaving only the res ipsa loquitur section which was approved in SB 129, making SB 95 unnecessary.