

(36)

8/26/60

Memorandum No. 74(1960)

Subject: Letters re Commission's Recommendations

Attached to this memorandum are the letters that have been received relating to the Commission's tentative condemnation proposals. This memorandum will be supplemented to forward any comments arriving after this memorandum is sent. The memoranda numbered 75(1960), 76(1960) and 77(1960) will analyze these comments as they relate to our specific recommendations.

You will note that the Bar Committee's comments relate principally to the evidence and moving costs studies. The chairman included some comment on the taking possession proposals, but the matter is to be considered by the full condemnation committee at the coming State Bar meeting. You will also note that the letter of the chairman of the State Bar Committee refers to comments made by Mr. George Hadley of the State Department of Public Works. These comments were not attached to this memorandum because they related to the first tentative statute contained in the study and not to the study itself or the statute presently being considered by the Commission. The views of the Department of Public Works are adequately expressed in the letters to the Commission from Mr. Robert E. Reed, Chief of the Division of Contracts and Rights of Way, which are attached to this memorandum.

Respectfully submitted,

Joseph B. Harvey  
Assistant Executive Secretary

TABLE OF CONTENTS

|   | <u>Page</u> |
|---|-------------|
| <b>COMMENTS FROM STATE BAR COMMITTEE</b>  |             |
| Letter from Leslie R. Tarr of August 4, 1960 .....  | 1           |
| Comments on Evidence Study by Richard L. Huxtable .....   | 4           |
| Comments on Evidence Study by Hodge L. Dolle .....  | 18          |
| <br><b>LETTERS FROM PUBLIC AGENCIES</b>   |             |
| <u>State of California</u>  |             |
| Attorney General, August 9, 1960 .....  | 22          |
| Department of Public Works (Evidence), July 25, 1960 .....  | 26          |
| Department of Public Works (Moving Costs), July 13, 1960 .....  | 37          |
| Revised Moving Costs Statute .....  | 48          |
| <br><u>Counties</u>   |             |
| County of Los Angeles, County Counsel, July 22, 1960 .....  | 52          |
| County of Marin, County Counsel, July 28, 1960 .....  | 67          |
| <br><u>Cities</u>   |             |
| Inglewood, City Attorney, July 13, 1960 .....   | 73          |
| Modesto, City Attorney, August 2, 1960 .....  | 75          |
| Mountain View, City Attorney, July 21, 1960 .....   | 77          |
| Newport Beach, City Attorney, August 17, 1960 .....   | 80          |
| Palm Springs, City Attorney, July 28, 1960 .....  | 82          |
| San Francisco, City Attorney, June 28, 1960 .....   | 84          |
| <br><b>LETTERS FROM INDIVIDUALS INTERESTED IN CONDEMNATION</b>  |             |
| <u>From persons representing condemners</u>   |             |
| Judge J. B. Lawrence (Evidence), July 29, 1960<br>[Formerly Deputy County Counsel, San Bernardino County] ..... | 86          |
| Judge J. B. Lawrence (Moving Costs), July 26, 1960 .....  | 88          |
| Robert P. McNamee, July 28, 1960<br>[Deputy County Counsel, Santa Clara County].....                            | 89          |
| <br><u>From persons representing condemnees</u>   |             |
| James E. Cox of Tinning & De Lap, July 29, 1960 .....   | 93          |
| Hodge L. Dolle of Hanson & Dolle, May 12, 1960 .....  | 98          |
| John F. Downey of Downey, Brand, Seymour & Rohwer, June 28, 1960 .  | 100         |
| Richard L. Huxtable of Holbrook, Tarr & O'Neill (Evidence)<br>May 10, 1960 .....                                | 102         |
| Richard L. Huxtable (Moving Costs), June 4, 1960 .....  | 108         |
| Richard L. Huxtable (Possession), July 29, 1960 .....   | 111         |
| Leslie R. Tarr of Holbrook, Tarr & O'Neill, July 14, 1960 .....   | 114         |

HOLBROOK, TARR & O'NEILL  
Suite 740 Rowan Building  
458 South Spring Street  
Los Angeles, California  
August 4, 1960

10 California Law Revision Commission  
School of Law  
Stanford, California.

Attention of John H. DeMouilly,  
Executive Secretary

Re: Views of the Committee on Condemnation  
Law and Procedure, State Bar of California.

20 Gentlemen:

We have just received a communication from the State Bar, requesting that the views of the Committee on Condemnation Law and Procedure be directed to the California Law Revision Commission, without a prior report to the Board of Governors of the State Bar.

30 The Committee met twice, both being lengthy meetings of the Southern Division. We plan to meet with the Northern Division at the meeting of the State Bar, but believe we should express our views at this time in order to assist in the preparation of legislation for the coming legislature. Due to the composition of the Committee, there has been wide disagreement on some of the matters presented for discussion. Members employed by public bodies tend to adhere to the status quo, while members who have represented property owners believe in a new approach to the problems presented.

40 We have been fortunate in having Bob Nibley and his assistant present at our meetings, with the result, no doubt, that he already has most of the ideas here expressed before him.

Our first approach was to the Evidentiary problems in Eminent Domain cases. Both Hodge Dolle and George Hadley prepared and presented their views in writing (copies of which are enclosed herewith). My associate, Richard L. Huxtable, who is currently engaged in doing the trial work in the firm's condemnation cases, likewise presented written comments, a copy of which is enclosed.

50 It has not been possible to secure a harmonious expression from the members of the Committee, but most of the members not employed by public bodies are in accord with the recommendations of the Law Revision Committee, with a few minor exceptions. One of them is that if the hearsay rule regarding sales price is made inapplicable, it should be clearly stated that such evidence (of price, other terms, and voluntary nature) is not to be treated

10 as collateral but should be subject to rebuttal. In the proposed section 1248.2 (b), we believe that the term should be "fair rental value" instead of "fair income", as this term has been generally used by appraisers, and better expresses the basis for capitalization. In section (2), we believe the words "but subject to impeachment" might well be added.

20 In the proposed Section 1248.3, we believe that (3) might well be omitted, for the reason that an owner may have formed his opinion of value upon offers for his property. His opinion should not be stricken, although such offers may not be introduced independently, even to support the testimony of either the owner or the expert witness.

30 Our next subject for discussion related to the proposed moving cost statute. We note that Richard L. Huxtable of our firm expressed his ideas in a letter of June 4, 1960. It has occurred to the writer that there is a basis for a claim of discrimination which might be said to favor those who had incurred indebtedness over those persons who have not, but have suffered loss, notwithstanding. The proposed statute contains an elaborate procedure for determination of moving costs, both for permanent and temporary takings. Frankly, the temporary takings in the State courts are infrequent and of minor nature, mostly for working strips adjacent to pipelines or polelines. During the recent war there were numerous temporary takes "for the duration only" for national defense, but the State courts were not involved. There is no doubt but what there are many persons who have been forced to remove their personal property in the event of condemnation of their land, but couldn't removal, like relocation, be included in section 6 of section 1248, and the entire subsection broadened to include the removing costs of property owners?

40 Both the study and recommendations relative to taking possession and passage of title in eminent domain proceedings arrived after our last meeting and will be the subject of our joint meetings with the northern division of the Committee. However, there has long been a need for a comprehensive study and revision of statutory procedure for the taking of possession and title to real property in eminent domain actions. This appears to be it and we feel that it meets the requirements in that it provides "due process" where none has existed in the past. There have been times when agents for public bodies actually threatened property owners with the taking of immediate possession, wherein the owner would be deprived of his property and have no funds either to move or to purchase other property. And it has been dynamite to business of industrial firms, forcing settlements to avoid business losses and financial failure.

10 The power to take immediate possession will not, under any condition, be extended to plaintiffs initiating procedure under Civil Code Section 1001. The right of immediate possession should be exercised only by public and quasi-public agencies and should not be a tool in the hands of individuals.

20 Aside from the suggestion in a prior letter that the last sentence of Section 1254 should be deleted, the procedural statute appears workable and should afford the needed relief. However, the suggestion that the Constitution should be amended to enable the legislature to extend the right to take immediate possession to all public bodies should be given further thought. It seems, just at first glance, that all public bodies should have the same right to take possession and that it should not be limited to rights of way and water reservoir purposes. ~~[On the other hand,~~ <sup>xxx</sup> to one that has had to try a condemnation case, with all improvements pertaining to the property destroyed, and the few photographs taken by the plaintiff before removing the improvements, presenting the property in the worst possible light, the suggestion that all condemnation cases be tried before a jury after the plaintiff has taken possession, destroyed the improvements, and altered the property, is not to be accepted without some further limitations on the right to take possession that are not now present.] We fear that if the right be made universal, all complaints will have a mimeographed order of possession attached thereto and served on all defendants as a matter of course, as appears from the State Highway Department's procedure. This aspect of the situation does not appear to have received that study and consideration which appears in the procedural study and recommendations.

30  
40 With respect to the incidental loss study, there appears no recommendations, as yet. Perhaps the full Committee will have an opportunity to discuss this study in the coming meeting.

Trusting we have made ourselves clear in this rather hurried effort to present our suggestions, in accordance with our instructions from the State Bar, we beg to remain,

Very truly yours,

S/ Leslie R. Tarr

50 Chairman, State Bar Committee  
on Condemnation Law and  
Procedure.

LRT:mf

EVIDENTIARY PROBLEMS IN EMINENT DOMAIN CASES

Comments by Richard L. Huxtable

10 Having quickly read the very scholarly review of the law  
and recommendations of the law firm of Hill, Farrer & Burrill,  
there is little that can be added to that work by way of necessary  
legal research. There are some omissions and some conclusions  
with which I would take issue, however.

20 Sales Price of the Identical Property.

Even prior to the Faus Rule, a sale of the identical  
property enjoyed a unique status. Under the dictum in Bagdasarian  
vs Gragnon, 31 Cal. 2d 744, 758, such a prior sale of the subject  
property, and even the price of such sale, was admissible on  
30 direct examination. The persuasive effect of such a transaction  
would necessarily be greater than a transaction involving  
property which was only comparable. U. S. Land in Dry Bed of  
Rosamund Lake, 143 Fed. Sup. 314 (U.S. Dist. Ct., Sou. Dist. of  
Calif., Judge Carter, 1956).

40 It is only logical that such a sale, being peculiarly  
significant can be both highly beneficial and highly prejudicial  
in arriving at market value. It is, therefore, necessary that  
the foundational showing requisite to the admission of the  
purchase price of a transaction, particularly those relating  
to the standards upon which the transaction itself is based,  
50 and the proximity in time to the date of valuation, be applied  
with equal or greater force to a transaction involving the  
subject property as to any other transaction.

Sale Made to One Having the Power of Eminent Domain.

10 The logic of the many cases holding that such transactions  
are not admissible in evidence, because of the necessities and  
compulsions involved, cannot be denied. However, under unique  
circumstances such transactions may be based upon careful  
appraisals of the property by both parties, resulting in a figure  
fixed by well-informed parties indicative of fair market value.  
Such a transaction, to be received in evidence, would require not  
20 only the foundation required of other transactions but in addition  
a showing that:

(1) The price fixed is unaffected by the necessities of  
the condemnor, or the prosecution, or defense of litigation to  
fix market value;

30 (2) The sum fixed is apportionable between the market  
value of the land taken and the damage to the remainder;

(3) That both parties were fully informed concerning the  
construction of the improvement in the manner proposed;

40 (4) That such factors as relocation costs, and other  
considerations not directly related to fair market value are not  
reflected in the price fixed between the parties; and

(5) That the parties to the transaction both regard that  
transaction to have been one which was fair, equitable, and a  
reasonable resolution of fair market value.

50 Obviously, such a foundation could be established only by  
the testimony of one or both of the parties to the transaction  
in question. Such testimony or procedure being lengthy, and

likely to invite prejudicial error, it should, if received at all, be heard first in Chambers or out of the presence of the jury. It may also be noted that such transactions might help avoid discriminatory practices on the part of the condemnor, although it would be an exceptionally rare circumstance where such would occur.

Rather than to wholly bar such transactions from evidence it would probably be wiser to impose upon their use a requirement of a foundational showing so strict as to insure the fairness of their use. Such a foundation, if strict enough, will certainly discourage abuse of the use of such transactions.

Offers to Purchase.

The arguments that offers to purchase land are too easily fabricated have some merit; however, all evidence is subject to fabrication. An owner who has received a bona fide offer for his property should not be compelled to forfeit the value secured by such an offer and subject the valuation of his property to even more speculative measures of value simply because it is feared that someone else might be dishonest. Similarly, the market value of Blackacre should not be measured by a sale of comparable Whiteacre where the new owner of Whiteacre has since received and declined offers substantially in excess of his earlier purchase price.

Such offers to purchase have been held by the Supreme Court to be admissible in evidence. Pao Ch'en Lee vs Gregoriou, 50 Cal. 2d 502.

Where an offer was made in writing in such form that its acceptance would have resulted in a binding contract to buy and to sell, the binding quality of which is contingent only upon events or determinations reasonably certain to occur in the immediate future, such offer being made by a financially responsible person, it should be admissible.

Offers to Sell.

An offer to sell is frequently confused with a listing. A listing, if accepted by a potential purchaser of the property does not result in a binding contract to buy or to sell the subject property, since such acceptance is itself an offer to buy. A listing is no more than an agreement by the property owner to pay a realtor's commission if a prospective purchaser can be found at the listing price. A listing, therefore, should not be received in evidence. An offer to sell, on the other hand, clearly indicates a top price at which such lands are available on the market. In dealing with "comparable transactions" the Court and jury are already dealing with variables frequently indicating top and bottom prices.

Sales Contracts.

Contracts for the sale of land may be of two basic types, those contemplating a present change in the use, occupancy, or title of the property involved, and those contemplating the occurrence of events long in the future. A contract which would not effect the use, occupancy or title of the property in question within a reasonable time before or after the date of valuation

should not be received in evidence since its effective date will be remote in time from the date of valuation.

Foundational Matters.

The safeguards prescribed by the Faus case may be of some assistance to a court in determining the admissibility of sales, offers, and similar evidence. However, the language there used, being extracted from treatise works is incomplete and to some degree unworkable. The foundational showing from the admissibility of such evidence should be more clearly defined, requiring the following elements:

(1) The effective date of the transaction must be sufficiently near in time;

(2) The price fixed must be one based upon the value of the property involved without particular effect of the economic or personal circumstances or necessities of the parties to the transaction;

(3) The land involved must be similar in character, situation, usability and improvement to the subject property;

(4) The parties to the transaction must have been reasonably informed concerning the character, situation, usability and improvement of the property;

(5) The purchase price must have been actually paid, reasonably secured, or otherwise reasonably sure of payment;

(6) The transaction must have been free of collateral inducements to the parties.

An apparent paradox has been introduced into the use of sales evidence by the present trend in discovery proceedings and the new status of sales evidence as independent evidence of value (if sales evidence now has such status). If sales are to be regarded as independent evidence of value and if half truths either on direct or rebuttal testimony are to be avoided, pre-trial procedure must be devised whereby such evidence is obtainable in discovery or by compulsory disclosure prior to the commencement of the case in chief by the party having the burden of proof. Such discovery has in the past been frustrated by contentions that such sales are not independent evidence of value but are only reasons of the appraiser, a portion of his report gathered at the request of the attorney solely for the purpose of preparation of trial and, therefore, privileged. If a party now contends that a given sale is comparable, as distinguished from the prior situation where it is only the appraiser who contends it is comparable, then such contention should no longer be privileged and it should be the subject matter of discovery or mutual disclosure. The date of valuation being the date of trial in many cases, and since appraisers are habituated in the submission of final reports shortly before trial, conventional discovery procedures might be unworkable. It would probably be more workable were the parties required prior to selecting the jury to present either testimony or written memoranda disclosing the location, legal description, date of transaction, parties, and price of each of their sales. Such procedure would:

(1) Enable the court to make a better informed ruling upon the admission of such sale since broader inquiry might be permitted

into its terms and conditions outside the presence of the jury:

(2) Hasten the presentation of such evidence to the jury and thus minimize expenses of trial;

(3) Insure both parties greater opportunity to investigate the other party's sales for purpose of rebuttal, thus insuring more accurate information in the first instance; and

(4) Minimize the possibility of prejudicial error or misconduct in the presentation of such evidence.

To effect such a procedure the only substantial alteration necessary in present procedures would be to delay assigning of a prospective jury panel to the trial department until such time as the panel is required by the clerk of the trial court. If the parties present their sales to the court, and to each other, by written memoranda, the parties and the court may well find themselves able to proceed upon a fully informed basis within a matter of minutes and the duration of the trial may have been lessened by one to twenty days, dependent upon the complexity of the sales evidence. Such procedure would also minimize the too frequent tendency of condemnation trial procedures to take on the proportions of a game of wits by which the attorneys and appraisers attempt, through a process of selective ignorance to justify in evidence transactions which should otherwise be barred, or to keep out transactions which should, were all of the facts shown, be admissible.

The Income and Reproduction Approaches.

Although sales evidence may, in many circumstances, be the most credible evidence of market value, great injustice can result

where too great an emphasis is placed on such evidence where unique or special purpose properties are involved, or where peculiar influences on the general market in the area have caused a scarcity of sales transactions or have caused the sales to be influenced by elements foreign to the principle of fair market value. Income and reproduction approaches should, therefore, be admissible on direct examination.

Conclusion.

In light of the above comments the "tentative evidence statute" stated at the end of the Hill, Farrer & Burrill discussion, as viewed by the undersigned, should be modified to read as follows:

TENTATIVE EVIDENCE STATUTE

1. Admissible Evidence Pertaining to Compensation.

Upon the trial, the following evidence shall be relevant, material and competent upon the issues of market value, damages and special benefits:

(a) Evidence of the price and other terms of any sale (.) evidence of the rent received, (whether fixed by gross receipts of a business, or otherwise,) and other terms upon any lease, (and evidence of any bona fide offer to buy or to sell,) relating to any of the property taken or to be taken or to any other comparable property in the vicinity thereof if:

(1) Such sale (,) lease (or offer) was made within a reasonable time before or after the date of valuation, (and effected or will effect use, possession or title of such property within a reasonable time before or after the date of valuation);

(2) It was freely made in good faith;

(3) (It was unaffected by the pendency of the action or by the actual or proposed construction of the public improvement;)

(4) (In the case of an offer, it is made and evidenced by a writing subscribed by the offeror, which is produced and offered into evidence, and is in such form that its acceptance would have resulted in a binding contract to buy or to sell, the binding quality of which is not contingent upon any event or determination other than one reasonably certain to occur in the immediate future.)

(b) Any other evidence which in the opinion of the court a reasonable well informed prospective purchaser or seller of real property would take into consideration, in deciding whether to purchase or sell the property and what price to pay including but not limited to, evidence of:

(1) The value of the property as indicated by capitalization of its fair income (value) attributable to the real estate as distinguished from any business conducted thereon,

(2) The value of the land, together with the cost of reproducing the functionally equivalent improvements thereon, less whatever depreciation such improvements may have suffered, functionally or otherwise, and provided such improvements are adapted to the land; (and)

(3) (View of the premises by judge and jury.)

(c) The evidence mentioned herein above in sub-paragraphs (a) and (b) shall be admissible on direct or cross-examination and

shall be treated as independent evidence of value. It shall not be barred by the rule against hearsay provided such evidence is (presented by testimony of) a witness qualified to express his opinion of value.

2. Inadmissible Evidence Pertaining to Compensation.

Notwithstanding the provisions of paragraph (1) no evidence shall be admitted on direct or cross-examination (relating to):

(a) The price and other terms upon the acquisition of any property if such acquisition was made by any person or body having the power of eminent domain (excepting where, after showing of the foundational elements required by paragraphs 4 and 5, the court shall be satisfied that such transactions are a reasonable index of market value);

(b) Any offer made between the parties to the action, or on their behalf, to buy or sell the property sought to be condemned or any part thereof;

(c) The price at which an offer or option to purchase or lease was made, or the price at which the property was optioned, offered or listed for sale or lease, (except those offers admissible under sub-paragraph (a) of paragraph (1) hereof,) ~~except to the extent that options, offers or listings to sell or lease the subject property shall constitute admissions against interest~~;

(d) The assessed valuation of the subject property or comparable property (or any other property).

3. (Effect of Consideration of Inadmissible Matters by An Expert.)

(It shall be permissible for an expert to consider both admissible and inadmissible matter in arriving at his opinion of

market value where the inadmissible matter constitutes solely a portion of his general knowledge concerning the property being valued, its vicinity and conditions prevailing in the general market.

4. Foundation Required for Showing on Consideration for Sales, Rentals and Offers.)

(Before the consideration paid or offered in any sale, rental transaction, or offer, may be received in evidence, in addition to those requirements stated in paragraph 1, subsection (a) above, it must also appear that:

((a) The price fixed in said transaction is one based upon the value of the property, estate or interest transferred, and without particular effect of the economic or personal circumstances or necessities of the parties to the transaction;)

((b) The property which is the subject of said sale, rental or offer is similar in character, situation, usability and improvement to the property being valued;)

((c) The parties to the transaction were reasonably informed concerning the character, situation, usability and improvement of the property;)

((d) The purchase price, rental, or price offered must have been actually paid, reasonably secured, or otherwise reasonably sure of payment;) and

((e) The transaction was free of collateral inducements to the parties.)

Testimony of a witness, otherwise qualified to express his opinion of value, that he has made inquiry into each of the foundational

elements heretofore stated by interview of one or both parties to the transaction, or of his agents or employees instrumental in said action, and that each and all of said foundational elements appear to be satisfied in said transaction, shall constitute prime facia showing with respect to each and all of said elements. A party desiring to contest or object to the admission of the consideration for said sale, rental, or offer, shall be entitled to immediate voir dire examination of the witness from whom such testimony is sought, with respect to each and all of the elements of said foundation.)

5. Foundation Required for Showing of Consideration for Purchases by an Agency having the Power of Eminent Domain.

(Before the consideration paid or offered in any purchase, rental, or acquisition of interest by an agency having the power of eminent domain, shall be received into evidence, in addition to those requirements stated in Paragraph 1, subsection (a) above, and stated in paragraph 4 above, it must also appear that:

((a) The price fixed was unaffected by the necessities of the condemnor, nor by the prosecution or defense of litigation to fix market value;)

((b) Where only a purchase of the property of the former owner was there being acquired, the sum fixed is apportionable between the value of the land taken and the foundation to the remainder, if any;)

((c) Both parties were fully informed concerning the construction of the public improvement in the manner there proposed;)

C ((d) Such factors as re-location cost and other consideration not directly related to fair market value are not reflected in the price fixed by the parties;) and

10 ((e) The parties to the transaction both regard that transaction to have been one that is fair, equitable, and a reasonable resolution of fair market value.

Testimony of a witness, otherwise qualified to express his opinion of value, that he has made inquiry into each of the foundational elements heretofore stated by interview of one or both parties to the transaction, or of his agents or employees instrumental in said action, and that each and all of said foundational elements appear to be satisfied in said transaction, shall constitute prime facia showing with respect to each and all of said elements. A party desiring to contest or object to the admission of the consideration for said purchase shall be entitled to immediate voir dire examination of the witness from whom such testimony is sought, with respect to each and all of the elements of said foundation.)

30 6. (Disclosure of Evidence Relating to Sales, Rentals and Offers).

40 (Where fair market value, damages, or special benefits, are to be determined by the verdict of a jury, the Court shall require, before the jury is impanelled, each of the parties to present by testimony, or by written memorandum, a copy of which is served upon the opposing party, the following information with respect to each sale, rental transaction, or offer contended by said party to be admissible:)

C ((a) Location;)

((b) Legal Description;)

C ((c) Effective date or the date of the recording of the instrument by which said transaction was effected.)

((d) Names of the parties to the transaction;)

10

((e) Price or consideration for said sale, rental or offer.)

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NOTE: Matter deleted from prior recommended statute indicated by cross-out line; Matter added indicated by parenthesis.

C<sub>30</sub>

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C

April 22, 1960

TO: Mr. Leslie R. Tarr, Chairman  
State Bar Committee on Condemnation  
Law and Procedure  
740 Rowan Building  
458 South Spring Street  
Los Angeles 13, California

FROM: Hodge L. Dolle

Re: Comments on study relating to evidenciary  
problems in eminent domain cases and on  
proposed Tentative Evidence Statute

As the purpose of the study (page 1, paragraph 1) is to determine whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens, it would seem to strongly indicate the desirability of interviewing private practitioners as to how the rights or private owners could be better safeguarded. Yet the only attorneys interviewed by the consultants were George Hadley, Baldo Kristovich and A. R. Early. While Mr. Hadley has had vast experience on the government side and is an authority by reason of such experience he has not represented property owners. Mr. Kristovich has had very limited trial experience in the condemnation field. Mr. Early's experience has been entirely on the government side and is not considered an authority on what should or should not be the procedure in condemnation proceedings. A recent example is the decision in Covina High School District v. Jobe, 174 A.C.A. 372 (1960).

Page 2. Some Superior Court judges refuse to give the U.S. v. Miller "full money equivalent" instruction.

Page 21. Footnote 61. Consequential damages are not necessarily those occasioned where no part of the property is taken. Where there is a partial taking appraisers recognize the damage caused by (1) severing and (2) consequential damage caused by construction.

Page 22. Doubt if words "market value" should be included in a statute. There are too many types of property which have no market such as schools, churches, athletic grounds, parks, parts of cemeteries, public utility type improvements.

Page 26. Item (2). Doubt if Faus decision has brought about extensive litigation. Know of no appellate case which went up on trial court's abuse of discretion in determining comparable sales.

Page 26. Item (3) uncertain as to what decisions cannot be justified. This statement is too broad and not specific enough to warrant legislation.

April 22, 1960

Page 29. Summation procedure probably can be defined better as "replacement" cost less depreciation instead of "reproduction" cost.

Page 34. No California decision labels comparable sales as "best evidence."

Note: Mr. Early has been trying to get the Superior Courts to give such instruction as well as his instruction that the sale must be for "cash" as indicated on page 34, lines 3 and 4. Such an approach is blind to the market place. Most sales are not made for cash nowadays.

Page 53. The Bagdasarian case is a fraud case and has not been recognized by the California Courts in condemnation cases. The Bagdasarian case is not authority on this point. The case of People v. Vinson (not mentioned in the study) is the case of first impression in California on this point and the leading case. In fact Justice Shinn was very critical of the Bagdasarian decision during the oral arguments in People v. Vinson.

Page 54. Footnote 107, paragraph (c). Interview with A. R. Early -- case was presented by Milnor Gleaves and Hodge L. Dolle and Mr. Early has been the voice in the wilderness. (See Early brief on Kita and read subsequent decisions approving Hoe rule.) An interview with A.R. Early would have little if any meaning as the case was tried by Milnor Gleaves and Hodge L. Dolle and has been followed and approved in subsequent decisions. The consultants' statement must have been based on Mr. Early's personal displeasure with the decision as illustrated in his comments in Respondent's Brief in Los Angeles City High School District v. Kita, where he gratuitously informed the District Court of Appeal that Milnor Gleaves inadequately represented the County of Los Angeles in the proceedings on appeal in County of Los Angeles v. Hoe. (See page 41 Respondent's Brief). I am reasonably certain that Judge Clarence L. Kincaid does not entertain this point of view as he consistently permits comparable sales to be introduced which took place a reasonable time after date of value.

Page 55. Paragraph 2. However, most courts will permit sales a reasonable period before and after value date. (Judge Kincaid in Murata; Judge Crum in Kita trials.)

Page 60. Messrs. Kristovich, Hadley and Early couldn't know reasons for condemnor's sales putting owners at disadvantage. There are additional reasons why acquisitions by agencies having power to condemn should not be used: (1) Superior means of obtaining data and persuading average owners of "scientific

10 appraisals" made by condemnor, (2) Where difference of value small prospective gain is too thin for owner to risk legal and appraisal costs, (3) Negotiations before sale take off the cream and those after suit filed (like in Murata) are claimed to be compulsion sales, whereas they may be the only ones where seller had advantage of appraiser and attorney, (4) Who is under compulsion as to plaintiff and who is not? In other words, who among the governing agents officers or employees would be able to officially label a certain acquisition compulsive and certain other acquisitions non-compulsive on the same project.

20 Page 61. Re the consultants' statements that some condemnees' attorneys have expressed the fact or fear that condemnor uses partial take settlements, credit an undue sum to the damage column and use the balance as reflecting the purchase price of the land, there is no support indicated for such statement since consultant has apparently not interviewed attorneys who consistently represent condemnees.

Page 62. The exception where only recent sales were to condemnor is what Faus case turned on as to appraisal data. This is so seldom true that the use is not justified. Expert opinion without sales is better.

Page 63. Footnote 130. Probate sales have been admitted in California. I think it is better they should not be admissible as estates generally need to raise money. Probate sharks are usual bidders at sales.

40 Page 68. Footnote 138. Interviews re offers inadequate as no condemnee's attorneys consulted. A. R. Early not consistent. In the first Kita trial the record discloses numerous instances where offers to sell were used; again Covina High School District v. Jobe the same tactics were employed.

Page 77. Bona fide offers to sell subject property (recent) should be admissible on cross-examination only.

Page 79. Options of no value should be rejected.

Page 80. Contracts of sale, if bona fide, are as good as sales and have as much probative value.

50 Page 84. Assessed value inquiry should be improper on cross-examination too in California.

Page 93-94. Sales prices even if hearsay source should go in if comparable.

10 Page 94. Comparable sales should not be considered independent evidence of value. The Nahabedian case is clear authority for this. If comparable sales were independent evidence of value the jury verdict could be below the lowest testimony or above the highest testimony. The jury and not the appraisers would be appraising the property and in such a situation expert appraisers would be completely done away with.

Comments on Tentative Evidence Statute

20 1. Strike words "and special benefits;"

1.(a)(1) Insert after was "an open market transaction and" made . . . ;

1.(b)(1) Insert after fair "rental value or fair" income . . .

1.(b)(2) Strike reproducing, insert replacing -- strike "functionally or otherwise," insert "from all sources or causes,"

30 1.(c) Strike "and shall be . . . of value."

40 cc: Russell B. Jarvis  
Reginald L. Knox, Jr.  
Thomas M. Mullen  
Robert Nibley  
Holloway Jones  
George C. Hadley

Stanley Mosk  
Attorney General

DEPARTMENT OF JUSTICE  
State Building  
Los Angeles 12

August 9, 1960

10

California Law Revision Commission  
School of Law  
Stanford, California

Attention: Mr. John H. DeMouilly  
Executive Secretary

20

Re: Recommendation and Proposed Legislation  
Relating to Moving Expenses

Dear Mr. DeMouilly:

30 Pursuant to the request contained in your letter dated May 2, 1960, we have reviewed the California Law Revision Commission's tentative recommendation and proposed legislation relating to reimbursement for moving expenses when property is acquired for public use. As you know, the office of the Attorney General handles condemnation cases for several state agencies, including Divisions of Beaches and Parks, Forestry and Small Craft Harbors of the Department of Natural Resources; Department of Water Resources; State Reclamation Board; Property Acquisition Division of the Department of Finance; and Department of Fish and Game. Condemnation cases for highway acquisitions are conducted by staff attorneys for the Division of Contracts and Rights of Way of the Department of Public Works; condemnation actions for acquisition of land for the University of California are handled by the office of the General Counsel of the Regents.

40

We refrain from commenting on the wisdom of the proposal to compensate condemnees for moving expenses. The expense of such compensation would be reflected in capital outlay of budgets of the various acquiring agencies. Their views in this regard will, no doubt, be made known to the Legislature at the appropriate time if legislation is introduced to implement the Law Revision Commission's tentative recommendation on this subject. In passing, however, we note that the California courts have universally held that neither owners nor tenants are entitled to the cost of removing or relocating their personal property, and in this regard California is in agreement with the majority of jurisdictions in this country. However, even though it appears to us that the wisdom of such legislation is a matter of legislative grace or policy, nevertheless, this office would be concerned with the method and procedure by which such moving expenses are determined.

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The suggested legislation provides for a judicial determination in the event of dispute between the condemnor and the condemnee as to the amount to be determined in accordance with the suggested statutory schedule. It is apparent that the suggested legislation could give rise to protracted

(W.S.Rountree)

litigation on this collateral issue with resultant increases in the costs of litigation to both the condemnor and the condemnee. In effect the statute puts the condemnor in the "moving business". Details of packing, routes of travel, storage of perishables, are just a few of the items that might have to be studied for cost analysis. It is also pointed out that under the proposed statute, a complex issue may arise as to whether a particular item constitutes personalty or a real property fixture.

One method of avoiding all of the collateral issues that could arise under the suggested legislation would be to make provision for the alternative of a lump sum amount or an amount graduated according to the award for the taking of real property.

SPECIFIC COMMENTS ON PROPOSED LEGISLATION.

With respect to the proposed statutory draft on moving costs as submitted by your Commission, we suggest the following:

1. A provision should be inserted to specify the date on which the law is to become effective and a declaration whether it affects then pending cases.

2. The word "state" should probably be deleted from Section 1270(3) because of the possibility that the use of the term might give rise to an argument that state property was subject to condemnation. It would appear that no substantial benefit would be lost to the state by such elimination, since there would be few cases where the state would incur moving costs.

3. Section 1270(5) defines "relocating" in such a broad manner that there would really be no limit on the liability of the public agency. Expenses in seeking a new location, renovating, and remodeling might well be included within this standard. Quite possibly, the condemning agency might well be required to expend funds under the definition of "relocating" considerably in excess of the entire market value of the property which is acquired.

4. In Section 1270.1, as we read it, the condemning agency might well have to compensate people whose interests are not being acquired. In the situation where the public agency acquires property which is leased or rented, it is often a policy of the condemnor to take subject to the lease or rent contract. The condemnor merely steps into the shoes of the original landlord whose interest is being acquired in the condemnation suit. Under the proposed statute the condemnor would be required to pay these lessees and tenants for their moving expenses, many of them speculative in nature, when the public project is to be commenced. The Commission's proposal represents a basic change in the law of landlord and tenant in a situation in which the public agency decides to take over as landlord for a period of time pending the actual completion of the project. Or, under the basic law of landlord and tenant, there is always a possibility that the lessor or landlord will give notice terminating the lease or tenancy, and in that situation the lessee or tenant would not have a right to be paid for his moving and relocating expenses by his landlord.

(W.S.Rountree)

This also presents administrative problems as well as budgetary problems. For example, if the state were to condemn an apartment house containing many units or a hotel, it would have to deal separately with each tenant and make arrangements which would vary considerably with each one of them. This would present a considerable administrative problem and would occasion substantial difficulties of a budgetary nature in determining the amount of an appropriation by the Legislature to satisfy the liability of the state to accomplish the acquisition.

We also call attention to a situation which would be inherent in many leases which exist today. A typical clause in effect assigns and transfers to the lessor any right to compensation or damages which the lessees might become entitled to by reason of the condemnation of the leased premises. If the courts would interpret this provision in the light of its express language, would the judgment hold that a lessor is entitled to receive the benefits which the Commission's proposed statute makes available to the lessee?

We also point out that Section 1270.1 does not limit the period of storage other than by the word "temporarily", which might well be construed by a court quite differently in individual cases. If the state were to condemn a residence it would seem that a period of weeks, or a couple of months, might well be the proper limit. However, in the case of the condemnation of commercial property or a manufacturing plant it might be proper to construe the "temporary" storage period to constitute a period of several months, or even years, until a new business location or plant had been obtained by the condemnee. Furthermore, the courts might construe the term "relocating" to require the condemning agency to completely remodel a building so that it could receive and use the personal property which was present in the site condemned.

5. Section 1270.4 provides for a separate action to determine the amount of moving costs. A more expeditious way of handling the matter would be to have this issue determined in the condemnation proceeding. The prayer of the condemnation complaint could request a determination of the amount of moving costs. A separate hearing could then be had before, in conjunction with, or after the main trial. The statute should specify whether the parties are entitled to a jury trial on the issue of moving costs. Still another method to handle the compensation which Section 1270.4 authorizes would be in the nature of a cost bill which could be filed in the Superior Court in conjunction with the condemnation action. This method would eliminate the necessity for a separate lawsuit.

A further objection to this section is the provision which would impose upon the acquirer the duty of commencing such a suit to determine moving expenses, with the penalty that if he does not do so the former landowner is entitled to attorneys' fees. It seems to us that the landowner who knows whether he has incurred expenses of this nature could properly set them forth himself on his own initiative a great deal easier than could the acquirer, for the latter would of necessity have to make an investigation to determine whether such expenses were incurred.

(W.S.Rountree)

10 There are conceivably many cases where a condemnor would acquire property where he would not contemplate any moving expenses at all and thereafter the landowner, under the proposed statute, would be authorized to bring a separate suit for some trivial piece of personal property and recover. In such a case the condemnor then would have to pay attorneys' fees which might well be in excess of the moving cost expenses.

ABANDONMENT.

20 The state's liability for moving costs, which often would be substantial, seriously affects the effective exercise of its right to abandon. For, it is feasible under the Commission's proposal that moving costs would not be determined until after the state's time within which to pay the amount of the award for the property, or abandon, had expired. Only after the determination of the issue of moving costs would the state be in a position to determine whether there was sufficient money for the acquisition and, if so, whether the expenditure thereof was wise. It would be embarrassing to pay the award and then have insufficient funds to pay the adjudicated moving costs. In such a situation the state might well have to abandon and still be unable to recover the award already paid to the property owner. Therefore, the sections of the Code of Civil Procedure relating to abandonment with particular reference to Section 1255a would have to be modified so as to extend the time to abandon in this type of situation. This also will tie into the right to abandon after possession is taken.

30 We trust that these comments will assist the Commission. Our comments on the Commission's Study of Evidence will follow in a few days.

Additional copies of this letter are enclosed for your convenience in making distribution thereof to members of The California Law Revision Commission.

40 Very truly yours,

STANLEY MOSK  
Attorney General

S/ WALTER S. ROUNTREE  
WALTER S. ROUNTREE  
Assistant Attorney General

WSR mh  
Encls. (12)

STATE OF CALIFORNIA  
DEPARTMENT OF PUBLIC WORKS

Division of Contracts and Rights of Way  
(Legal)

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July 25, 1960

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

20

Dear Mr. DeMouilly:

Re: Comments on tentative recommendations and proposed  
legislation relating to evidence in eminent domain cases

Reference is made to your letter of May 5, 1960 requesting our comments and suggestions on the tentative recommendations and proposed legislation of the California Law Revision Commission relating to evidence in eminent domain proceedings.

30

As you know, the Department of Public Works of the State of California is directly interested in, and vitally concerned with, the field of condemnation law. The present and future highway program will, beyond a doubt, require the acquisition of considerable property by negotiated purchase and eminent domain proceedings. In any eminent domain proceeding the length of the trial and the complexities of the issues are of major importance, not only to the condemnor, but to the defendant property owner. Thus, the time element must be a major factor in consideration of an evidence statute. Any procedure or evidentiary rule which would unduly lengthen the trial and increase the already heavy burden on our courts, with added expenses to the property owner and to the condemnor, should be viewed with caution.

40

As hereafter indicated, we believe that we are in complete accord with all of the objectives of the Commission in this phase of its eminent domain study. However, we feel that the evidentiary questions that may arise in a condemnation proceeding are too numerous and varied to lend themselves to codification in a statute so brief, and yet so general, as that proposed. Heretofore we have always considered the condemnation rules of evidence to have their principal origin in case law rather than statutory law. The proposed statute would seem to have the practical effect of doing away with all evidentiary case precedent. The statute itself, however, being quite broad and general, and in many of its parts indefinite, may, if adopted, give rise to many more cases interpreting it. Certainly any statute on evidence will present the trial and appellate courts with numerous problems of interpretation.

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It seems preferable to us not to disturb the existing evidentiary case law except to accomplish the objectives of the Commission by specific

statutory provisions -- for example, a statute to clarify the Faus case (County of Los Angeles v. Faus, 48 Cal. 2d 672), and a statute finally determining whether evidence of offers are properly received on direct or cross-examination. A brief look at the chapters on evidence in NICHOLS on EMINENT DOMAIN, ORGEL on VALUATION UNDER EMINENT DOMAIN, and KALTENBACH on JUST COMPENSATION demonstrates the extensive comments necessary to interpret and explain such brief statements as contained in the proposed statute.

At the present time the case law fairly well defines the evidence which is admissible, with a few exceptions. If it is determined that additional evidence should be made admissible or inadmissible, the specific type of evidence should be so designated. It is interesting to note that, to our knowledge, no other state has codified a subject so intricate as the evidentiary rules applicable to eminent domain proceedings. The ordinary rules of evidence are applicable in condemnation cases but the courts have worked out some special adaptations thereof. To codify these would require codification of the general rules as well. This probably could not be done except by a model evidence code.

The tentative evidence statute appears to exclude all evidence other than the expert valuation witness' opinion. The tentative statute in Section 1248.1 states that "only" the opinion of qualified witnesses may be used to prove value. While it is true that testimony of qualified appraisers usually consumes the major portion of the trial in eminent domain cases, additional evidence is presented through other witnesses on issues which, while special in a sense, are nevertheless germane to the issue of value. For instance, engineering testimony concerning the construction of the improvement in the manner proposed; hydraulic engineers as to drainage conditions; geologists as to subsurface conditions; experts as to adaptability of the property for certain uses; architects as to building construction and plans; planning directors as to zoning of property; and other miscellaneous witnesses. In addition, there is the evidence presented to the jury by the view it takes of the property, which is certainly evidence of value, but nowhere mentioned in the proposed statute.

The above mentioned problems are only a few of the ones which we are fearful will arise from an attempt to draft an all-encompassing evidence statute. This inevitably leads to a recommendation that specific statutes be proposed covering only those items of evidence in condemnation cases which require clarification or revision, such as those specified.

For convenience our detailed comments will be first directed to the conclusions contained in the tentative recommendations of the California Law Revision Commission and then to the specific sections and subsections in the proposed statute.

#### COMMENTS ON COMMISSION'S RECOMMENDATIONS

1. Evidence of value in eminent domain cases should continue to be limited to the opinions of the owner and qualified expert.

As we have analyzed the consultant's report and the tentative recommendations of the Commission, including the proposed statute on the subject of

evidence, it seemed to us that the Commission intended to make it clear that the only direct evidence of value in eminent domain cases should be opinion evidence of qualified witnesses. There was certain language in the Faus case that intimated that possibly direct evidence of the terms of purchase and sale of other property might be introduced and considered by the jury directly without the interpretation of such a sale by any qualified expert.

10 The general conclusions as stated by the Commission are in accord with Code of Civil Procedure Section 1845.5 and our views. However, as mentioned above, there is additional evidence in a condemnation case which should not be inadvertently excluded or eliminated by a broad statute on eminent domain evidence. We are very fearful that this result would follow from the proposed statute.

2. An expert should be permitted to give the reasons for his opinion on direct examination.

20 We agree with the Commission as to the general statement of this rule. In fact, the rule is codified in Code of Civil Procedure Section 1872, which permits an expert on direct examination to "state the reasons for such an opinion". The statute has been interpreted to not allow a witness to use as reasons matters which would be otherwise inadmissible. (See People v. LaMacchia, 41 Cal.2d 938.) This rule of evidence should not be so broadly construed as to open "Pandora's Box" by letting into evidence inadmissible items and noncompensable damages under the guise of reasons.

30 As pointed out in our comments on Section 1248.2(1)(a), we disagree with the statement in the Commission's recommendation that some practitioners report that the trial of eminent domain cases has been simplified and shortened by the Faus case. [On the contrary, our experience has indicated that condemnation trials have definitely been lengthened, sometimes as much as several days, because of some of the statements contained in that opinion.] However, this result has not ensued from the single point in that case that sales prices are admissible on direct examination. Rather, the delay has resulted from the language indicating that sales may be considered direct evidence of value, that acquisitions of the condemnor may be admitted if the court finds that they can be considered to represent market value, etc.

40 3. An expert should be permitted to state the facts and data upon which he relied in forming his opinion whether or not he has personal knowledge of such matters.

50 We agree with the generalization of the Commission on this point and the principle that an expert can consider reasonably reliable hearsay in forming his opinion. These rules are presently based upon case law, and the case law has provided sufficient safeguards concerning their admissibility. We are fearful, however, that the proposed statute might be used as a vehicle to bring in inadmissible matters. While an expert witness can consider information that he has gathered and base his opinion upon the facts included in such information, he cannot bring in conversation or

secondary evidence as such. An example of hearsay now properly excluded but which might come in under the statute are inflammatory or biased comments contained in statements upon which an expert has relied. An appraisal expert ordinarily talks to one of the parties to a comparable sale and finds out that the sale actually took place and the price thereof. He should be able to rely upon such a conversation to support an assumption that the sale did occur at the price stated. He should not, however, be permitted to testify as to the entire conversation with such person, including inflammatory remarks or opinions of that person. Such conversations should not be permitted because the person with whom he talked is not before the court and cannot be cross-examined. In other words, the door should not be opened to the verbatim repetition of alleged statements by persons not present in court and not subject to cross-examination.

It should be noted by the Commission that these matters are not technically hearsay since they are only used to support the expert witness' opinion and are not introduced to prove the truth of the matter asserted. The same reasoning applies to matters falling within the Best Evidence Rule.

As we understand it, the Commission has no quarrel with the case law on this particular subject. Our approach is not to take the risk of up-setting the rules by the enactment of a statute.

4. In formulating and stating his opinion as to the value of the property an expert should be permitted to rely on and testify concerning any matter that a reasonable, well-informed man would take into consideration in determining the price at which to buy or sell the property.

Although we are in accord with the objectives later stated by the Commission, the conclusion quoted is objectionable for many basic reasons. First, it is an omnibus statement which would open the door to many types of evidence heretofore deemed collateral under existing evidentiary rules. Second, it would be a vehicle for putting before the trier of the fact, evidence of noncompensable items of damage. Third, this recommendation of the Commission may well lead to all sorts of evidence relating to personal desires rather than market value. Fourth, it would in effect change the present and well accepted definition of market value.

In this recommendation the Commission makes it clear that the main purpose to be accomplished is to permit a qualified expert on direct examination to testify as to the three basic approaches to the determination of market value. However, to permit an expert to testify "concerning any matter that a reasonable, well-informed man" would take into consideration in determining the price at which he would buy the property departs entirely from the conception of market value because the reasonable, well-informed man might have a specific use in mind in connection with adjoining property which he might own, or other personal reasons. Many types of evidence heretofore deemed collateral under existing evidentiary rules would be made admissible by this language. It could be used as a means to put before the court or jury evidence of noncompensable items of damage, or to personal desires or ideas not connected with the issue of market value. More detailed comments concerning this recommendation are contained in our remarks concerning proposed Code of Civil Procedure Section 1248.2(1).

5. Certain factors that are of doubtful validity in their bearing on value should be specifically excluded from consideration in determining value.

10 (a) Sales to a condemnor. We agree with the recommendation of the Commission that the rule laid down by the Faus case should be changed. While every effort is made to see that purchases by the State are based on fair market value, the fact that if an agreement cannot be reached, condemnation follows, is inescapable. The "willing buyer" and the "willing seller" are not involved. Furthermore, because of partial taking, consequential damages, and other matters, such acquisitions do not serve as comparable sales. Many public and private agencies acquiring property for public use do not have the right of immediate possession, nor do they have staffs adequate to appraise and negotiate for the acquisition of properties. As a result, they may at times pay more than fair market value in order to acquire the properties without litigation or to obtain immediate possession. As a corollary, there are undoubtedly instances where an owner takes less to avoid litigation.

20 (b) Offers between the condemnor and the property owner for the property sought to be condemned. We agree with the conclusion of the Law Revision Commission on this point, since pretrial negotiations and settlements would be greatly hindered by a contrary rule. This is in accordance with the present case law. This rule would be helpful in protecting both parties from their inadvertent statements that an offer of compromise was their opinion of fair market value and thus admissible declarations against interest. The codification of this provision would promote frankness in any negotiations between the parties and would be definitely helpful in that regard.

30 (c) Offers or options to buy or sell the property to be condemned or any other property. We agree with this conclusion of the Commission, with the qualification that offers to sell (other than to the condemnor) by the owners of the property to be condemned constitute an admission against interest, for the purpose of impeachment.

40 (d) Assessed valuations. We generally agree with the rule that assessed valuation is not relevant as to market value and is therefore inadmissible on direct examination. However, there are other reasons for allowing this evidence to be used, under certain circumstances, particularly on cross-examination. For example, to determine: (1) the basis upon which tax rates are used to check a capitalization study, (2) the basis upon which tax rates are used to show differences in communities as bearing on comparability, and (3) the different tax rates in regard to different size holdings as bearing on comparability.

50 6. Repeal of Code of Civil Procedure Section 1845.5. Code of Civil Procedure Section 1845.5 should be repealed if an all-encompassing evidentiary statute is adopted. However, if the Commission agrees with the theory that separate evidentiary statutes should be proposed, Section 1845.5 should be amended to be the nucleus of a comparable sales statute.

COMMENTS ON COMMISSION'S PROPOSED STATUTE

10 It is noted that the Commission proposes to add Sections 1248.1, 1248.2 and 1248.3 to the Code of Civil Procedure. These sections would be added to that part of the Code of Civil Procedure dealing with eminent domain, and, of course, would be only applicable to the valuation of real property in condemnation proceedings. If any codification of the evidence principles is to be made, consideration should definitely be given to incorporating them in the evidence portion of the Code of Civil Procedure in order that the evidentiary rules for valuing real property will be the same in both condemnation cases and other proceedings. Certainly there should not be two sets of evidentiary rules in valuing real property.

20 Section 1248.1. This section appears to codify the present case law except for the last sentence, wherein it is stated that the property owner "is presumed to be qualified to express such opinion". The recent case of People v. LaMacchia, 41 Cal. 2d 738, held an instruction to be improper which stated that an owner is presumed to know the value of his property. The word "presumed" should not be used, and the last sentence of the section should read as follows: "The owner of the property or property interest sought to be condemned should be permitted to express such opinions."

30 If the Commission feels that the evidentiary statutes should be contained in the evidence portion of the Code of Civil Procedure, it will be necessary to delete the reference to subdivisions 1, 2, 3 and 4 of the Code of Civil Procedure Section 1248, and instead refer to the issues of market value, damages and special benefits.

40 Section 1248.2(1). This subdivision contains the following objectionable language: "only if the court finds that the opinion is based upon facts or data that a reasonable, well-informed prospective purchaser or seller of real property would take into consideration in determining the price at which to purchase or sell the property or property interest." The major objections to this language are contained in our comments to the Commission's recommendation No. 3 above. All of this testimony would be given as data to support the witness's opinion of market value. We are in complete agreement with the objectives of the Commission. However, we feel that in some instances hereafter indicated that the language of the statutes goes further than we believe the Commission intended. This provision practically abolishes all rules of inadmissibility except those items excluded in Section 1248.3. This subdivision, in connection with subdivision (2) of Section 1248.2, will allow witnesses to testify to almost anything in any way connected with the property.

50 At this stage it is impossible to contemplate all of the varied and irrelevant personal preferences which a "reasonable, well-informed prospective purchaser or seller would take into consideration". Personal, sentimental, and other individual considerations often affect reasonable, well-informed persons, and enter into their determinations to buy or sell property, but they do not constitute elements that a qualified appraiser is permitted to rely on. Due to the change made by the proposed statute,

the courts may well feel that the door is completely open to all sorts of what otherwise would be irrelevant and immaterial testimony. It will take years before the appellate courts can set reasonable limits on the introduction of this type of evidence, although under the present case law the limits are fairly well defined. We again repeat that there are areas in the eminent domain field that need clarification, but it is felt that it can best be handled by individual statutes.

10 The effect of this omnibus provision would let into evidence many collateral matters which are now deemed inadmissible under the existing rules. It would also be a means by which noncompensable items of damage could be given consideration by an expert witness or owner. It would also have the possible effect of expanding the present liability of all public agencies with respect to inverse condemnation actions. The wording in the statute would change the present objective standard of market value to a subjective one, taking into account all those personal matters which any individual purchaser or seller might take into account. In effect the statute would change our long-standing definition of market value. The above quoted words would thus emasculate the accepted definition of market value by setting up a double standard of value. Very often factors which will be considered by a seller will be disregarded by the buyer, or render the buyer unwilling to buy at the indicated price. This provision could also be construed to permit evidence of value in use to the owner or the special use of the property, contrary to our long standing rule against the inadmissibility of such evidence.

30 It is suggested that if the Commission attempts to propose an all-encompassing evidence statute in the eminent domain field, the provision should read as follows: "and any other competent reasons of such qualified witness which are relevant and material". Such a provision would in effect, codify the multitude of miscellaneous case rules which have put reasonable limits on the items that an expert may take into consideration. A provision of this nature would not allow any new side issues to be litigated in a condemnation case when they have no direct bearing on, or relevancy to, market value.

40 Section 1248.2(1)(a). This provision apparently attempts to codify the comparable sales rule contained in the recent Faus case. The Faus case changed the previous rules of evidence in eminent domain cases in several respects, one of which was to permit sales prices to be testified to on direct examination by an expert appraisal witness. As long as this testimony comes in for the purpose of supporting the expert's opinion on the ultimate question of value, we have no quarrel therewith and believe that it does facilitate the trial of eminent domain cases. However, the holding in the Faus case that comparable sales constitute direct evidence of value and that sales to the condemnor may be introduced in evidence, etc., have, in our opinion, greatly complicated the trial of condemnation proceedings and have lengthened the duration thereof substantially. Most of the specific changes recommended by the Commission, and we are in accord therewith, would restore the law to what it was before the Faus case.

The phrase used in the proposed statute "when paid or contracted to be paid" contemplates the inclusion of purchases where the price is paid over a period of time. In the interests of simplicity, the term "price" should be used since it includes both the amount paid and amount promised to be paid. In addition, there may be other terms of a sale which are important because they bear upon the full consideration which is paid for the property; such things as who pays the taxes, insurance, the interest rate, amount of interest, prepayment clauses, release clauses, etc. Consequently, we feel that the phrase "and other terms of any sale" should be included in the statute. It should be noted that in Section 1248.3(1) and (2) the phrase "the price or other terms" of an acquisition or offer is used. Our suggestion would make the whole statute uniform in wording and in meaning.

The tentative statute appears to require that before a sale of the subject property may be considered by an expert, it would have to be a sale of the very same area sought to be condemned. As you know, many cases involve partial takes, i.e., where the condemnor only seeks to take a portion of the defendant's property. In that situation there could hardly be a sale of the property sought to be condemned. We feel that the language should be broadened to include a sale of what we would call the larger parcel, i.e., a sale which would include the property sought to be condemned.

It is noted that the word "lease" is contained in this code section. If it is contemplated by this term to allow consideration of the rent reserved on the subject property, then we feel it should be contained in a separate provision in the statute.

Summarizing our above thoughts, we feel that this subdivision of Section 1248.2 should be broken down into three subdivisions, which would read as follows:

"(a) The price and other terms of any sale which included the property sought to be condemned or any part thereof, provided such sale was freely made in good faith;

"(b) The price and other terms of any sale of comparable property, provided such sale was freely made in good faith within a reasonable time before or after the date of valuation;

"(c) The rent reserved, and other terms of any existing lease upon the property sought to be condemned, provided such lease was freely made in good faith."

Subdivision (c) above would, in effect codify the existing case law (People v. Dunn, 46 Cal.(2d) 639). We have not made any reference to leases on comparable property as such leases are not evidence of value, and are misleading. The only place that such rentals should be admissible is in a Section 1246.1 proceeding. Consequently, if such are to be admitted they should be in a separate section specifying the purpose for which they are relevant and the stage of the proceedings at which they are admitted.

Section 1248.2(1), (b) and (c). The danger of permitting the capitalization or summation (reproduction and replacement) studies on direct examination lies in the confusion it creates in the minds of the jury. These studies are, except in rare instances, used exclusively as a check on the expert's opinion of value; they are not fair market value in and of themselves, and rarely do these checks reach the same result. An example can be seen in the case of Redevelopment Agency v. Modell, 177 A.C.A. 345, where the expert witness for the plaintiff testified that the fair market value was \$47,500 and that he used a summation study which resulted in a value of \$42,100. The jury was obviously confused and came in below the amount testified to as the fair market value, although it was above the indicated summation approach to value. The court correctly held that the jury's verdict would not be based upon the summation value alone.

While we have serious doubts as to whether permitting witnesses to go into these matters on direct examination will be of benefit to the judge or jury trying the facts, we have no objection to the proposal if the Commission feels it desirable. The proposal is within the meaning of the present Section 1872 of the Code of Civil Procedure.

The term used in the proposed statute "fair income attributable to the property" is not in accord with the terms currently used by real property appraisers. The term accepted in the field and more nearly descriptive of the process is "the reasonable net rental attributable to the land and the existing improvements".

The distinction made in subsection (b) between net rental income attributable to the property and income and profits from the business conducted thereon is necessary in order to accurately capitalize only that income which is derived from the land. This section codifies the rule in the Supreme Court decision of People v. Dunn, supra.

In subsection (c), dealing with reproduction costs, the Commission has apparently overlooked the two methods in a summation study which are similar but distinguishable, i.e., replacement with a similar improvement, and reproducing the exact same improvement. This approach to value should not be confined to reproduction costs but should also include replacement costs, that is, those costs necessary to replace the functional equivalent of the improvement being taken.

The term "depreciation" does not include within its common accepted meaning "obsolescence". Obsolescence, of course, is a major factor in this type of study.

Putting the above comments together in the same format as the statute proposed by the Commission, the subsections should be relettered and read as follows:

"(d) The capitalized value of the reasonable net rental attributable to the land and the existing improvements, as distinguished from the profits or income derived from any

business conducted thereon;

"(e) The value of the property, as indicated by the value of the land, together with the replacement or reproduction cost of the improvement thereon, less depreciation and obsolescence due to all causes, if the improvements enhance the value of the land for its highest and best use."

In addition, there should be added the following catch-all subsection:

10       "(f) Any other competent reasons of such qualified witness which are relevant and material."

The necessity for this last clause, and reasons for its use, are indicated in our general comments concerning the introductory statement in Section 1248.2(1).

20       Section 1248.2(2). The apparent purpose of this subsection is to allow an expert witness or owner to testify to matters which he considered in forming his opinion, which would ordinarily be objectionable on two grounds: one, that it violates the rule against hearsay, and two, that it is not the best evidence. As indicated above, we agree with the rule which allows an expert within reasonable limits to base his opinion upon matters which are hearsay and not the best evidence.

30       The cases do not permit an expert witness to relate statements made to him or to state the contents of documents but they do allow the witness to indicate that he considered these statements and documents. Although this may be a fine distinction, it does limit the effect of such testimony by not permitting a third person's statements and conclusions to go into evidence without their being personally in court and subject to cross-examination. Also, the courts have indicated, that an expert witness may consider hearsay matters, but that it be confined to "reasonably reliable hearsay". However, an expert cannot base his opinion on an opinion. The statute might be construed to permit that, which in our opinion would be very objectionable.

40       The above reasons indicate why it is so difficult to draft a statute which would codify existing case law and yet be simple in form and not add confusion to our law by creating more room for interpretation.

Section 1248.3. If the Commission feels that this code section is to be contained in the evidence portion of the Code of Civil Procedure rather than the eminent domain portion, the references to subdivisions 1, 2, 3 and 4 of the Code of Civil Procedure Section 1248 should be deleted, and reference made to market value, damages and special benefits.

Section 1248.3. As a general comment, all of the subsections in Section 1248.3 are ones which will have to be clearly restated in our law regardless of whether a complete revision is made or not.

50       Section 1248.3(1). This subsection apparently clarifies the holding

of the Faus decision with respect to purchases by the condemnor. The comments made by the Commission and the additional comments which we have made above, would support the clarification made herein.

Section 1248.3(2). This subsection incorporates recommendation No. 5 of the Commission, with which we are in agreement.

10 Section 1248.3(3). This subsection follows recommendation No. 5 of the Law Revision Commission. A rule in this area is definitely needed due to the apparently conflicting opinions of some of the recent court decisions.

Section 1248.3(4). As pointed out above in our comments on the Commission's recommendation No. 5 on assessed valuation, we feel that there are other relevant purposes for this type of evidence, such as a check on capitalization studies, and as having a bearing on comparability. We agree with the present case law rule that assessed valuation is not evidence of market value as such.

20 If the Commission is to completely codify the eminent domain evidence rules, consideration should be given to the holding in Sacramento and San Joaquin Drainage District v. Jarvis, 51 Cal. (2d) 799. In that case the Supreme Court held that a witness should not be permitted to give an opinion of the value of property other than that sought to be condemned. Consequently, the following is submitted for your consideration:

"Section 1248.3(5). Any opinion as to the value of property other than that sought to be condemned."

30 If a general recodification of evidence in the field of eminent domain is attempted, there are other subjects which, of necessity, must be covered in order that the proposed statute of the Commission will not be interpreted as eliminating them from the court's or jury's consideration. One such subject is the jury view of the property which is evidence of value. Certainly other provisos should be included which would incorporate all other rules of evidence which would allow maps, photographs, zoning ordinances, etc., to be introduced as evidence of market value.

40 I wish to again thank you for affording this department the opportunity of commenting on the recommendations and tentative statutes of the Commission. It is our desire and wish to be helpful to the Commission in this respect, and to give the Commission the benefit of our long experience in this field of the law. If further comments or suggestions are advisable, please do not hesitate to ask. If you desire, a representative can be present at the Commission's meeting which considers the tentative evidence statute and these suggestions and comments.

50 Additional copies of this letter are being included so that you may send a copy to each of the members of the Commission in order that they may be advised of our thoughts on this subject.

Yours very truly,  
S/ Robert E. Reed  
ROBERT E. REED  
Chief of Division

(36)

STATE OF CALIFORNIA  
Department of Public Works  
Division of Contracts and Rights of Way

Public Works Building  
1120 N. Street  
(P. O. Box 1499)  
Sacramento 7, California

July 13, 1960

10 Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
School of Law  
Stanford, California

Dear Mr. DeMouilly:

20 In re: Recommendation and Proposed Legislation  
relating to moving expenses and  
incidental business losses.

Please refer to your letters of May 5 and May 24, 1960, requesting our comments and suggestions on the tentative recommendation and proposed legislation of the California Law Revision Commission relating to reimbursement for moving expenses and incidental business losses when property is acquired for public use.

30 As you know, the Department of Public Works of the State of California is directly interested in, and vitally concerned with, the field of condemnation law. The present and future highway program will, beyond doubt, require the acquisition of considerable property by negotiated purchase and eminent domain. This will require the expenditure of great sums of both Federal and State gas tax revenue.

40 Our comments will be first directed toward the recommendation and tentative moving expense statute. The recommendation and tentative statute on evidence in condemnation cases will be commented on in a separate letter which will follow shortly.

50 In the fiscal year ending June 30, 1959, the Division of Highways of the Department of Public Works concluded the acquisition of 8,556 parcels of land. During the same fiscal year, only 139 parcels were acquired through contested condemnation cases which represents a mere 1.8% of the total parcels acquired for right of way purposes. Any change in the eminent domain law which creates uncertainty as to amount of payment will lead to more litigation. An abrupt increase in the ratio of contested court cases to negotiated settlements would be cause for grave concern.

July 13, 1960

Since 1868 our California courts have consistently ruled that the cost of removing personal property from the property taken is not compensable in an eminent domain proceeding (Central Pacific Railroad Co. of Calif. v. Pearson, 35 Cal. 247, 263). This fixed rule of law has come before the California courts on several later occasions. After careful consideration of facts and arguments, our courts have upheld the rule of noncompensability. In County of Los Angeles v. Signal Realty Co., 86 Cal. App. 704, at 712, the court expressed its reason for the rule as follows:

"... As the title to all property is held subject to the implied condition that it must be surrendered whenever the public interest requires it, the inconvenience and expense incident to the surrender of the possession are not elements to be considered in determining the damages to which the owner is entitled. ..."  
(emphasis added)

California has thus followed the great majority of cases in the United States which deny recovery for the moving of personal property (69 A.L.R. 2d 1453). Recent out-of-state cases have considered and denied the payment of moving expenses (see McGhee v. Floyd County, 97 S.E. 2d 529 (Ga.); In Re Appropriation for Highway Purposes, 150 N.E. 2d 30 (Ohio); Amoskeag-Lawrence Mills Inc. v. State, 144 A. 2d 221 (N.H.); State of Texas v. Vaughan, 319 S.W. 2d 343 (Tex.); Arkansas State Hy. Comm. v. Fox, 322 S.W. 2d 81 (Ark.)). Tenants, as well as owners, hold their property subject to the obligation to move. (See consultant's report, page 3 which quotes from 36 A.L.R. 180.)

In United States v. Inlots, 26 Fed. Cas. 482, the court stated:

"The claimants being bound by the conditions of their respective leases to remove their property at the end of their terms, the act of appropriation only changes the time when the removal should take place, but does not occasion the obligation to remove, and that, therefore, the government is not justly chargeable with the losses consequent upon removal but is only liable for the value of the right to remain or of the occupancy for the unexpired term of the lease."

Also, the statement in the case of In Re Post Office Site in the Borough of the Bronx, 127 C.C.A. 382; 210 F. 832, is pertinent:

"... the condemnation of the land merely changes the date of the lessee's removal and entails no damages which he would not incur in any event."

July 13, 1960

And, in St. Louis v. St. Louis Ry. Co., etc., 266 Mo. 694; 182 S.W. 750, the court compared a lessee with the fee owner and stated:

10 " ... In fact, the reasons are more cogent for permitting the owner of the fee to recover as damages expenses of this sort than they are in favor of the lessee ... ."

It is our firm conviction that no payment for moving expenses should be made to a tenant because he is usually required by his lease to stand the cost of removal at the end of his term; the taking merely advances the time when the expense is incurred.

20 Our primary objection to the requiring of condemning agencies to pay moving expenses is that such a statute would constitute a definite departure from the traditional idea that payment should be based upon an "objective standard". That standard, as established by the courts, has been that every owner holds his property subject to the possibility that it may be needed for public use and that in such an event he will be paid the market value thereof, plus damages to the remainder in the event of a partial taking. In a sense this standard has been adopted with the idea that it affords "equal protection of the law". Two identical pieces of property (if there are two pieces that are entirely identical) would call for the same payment.

30 The payment of moving expenses departs from this fundamental idea and introduces an entirely new consideration--a subjective standard--based upon the particular circumstances of the individual who happens to own or occupy the property.

40 As indicated above, the Department of public Works, acting through the Division of Highways, has been acquiring between 8,000 and 9,000 parcels of property every year. For several years the total right of way expenditure has annually exceeded \$100,000,000. All indications are that this rate of acquisition will continue. To handle this program and to keep some manner of control so that there will be uniformity of practice, a right of way organization of two main parts has been set up in each of the eleven district offices of the Division of Highways. When it is known that right of way for a particular project must be acquired, and the necessary engineering work has been done so that the particular properties needed can be ascertained, a group of trained personnel proceeds to appraise each parcel of property needed. Supervisors of the field appraisers in the district office go over the appraisal in detail and it is finally submitted to the District Engineer who is in charge of that district office. The appraisal is then forwarded to Headquarters where it is again checked by trained personnel who are generally familiar with conditions throughout the State.

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July 13, 1960

10 After approval of that appraisal, and only then, is the district office permitted to commence negotiations with the owner thereof. At that point, the negotiators of the right of way organization approach the property owners. It is the policy of the department to offer the appraised price and not to vary therefrom unless the owner can point out some matter that has been overlooked or undervalued. Appraisals have to be rechecked and brought up to date, particularly in areas where there is a great deal of real estate activity, but settlements are based on the current appraisals. If they cannot be made on that basis, condemnation proceedings are filed.

20 It is significant that only 1.8 percent of the acquisitions made for highway purposes by the State are accomplished through contested trials. Even so, condemnation litigation in many counties of the State has assumed major proportions in contributing to the work load of the courts and the congestion of cases awaiting trial.

30 When, by a change in the law, some item or items must be paid for in addition to market value, the "objective standard", which permits the application of appraisal rules and theories, is lost. This would be particularly true with regard to moving expenses, as they would depend upon a great many variables, such as the amount of personal property, the type, the distance to be moved, and a great many other factors. By reason thereof, several administrative problems of great difficulty are created. In the first place, there is no way of estimating in advance the cost of a project, such as can be now done by the application of appraisal methods. Secondly, opportunities for collusion between owners, movers and public employees as to moving costs are offered which could not be checked other than by excessive supervision.

Of great importance is the fact that an additional element is introduced concerning which there may be disagreement and settlements prevented.

40 A basic constitutional question is involved as to whether the Legislature can by statute extend just compensation to include such items as moving costs. It has been stated that the interpretation of the constitutional provision concerning just compensation is strictly a judicial question (Monongahela Navigation Co. v. U.S., 149 U.S. 312; 37 L. Ed. 463). In that case, the United States Supreme Court said:

50 "It does not rest with the public taking the property through Congress or the Legislature, its representative, to say what compensation shall be paid or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

July 13, 1960

10 In the usual situation, it is believed that no great injustice results under the present law. In the first place, most market value sales are made by persons who do not have to sell. When they fix the price at which they are willing to sell, it includes consideration of the fact that they will have to move their personal property. Market value, in effect, reflects moving costs in the usual situation, particularly in residential sales.

20 In all acquisitions by agencies having the power to condemn, whether by negotiation or condemnation, the condemning agency pays all of the expenses which in ordinary private transactions the seller has to bear. In most instances, these far outweigh moving costs. Included in such items are real estate commissions, in many instances title expenses, recording fees, and the like. Another important consideration is that rather than time payments the full fair market value is generally paid in cash by the condemnor.

30 In many instances the condemning agency permits the owner to continue in possession after its acquisition, either informally or by lease. The Division of Highways always handles such matters by formal lease. The rent provided in such leases is usually below the normal rental rates for similar property because of the unusual circumstances and the insecurity of the tenure. In such instances, of course, the owner has the use of the entire purchase price and still remains in possession of the property.

40 While there have been a few jurisdictions that have by statute recently provided for the payment of moving costs, in most instances this has been confined to redevelopment agencies. The problems there are peculiar because such projects involve blighted areas which are usually occupied by people of low income, living in crowded conditions. It is not, however, the policy of the Federal Government generally to pay moving costs in connection with property acquired, as is evidenced by the fact that the Federal Government will not contribute federal highway funds to a state for the moving of personal property in connection with the acquisition of highway right of way. (Policy and Procedure Memorandum 21-4.1 of the Bureau of Public Roads.) On all federal interstate highway projects wherein the State is reimbursed 91-1/2 percent of the total cost, the State would have to pay the entire cost of the moving expenses without federal participation. At the present time, over half of the right of way acquisitions are made on federal interstate projects.

50 While this department is basically opposed to any payment for moving expenses for the above reasons, we feel that comments on the proposed statute are necessary. We are enclosing a revision of the draft which was enclosed with your letter and below will attempt to indicate changes made and the reasons therefor. The fact that we have attempted to redraft the proposed

July 13, 1960

statute should not be construed as approving or recommending the enactment of a statute on the subject of moving costs.

DISCUSSION OF PROPOSED CHANGES IN  
TENTATIVE MOVING EXPENSE STATUTE.

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Section 1270

Although definitions are probably surplusage in the statute, they have been retained in the revised draft. The definitions of "Relocating" and "Removing" have been incorporated into the definition of the word "Moving" and the definition of the word "Moving" has been limited to "packing, transporting and unpacking".

20

One of the basic problems in any moving expense allowance is the speculation involved and the lack of certainty of precisely what is and is not included as reimbursable expenses. In the proposed statute, the phrase "installing and all other acts incidental to the placement of personal property upon a new location and making it ready for use" would foster numerous contentions, such as the expense of seeking a new location, the preparing of that location to receive the property, including the renovating and remodeling of an existing building, etc.

30

It is strongly suggested that the definition be revised to clearly limit the reimbursement to the actual packing, transporting and unpacking of the personal property involved.

40

The person whose property is taken is entitled to receive just compensation and no more. When speculative items are introduced, the property owner may receive money for expenses which he may never incur, and also may receive money for putting himself in a better position, such as receiving all of the costs involved in installing and remodeling in a new and better location and in a new and better building. In this situation the condemnor, and consequently the taxpayers, would be more than compensating him for his loss. If a property owner is to be compensated at all for his moving expense, it should be limited to the actual packing, transportation and unpacking of his personal property.

Section 1270.1

50

Section 1270.1 of the tentative statute seems to contemplate paying moving expenses to individuals who may be occupying the property, but whose interests are not acquired. For example, a lessee whose lease has a year to run might be permitted to complete his term; in other words, the acquisition would be subject to the

July 13, 1960

lease. Under such circumstances, the public agency has merely stepped into the shoes of the original landlord. In many instances the Department of Public Works does not negotiate with or name as defendants in a condemnation suit tenants at will or tenants under a term lease which is about to expire. In these situations the State takes subject to the lease. This type of tenant, because of the nature of his lease, has the obligation of incurring the cost of moving at the end of his lease or upon written notice. Under such circumstances there would seem to be no reason why the lessee should be entitled to compensation for moving personal property and to change the basic law of landlord and tenant simply because the public agency takes over as the landlord.

To permit a tenant who has had no legal right disturbed, to recover for his moving expenses just because a public agency became his landlord, might well be a gift of public money and unconstitutional under our State Constitution.

Under the revised draft, such a lessee as described above would not receive any compensation unless his interest was acquired and he was required to move before his tenancy was legally terminated.

From an administrative standpoint, the acquisition of an apartment house or rooming house illustrates the difficulties involved in this type of statute. Where a public agency might acquire a furnished apartment house, for example, it certainly should not have to deal with each tenant as to the moving of his clothing and other personal effects. The tentative statute as drafted would require it. The statute would also require the same with respect to tenants or occupants of rooming houses or hotel and motel rooms. The amount might or might not be minor; but the harassment and administrative expense would be great.

Another problem which is pertinent to raise at this point concerns the condemnation clauses which are used extensively in lease forms today. A typical clause "irrevocably assigns and transfers to the lessor any right to compensation or damages to which the lessee may become entitled by reason of the condemnation of all or part of the leased premises". In a lease where this clause is a part, the lessor would receive the award of moving expenses and the lessee would not receive any portion of it, yet the lessee is the one who actually incurs the expenses. Consideration should be given by the Commission to a change in the Landlord and Tenant Law to prevent such a windfall to the lessor in the event that the Commission sponsors a moving cost statute.

Section 1270.2

The primary change made in this section is to incorporate the definition of moving and thus shorten this section.

July 13, 1960

Section 1270.3

A necessary and practical limitation has been incorporated into the revised draft providing that reimbursement should not be made if the cost of moving the property exceeds its value. Such change is necessary to prevent the costs involved in moving "junk".

10 A change has also been made in subsection (2) so as to require the same limitation in a negotiated settlement as would be paid in a court-determined award. It is our feeling that a person should be entitled to receive the same compensation whether he decides to go to court or decides to settle by negotiation. However, it is stated that in a negotiated settlement the parties may include estimated moving costs in order to insure that payment may be made to the property owner prior to the actual move.

20 The few states and jurisdictions which have adopted a moving expense statute have almost unanimously limited the moving to a maximum dollar amount rather than by mileage. Both mileage and dollar limitations involve arbitrary limits. However, the dollar limitation is far more appropriate and workable, and would afford uniformity of treatment without creating further uncertainty in the amount recoverable. It is respectfully suggested that if the Law Revision Commission is to sponsor moving cost legislation that it revise the present tentative statute so as to limit the moving expenses recoverable to a set statutory limit as has been  
30 done in the few jurisdictions that have such statutes.

Section 1270.4

If the right to collect moving costs is limited to those who have an interest in the real property that is acquired for public use, there would seem to be no reason for providing for a separate and new type of legal proceeding, because there would be a condemnation case pending in which moving costs could be determined whenever there was a failure to agree. We feel that  
40 the determination of moving costs in a separate lawsuit would increase the already heavy burden on our courts with added expense and little or no benefit to the property owner. A separate legal proceeding would of course be necessary if the tentative statute does not limit the payment of moving costs to those whose interests are condemned. In the revised draft of the statute there has been incorporated a procedure of recovering moving costs similar to the procedure used in cost bills. The motion for determining moving costs could be made at any time in the case and could be quickly ruled upon, thus providing a quick means for payment to the property  
50 owner. In a negotiated settlement, the moving costs would, of course, be included in the amount paid to the property owner.

July 13, 1960

Section 703

This section need not be amended if the procedure of obtaining reimbursement for moving costs is part of the condemnation proceeding.

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In the document furnished by the Consultant, entitled "A Study to Determine Whether the Owner of Real Property Should be Compensated for Incidental Business Losses caused by the Taking of Real Property by Eminent Domain", it is clearly stated that the adoption of a statute for the payment of moving costs is the first step in an entire change in the concept of "just compensation" to be made in eminent domain. Under our present law "just compensation" provides for payment for property taken or damaged. However, the Consultant proposes to consider each individual situation without regard to property values. The Consultant suggests that the change is so basic that it should be adopted one step at a time and that the moving cost statute should be tried out before additional changes are made.

Adopting this line of thinking, it is suggested that if a moving cost statute is proposed by the Commission, it be limited at first to residential property, as that is where the talked-of hardships exist and which involve by far the majority of acquisitions. If a moving expense statute is proposed and limited to residential property, the expense recoverable should be limited to household effects. Consideration should be given to exclude the payment of moving expenses for such items as automobiles, livestock, trailers, boats, animals, pets, fuels, plants, shrubs and waste material.

Also, a definite effective date should be included in any draft of legislation for the payment of moving expenses. This is necessary in order that there will be no uncertainty as to pending cases and to enable all public agencies to properly budget their funds.

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The report of the Law Revision Commission indicates that it is not prepared at this time to make a recommendation for or against compensating condemnees for incidental business losses. The general observations and reasons against the adoption of a moving cost statute contained herein naturally apply to any recommendation for the payment of incidental business losses. It should

July 13, 1960

10 be borne in mind that any study which encompasses the payment to the property owner of supposed personal losses or inconvenience should also include the offset of all benefits, general as well as special, to be offset not only against severance damages but against the value of the part taken. No true theory of "indemnity" to the property owner would be complete without a full consideration being given to benefits.

The last word on this subject of incidental business loss is contained in the recent case of People v. Ayon, 54 A.C. 210. In that case the Supreme Court stated at pages 216, 219:

" ... If loss of business results, that is noncompensable. It is simply a risk the property owner assumes when he lives in a modern society ... ."

\* \* \*

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"Appellants' offer of proof in the court below, as well as the reservation in the stipulation which preserved their right to offer evidence 'concerning purported elements of damage involving loss of business, customers and good will,' indicates that they are actually attempting to recover damages for injury to their business which may result from this street improvement. The trial court correctly ruled that the items reserved in the stipulation are noncompensable. (citations) 'A particular business might be entirely destroyed and yet not diminish the actual value of the property for its highest and best use.' ..."

40

Please understand that the suggestions in this letter and the changes in form and substance in the attached revised draft do not mean that this Department approves of the principle of payment for moving costs in condemnation cases.

50

We appreciate being kept advised of the studies being made by the Consultant for the Commission, and the tentative recommendations and statutes of the Commission. We hope that our comments and suggestions are helpful in the Commission's work in this field. If further comments or suggestions are advisable, please do not hesitate to call upon us. If you so desire, a representative can be present at the Commission meeting which considers these suggestions and comments.

July 13, 1960

A copy of this letter is being sent to each member of the Commission in order that they may be advised of our thoughts on this subject.

Very truly yours,

ROBERT E. REED  
Chief Counsel

10

cc: Mr. Roy A. Gustafson  
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20

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30

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An act to add Title 7a (beginning with Section 1270) to Part 3 of the Code of Civil Procedure, and to add Section 1248.5 to the Code of Civil Procedure, all relating to the payment of compensation and damages when property is acquired for public use.

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

10 Section 1. Title 7a (beginning with Section 1270) is added to Part 3 of the Code of Civil Procedure, to read:

TITLE 7a.

REIMBURSEMENT FOR MOVING EXPENSES WHEN PROPERTY IS  
ACQUIRED FOR PUBLIC USE

20 1270. As used in this title:

(1) "Acquirer" means a person who acquires real property or any interest therein for public use.

(2) "Acquisition" means the acquiring of real property or an interest therein for public use either by the consent of  
30 the owner or by eminent domain.

(3) "Person" includes a natural person, corporation, association, joint venture, receiver, trustee, executor, administrator, guardian, fiduciary or other representative of any kind, the State, or a city, county, city and county, district or any  
40 department, agency or instrumentality of the State or of any governmental subdivision in the State.

(4) "Public use" means a use for which property may be taken by eminent domain.

(5) "Moving" means packing, transporting and unpacking  
50 of personal property.

1270.1. Subject to Section 1270.3, a person whose real property or interest therein is acquired for public use is entitled to reimbursement from the acquirer for his actual, but not exceeding the reasonable, costs incurred in moving his personal property as a necessary result of the acquisition.

10 1270.2. (1) A person is entitled to reimbursement under this section only if:

(a) Such property and his interest therein is acquired for a term only; and

20 (b) He has, at the time of the acquisition, the right to the possession of the real property immediately after the term acquired for public use.

(2) Subject to Section 1270.3, a person described in subdivision (1) of this section is entitled to reimbursement from the acquirer as provided in Section 1270.1, and, in addition,  
30 is entitled to reimbursement from the acquirer for his actual, but not exceeding the reasonable, costs incurred as a necessary result of the acquisition in:

(a) Storing the personal property that was moved from the real property acquired or from the larger parcel from which the  
40 part acquired was severed during the time the real property is occupied by the acquirer.

(b) Moving such personal property to the real property acquired after the expiration of the term for which the real property was acquired for public use.

50

1270.3. (1) Subject to subdivision (2) of this section, a person is entitled to reimbursement under Section 1270.1 for transporting his personal property a distance of not more than 25 miles by the most direct practical route and is entitled to reimbursement under subdivision (2) (b) of Section 1270.2 for  
10 transporting his personal property a distance of not more than 25 miles by the most direct practical route.

(2) In no event shall reimbursement under Section 1270.1 or Section 1270.2 exceed the value of all the personal property.

(3) Where the acquisition is consummated pursuant to an  
20 agreement, the parties may include estimated moving costs as part of the compensation to be paid.

Section 1270.4. Any person entitled to reimbursement for moving personal property may file a verified claim in the condemnation proceeding affecting the real property on which it  
30 is located. Such claim shall be served upon the acquirer and filed within ninety days after such personal property is moved. The claim shall itemize the actual costs necessarily incurred and the date on which said personal property was moved.

The acquirer may within twenty days after service of  
40 said claim, serve and file a notice of motion for an order determining the amount of said claim. Not less than twenty days' notice of the hearing shall be given to the claimant, and the notice shall state the acquirer's objections or other basis for the motion. Upon the hearing the court shall make its order  
50 determining the amount recoverable, if any, and for payment

of such amount by the acquirer within thirty days. If no objection is filed, the court shall make its order requiring the acquirer to pay said claim within thirty days.

10           Sec. 3. Section 1248.5 is added to said Code, to read:

20           1248.5. Notwithstanding any other provision of law the opinion of a witness as to the amount to be assessed in a condemnation proceeding is inadmissible if the court finds that it is based, wholly or in part, upon the cost of moving, transporting, storing or relocating personal property.

30           Sec. 4. This act shall become effective on the 1st day of January, 1962. No proceeding to enforce the right of eminent domain commenced before this title takes effect is affected by the provisions of this act.

July 22, 1960

10

California Law Revision Commission  
School of Law  
Stanford, California

Attention: Mr. John H. DeMouilly

20

Subject: Recommendations relating to moving costs  
and the rules of evidence in eminent  
domain proceedings.

Gentlemen:

30 Thank you for your letter requesting the comments of this  
office on the recommendations that have been made to your  
Commission regarding reimbursement of moving costs and the  
rules of evidence in eminent domain proceedings. As you know,  
this office represents not only the County of Los Angeles but  
also the Los Angeles County Flood Control District and over  
100 school districts which are involved in development programs  
involving the acquisition annually of many millions of dollars  
worth of privately owned real property. The subject is one of  
vital interest to this office and one in which we have had sub-  
stantial experience.

#### MOVING COSTS

40

This office opposes the reimbursement of private property  
owners for moving costs when property is acquired for public  
use. Such reimbursement would depart from the concept of fair  
market value now applied in compensating the owner. As just  
compensation an owner now receives the fair market value of  
his property. Fair market value is briefly defined as the  
price agreed upon by willing, well-informed buyers and sellers.  
50 It is based on the prices at which properties similar to that  
condemned have sold. All sellers know that upon selling their  
property, they must move to another location. Consequently,  
such sales prices reflect the moving costs incurred by the  
sellers. So, too, does fair market value which is based on  
comparable sales prices.

10 In eminent domain proceedings the condemnee enjoys the  
advantage of receiving fair market value for his property without  
paying many of the expenses which would be incurred by him in a  
private sale, for instance, broker's commissions and escrow fees.  
A condemnee also enjoys a tax advantage over the open-market  
seller. Sec. 1033 of the Internal Revenue Code provides that  
when property is involuntarily converted into similar property  
as a result of condemnation, no taxable gain results. These tax  
advantages are discussed by Austin H. Peck, Jr., in the December,  
1959 issue of "Right of Way Magazine" commencing on page 43.  
20 Also see the article by W. Edgar Jessup in the June, 1960 issue  
of the Los Angeles Bar Bulletin, commencing on page 256 entitled  
"Some Recent Developments in Condemnation."

30 If the concept of fair market value is abandoned and replaced  
by the indemnity theory, it would be manifestly unfair to reimburse  
an owner for moving costs unless the government is also allowed  
to offset the increase in market value which the owner's remaining  
land realizes as a result of the construction of the public  
improvement. Unlike California, jurisdictions which allow recovery  
of moving costs permit the government to offset special (and some-  
times general) benefits against both severance damages and the  
value of the part taken.

Bauman v. Ross (1897) 167 U.S. 548 at 574 and  
581-582.

U. S. v. Grizzard (1911) 219 U.S. 180 at 184-185.

Aaronson v. U. S. (D.C. Cir. 1935) 79 F2d 139  
at 140.

Robinson v. State Highway Commission (N.C. 1958)  
105 SE2d 287. (general benefits offset)

40 Dona Ana Company v. Gardner (1953) 59 N.Mex. 478,  
260 P2d 682.

State v. Mink (Mo. 1956) 292 SW2d 940.

Muse v. Mississippi State Highway Commission  
(Miss. 1958) 103 So2d 839.

3 Nichols on Eminent Domain (3d Ed.) page 57.

The offset of benefits against the value of the part taken is  
not a novel concept in California.

50 Section 24, Railroad Act, Statutes 1861, page 619  
(offsetting general as well as special benefits)

Such a rule would abolish the "perplexing question" presented  
when attempting to distinguish between special and general benefits.

Podesta v. Linden Irrigation District (1956)  
141 C.A.2d 38 at 54.

10 To allow reimbursement for moving costs would increase litigation to a point where public acquisitions would often become economically prohibitive. It would also add a tremendous burden to already congested court calendars.

20 Replacement of the market value concept by the indemnity theory is not justified. Over 95% of all acquisitions are now settled out of court. Such is the experience of this office and all other large governmental bodies in Southern California. Hardship cases resulting from non-reimbursement of moving costs have never been brought to our attention. They may exist, but are rare indeed.

## RULES OF EVIDENCE IN EMINENT DOMAIN PROCEEDINGS

### GOVERNMENTAL SALES

30 This office agrees with the conclusions of the Commission's consultant that evidence of the prices paid for other properties by governmental agencies should be excluded from evidence in condemnation proceedings on both direct and cross-examination because they were not paid in voluntary sales.

### OFFERS

40 This office also agrees with the consultant's conclusion that offers to buy property condemned or other property should be excluded from evidence on both direct and cross-examination in condemnation proceedings. We likewise agree that offers made by the owner to sell the very property condemned are admissible as an admission against interest in litigation in which he contends that the property condemned has a higher value than the price for which he offered to sell it. We disagree, however, with the consultant's statement at page 66 that in County of Los Angeles v. Faus (1956) 48 C.2d 672, the court indicated that offers to buy have an important bearing on the question of value. Although that opinion quotes an excerpt from 2 Wigmore on Evidence (3d Ed. 1940) Sec. 463, where the author mentions "offers of money." This expression is used by Professor Wigmore while presenting his sound argument for the reception in evidence of comparable sales

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10 prices. Nowhere does he state that mere unaccepted offers to buy are evidence of the value of real property; nowhere does he even contend that they ought to be. On the contrary, at the conclusion of his argument in which the language about "offers of money" appears, there is a footnote which, commencing at the bottom of page 505 and including the current pocket supplement, contains a full dozen pages of citations to cases which support the proposition that comparable sales prices should be received as evidence of value while a great many of these same cases at the same time excluded evidence of unaccepted offers to buy. That the opinion in the Faus case was not focused on the subject of offers, but only on sales, is emphasized by the court's statement at page 578 that "In any event the sale must be genuine and the price must be actually paid or substantially secured."

20 We agree with the consultant when at page 67 he states that "offers to buy or sell property are not only treated as an inferior type of sale evidence, but most courts which have considered them have concluded that they are inadmissible." The law is clear to this effect. Revision of the law in this area is not necessary.

#### JUSTIFICATION FOR STATUTORY CHANGES

30 To justify legislative change of the rules of evidence in eminent domain proceedings, the consultant states (pages 25 and 26) that the courts are uncertain as to the proper method of presenting evidence in condemnation actions. He also states that, as a result of the decision in County of Los Angeles v. Faus, supra, which wrought a major change in the rules of evidence followed in condemnation proceedings in this state, a great deal of uncertainty and further confusion has also resulted which he alleges has and will produce an increase in litigation.

40 These statements are simply not true. The Faus case established for the first time in California, a clear, simple and positive rule for the courts to follow in admitting and excluding evidence on direct and cross-examination: Evidence of the price at which property sold is admissible to prove value where the property is similar to that condemned, the price results from an open market transaction, and it is either paid or substantially secured; no other transactions are admissible on either direct or cross examination. This recent case brings the law in the California courts into line with that followed in the federal courts and those of most other states for over half a century.

10 During the past half century the federal courts and those in the vast majority of the states have resolved the alleged "uncertainty and confusion" by the development of a harmonious body of law upon which both parties to a condemnation suit may rely. The experience of this office and that of the other government agencies in this area which have been consulted shows no increase whatsoever in litigation which can be attributed to the Faus decision.

20 The consultant also claims at page 26 that "Particular decisions of the California courts as to permissible and preferable methods of proving market value present serious doubts as to their justification." He cites no cases and identifies no allegedly doubtful methods.

30 The consultant argues that the proposed legislation will give notice to litigants of the scope and limitations of the law (page 26). Actually, the proposed legislation is an attempt to prove ultimate facts by a codification of rigid rules of evidence. This is a most difficult task and we submit that it is one best left to the courts to deal with as different problems arise. Experience shows that it is impossible to anticipate all the factual problems that arise in the process of determining fair market value. Moreover, the experience of your commission and that of the State Bar Committee to Consider Uniform Rules of Evidence shows that statutes pertaining to evidence to be workable must be confined to basic rules rather than detailed rules.

40 The consultant also alleges that modern appraisal concepts have changed and that legislation is necessary to bring outmoded legal rules up to date. (page 27) As a matter of fact, the basic methods of appraisal have not changed. Schmutz, Condemnation Appraisal Handbook (1949). As new factors, such as the tax effect of sales, zoning, price regulation, etc., arise, they are adequately treated and applied by these basic methods in determining fair market value. The proposed statute which attempts to cure this alleged defect adds nothing new to the basic appraisal methods now followed in the courts. The quotation that "The methods of proving value are 50 years outdated" (page 27), refers to archaic methods formerly used in the state of Pennsylvania which are not used or followed in the courts of California.

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## TRINITY RE-APPRAISED

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The consultant's statement at page 29 that "Where applicable, appraisers use all three approaches in arriving at market value for a particular piece of property," when referring to the comparable sales approach, capitalization of income approach, and the reproduction cost less depreciation approach is neither clear nor correct. All three approaches are never applicable at the same time. Likewise, there is no such concept as the "Trinity."

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Comparable sales are the best evidence of value. Where sufficient comparable sales are available, the comparable sales approach is and should be used to the exclusion of the other methods which are less accurate. The California courts, along with the great weight of authority, have recognized the superiority of the sales approach and the relative inaccuracy of the other approaches.

- Kaiser Company, Inc. v. Reid (1947) 30 C.2d 610 at 623.
- Forster Shipbuilding Company, Inc. v. County of Los Angeles (1960) 177 A.C.A. 572, affirmed by the California Supreme Court, July 8, 1960. ("Capitalization of income is accepted as appropriate because of absence of a market for sale of such leases")
- Joint Highway Dist. No. 9 v. Railroad Co. (1933) 128 C.A. 743 at 755-756 (Hearing denied by Supreme Court)
- United States v. Toronto Nav. Co. (1949) 339 U.S. 396.
- United States v. New River Collieries (1923) 262 U.S. 341 at 344.
- Douglas Hotel Co. v. Commissioner (8 Cir. 1951) 190 F2d 783 at 771.
- Baetjer v. United States (1 Cir. 1944) 143 F2d 391.
- United States v. Meyer (7 Cir. 1940) 113 F2d 387 at 396, cert. den. 311 U.S. 7.
- Welch v. TVA (8 Cir. 1939) 108 F2d 95 at 101, cert. den. 309 U.S. 688.
- United States v. Land in Dry Bed of Rosamond Lake, California (SD Calif. 1956) 143 F. Supp. 314 at 319.
- United States v. 329.05 Acres (SD N.Y. 1957) 156 F. Supp. 67 at 71.
- Recreation and Park Commission v. Perkins (1957) 231 La. 869, 93 So2d 198 at 199.

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Housing Authority of New Orleans v. Palmer (1956)  
231 La. 452, 91 So2d 600 at 601.  
City of Chicago v. Lehmann (1914) 262 Ill. 468,  
104 N.E. 829 at 931.  
City of Amarillo v. Attebury (Civ. App. Tex. 1957)  
303 S.W.2d 804 at 806.  
St. Agnes Cemetery v. State of New York (1957)  
3 N.Y.2d 37, 143 N.E.2d 377 at 382.

Probably the most respected and widely-known writer in the appraisal field was the late George Schmutz. In his *Condemnation Appraisal Handbook* published in 1949, he several times repeats the statement that "actual sales are the best evidence of market values" (pages 8, 24 and 25). Again, he states that "If there are adequate sales data to indicate the proper market value of the property under appraisal, then it is not necessary to make studies of capitalized value and depreciated costs. . ."

At page 34 the consultant claims that the sales approach is "blind to the advancement of the appraising techniques and, more, to the market place." He contends that it disregards relevant factors affecting value. To the contrary, it must be understood that the California rule admitting prices at which comparable properties have sold also admits evidence of all circumstances surrounding the transactions, including the financing terms and the state of knowledge of both the buyers and the sellers.

#### CAPITALIZATION

The main reason for the judicial and economic recognition of the superiority of the sales approach over the income capitalization method is the impossibility of accurately determining the capitalization rate. A capitalization rate of 3% produces a valuation 100% higher than a capitalization rate of 6%. For accurate results it must be precisely determined to a tenth of one percent. The capitalization rate is also determined by and depends upon the ratio between sales prices and income. If sales are not available, an accurate capitalization rate cannot be determined. If sales are available, a capitalization study is not necessary; it merely adds to the confusion of court and jury while prolonging the trial.

Introduction of income data as evidence of value also gives rise to many collateral matters, not the least of which is the quality of management. The consultant indicates at page 37 that

10 "those who set the rents and those who pay the rents know the potential business volume for a given location and know, also, that any good management can reach that volume." One has only to observe the increase in business failures and the number of bankruptcies published by the Administrative Office of the United States Courts since 1898 to see the fallacy in this statement.

### SUMMATION

20 The reproduction cost less depreciation approach to value is often called the summation approach. It has a number of inherent weaknesses. It applies only to improved property. It is based on the fiction that the improved land is vacant. It frequently involves extreme difficulty in determining a fair rate of depreciation. This last problem can be appreciated by anyone seeking to set a proper depreciation rate on the Palace Hotel, the State Capitol Building or the San Francisco Opera House.

30 Where the number of comparable sales is inadequate, the courts hold that it is proper to resort to the other less accurate approaches to value in order to determine just compensation.

Kimball Laundry v. U.S. (1949) 338 U.S. 16.  
U. S. v. Miller (1943) 317 U.S. 369 at 374.  
Washington Water and Power Company v. U. S.  
(9 Cir. 1943) 135 F2d 541 at 542,  
cert. den. 320 U.S. 747.

40 The federal case discussed by the consultant at page 41 represents an application of this rule rather than a "rising of the court above an established restriction." While pointing out in that case that the court admitted income data, the consultant failed to mention that the property condemned was "the only tract available within a reasonable distance of the center of Washington for development of this sort."

(U. S. v. 25.406 Acres (4 Cir. 1949) 172 F2d 990  
at 991

50 If methods of appraisal other than the comparable sales approach should be allowed, valuable time will be wasted while the court and jury wind through a labyrinth of data to arrive at answers that are not nearly so accurate as those given by the use of sales prices alone. After making the numerous adjustments, estimates and fictitious assumptions that these methods require, all of which are

10 incapable of accurate determination, the court and jury are confused more than they are helped.

### COMPARABLE RENTALS

20 It is well established that rentals obtained from comparable property are neither admissible nor helpful in determining the value of the property condemned.

McCandless v. U. S. (9 Cir. 1935) 74 F2d 596 at 603. This case was reversed by the United States Supreme Court (1936) 298 U.S. 342, having stated that "We find no reason to differ with the holding of the court below as to the inadmissibility of evidence respecting the rent paid for other lands."

30 18 Am. Jur., Eminent Domain Sec. 344, page 996 states that "Evidence as to rent paid for other land is ordinarily inadmissible."

It is inconsistent with the rule that sales are the best evidence of value to admit evidence of comparable rentals.

### AFTER SALES

40 Contrary to the language quoted by the consultant at page 54 from Orgel, the overwhelming weight of authority excludes evidence of sales and all other events occurring after the date of valuation.

Old Dominion Land Co. v. United States (1925)  
269 U.S. 55 at 65.

Shoemaker v. United States (1893) 147 U.S. 242  
at 303-305.

50 Kerr v. South Park Commissioners (1886) 117 U.S. 379.  
United States v. Miller (1943) 317 U.S. 369.

Standard Oil Company of California v. Moore  
(9 Cir. 1957) 251 F2d 188 at 221-222.

Lebanon & Nashville Turnpike Co. v. Creveling (1929)  
159 Tenn. 147, 17 S.W.2d 22 at 28,  
65 A.L.R. 440, at 450-453.

- 10 United States v. 70.39 Acres (Calif. 1958)  
164 F. Supp. 451 at 477 (affirmed in  
Carlstrom v. United States (9 Cir. 1960)  
275 F2d 802.)
- Del Vecchio v. New Haven Redevelopment Agency  
(Conn. 1960) 161 A2d 190 at 192.
- City and County of Denver v. Lyttle (1940)  
106 Colo. 157, 103 P2d 1.
- Pittsburgh etc. Ry. Co. v. Gage (1919)  
286 Ill. 213, 121 N.E. 582 at 586.
- 20 Yoder v. Hutchinson (1951) 171 Kan. 1,  
228 P2d 91C.
- City of Los Angeles v. Pomeroy (1899)  
124 Cal. 597 (see instruction XXVII  
quoted at page 642 and approved in the  
majority opinion commencing at page 647)
- Sacramento v. San Joaquin Drainage District v.  
Truslow (1954) 125 C.A.2d 478 at 487-489.  
(hearing denied by Supreme Court)

30 At page 57 the consultant discusses County of Los Angeles v.  
Hoe (1955) 138 C.A.2d 74. He states that the Hoe case "is in  
accord, at least under certain circumstances, with the rule admitting  
subsequent sales." This is true in the sense that no after sales  
were even offered in evidence in that case. The consultant further  
states at page 54 that "In that case the court permitted evidence  
of a sale of property occurring seven months after the date of  
valuation." This statement is misleading if not downright incorrect.  
In the Hoe case no sales prices whatsoever were testified to on  
direct examination. The case was tried before the decision in the  
40 Faus case which first permitted such sales prices. On cross  
examination in the Hoe case, it was disclosed that a witness had  
considered but had NOT relied upon a sale after the date of valuation.  
A motion to strike all of the witness's testimony was denied. This  
was upheld on appeal because "it is undisputed that much of his  
testimony was proper" (138 C.A.2d 74 at 80). The opinion also  
points out that the witness had been unable to find any comparable  
sales within the period of a two-year search.

50 The reason for excluding after sales is fundamental. To  
receive them in evidence violates the basic concept of the law of  
eminent domain, i.e. our definition of fair market value. Fair  
market value represents the price that a fully informed buyer would  
pay a fully informed seller on the date of valuation. No matter  
how well informed the buyer and seller might be on that date, they  
would be ignorant of future events which could affect the price.  
To receive after sales would require a change in this definition of

10 fair market value. Another reason for excluding after sales is obvious. If evidence of such sales should be received in evidence, the size of the verdict would depend on the date of the trial. This is manifestly unfair to both the government and to the owner. The property taken has a certain value as of the date of valuation and this should not change as the date of trial is changed due to the exigencies of counsel, witnesses and the court calendar.

20 There is a small group of cases which represent an exception to the general rule. These cases admit evidence of after events only on the issue of severance damage, not on the value of the part taken. Some of these cases are cited by the consultant at page 55, footnote 111. The determination of severance damage requires a determination of the value of the remaining land which is not taken from the owner after condemnation. Reception of evidence of after events for the sole purpose of determining the after-condemnation value of the remainder on the issue of severance damages is approved by the Massachusetts cases cited in footnote 111. These cases do not, however, approve the reception of such evidence on the issue of the fair market value of the property taken. For instance, in *Bartlett v. Medford* (1925) 252 Mass. 311, relied upon by the consultant, the court instructed the jury that it could consider evidence of sales that occurred after the date of valuation only with respect to the value of the remaining land not taken in its "after condition" but not with respect to the value of the land before the taking.

40 The Westinghouse and Brooklyn Union Gas Company cases cited at page 55 in footnote 111 have nothing to do with the question of after sales. Their inclusion in the report must have been inadvertent.

#### OPTIONS

50 This office agrees with the recommendation of the consultant that option prices should not be admissible on direct or cross-examination for any purpose.

#### SALES CONTRACTS

5 Nichols on Eminent Domain (3 ed.) page 307 states that "while evidence respecting an executory sale of similar lands is inadmissible,

10 even in a jurisdiction in which evidence of offers is rejected, evidence of the price fixed in a contract for the sale of the property taken, made in good faith, is admissible." It is our recommendation that executory contracts for the sale of real property should continue to be excluded from evidence, although executed contracts for the sale of real property in which title is not passed until a later date are perfectly valid as evidence of value.

#### 20 ASSESSED VALUE

30 We can hardly agree with the statement of the consultant that "seldom is the assessor for tax purposes competent enough by training to determine market value for most types of property, at least as compared to his counterpart, the real estate appraiser." The assessor in this county employs at least 300 full-time professional real estate appraisers including the President of the Southern California Chapter of the American Institute of Real Estate Appraisers.

The most valid objection to evidence of assessed values for tax purposes is that such valuations constitute the opinion of value of someone who is not present in the courtroom, subject to cross-examination. If such assessments are not admissible on direct examination and may not be relied upon by a witness in forming his opinion of value, they do not serve to test that opinion of value in any manner and should likewise be excluded on cross-examination.

40 However, one factor that an informed buyer and an informed appraiser would consider in dealing with fair market value of real property is the amount of taxes paid thereon. The taxes represent the product of the tax rate by the assessed value. For this purpose, it is submitted that these items should be received in evidence.

#### 50 FOUNDATION AND HEARSAY MATTERS

There is no other jurisdiction in the United States which permits sales prices to be received as evidence of value in which those sales prices are not independent evidence. This is true in the local federal courts. There is no logical reason whatsoever for relegating comparable sales prices--which are the best

10 evidence of value, even superior to the opinions of the witnesses -- to an inferior status.

The consultant cites People v. Nahabedian (1959) 171 ACA 335 for the proposition that sales are not independent evidence. This office is led to a contrary conclusion by the statement at 171 ACA 343 that "The sales are the objective evidence."

20 The consultant also implies at page 94 that Redevelopment Agency v. Modell (1960) 177 ACA 345 refuses to recognize sales as independent evidence. This is not consistent with the facts of that case because in that case, comparable sales were not available to the Jury. The briefs and transcript agree that three of the four witnesses who testified found no comparable sales whatsoever, and the fourth witness found only one debatably comparable sale.

City of Los Angeles v. Morris (1925) 74 Cal. Ap. 473 at 484 (hearing denied by the Supreme Court) is clear authority for the proposition that a Jury may arrive at a verdict outside the scope of the opinions expressed by the expert witnesses by a process of rejecting and accepting various portions of their testimony and reconciling the rest.

40 This office believes that the authorities establish the proposition that the hearsay rule may properly be relaxed in the case of an expert witness so long as his sources of information are sufficiently reliable to satisfy the trial judge in the exercise of his discretion. We submit, and the cases hold, that sales prices based merely on "talk in the street", recitations of sales prices in deeds or computations from Internal Revenue stamps affixed to deeds are so unreliable that the admission of prices based thereon would constitute an abuse of discretion.

#### INCOME APPROACH

50 At page 93 the consultant states that "the basic theory of value held by almost all economists" is that "the value of income producing property equals the present value of the income it will produce," citing only Orgel. Although income is a very important factor in determining the value of property, we disagree that this is the basic theory held by any reputable economist. The value of income producing property, like other property, is represented by the sale price it will command on the open market.

10 Because income studies are so greatly inferior in accuracy to the sales approach, this office recommends, as does the late Mr. Schmutz, that no income study whatsoever be received in court when sufficient sales data is available. Illustrative of the inaccuracy of an income approach to value is the testimony received on July 28 of this year before the local Board of Equalization regarding the valuation of a 30-year-old building at the corner of 9th and Broadway in the City of Los Angeles known as the Eastern-Columbia Building. A capitalized value based on this year's income was \$1,600,000.00; based on last year's income, it was only \$290,000.00. Everyone present agreed that the value was 20 substantially the same each year. The difference was due to the accounting system of those operating the building. Last year, substantial expenses for air conditioning and elevators were treated as operating expenses rather than as capital charges, a practice approved by the Treasury Department.

This office agrees with the consultant that rentals and profits should be treated the same way because they are so thoroughly tainted with the management factor, but concludes that both should be excluded from evidence.

30 With respect to the consultant's discussion at page 103 of People v. Frahn (1952) 114 Cal. Ap. 2d 61, it should be noted that the property being valued was a sublease (not the fee) and comparable sales were not available, hence it was proper to consider evidence of income and capitalization.

#### 40 REPRODUCTION APPROACH

Because sales are the best evidence of value, this office believes that evidence should not be received of reproduction cost less depreciation studies when sufficient sales data is available. This office agrees that the reproduction approach is superior, when available, to the results of income or capitalization studies. This office recognizes, as do the courts, the fact that many unique properties such as churches, school buildings, parks and monuments can only be valued by a reproduction study.

#### 50 ATTORNEYS' FEES

If the Commission concludes that this state should adopt the Indemnity Theory rather than the market value approach to just

19 compensation, serious consideration should be given by the Commission to enact a statute similar to that followed in the probate courts providing for reimbursement of attorneys' fees to property owners whose land is condemned.

Respectfully submitted,

HAROLD W. KENNEDY  
County Counsel

20 By *A. R. Early*  
A. R. Early  
Deputy County Counsel

ARE/kb

Office Of The  
COUNTY COUNSEL OF MARIN COUNTY  
1005 A Street  
San Rafael, California

July 28, 1960

10

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
School of Law  
Stanford University, California

Dear Mr. DeMouilly:

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I have received and reviewed the tentative recommendations and proposed legislation of the California Law Revision Commission relating to eminent domain proceedings. I am in full accord with many of the recommendations to be made by the Commission in this field. Frankly, however, certain portions of these proposed recommendations do cause me considerable concern. I will readily admit that I, perhaps, have not followed closely the work of the Law Revision Commission in this field, and consequently, my comments may at this point be somewhat belated. I am not fully aware of the sources used by the Law Revision Commission in gathering information to support the proposed recommendations, but I do have the distinct feeling that several of these recommendations fail to adequately consider principles of good real property appraisal processes.

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The first comments that I wish to make relate to matters of semantics. On page one of the recommendations relating to evidence in eminent domain cases is found the following statement: "For example, it has been held that an expert may not testify on direct examination concerning the income from business property being condemned or the cost of reproducing the improvements, less depreciation, that enhance the value of the property being condemned". It is my belief that the use of the word "enhance" in this context is not desirable. "Enhance" means to "advance, augment or elevate - to make or become larger". The impression may be given by the use of this word in this fashion that the income from business property or the cost of replacing the improvements less depreciation must, of necessity, dictate a greater value for the property than would otherwise be the case. This of course, is not true, as any qualified appraiser will advise. As a matter of fact, it appears to me that in some cases of a misplaced improvement or an over-improvement or under-improvement of real property, the improvement will be of no value and the total value of the real property will be attributed to the land alone. As a matter of fact, under such circumstances, the existing improvements may constitute a detriment to the total property value and may, therefore,

result in a reduction of its value rather than an enhancement of it. It appears to me that the word "enhance" could be better replaced by the word "affect".

10 It is my belief that the language contained in the Commission's recommendations is misleading when it describes the cost approach to value as involving "the cost of reproducing the improvements on the property less depreciation". This quotation appears on Page 4 of the recommendation relating to evidence in eminent domain cases. Elsewhere in these recommendations the word "reproduce" is also used in connection with the cost approach to value. It is my contention that the word "replacement" should be substituted for the word "reproduction". It is felt by most appraisers that reproduction cost less depreciation is not the correct criterion of value. As stated in the handbook of the American Institute of Real Estate Appraisers:

20 "In beginning a discussion of building cost estimates, it is important that we have a clear understanding of the distinction between the meanings of the terms "reproduction cost new" and "replacement cost new." Simply stated, reproduction cost is the cost of replacing the subject improvement with one that is an exact replica. Replacement cost is the cost of replacing the subject property new with one having exactly the same utility. In most instances, it is impractical to attempt to estimate the cost of reproduction because certain identical materials may not be available and construction methods may have changed."

30 In short, the cost approach to value involves an estimate of the cost of replacing an improvement of equal utility less depreciation.

40 I am in complete disagreement with Recommendation No. 5 relating to evidence in eminent domain cases. It appears to me that this recommendation is entirely at variance with accepted appraisal practice. The first point of my disagreement with this recommendation relates to the right of the expert appraiser to consider, among other things, in arriving at his opinion of value, sales to agencies which could have acquired the property by condemnation. To assume that all such sales do not involve a willing buyer and a willing seller is entirely erroneous. Without doubt, many such sales are made under the pressure of compulsion resulting from the power of eminent domain possessed by the purchasing agency. However, such is not universally the case. I do not know to what extent the Law Revision Commission sought the advice and experience of attorneys specializing in municipal law and particularly in eminent domain, but I am sure that if such an attempt to consult such specialists were made, the Commission would have discovered that frequently sales of property to public agencies are truly made at arms length and involve a willing buyer and a willing seller. Public agencies often come to full agreement with the seller of

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property over its value. As a matter of fact, in my own personal experience there have been instances where the public agency and the owner of the property have agreed to submit the question of value to a mutually satisfactory expert appraiser. The purchase at the value so fixed has then been made by the public agency. To unequivocally conclude that all sales of property to public agencies possessing the power of eminent domain "are not sales in the 'open market'" is erroneous. Any qualified appraiser in using the market data approach to value must and will consider purchases of comparable property made by public agencies having the power of eminent domain. He will, of course, sift all such purchases and remove from consideration those which he feels were made under compulsion and which, therefore, did not involve a willing buyer and a willing seller. It should be left to the judgment of the court to determine whether a particular sale to a public agency was truly an "open market" sale. In this connection, the principle expressed by the Supreme Court in County of Los Angeles vs. Faus (48 Cal. 2d 672) should be applied. At pages 678-679, the Supreme Court in the Faus case quoted with approval the following statement:

"Since the market value sought is the estimate of what a willing (buyer) would have paid a willing (seller) prices on other sales of a forced character are inadmissible ..... (E)vidence of the price paid (by the condemner) should come in if the condemner can satisfy the judge that the price paid was sufficiently voluntary to be a reasonable index of value. In any event, the sale must be genuine, and the price must be actually paid or substantially secured."

Certainly the condemnee must be given the right to present to the judge such evidence as the condemnee feels may reflect upon the voluntary nature of an alleged comparable sale to a public agency possessing the power of eminent domain. However, I again repeat that to entirely exclude any relevant data or source of information commonly recognized in the field of real property appraisal is unwise. As a matter of fact, the recommendations of the Law Revision Commission in this regard are self-contradictory. The Commission recommends that the expert witness shall base his opinion of value "upon facts or data that a reasonable, well informed prospective purchaser or seller of real property would take into consideration in determining the price at which to purchase or sell the property." (CCP Sec. 1248.2 as recommended by the Commission). And yet, at the same time, the Commission would exclude from consideration data which any well qualified appraiser or purchaser of real property would take into consideration. I wish to repeat that I do not contend that all purchases by public agencies possessing the power of eminent domain would constitute a sound basis for expert opinion. Whether a particular purchase may properly be taken into consideration by the expert should be left to the sound discretion of the trial judge.

The purpose of the Commission in revising the rules relating to evidence in eminent domain cases is simply stated on the

first page of the proposed report. It is to permit "expert witnesses in eminent domain proceedings to testify concerning many factors that a modern appraiser takes into consideration in determining the market value of the property". If such be the true purpose, why proceed to circumscribe the activities of the appraiser by dictating to him that he can, under no circumstances, take into consideration sales of comparable property made to public agencies regardless of how free and open such sales may have been?

10 It is my belief that the statement contained in the last paragraph of Recommendation No. 4, relating to evidence in eminent domain proceedings is not entirely accurate. It is true that modern appraisal practices involve three basic approaches to the determination of value. However, I do not believe that it is accurate to state that one of these approaches is the "consideration of the sales of comparable property". More properly, this approach should be designated as "the market data approach". The market data approach does, of course, include the consideration of the sales of comparable property. However, any competent appraiser will, I am sure, advise  
20 the Commission that the market data approach takes into consideration all other factors which may be garnered from the real estate market and which reflect upon the value of the property. It is for this reason that in the handbook of Appraisal Practices, published by the American Institute of Real Estate Appraisers, this approach to value is designated as "The Market Data Approach" (see The Appraisal of Real Estate, 2d Edition, published under the direction of the Education Committee, American Institute of Real Estate Appraisers, 36 South Wabash Avenue, Chicago 3, Illinois). This volume, I believe, is regarded in the appraisal field as the basic text on modern appraisal methods. Chapter 20 thereof is entitled "The Market Data  
30 Approach".

The comments in the foregoing paragraph are relevant to my disagreement with the recommendation contained in the next to last paragraph of Recommendation No. 5 relating to evidence in eminent domain proceedings. Therein it is stated "Offers or options to buy or sell the property to be condemned or any other property by or to third persons should not be considered on the question of value except to the extent that offers by the owners of the property to be condemned constitute admissions". This again, in my opinion,  
40 reflects a misunderstanding of one of the approaches to value used in modern appraisal practice. It again indicates that the Law Revision Commission believes that sales of comparable property are the sole evidence to be garnered from the real estate market which may properly be taken into consideration by an expert in determining the value of property. It again fails to recognize that the market data approach takes into consideration all relevant information which can be obtained in the real estate market. It is fundamental that the market data used in this approach should include offers, options to buy or sell and even listings of properties. The relative  
50 weight to be given to such data is, of course, another matter, but to completely exclude from consideration such data does violence

to the same modern practices of real property appraisal which the Law Revision Commission has stated it desires to preserve in condemnation proceedings. Attention is again directed to Chapter 20 of The Appraisal of Real Estate. Therein it is clearly stated that sales, offers, rentals, and listings of other properties must be considered by any competent appraiser. Such data must be given such weight as to the appraiser appears warranted. Particular attention is directed to pages 404-412 of The Appraisal of Real Estate, wherein the relevancy of listings, offers to sell, offers to purchase, and rentals or leases is considered. It is true as stated on page 406 that "listings or offers to sell tend to set the ceiling of market price, while offers to purchase tend to set the floor of market price". However, it is important to the appraiser to have available to him these indications of the upper and lower limits of market value. Regardless of any attempt by the Legislature or the courts to dictate to the expert appraiser that he shall not consider listings or offers, it is my belief that he will, of necessity, actually give them consideration. How can we expect him to do otherwise? By attempting to exclude these factors from his consideration, we are dictating to him that he shall not utilize all of the information which by training and practice he has become accustomed to utilizing in determining the market value of property.

I am in full accord with the basic recommendation of the Law Revision Commission that the condemnee should be permitted to recover the cost of moving which may be incurred when his property is taken for public use. There is only one point which causes me concern. I am inclined to believe that juries in condemnation cases at present tend to give consideration to the cost of moving and the general inconvenience caused to a condemnee. Although this is not recognized as a proper consideration in the present state of the law, it nevertheless has often entered into a jury's deliberations. Consequently, if the condemnee is now to be given the right to recover such expenses in a special proceeding, some safeguard should be made to provide the clearest possible assurance that a jury will not consider such factors in the principal case when the question of the value of the property taken should be their sole consideration. I think, therefore, that it might be proper to add to the recommendations of the Commission a provision which would require the court to instruct the jury in the principal case that it shall not take into consideration the question of reimbursement for moving expenses or for inconvenience caused the condemnee. This instruction should further point out that the law makes other provisions whereby these expenses will be reimbursed to the condemnee.

I believe the wording of the proposed new CCP Sec. 1249.1 could be improved. The Commission suggests that in the assessment of compensation and damages there shall be considered "all improvements pertaining to the realty that are on the property on the date of the service of summons and which enhance its value for its highest and best use .....". The use of the word "enhance" is,

10 I believe, misleading. As indicated earlier in my comments, improvements do not always enhance the value of the total property. In some instances the improvements may be so misplaced as to actually detract from the value of the total property. In such cases, before the property can be put to its highest and best use, the existing improvements must be demolished. The purchaser of such property will take into consideration the cost of demolition in such a case in determining the price he will pay for the property. This cost of demolishing the existing improvements will actually reduce the value of the total property below the value of the land in a vacant condition. Certainly it is important that all existing improvements should be considered rather than just those which enhance the value of the property. It is my belief that the word "enhance" should be replaced by the word "affect".

20 It is my sincere hope that any comments contained herein will be understood in the spirit in which they are given. I strongly disagree with the recommendations of the Commission in some respects, but generally feel that the revisions under consideration are matters which have long been in need of review.

Yours very truly,

/s/ Leland H. Jordan

LELAND H. JORDAN  
County Counsel

30 LEJ:tls

CITY OF INGLEWOOD  
CALIFORNIA

Office of  
Mark C. Allen, Jr.  
City Attorney

July 13, 1960

10 Roy A. Gustafson, Chairman  
California Law Revision Commission  
School of Law  
Stanford, California

Attn: John H. DeMouilly

Re: Tentative Recommendation and Proposed Legislation Relating  
to Reimbursement for Moving Expenses and Incidental Business  
Losses when Property is Acquired for Public Use, draft dated  
May 2, 1960, revised May 24, 1960.

20 Dear Mr. Gustafson:

I have read with great interest the two studies, (1) A Study to  
Determine Whether the Occupant of Real Property Taken by Eminent  
Domain Should Be Reimbursed for His Expenses of Moving, dated May  
5, 1960, and (2) A Study to Determine Whether the Owner of Real  
Property Should be Compensated for Incidental Business Losses  
Caused by the Taking of Real Property by Eminent Domain, dated  
May 6, 1960, which were prepared for your Commission by the law  
firm of Hill, Farrer & Burrill, and the tentative recommendation  
30 and proposed legislation relating to the above two reports, dated  
May 2, 1960 and revised May 24, 1960.

Let me first state that I am not a specialist or expert in the  
field of eminent domain law, but in the past eight years represent-  
ing this city and the city of Santa Monica I have represented  
these two cities in matters involving the acquisition of all or  
part of 75 to 100 parcels of real property in situations where  
the power of eminent domain was exercised or would have been  
exercised if the purchase could not have been negotiated. I have  
40 participated in the trial of only a very few eminent domain  
actions, usually negotiating a settlement subject to the approval  
of the City Council, either with the parties directly, where they  
are not represented by attorneys, or with their counsel in  
instances where they are represented.

In reviewing the two studies above referred to, I feel that an  
excellent study that has been completely objective has been  
submitted to your Honorable Commission by the firm of Hill, Farrer  
and Burrill. I do not, however, agree with the recommendations  
50 proposed to your Honorable Commission.

July 13, 1960

With reference first to the general subject of the recommendations, it would seem advisable to the undersigned that until some experience with this type of statute had been developed, there should be either a dollar or percentage limitation imposed upon moving expenses. While such a limitation may to some limited extent impair the usefulness of the statute, it would appear that inasmuch as there is presently no provision for moving expenses, a limitation would be a wise precaution so that the statute could be cautiously tested against experience for some period of time before it was broadened without limitation.

Secondly, commenting on paragraphs 4 and 5 of the recommendations, it would appear to the undersigned that any statute should provide a means similar to a cost bill in an ordinary civil action, whereby, within a given period of time after final judgment and possession, the condemnee could file a statement of his moving costs. The form in which such statement should be filed should be in considerable detail and should be required to be supported and verified. In a manner somewhat similar to objections to a cost bill, the condemning agency should be permitted to file an objection or objections to the moving expenses claimed. If an objection or objections are filed, provision should be made for a hearing before a judge without a jury to ascertain the moving costs, and the burden should be placed upon the condemnee to establish all costs he is to recover. The statute should further provide for a supplemental judgment in the nature of a civil judgment to be entered in favor of the condemnee for such costs.

My final comment deals with paragraph 6 of the recommendations. I would agree with the recommendation, but it would appear that any such statute should further provide that in an eminent domain proceeding a jury should be expressly instructed, prior to determination of the issue of compensation, that the condemnee will be compensated for his moving expenses over and above their determination of the fair market value of his property. Such instruction should preclude the possibility that a person might be compensated twice for the same loss, but the absence of such an instruction, or silence on the subject, would not do so.

I very much appreciate Mr. DeMouilly's furnishing me with these reports and studies, and trust that my comments may be of some assistance to the Commission in preparing your recommendations to the legislature.

Respectfully submitted,

MARK C. ALLEN, JR.  
CITY ATTORNEY

MCA:dd

cc: Hill, Farrer & Burrill  
Lewis Keller, League of California Cities

Office Of  
THE CITY ATTORNEY  
of  
Modesto, California

August 2, 1960

Mr. John H. DeMouilly  
10 Executive Secretary  
California Law Revision Commission  
School of Law  
Stanford University, California

Re: Recommendations Relating to Eminent Domain.

Dear Mr. DeMouilly:

I have received and examined the material sent to me in response  
20 to my recent request regarding the recommendations of the Commission  
relating to eminent domain.

Generally speaking, I am in accord with the recommendations of the  
Commission and believe that they will improve the administration  
of justice insofar as it relates to the exercise of the power of  
eminent domain. However, there are several matters upon which I  
would like to comment. These all relate to the taking of possession  
and passage of title in eminent domain proceedings.

30 Immediate Possession. As the material points out, present  
statutes implementing the Constitutional provisions provide for a  
three day notice prior to the taking of possession. While it is  
admitted that the three day period is short, I am of the opinion  
that the twenty day provision included in the proposed legislation  
is too long and inimicable to the interests of the public in exer-  
cising the power of eminent domain. It would seem to me that a  
period of ten days would be quite adequate to provide reasonable  
notice of taking immediate possession. Furthermore, I am somewhat  
concerned with the recommendation that within the twenty day period  
40 after notice is given, an owner should be able to obtain an order  
delaying the effective date of immediate possession in order to  
prevent necessary [sic.] hardship. It appears to me that while such  
a provision at first glance may appear reasonable, it could be  
readily abused to delay and hinder public agencies in obtaining  
immediate possession for important public use.

It provides basis for delay which is too frequently utilized at  
present by attorneys in all types of judicial proceedings instead  
of getting on with the business. I recommend that the provision  
50 be deleted.

For similar reasons, I recommend that the language of Section  
1243.5 as proposed to be amended, authorizing the vacation or

August 2, 1960

stay of an order authorizing immediate possession be deleted unless possession be defined so as to include any and all use of all or any part of the property by the condemnor. For example, does the posting of signs constitute "taking possession"?

I appreciate the opportunity to review this material and offer 10 comments and suggestions.

Sincerely yours,

S/ Allen Grimes

ALLEN GRIMES  
City Attorney

20 AG/p/efm

cc: League of California Cities

CITY OF MOUNTAIN VIEW  
Mountain View, California

Department  
City Attorney  
540-A Castro Street

July 21, 1960

10 Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
School of Law  
Stanford University, California

Re: Comments on tentative recommendations  
relating to eminent domain.

Dear Mr. DeMouilly:

20 First, I would like to take this opportunity to thank you  
for forwarding a copy of your proposed recommendations to this  
office.

In general, I feel that the proposed changes have been  
needed for a long time, and that, if adopted, they will produce  
better results in the future.

30 In relation to my specific comments, set forth below, I  
have followed the same topical sequence used in your outline,  
i.e., No. 1. Evidence; No. 2. Moving Expenses; and No. 3.  
Possession and Passage of Title.

No. 1. Evidence.

Under the proposed new Section 1248.1 of the Code of Civil  
Procedure, what would be the effect of a jury's "view" of the  
property?

40 Under new Section 1248.2 of the Code of Civil Procedure,  
it would be rather difficult for an attorney to prepare his  
expert witness for trial, without knowing what facts or data the  
court might consider proper. This "open door" policy is akin  
to the admission of "comparable" sales, within the discretion of  
the court, guided by certain "safe guards", as set forth in the  
Faus case. Some courts make no attempt whatsoever to determine  
what properties are "comparable" and merely allow anything to  
come in, on the theory that these matters can be adequately  
50 handled by cross examination. Likewise, many courts may permit  
an expert witness to testify to all facts and data that he (the  
expert witness) considered, rather than the facts or data that  
a reasonable well-informed prospective purchaser or seller of  
real property would consider. As I am sure you are aware, it  
is not always true that incompetent evidence can always be taken  
care of on cross examination.

July 21, 1960

I feel that your recommendation which would exclude evidence of sales to agencies having the power of condemnation is excellent. I think that there is no question whatsoever that such sales are not "market" sales.

No. 2. Moving Expenses.

10 I feel that sub-section 2 of Section 1270.1 (proposed) of the Code of Civil Procedure would be unnecessary, if and when your recommendations regarding notice prior to possession became effective. If a condemning agency were required to give 20 days' notice, and further, if the condemnee could appeal to the court for an extension, based upon hardship, then it appears that there would be no need for temporary storage. Such a procedure would open the flood gates for many unnecessary "spite" expenses, incurred by the condemnee, at the expense of the condemnor. Further-  
20 more, the threat of incurring such temporary storage expenses would give the condemnee an unfair bargaining point.

I also think that there should be some statutory authorization for the condemnor to provide for the moving and relocation of personal property. This would enable condemning agencies to call for bids from moving companies, and thus secure a lower cost to the public. Furthermore, such a procedure would circumvent the possibility of "feather-bedding", which would undoubtedly occur in most cases. It might be pointed out also, that such a procedure would still insure the condemnee that his moving expenses  
30 would be paid by the condemnor.

No. 3. Taking Possession and Passage of Title in Eminent Domain Proceedings.

On page 7 (paragraph 1) of your recommendations relating to the above referenced topic, you stated that under Section 4986 of the Revenue and Taxation Code, special assessments are prorated from the date possession is taken. I have checked this section of the Revenue and Taxation Code, and I fail to see how  
40 such a conclusion is drawn. Furthermore, I think that the case law supports the conclusion that special assessments are payable in their entirety from the condemnation award. It is my belief that City of Los Angeles v. Superior Court, 2 Cal.2d 138 is still the law on this subject. Furthermore, I feel that there should be no departure from this rule, for the reason that a special assessment cannot, in fact, be prorated. Merely because payments for special assessments are made annually, they bear no relation to the actual benefits for which the assessments were levied. Since a condemning agency must pay the fair market value for  
50 property, and this term necessarily includes all items which add

August 17, 1960

2. The same problem exists under Section 1270.2 as proposed. Removing, storing, and relocating personal property on real property taken for a term only may run the cost to the condemnor far higher than the value of the personal property involved. In some manner this should be avoided. This may be possible by placing a limit on the time such personal property may be stored or by placing a limit on the amount of reimbursement in relationship to the value of the personal property.

10

3. Any legislation requiring compensation for incidental business losses should be prepared with extreme caution. The result of changing the theory of compensation in eminent domain cases to that applied in damage cases for tort or breach of contract is difficult to foresee. If not carefully done, it may open the door to extreme abuses and could make the cost of public improvements where the acquisition of property is required a great deal higher than is now the case.

20 Taking Possession and Passage of Title.

No comments.

I appreciate this opportunity to comment on the material you have forwarded.

Very truly yours,

30

S/ WALTER W. CHARAMZA  
Walter W. Charamza, City Attorney,  
City of Newport Beach

WWC:mec

July 21, 1960

10 value to the property, the result would be a "double payment". Thus, if a special assessment lien, payable over a 20-year period had conferred a benefit upon the property, which benefit in turn increased its market value, then it is obvious that the condemning agency would be paying for this benefit in the condemnation award. Therefore, it should not have to pay the balance of the lien, yet remaining unpaid, because the property owner has already realized the full benefit for which the lien has been assessed.

In conclusion, I hope that some of the above comments may be helpful, although I realize that you have probably considered all these matters at great length already. Again, I would like to emphasize that it is gratifying to see that prospective legislation is currently underfoot to correct many of the existing abuses in this field of the law.

20 Very truly yours,

Michael Atherton  
Assistant City Attorney

MA:je

30

#34

CITY OF NEWPORT BEACH

CALIFORNIA

August 17, 1960

10 California Law Revision Commission  
School of Law  
Stanford, California

Attention: John H. DeMouilly  
Executive Secretary

Dear Sir:

20 By letter of transmittal dated June 30, 1960, you forwarded for comment a copy of the tentative recommendations of the Law Revision Commission and research study of the consultant on portions of your condemnation study on: Evidence in Eminent Domain Proceedings; Reimbursement for Moving Expenses and Incidental Business Losses; and Taking Possession and Passage of Title.

Although time has not permitted an exhaustive study of the various problems, I have the following comments after reviewing the material:

Evidence in Eminent Domain Proceedings.

30 1. Section 1248.2 (1) (a) would permit an opinion to be based upon an amount contracted to be paid for the property or interest being condemned if the contract was freely made in good faith within a reasonable time after the date of valuation. Any contract made after the summons is issued of which the property owner usually has notice would be highly suspect. If a contract were made and taken into account by an expert testifying as to value, it would be very difficult for the condemnor to obtain and present evidence that such contract was not freely made in good faith. For these reasons, I feel that any contract made after the date of valuation and possibly within a reasonable time prior to the time the complaint is filed or the summons is issued probably should not be taken into account.

40 Reimbursement for Moving Expenses and Incidental Business Losses.

50 1. In Section 1270.1 as proposed a person occupying real property becomes entitled to costs for temporarily storing personal property until the real property in which the personal property is to be relocated for use is available for occupancy. It seems that some specific limit should be placed on the time the personal property may be stored. Circumstances may justify varying lengths of time but the Legislature should provide either a specific limit or more specific and limiting standards than now appear in this proposed section.

August 17, 1960

2. The same problem exists under Section 1270.2 as proposed. Removing, storing, and relocating personal property on real property taken for a term only may run the cost to the condemnor far higher than the value of the personal property involved. In some manner this should be avoided. This may be possible by placing a limit on the time such personal property may be stored or by placing a limit on the amount of reimbursement in relationship to the value of the personal property.

10

3. Any legislation requiring compensation for incidental business losses should be prepared with extreme caution. The result of changing the theory of compensation in eminent domain cases to that applied in damage cases for tort or breach of contract is difficult to foresee. If not carefully done, it may open the door to extreme abuses and could make the cost of public improvements where the acquisition of property is required a great deal higher than is now the case.

20 Taking Possession and Passage of Title.

No comments.

I appreciate this opportunity to comment on the material you have forwarded.

Very truly yours,

30

S/ WALTER W. CHARAMZA  
Walter W. Charamza, City Attorney,  
City of Newport Beach

WWC:mec

CITY OF PALM SPRINGS  
CALIFORNIA

Office of Jerome J. Bunker,  
City Attorney

July 28, 1960

California Law Revision Commission  
School of Law  
10 Stanford, California

Re: Tentative recommendations and proposed legislation in the  
field of eminent domain.

Dear Sirs:

It has been my pleasure to give some rather careful study and  
attention to your tentative recommendations and proposed legislation  
in the field of eminent domain with regard to the subjects:

20

(1) "Reimbursement for moving expenses and incidental business  
losses when property is acquired for public use". I prefer  
to make no comment.

30

(2) With regard to your proposed legislation relating to  
"evidence in eminent domain cases", I refer you to the  
proposed addition, namely 1248.3, subdivision (1), with  
proposed inadmissability of the price or other terms of  
an acquisition of property or a property interest if the  
acquisition was made for a public use for which property  
could be taken by eminent domain, is subject to question.  
Even the authors, Hill, Farrer and Burrill, at page 7,  
item 3, of their study relating to taking possession and  
passage of title, note that the problem of not having the  
right to immediate possession often produces an excessive  
price paid from a public treasury.

40

I simply do not feel that there is such awful danger inherent in  
using this type of evidence, and believe that some thought should  
be given to limiting the rule of inadmissability to those instances  
where the condemnor has the right to immediate possession. If, of  
course, ultimately the Constitution were changed so that immediate  
possession accrues in all condemnation actions, then this rule of  
inadmissability proposed would be proper.

50

With regard to Subdivision (3) of proposed addition 1248.3 to the  
Code of Civil Procedure, I do not have the confidence that the  
modern day jury will limit the price, offer, option to purchase or  
lease, to an admission against interest. Theoretically the jury  
will use the numerical evidence to ascertain market value.

July 28, 1960

With regard to the proposed legislation for the taking possession and passage of title, I cannot agree with the recommendation, namely C.C.P. 1243.5, subdivision (7), set forth on Page I-4. The study relating to the taking of possession is replete with the hardships imposed on a whole community of people by one recalcitrant.

- 10 Finally, that portion of the last paragraph on Page I-12 reading "If, for any reason, the money shall at any time be lost, or otherwise abstracted or withdrawn, through no fault of the defendant, the Court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of Court, as above provided".

20 This proposal would seem in some respects to make the condemnor a surety for possible neglect or fraudulent handling of funds by officers of the State or County Treasurer. It cannot be parenthetically stated that the surety bond of these officers would cover every situation of lost or abstracted money.

I trust these few observations may be of some little help.

Very truly yours,

30 S/ Jerome J. Bunker

JEROME J. BUNKER  
City Attorney

JJB/d

40 cc Lewis Keller, Esq.  
Associate Counsel,  
League of California Cities  
Hotel Claremont  
Berkeley 5, California

D I O N R. H O L M

CITY ATTORNEY  
City Hall  
San Francisco 2, California  
HEmlock 1-1322

June 28, 1960

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

Dear Mr. DeMouilly:

Your letter of May 24 with enclosures was received. Following is my view concerning the subject of your letter.

Moving Expenses

The Law Revision Commission has made the following tentative recommendations respecting moving expenses:

1. Subject to reasonable limitations the occupant of land acquired for public use should be reimbursed for actual and reasonable costs necessarily incurred in moving his personal property off the land.

2. Such reimbursement should be provided only for transporting property to another location within the same general area as the land taken. The limitation proposed is 25 miles.

To require the occupant of the land to pay his own moving costs is a harsh rule. The public generally who will enjoy the benefits of the improvements resulting from condemnation can much easier assume this burden and should. It is believed, however, that there should be some limitation respecting the allowance of such costs. Section 106 (f) (2) of the Housing Act of 1949, as amended, provides a maximum allowance of \$3,000 for relocation of a business concern and \$200 for relocation of an individual or family. Perhaps the tentative proposal of the Commission would be more equitable since it would allow the actual costs. While the Commission has proposed to apply the area of limitation on moving costs only to litigated suits, it is believed that if such a limitation is to be used it should also be applied to negotiated settlements.

Where land is taken for a term only it is proposed that if the occupant has the right to re-occupy the property at the expiration of the term, he should be reimbursed for moving, storing and relocating his personal property. There should be no objection to this provision.

The Commission has recommended that where the parties do not agree on the amount to be paid, relocation costs should be determined in a separate proceeding after the trial of the condemnation suit. It is believed that this procedure would unnecessarily increase the number of matters to be litigated. Moreover, since it is assumed that many jurors presently allow something for relocation costs in determining market value, if such proceedings were consolidated a more equitable determination should result.

#### Incidental Business Losses

The Law Revision Commission is not presently prepared to make a recommendation for or against compensating condemnees for incidental business losses such as good-will, business interruptions and profits. The reasons given by the Commission are a long history of the denial of all incidental losses, admitted difficulties that the courts and others would have in administering any proposed statute and lastly because of the many questions as yet unanswered due to lack of experience with such statutes. Adoption of the moving cost statute would give the courts, administrators and attorneys an opportunity to gain considerable experience with reimbursement of one type of incidental loss which should provide some guidance in awarding compensation for other incidental losses.

In view of this recommendation it is suggested that adoption of an incidental business loss statute providing for recovery of loss of good-will, business interruptions and profits should be opposed.

I trust the foregoing may be of some little help in the important study you are undertaking. There are many other awkward provisions in the statute concerning eminent domain that should be given careful consideration and ambiguities that should be clarified, as well as some onerous provisions from the condemnors standpoint that should be stricken.

Yours truly,

/S/ Dion R. Holm

DION R. HOLM  
City Attorney

MUNICIPAL COURT

County of San Bernardino

Court House  
San Bernardino, California

10

John H. DeMouilly  
California Law Revision Commission  
Stanford University, California

July 29, 1960

Dear Sir:

17

Your proposed legislation relating to evidence in eminent domain cases suggests the following comments:

20

The theory that juries weigh only opinion evidence of value is merely a theory. The jury needs expert guidance in interpreting facts, but the expert should not exclude the jury from this function. If we were to adhere to this concept consistently, the jury ought not to be allowed to split the bracket of the experts' opinions, but ought to be required to pick one appraisal as reliable and adopt it to the penny.

An extrajudicial admission of low value by the owner should be admissible as direct evidence of value even if the owner does not take the stand. Your proposed Sec. 1248.3 (3) seems to prohibit this.

30

Proposed used such as subdivisions should be expressly excluded; so also should "as if" values-valuation as if the land were already subdivided or combined with other parcels, or otherwise different from its actual status.

The words "or after" in Sec. 1248.2 (1) (a) are good, if value attributable to the proposed improvement is excluded. Such value should be excluded in any case; for example, if a new Junior College site is announced, this will raise values of adjoining lands, and speculative sales of such lands then often force up condemnation values on the site itself.

40

Your proposed legislation relating to possession and title suggests the following comments:

Your proposed broad and flexible power of taking immediate possession is reasonable, but I doubt that the voters will buy it. Eminent domain is already a bugaboo.

50

While we are revising the law, we should adopt the rule of some jurisdictions that benefits to land not taken are offset against the value of the land taken as well as against severance damages. The present system results in the payment of judgments to landowners who are also receiving a large unearned increment of value, from, for example, flood control works. The reason for our present practice is merely that, because some adjoining land owners received unearned increment of value gratis, we ought not to deny the same windfall to condemnees who also own adjoining lands. On the contrary, I think we should block every windfall we can, even though some or many will get by.

(J.B.Lawrence)

You propose that plaintiff must show necessity for immediate possession. I suggest a standard of reasonableness, or a showing that delay would cause significant loss or damage to plaintiff.

10 I question the inclusion of special assessments in the proposed Section 1248 (8) and 1252.1. If defendant's property has been increased in value by the installation of sewers, the entire amount due (discounted for prepayment) should come out of his compensation. Otherwise, his compensation includes the increased value, for which he (alone among his neighbors) will never pay.

Where specific benefits are involved, the above argument may also apply to bonded debt.

20 I wonder if the summary procedure for claiming costs (invoked in the proposed Sec. 1252.1 (3)) is adequate for solving knotty apportionment problems arising from a partial taking of a non-uniform parcel. You should also make

it clear that no tax exemption is caused by the condemnation of a term interest, except as the constitution may require (such as the public school exemption, which is based on use rather than ownership).

30 The proposed Section 1253 (3) is ambiguous. Is Plaintiff "authorized to enter" on the date set in Sec. 1243.5 (2) (d), as proposed, even if he has not (without fault) been able to serve the prior notices required in Sec. 1243.5 (3)?

I suggest that interest should always commence to run on the day of valuation. Any gap or overlap here will lead to overcompensation or undercompensation. As you say, interest can stop when a withdrawable deposit is made.

Improvements should also be valued as of the day of valuation, excluding any improvements made with actual knowledge of the pendency of the action.

40 Title and tax liability should pass together on the day that Plaintiff acquires a perfected right to possession, whether or not this is prior to the Final Order.

I have enjoyed writing this; I hope it may have some value.

S/ J. B. LAWRENCE  
Judge

50 JBL/pw

MUNICIPAL COURT  
San Bernardino Judicial District  
County of San Bernardino

Chambers of  
J. B. Lawrence  
10 Judge of the Municipal Court

Court House  
San Bernardino, California

July 26, 1960

John H. Demouilly  
California Law Revision Commission  
Stanford University, California

20 Thank you for the tentative proposals relative to eminent domain.

I agree with your proposal that moving expenses should be paid. However, some procedural questions arise.

The requirement of an additional proceeding on moving expenses is burdensome. At least the condemnor should be permitted to include in the eminent domain complaint a prayer that reasonable moving expenses be determined.

30 I note that if the condemnee sues for moving expenses, he gets attorney's fees, but if the condemnor initiates this, the condemnee does not get attorney's fees. I do not see why fees should be paid in either situation.

40 Payment of storage expense will lead to problems. When is the relocation site "available"? This may involve subjective elements (the condemnee's ability to pay, for example,) and delays within the condemnee's control (such as intentional selection of property not immediately available).

As to Sec. 1270.2, why should storage expense be allowed for five years if the estate condemned is a five year term? During that time the condemnee could more profitably put his machinery to work or sell it, and at the end of that time it will be obsolete.

Is it intended that an action under Sec. 1270.4 (5) can be brought in Small Claims Court?

50 Thank you for this opportunity to comment.

S/ J. B. Lawrence

Judge

JBL/pw  
CC Kitchell

ROBERT P. McNAMEE  
Attorney at Law  
Room 330, Courthouse  
San Jose, California

10

July 28, 1960

Mr. John H. DeMouly  
Executive Secretary  
California Law Revision Commission  
School of Law  
Stanford University, California

20 Re: Tentative Recommendations and Proposed Legislation

1. Evidence in Eminent Domain Proceedings
2. Reimbursement for Moving Expenses and  
Incidental Business Losses When Property  
is Acquired for Public Use.

Gentlemen:

C<sub>0</sub> I am a Deputy County Counsel for Santa Clara County and for the past four years the greatest portion of my time has been dedicated to the trial of condemnation cases. The opinions expressed herein are my own and have not been discussed with anyone else. Accordingly, I feel free to state that in my personal opinion the recommendations of the Commission with respect to the two propositions referred to above leave much to be desired, both as to reasons for recommended changes and the draftsmanship of the proposed legislation.

40 Considering the tentative recommendations relating to evidence in eminent domain proceedings, I will briefly consider each of the six points commencing on page 2 and ending on page 5.

With respect to the first recommendation, the Faus case was interpreted in Brady v Carman 179 ACA 77 (1960) as holding that comparable sales are independent evidence of value. A good argument can be made for the retention of this rule of law until it has had a chance to be applied, before making a decision as to whether the recommendation is good or bad.

Two reasons are given by the Commission for its first recommendation:

50

1. Testimony of non-expert witnesses as to comparable sales would unduly prolong trial.
2. The court or jury could return a verdict above or below the expert's opinion of the value of the property.

With regard to the first point, it does not follow that there would be an unduly long prolongation of testimony. In fact, with respect to direct and cross-examination of some experts who abuse the hearsay rule it might result in shortening many trials. Its existence would certainly tend to make the experts more careful in their testimony. Moreover, testimony from the actual parties to a sale would result in more accurate data on the facts of the sale being presented to the court or jury. As far as excessive or minimal verdicts, the law provides for motions for new trial and appeals. It does not seem to me that either of the reasons submitted by the Commission for limiting evidence of value to opinions of qualified experts are meritorious: Also, direct proof of sales from which value may be ascertained may have the further advantage of decreasing fraud and misrepresentation by experts.

The second recommendation on page 2 is only a statement of the existing law which existed even before the Faus case, (C.C.P. §1872) and, therefore, the recommendation for further legislation seems unnecessary.

The real problem involved in the expert giving the facts and data upon which his opinion is based has always been how far the expert can go in bringing in hearsay evidence or giving improper reasons for his valuation. It is submitted that the rules of evidence covering the opinion of experts in fields other than condemnation are and should be applicable to experts who give their opinion of value in condemnation cases. In general, experts may give their opinions based on hearsay and give the source of the hearsay, but cannot give the details of hearsay.

The third recommendation of the Commission seems unnecessary, as it is the rule at the present time and no desirable reasons for change seem to exist. In fact, the proposed change might be interpreted so as to extend the hearsay rule in condemnation cases to a point beyond that applicable to experts in other cases.

The fourth recommendation seems to me to contain two matters: First, the reasoning of the reasonable, well-informed man and, second, the three basic approaches to the determination of value. The way this recommendation is worded seems to assume that the reasonable, well-informed man in purchasing property utilizes the three basic approaches of value. I do not believe this is true. Normally, the capitalization of income and cost of reproduction less depreciation are occasionally used only as a check on an opinion based on comparable sales. They are used as a primary method only when comparable sales are unavailable. The weakness in the capitalization of income method lies in the appraiser's power to pick any capitalization rate and to attribute potential income to the property. These two variables permit one to come up with any value desired. In the cost of reproduction method the percent of depreciation allowed is a variable which also permits the appraiser to pick figures that achieve a result which will conform to a pre-determined idea of value. Making these two methods available where comparable sales exist would create methods whereby the ascertainment of "value" would be made even more speculative than it now is.

With respect to the fifth recommendation, I agree in general with the position of the Commission on sales to condemnors, although the Commission still ignores the basic problem as to whether such sales should be permitted when there are no other sales in the market. I believe that requiring direct evidence, rather than permitting hearsay, as to the voluntariness of the sale would be an appropriate way of handling the problem and this type of evidence be allowed only when the court finds there are no comparable sales or not a sufficient number to form a good basis for an opinion.

The recommendations with respect to offers does not seem to me to be realistic. The recommendation appears to treat offers as unreliable for the basis of valuation. It seems to me that a bona fide offer to sell the subject property does give some idea of the property owner's idea of value. Likewise, however, a bona fide offer to purchase the subject property seems to me to have some indication of value and the analysis of the Union Machine Company case (133 CA 2d 167) should be given more consideration. I would like to point out that in the treatment of offers the Commission has limited its consideration to their use as a basis for an opinion on direct testimony. This does not treat the problem as to whether an expert should be cross-examined on his knowledge of them so as to test the extent of his investigation. This aspect of the problem has not been dealt with sufficiently. In general, I would suggest that direct evidence of proof of bona fide offers on the subject property should be required outside of the presence of the jury before reference is made to offers on direct or cross-examination. Direct testimony on offers for comparable properties should be excluded, but cross-examination on such offers without reference to the amount could be allowed.

These are my personal views, as previously stated herein. I am not going to discuss the proposed statutory changes dealing with evidence, except that with respect to the proposed §1248.2 (1) (b) and (c) I would like to point out that the capitalization of income section refers to the general income attributable to the property as distinguished from the income derived from the property itself. Thus, by choosing any income he wants the appraiser may come up with any particular predetermined figure that he desires. With respect to the cost of reproduction less depreciation clause, most appraisers are not competent to estimate the cost of reproduction and, as a practical matter, the method is artificial because most buildings would not be reproduced in their present design. I believe these two methods should be used only in exceptional circumstances and, when used, the expert should be qualified on the basis of his background in either finance or construction, not on his real estate background alone.

With respect to the recommendations to reimburse for possible moving expenses, I am in accord that some type of legislation is necessary in this field.

Before commenting upon the recommendation on the proposed legislation of the Commission, I would like to suggest that the condemnor be given the right to perform the move at its own expense or to contract for the move for the benefit of the occupant, or give a cash amount to the occupant.

I would also suggest that any right of action given the occupant to recover his moving expenses be limited to a recovery for expenses which already have been incurred, with interest from the date they were incurred if demand for payment from the condemnor is refused.

10 If this were done, the applicant should be entitled to sue when he moves; at any time during storage; or after he returns to property held for a period less than his right of occupancy. Obviously, these changes would require complete revision of your proposed legislation.

20 I might point out that the proposal to charge the condemnor for attorneys' fees in the event they do not institute suit seems to me to be unreasonable because often it will be first necessary to ascertain the rights between owner and occupant as to the property in or affixed to the realty. A possible compromise might leave the problem of attorney fees to the discretion of the court, to be awarded when the conduct of the condemnor has been inequitable.

I realize the foregoing is sketchy and I have attempted to hit only a few highlights. I do believe some statutory changes covering both evidence and moving expenses are desirable. I do not think the Commission has gone far enough into the effect some of the proposed changes would have.

Very truly yours,

/s/ Robert P. McNamee

Robert P. McNamee

RPM:gk

TINNING & DE LAP  
ATTORNEYS AT LAW  
Court and Mellus Sts.  
Martinez, Calif.

July 29, 1960

10

The California Law Revision Commission  
School of Law  
Stanford, California

Attention: John H. DeMouilly, Executive Secretary.

Gentlemen:

20

Your Tentative Recommendations Received

My comments follow:

I feel your text material is sound in that it urges the trier of fact to go into the market place and determine the real factors which govern the price paid for real property. I have had recent experience trying several large subdivision property cases wherein old law such as City of Los Angeles vs. Hughes, etc. was argued to the court re inadmissibility of subdivision cost analysis. As is usual in these artificial situations, such evidence comes in to show "adaptability" but is said to be too "speculative" for its unlimited reception as to value. No subdivision property in California today is sold (if the seller and buyer are at all informed) other than on a finished lot cost basis. To people in the field of real estate, it seems almost insane to exclude evidence which is the principal predicate for determining consideration in the real world.

40

I should think a general statutory provision should be sufficient. All evidence normally considered by informed persons in the market place may be received, etc. In fact, the bill submitted to you is incomparably superior to your revision, as is the Senate Bill quoted. I would question the inadmissibility sections of this bill submitted for a bona fide offer can be extremely pertinent and the fear of fabrication isn't persuasive to me. People do that at their peril. Such hanky panky would generally lead to lower, rather than higher awards.

50

I make strenuous objection to the Commission proposed amendment to 1248.3 which says the opinion of the witness is inadmissible if the witness does such and so. Without wishing to be offensive on the point, I urge that this is about as unreal a revision as it is possible for you to suggest. I would prefer to see the law as is, rather than so revised. The distinction is between allowing a witness to testify on direct examination to the objectionable

10 items referred to numbered 1 through 4 and holding an opinion inadmissible if he's considered any of these things. Such an amendment will simply lead to more pettifogging on evidentiary matters in the trial of these already protracted actions. If  
a witness knows of any such facts, (and he usually will) of course he has to consider them in forming his opinion. It's impossible for the human mind to honestly disregard any evidentiary fact, whether its weight be great or small, which it has encountered. Your amendment would counsel falsity and it is ridiculous. This statute will lead to the spectacle of cross-examination by lawyers to determine whether or not the witness is (a) aware of, and (b) has considered any of the items one through four, and then a lengthy motion to strike, etc., will be made. The spectacle will be  
20 interesting, but not enlightening. I definitely feel it is a major error to couch your revision in the language of inadmissibility of opinion, rather than in the language of exclusion from evidence on direct examination of such factors (assuming they are as objectionable, as you believe). In summary, my deep feeling, as the result of having tried quite a number of these cases, is this:

1. This field of law is ridden with petty, technical restrictions of all kinds which simply prolong trial and all too frequently prevent these matters being tried on their merits. Your basic  
30 idea to admit any evidence reasonable people in the real world consider in fixing consideration is extremely sound. I feel that specific amendments such as 1248.3, affording further technical means of striking out a witness's opinion if he has come into the possession of the prohibited factual data and is honest enough to say that he gave it some slight consideration in forming his opinion will serve only to aggravate the present situation rather than improve it. I might comment inasmuch as I may not get to write to you again by your deadline of August 1st, that the data  
40 I have read is excellent and I think the gentlemen you selected have done an outstanding job for you. I might say that it is my most considered opinion that condemnees need and are entitled to more legal help than the law of California now provides. In my opinion this help is needed if the meaning of basic law is to be translated into some sort of rough reality in the courthouse. It is my general observation that most landowners are so fearful of litigation that they will take whatever figure is offered rather than employ counsel or even real estate advice of their own choosing. Among those who do find counsel are usually the well-to-do. It is an area in which rather than great opportunity being  
50 afforded to the unscrupulous citizen, great opportunity to exercise utilitarian zeal is afforded to the various personnel of the various governmental agencies. I might say that I have now spent ten pretty active years generally engaged in litigation of all kinds and I believe that I have seen far more injustice done by various governmental agencies to those unfortunate enough to have their property

10 required for public use than I have seen in any other area of dispute in our society. As a practical matter you can not come in too high on behalf of the landowner without losing touch with the jury. You can come in with figures that to an informed person are ridiculously low without offending a lay jury, except under the most unusual and aggravated circumstances. I believe that any lawyer familiar with the courts would generally agree with this observation. The reasons for it are apparent. It is in this climate that the idea that "We are fair, so you must do as we say", finds a great deal of currency, and is probably a necessary foundation for proper team spirit in the various omnipresent entities taking property today.

20 Re Subdivision 2, as proposed, re offers. I think that this should be modified to provide for the admission of any staff appraisal, or any appraisal made of the property being valued by any party litigant. This is in keeping with the subject I addressed myself to in an earlier letter, namely, the practice of hitting on the low side in a staff appraisal and then, if the owner refuses this, employing accommodating independent appraisers who come in with figures substantially below the original figure offered. This is the principal weapon of the Division of Highways in my experience with them and is often used as a means of putting pressure upon lawyers who try condemnation cases sufficiently well to cause them discomfiture. The right of way agents of the various governmental agencies, and particularly the Division of Highways, are quick to tell people that this definite possibility exists. The people who are given this advice have difficulty in understanding that such statements are not intended as threats. As presently phrased, your proposed statute seems to give legislative sanction to this practice, which is so wide-spread as to be well known among trial judges and trial lawyers with an increasing number of courageous trial judges allowing the defendant to call the staff appraiser under 2055 and prove the government's original figures. I am sure that any lawyer who has had more than a passing acquaintance with this field of litigation can cite a brief-case full of examples of this type of conduct.

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40  
50 Senate Bill 1313 as proposed, page 43, your data, is a better bill than the detailed substitute for it. Generally people are uninformed as to the value of their property. This is particularly true in this era of rapidly depreciating currency, expanding population, and fluctuation in use of land by reason of zoning. In my opinion, it is unfair and misleading to bring in some ill-considered notion as to value previously expressed by an owner. If the owner takes the stand and personally gives an opinion, such prior inconsistent conduct would be proper cross-examination. The general situation is that the demand has to be well out of touch with reality before it is referred to by the condemnor and it serves no useful purpose in trying to adjudicate a proper award.

Comment re capitalization approach:

10 It is a mistake to limit the obviously necessary admission  
of this evidence to "going concern" property. Virtually no  
commercial or business or income property is sold today in our  
area of California without the buyer in fact conducting a  
capitalization approach to value prior to purchase. Bare land  
is more difficult of valuation than committed or improved property.  
Testimony as to inquiry of an expert into square foot lease rates  
for uses determined by investigation to be logical and proper uses  
on the subject property should be permitted. Buyers do not ask  
what did other property sell for? They ask, what can I get out  
20 of this property if I put my money into it? Certainly this will  
be subject to chicanery like the entire evidentiary problem which  
is itself the subject of a great deal of active fraud and chicanery  
on both sides. As a safeguard here, nothing can be more hazardous  
for an owner than to go in with fanciful and unsupported notions  
on a capitalization theory. Its use is tactically dangerous when  
it is competently and honorably applied. In that regard, it's  
interesting to note the continuing comment on abuses and the  
like when it seems quite evident that honesty and integrity of  
purpose on the part of government or citizen can't be legislated  
30 into existence and are, and long have been, too often sadly lacking  
in adversary proceedings generally and particularly in adversary  
proceedings where forensic experts of any kind are employed by  
the litigants. It is interesting to note the comment that the  
California courts exclude reproduction costs less depreciation  
on the summation approach. I have yet to try a case in which both  
sides did not proceed to put such evidence in whenever its use  
was reasonably indicated. Further, a number of cases are tried  
without paying any heed to the so-called exclusionary rule on  
cost analysis. An example of this is Napa Union High School  
40 District vs. Lewis, where net finished lot cost and net value of  
finished lot, and the standard process by means of which these  
factors are obtained were gone into in great detail by both sides.  
Our experience is that juries generally cut down claims of the  
most valid nature in these proceedings, and inflated claims no  
matter how ably presented and advanced have no real chance in the  
court house today.

I repeat my opinion that the tentative evidence statute is  
far better than the commission's revision of it. I note again that  
50 the proposed 1248.5 seeks to hold opinions of witnesses inadmissible  
if the witness has considered some prohibited fact. He either  
considered it, if it were known to him; or he lied about it. It  
doesn't make sense and calls for an unworkable rule of practice,  
creating lengthy and interminable wrangling. It must be remembered  
that the average condemnor would just as soon draw a trial out  
and create confusion as does the average defendant in civil litigation

10 know delay redounds to his benefit, as it does in every kind of litigation. The way these statutes are framed there will be motions to strike, voir dire examination of experts, and petti-fogging ad infinitum in the trial court. You can accomplish your same objective by less drastic means. In other words, don't exclude the opinion, just don't let the man testify to the bad facts on direct examination.

Hoping these comments may be of assistance, and apologizing for the hurried nature of this letter; but I felt it better to get it off in time than to polish it and send it late.

20 Hoping you will advance the administration of justice in this difficult and important field of contact between a responsible element of the citizenry and its mushrooming government.

Very truly yours,

TINNING & DeLAP

By S/ James E. Cox

James E. Cox

30 JEC:kg

HANSEN & DOLLE  
711 Citizens National Bank Building  
453 South Spring Street  
Los Angeles 13  
MAdison 8-1245

May 12, 1960

California Law Revision Commission  
State of California  
School of Law  
Stanford, California

Attn: Mr. John H. DeMouilly  
Executive Secretary

Gentlemen:

Thank you for the letter of May 6, 1960 and please place my name on your distribution list for various materials.

As I am presently serving on the State Bar Committee which is considering the work and recommendations of your consultant, I am familiar with the same. At the last regular meeting, I presented my views in writing to the chairman Leslie Tarr as to all of the studies made at that date - about two weeks ago.

I approve basically of the proposed new Sections 1248.1, 1248.2 and 1248.3 of the Code of Civil Procedure with the following amendments and deletions:

Section 1248.2 (1)(c) - eliminate words: "for its highest and best use." The reason is that a use which may not be the highest and best use may and many times does enhance the land value. If the words were left in, there would be a prolonged contest in each side's views as to the highest and best use. This would require the Court to decide which side was right before the reproduction cost less depreciation data could be presented. The jury should decide as an incidental factual matter which highest and best use opinion seems most appropriate and apply all the valuation testimony to their deliberations. The conflict in opinion of highest and best use should only go to the weight of the testimony. The Court should not decide it as a preliminary to admissibility.

Section 1248.2 (2) should be enlarged as follows after word "opinion" -- "and evidence may be produced to either rebut said facts or data or impeach the witness's opinion."

Section 1248.3 (3). I believe that if offers are excluded, even if they are in writing and bona fide, etc., that it is not fair to the owner whose property is being condemned to admit offers or listings to sell or lease the property. The words

May 12, 1960

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starting on line 4 of said Section as follows should be eliminated:  
"except to the extent that an option, offer or listing to sell  
or lease the property or interest therein sought to be condemned  
constitutes an admission."

Thank you for affording me the opportunity to express  
my views.

Yours very truly,

20

Hodge L. Dolle

HLD:mo

DOWNEY, BRAND, SEYMOUR & ROHWER

Crocker-Anglo Bank Building

Sacramento 14

June 28, 1960

10

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

Dear Mr. DeMouilly:

20

This is in reply to your letter of June 9th soliciting comments on the tentative recommendations for proposed legislation in eminent domain cases. Thank you for asking for my comments. I have reviewed the draft and generally am very much in accord with it. I do have one or two comments however.

I agree with the concept that offers, listings, assessed valuations and sales to condemning agencies should not be used as the basis for an expert's opinion on value. I would have considerable concern, however, with legislation in the form suggested as Section 1248.3. Stating that an opinion is inadmissible if based on these elements would seem to me to invite cross-examination regarding offers, listings, etc. In my opinion, one of the most difficult problems in condemnation cases is the practice used by some lawyers of placing before the jury various inadmissible transactions through questions asked in cross-examination. Under the guise of attempting to show that a witness' opinion is founded on improper elements, the witness might well be asked about specific offers, listings, etc. The purpose would be actually to reveal to the jury those particular transactions by stating them in the questions. This would seem to defeat the purpose of the proposed legislation. I would suggest that it might be more effective to say directly that evidence of offers, listings, assessed valuations, or sales to condemning agencies is inadmissible in every way. This would be ample authority for a judge to refuse to allow cross-examination on such subjects.

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I also have some considerable concern about legislation which would eliminate the consideration of options in arriving at market value. I think it would be readily acknowledged that the option device of purchase is now used extensively in place of the deed of trust type of transaction. The consideration paid for the option is the equivalent of a down payment. Since

John H. DeMouilly

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June 28, 1960

10 a seller on a deed of trust has no security for his purchase  
price except the return of the property itself, and since the  
buyer's obligation is to pay the installments only if he wishes  
to retain the property, the parties are in no different position  
whether the transaction is on a multiple option basis or on a  
deed of trust with installment payments. The option type of  
transaction is therefore widely used now (particularly for  
various tax reasons). In reality it is the equivalent of a  
purchase (at least to the extent that the payment for the option  
is equal to the down payment on a sale). I believe the trial  
20 court should have sufficient leeway to admit the option type  
transaction as a comparable sale where the transaction is, in  
effect, exactly that.

I hope that these comments will be of some use to you,  
and I again thank you for the opportunity of expressing them.

Sincerely,

30 JOHN F. DOWNEY

JFD:F

HOLBROOK, TARR & O'NEILL  
Suite 740, Rowan Bldg.  
458 South Spring St.  
Los Angeles 13  
MAdison 4-2191

May 10, 1960

California Law Revision Commission  
School of Law  
10 Stanford, California

Attention of John H. DeMouly, Esq.

Gentlemen:

In answer to your letter of May 6, 1960, I would appreciate being placed on your distribution list and receiving various materials.

20 The work of your Commission and of Hill, Farrer & Burrill has not been unknown to me and I have already examined your tentative recommendation and proposed legislation dated May 2, 1960 relating to evidence in eminent domain cases.

I agree with the basic content of your tentative recommendation with five exceptions:

30 FIRST, the effect of the new Section 1248.2 (2) is to give sales the stature of only indirect evidence of value. The exception to the hearsay rule is, of course, necessary, but under no possible interpretation should sales be regarded as collateral matter, else they are improper subject matter for rebuttal. To avoid confusion and the contention that rebuttal evidence can not be presented on sales testimony, Section 1248.2 (2) should, at least, be amended to add the phrase, "and such testimony shall be proper subject matter for rebuttal."

40 SECOND, I take great exception with both the recommendation of Hill, Farrer & Burrill and with your tentative recommendation as they relate to offers to purchase the subject property. To categorically exclude such evidence is patently illogical.

50 Point 4 of your comments, relating to your tentative recommendation, begins as follows: "In formulating and stating his opinion as to the value of the property, an expert should be permitted to rely on and testify concerning any matter that a reasonable, well-informed man would take into consideration in determining price at which to buy or sell property." It is fundamental that if a well-informed buyer wishes to buy a piece of property and knows that the owner has already turned down a specific sum, he will necessarily take such fact into consideration

10 or indulge in idle acts. The argument that such evidence is subject to fabrication is illogical and contrived. All evidence is subject to fabrication, therefore, we have the defined crime of perjury, the statute of frauds, and other protective provisions.

20 If an owner has received (1) a bona fide offer to purchase (2) the identical property, or a portion of the identical property, being condemned (3) in writing (4) in such form that its mere acceptance will constitute a binding contract to buy and to sell (5) from a person who is ready, willing and able to purchase the property, (6) such offer being contingent only upon events or determinations reasonably certain to occur in the immediate future, such offer must be admissible in evidence.

30 Such an offer was admissible on cross examination, and its exclusion was reversible error, before the Faus Case. People v. Union Machine Co., 133 C.A.2d 167, 172. Such an offer has been admissible on direct examination since the Faus Case, Pao Ch-en Lee v. Gregoriou, 50 Cal.2d 502. Particularly significant is the Supreme Court's approval, in the Faus Case, at page 679, of Justices Traynor, Carter and Schauer's concurring and dissenting opinion in People v. La Macchia, 41 Cal.2d 738, 754-6, the penultimate sentence of which states, "It is my opinion that when, as here, the offer is bona fide and is for the identical property and is by a purchaser able and willing to buy, evidence of the offer should be admitted."

40 The six requirements mentioned above, if met as a foundation, would result in the admission of evidence having the highest probative value with the least possible error. As Professor Wigmore observed, and as he was quoted in the Faus Case, at page 677, in discussing the effect of the offers of third parties on the market, "Their offers of money not merely indicate the value; they are the value; . . .".

THIRD, my personal view is that an additional section should be adopted defining the foundation required for the showing of a sale or offer in evidence, somewhat as follows:

"(1) Before the consideration paid, fixed or offered in any sale, rental transaction, or offer, may be received in evidence, it must be shown that:

50 "(a) Such sale or offer was made, or said rental was fixed, within a reasonable time before or after the date of valuation, and said transaction did effect or was intended

"to effect use, possession or title of the property to which it related, within a reasonable time before or after the date of valuation;

"(b) It was freely made in good faith;

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"(c) It was unaffected by the pendency of the action in which offered as evidence, or by the actual or proposed construction of the public improvement upon the property being taken;

20

"(d) The price fixed in said transaction is one based on the market value of the property, estate or interest transferred, or to be transferred, and not effected by the economic or personal circumstances or necessities of the parties to the transaction;

"(e) The property which is the subject of said sale, rental or offer is similar in character, situation, usability, and improvement to the property being valued;

30

"(f) The parties to the transaction or the offeror were reasonably informed concerning the character, situation, usability, and improvement of the property being transferred or intended to be transferred;

"(g) The purchase price, rental, or price offered was actually paid, reasonably secured, or otherwise reasonably sure of payment;

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"(h) The transaction was free of collateral inducements to either of the parties;

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"(i) In the case of an offer, that such offer is a bona fide offer to buy or sell the identical property being valued, or a portion thereof, in writing, in such form that its acceptance would have, or will, result in a contract to buy and to sell, contingent only upon events or determinations reasonably certain to occur in the immediate future, and such offer was made by a person ready, willing and able to buy or to sell the property.

"(j) In the case of a rental, that said rental is fixed in the sum certain, or a mathematically ascertainable portion of the gross receipts of a business, but not fixed by profits of a business.

"(2) Testimony of a witness, otherwise qualified to express his opinion as to value of the property being valued.

10           "(a) That he has examined all available public records relating to said transaction and found them consistent upon their face with a true form and substance of said transaction as revealed by other investigation of the witness;

20           "(b) That he has made inquiry specifically relating to each of the factors enumerated as (a) through (j) of subsection (1) hereof;

          "(c) That said inquiry was made of one or both of the parties to said transaction, or of an agent or employee of either or both of the parties and who were instrumental in said transaction;

30           "(d) That the inquiry was made in such manner as to elicit the whole knowledge of the party of whom such inquiry is made, relating to each of the factors enumerated; and

          "(e) That such inquiry disclosed that each and all of the applicable factors were present;

shall constitute a prima facie showing with respect to each and all of said applicable factors.

40           "(3) A party objecting to the showing of the consideration paid, offered or fixed in any such transaction, shall, upon request, be entitled to reasonable and immediate voir dire examination of the witness from whom such testimony is sought, respecting each and all of the applicable elements of said foundation."

50           Each of the above fundamental elements, although numerous, is formulated in the light of particular applications encountered in the trial of condemnation cases by the undersigned and other members of our firm and are designed to result in as equitable and clearcut a foundation as possible.

10 It will be noted that a listing will not qualify as an offer under the above foundation, since a listing is not in such form that its acceptance will result in a binding contract to buy or to sell the property. The "acceptance" of a listing is only an offer to buy at the listed price, while the listing itself constitutes no more than an agreement to pay a realtor's commission in the event he finds a prospective purchaser. If an offer to buy, made pursuant to a listing, does qualify in form and substance, it should, of course, be admissible.

20 FOURTH, it should also be noted that the proposed Section 1248.1 appears to exclude as evidence a view of the property being valued by the judge or jury. A view is desirable in almost all cases and should be permitted in the discretion of the trial court.

30 FIFTH, it seems a paradox to state that the appraiser may consider all that a reasonable, well-informed prospective purchaser or seller would take into consideration and then proceed to legislate that if such expert's opinion is predicated upon particular information, that opinion will be inadmissible. The effect is to say that the opinion is inadmissible when, in fact, it is the reason that is inadmissible. It is true that condemners' purchases and assessed values where there is better evidence are of little probative value and should be inadmissible on direct examination.

40 If offers to purchase the property condemned continue to be covered by the provisions of proposed Section 1248.3, the result will be that the opinion of the owner will be stricken in almost every case unless the owner's attorney has urged him to a convenient loss of memory. As previously stated, such an offer should be admissible on direct examination, but if such is not the ultimate rule, the consideration of an offer, which Professor Wigmore and the Supreme Court feels has high probative value, should not result in the striking of the opinion.

50 You will note that Mr. Leslie R. Tarr is one of the senior partners of the law firm with which I am affiliated. Mr. Tarr is the Chairman of the State Bar Committee on Condemnation Law and Procedure. The undersigned is not a member of that Committee and the suggestions made above are the views of the undersigned and are not intended to reflect or state the views of Mr. Tarr, his Committee, or of any other member of our firm.

California Law Revision Commission  
May 10, 1960  
Page Six.

Additional copies of this letter are enclosed for such use or distribution as you should desire to make of them.

Thank you for your courtesy and interest in asking  
10 my comments.

Very truly yours,

Richard L. Huxtable.

20 RLH:mf  
Enclosures.

Law Offices of  
HOLBROOK, TARR & O'NEILL  
458 South Spring Street  
Los Angeles 13

June 4, 1960

10 California Law Revision Commission  
School of Law  
Stanford, California

Attention of John H. DeMouilly,  
Executive Secretary

20 Re: Tentative recommendation and proposed legislation  
relating to reimbursement of moving expenses and  
incidental business losses.

Gentlemen:

In answer to your letter of May 24, 1960, I again thank you for requesting my comments. Perusal of your proposed sections has not raised any serious criticism in my mind.

30 It should be observed that under the present wording of Sections 1270.1-1270.4 in an unusual case the damages could become unreasonable. A section should be added to the effect that where the damages which would be payable under these provisions exceed the value of the personal property, that said personal property may be, at the option of the condemner, regarded as a portion of the realty and condemned in the action.

40 It is not uncommon for an established and prosperous business to be wholly destroyed as a result of the loss of its known location. It is quite common for substantial losses in receipts to occur during periods of moving and relocation. Of course, a provision relating to loss of gross receipts, net receipts, or business good will - although it is unjust to leave these losses uncompensated - will be extremely difficult to draft and would be premature without extensive study and discussion to avoid a rule which is too speculative or too easily abused. One type of incidental business loss is not too speculative and not too easily abused and should be the subject of immediate legislation.

50 The greatest injustices in business losses occur where an enterprise has incurred substantial debts necessary to the furtherance of its business or has incurred continuing payroll commitments, and where work stoppage prevents the enterprise from meeting such obligations. In my opinion, legislation generally as follows should be recommended:

10 Where land occupied and used by an established commercial, industrial, multiple residential, recreational, educational, charitable, religious, or public utility enterprise or other enterprise devoted to public health, safety, and welfare, is being acquired or has been acquired for a public use; and

Where said enterprise has incurred indebtedness for the purpose of the purchase, renovation, or maintenance of facilities or equipment necessary to the activity of such enterprise, or

20 Where such enterprise has incurred by labor contract, payroll commitments which continue during temporary work stoppages; and

Where said facilities, equipment, or the labor force which is the subject matter of such labor contract, which otherwise would have been, or would be productive, but have been or will be rendered nonproductive by virtue of temporary stoppage of the activity of said enterprise during periods of moving, storage, transporting, and relocation contemplated by sections 1270.1 and 1270.2;

30 the actual incidental business loss, suffered by said enterprise due to such nonproductivity, shall be paid to or recovered by said enterprise in the same manner and in the same procedures set forth in Section 1270.4. The maximum period for which said incidental business losses shall be paid shall be 30 days. Where the damages paid pursuant to this provision are inclusive of any sum applied as against the principal of any such indebtedness for the purpose of the purchase, renovation or maintenance of facilities or equipment (such as sums paid to prevent repossession under  
40 conditional sales contract), such damages, to the extent applied against such principal, shall be offset in favor of the acquirer and against any subsequent compensation which may become payable to said enterprise in the principal action; or, in the event said enterprise is not entitled to further compensation, the acquirer shall be entitled to recover such damages to the extent applied against such principal, six months after said enterprise has been relocated and has resumed its normal activities.

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California Law Revision Commission  
June 4, 1960  
Page Three.

Section 1248.5, as proposed, would have to be expanded to bar consideration by the expert of incidental business losses covered by the above suggested provision.

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I appreciate your sending to me the materials prepared by your Commission and shall look forward to your future recommendations.

Very truly yours,

(Signed) Richard L. Huxtable

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RLH:mf

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Los Angeles 13, Calif.

California Law Revision Commission  
School of Law  
Stanford, California.

10

Attention of John H. DeMouilly,  
Executive Secretary

Re: Tentative Recommendation relating to  
taking possession and passage of title  
in eminent domain proceedings.

Gentlemen:

20 After review of your tentative recommendation in proposed legislation relating to taking possession and passage of title in eminent domain proceedings, I am substantially in agreement with its content, however, there are a few oversights and approaches I would like to call to your attention.

30 Both proposed amendments of C.C.P. Sec. 1243.5 and the proposed amendment of Article I, Section 14, of the California Constitution, are mutually evasive as to the identify of a plaintiff who may take immediate possession. I realize that it is the intent of this proposed legislation to remove discrimination between public and quasi-public agencies, however, I do not believe it is your intent to extend a right of immediate possession to persons bringing action under Civil Code Sec. 1001. Although such actions are infrequent and, under certain circumstances, highly proper, they could become a useful tool of spite or business rivalry, if armed with the weapon of immediate possession.

40 Amended Section 1243.5 (2) (b) should read, "State the purposes of the condemnation and statutory provision authorizing the exercise of the power of eminent domain for said use; and if the plaintiff is a city, or city and county, said order shall state whether or not the property sought to be condemned is situated within the boundaries of said city or city and county." Immediately following subsection (2) (b), as a new (c), there should be a provision similar to the following: "State whether or not the property sought to be condemned is already dedicated to a public use, and if said property is so dedicated, said order shall state, in general terms, such facts as cause it to appear that the use for which said property is sought to be condemned is a more necessary public use than that to which said property is already dedicated." These provisions should be required in the order of possession to avoid unnecessary motions to vacate the order at a later date and places upon the court only  
50 the moderate burden of reading a slightly longer affidavit and of checking the appropriate code sections at the time the order is signed.

10 Proposed Section 1249.1 should be revised to delete the words "for  
its highest and best use." This phrase is unnecessary and, under certain  
circumstances, could produce an injustice. Taking as a hypothetical  
situation an office building in an industrial area, it may well be  
that industrial use will produce a greater ground rental than office  
or commercial uses. Such greater ground rental, indicative of the  
highest and best use of the land itself, may be insignificant when  
20 compared with the cost of destroying the office structure and building  
industrial facilities. In such a case it is manifest that the office  
building, producing a substantial income, although something less  
than the full income that could be secured were some other improvement on  
the property, still has value. The only purpose of this phrase in this  
proposed code section is to place a gag or limitation upon the testimony  
of expert witnesses at the time of trial. If the property owners' experts  
choose to become "farfetched" by placing full industrial value on the  
land and full commercial value on the building, ignoring the inconsistencies  
of these uses, it is for the jury to detect and consider in weighing their  
testimony. It is true that the legal profession must define the circum-  
stances under which the condemning body will be liable for damages, to wit:  
the exclusion of the police power. The legal profession, however, should  
not seek to tell the appraisal profession how to appraise property. Such  
efforts only cause the trial of a condemnation action to take on the  
proportion of a game of wits and soon lead to tragic injustices.

30 Proposed Section 1252.1 should be simplified, eliminating sub-section  
(3) and by adding to sub-section (2) the following: ". . . which shall  
be claimed by the defendant at the time and in the manner provided for  
claiming costs". At such time title will have, in any event, vested in  
the plaintiff, and the amount of taxes to be pro-rated will be determinable.  
Such a method of claiming and assessing the taxes to be added to the award  
will be the same in all cases, thus avoiding confusion and greater  
probability of error. A simpler method of avoiding the tax problem and the  
injustices that may arise is simply to provide that taxes will not be  
pro-rated where they have been prepaid and that where a property is subject  
40 to a lis pendens in a condemnation action, that the first installment  
of taxes will not become delinquent until January 10th and that the second  
installment of taxes will not become delinquent until July 10th. By this  
method there will be no problems of tax refunds or increased awards in  
refund of prepaid taxes. Also, it will avoid needless motions to tax costs  
and other post trial procedures.

50 Section 1254 should be further amended to delete its last sentence,  
which provides that where the property owner obtains a new trial and  
fails to obtain greater compensation, the costs of such new trial are  
taxed to him. This provision is, and always has been, unfair and illogical.  
If a property owner does obtain a new trial, it is because the conduct or  
decisions of the court have deprived him of a fair trial in the first  
instance and such is seldom a result of the property owner's own conduct.  
If it is true upon the first trial that it is a denial of just compensation

California Law Revision Commission  
July 29, 1960  
Page Three.

10 if the property owner is required to pay costs (Heimann v. City of Los Angeles, 30 Cal.2d 746, 752-753) such is even more true where that same property owner has been compelled to present his own case in court twice as a result of a misconduct or error of the court, jury, or the condemner.

In Section 1255 b (2) (a) the words "is available for withdrawal" should be inserted in lieu of the words "may be withdrawn". Although the meaning of the proposed subsection may be clear to those familiar with the work of the Law Revision Commission and the intent of the amendment, the present language might be interpreted as meaning that interest will cease on the date the money is withdrawn, which is contrary to the intent of the amendment.

20 The proposed amendment of Article I, Section 14, of the California Constitution, is, as mentioned above, equivocable as it applies to a plaintiff proceeding under Civil Code Section 1001, who seeks to obtain an order of immediate possession. Following the word "plaintiff" on page II-2, the words "public or quasi-public agency."

Thank you again for this opportunity to express my views concerning the fine work of your Commission.

Very truly yours,

S/ Richard L. Huxtable

Richard L. Huxtable

30 RLH:mf

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LAW OFFICES OF  
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July 14, 1960.

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

Attention of Mr. John H. DeMouilly,  
Executive Secretary

20 Gentlemen:

Recommendations and proposals relating to Taking Possession and Passage of Title in Eminent Domain Proceedings were received and read with considerable interest, as this field of the law is in need of remedial legislation.

30 However, I note that the proposed legislation retains a portion of existing Section 1254, Code of Civil Procedure, which I feel deserves further consideration from you. Although the Committee of the State Bar has not had an opportunity to discuss this matter as yet, as an individual, I believe I should call this matter to your attention, as you requested comments by August 1st.

40 The provision I mention is the last sentence of Section 1254. This provides that costs shall be borne, in the event of a new trial, by defendant, if the award does not exceed the award at the first trial, if motion for new trial is made by defendant. In my opinion, this is clearly unconstitutional. New trials are not granted merely on motions of defendants. They result from some error committed during the trial, often from erroneous instructions given by the trial judge or from a patent miscarriage of justice resulting in an insufficient award to compensate the defendant for the taking or damaging of his property. The grounds for a new trial are set forth in Section 657 C.C.P. The motion is determined by the trial judge. Why should the defendant be penalized because he urged the error as a ground for a new trial? It is bad enough to have to retry a case where defendant was blameless in the original trial without having to give consideration to the burden of bearing the costs of a new trial necessitated, possibly, by plaintiff's conduct. And suppose defendant receives a greater award on the second trial, are the additional appraisal fees and attorneys' fees borne by the plaintiff? NO!

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This bit of extraneous legislation was no doubt proposed by attorneys representing public bodies, but should, we feel, be deleted in the proposed legislation.

Very truly yours,

/s/ Leslie R. Tarr

LESLIE R. TARR  
Chairman State Bar Committee on  
Condemnation Law and Procedure.

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LRT:mf

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