

#36.300

12/5/74

Memorandum 75-12

Subject: Study 36.300 - Condemnation Law and Procedure (Statement to Board of Governors of State Bar)

The State Bar Committee on Condemnation reported to the Board of Governors in August 1974 that, after having reviewed the Eminent Domain Law tentative recommendation, it generally agreed with the recommendation. The committee, however, noted fifteen matters on which it disagreed with the Commission, and requested the Board of Governors to oppose the legislation unless changes were made in these fifteen matters. See Exhibit I (green).

The Board of Governors reviewed the report of the Bar Committee and sent it to the Commission asking for the Commission's comments and deferring action pending receipt of the comments. Attached as Exhibit II (yellow) is a copy of a draft of a letter to the Board of Governors, with comments. We hope to review this letter and comments at the January meeting and send it to the Board of Governors immediately thereafter.

Respectfully submitted,

Nathaniel Sterling
Staff Counsel

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August 23, 1974

John H. DeMouilly, Esq.
 Executive Secretary
 California Law Revision Commission
 School of Law
 Stanford, California 94305

Dear Mr. DeMouilly:

The State Bar Standing Committee on Condemnation on August 6, 1974, reported to the Board of Governors its recommendations concerning the LRC Tentative Recommendation Relating to Condemnation Law and Procedure.

While generally agreeing with the proposed revision, the Committee disagreed with the Commission's proposed action regarding fifteen sections, stated that its position had been transmitted to and disapproved by the Commission, and requested the Board oppose any legislation which does not conform to the Committee's recommendation regarding these sections.

After reviewing the Report the Board directed that the Committee's recommendations on these sections be sent to the Commission with the request that the Commission advise the Board why it did not concur with the Committee's recommendations. Further action was postponed pending receipt of any reply the Commission might make.

A copy of the Committee's recommendations regarding these sections is enclosed.

Yours very truly,

William B. Eades
 William B. Eades
 Committee Coordinator

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* Repeal of CC §1001 (September 16, 1972)

Newton moved to recommend retention of §1001.

Keagy seconded.

Unanimously passed.

Reason - The section was felt to serve a utilitarian purpose and in the collective experience of the Committee membership had not been subjected to abuse.

§ 1001. Acquisition of property by exercise of eminent domain. Any person may, without further legislative action, acquire private property for any use specified in section twelve hundred and thirty-eight of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of title seven, part three, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title is "an agent of the state," or a "person in charge of such use," within the meaning of those terms as used in such title. This section shall be in force from and after the fourth day of April, eighteen hundred and seventy-two. [1872.] *Cal Jur 2d Corp § 9, Em D §§ 229, 230, 232, 234; Witkin Summary p 2027.*

* §1240.120. Taking Property to Make Effective Use of
Other Property with Power to Grant Out Subject
to Reservations (September 16, 1972 Minutes
p. 6)

Newton moved to recommend disapproval.

Baggot seconded.

Unanimously passed.

Reason - This was felt to be a taking not for a public use and several committee members had experienced abuse of the power of eminent domain being used in takings "for reservations as to future use".

§ 1240.120. Right to acquire property to make effective the principal use

1240.120. (a) Subject to any other statute relating to the acquisition of property, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire property necessary to carry out and make effective the principal purpose involved including but not limited to property to be used for the protection or preservation of the attractiveness, safety, and usefulness of the project.

(b) Subject to any applicable procedures governing the disposition of property, a person may acquire property under subdivision (a) with the intent to sell, lease, exchange, or otherwise dispose of the property, or a right or interest therein, subject to such reservations or restrictions as are necessary to protect or preserve the attractiveness, safety, and usefulness of the project.

Comment. Subdivision (a) of Section 1240.120 codifies the rule that, absent any express limitation imposed by the Legislature, the power to condemn property for a particular purpose includes the power to condemn property necessary to carry out and make effective the principal purpose involved.

See *City of Santa Barbara v. Cloer*, 216 Cal. App.2d 127, 30 Cal. Rptr. 743 (1963). See also *University of So. Cal. v. Robbins*, 1 Cal. App.2d 523, 37 P.2d 163 (1934). Cf. *Flood Control & Water Conservation Dist. v. Hughes*, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962).

Section 1240.120 permits a condemnor to protect the attractiveness, safety, or usefulness of a public work or improvement from deleterious conditions or uses by condemning a fee or any lesser right or interest necessary for

protective purposes. See Section 1235.170 (defining "property" to include the fee or any lesser right or interest). A taking for this purpose is a public use. *E.g.*, *People v. Lagiss*, 223 Cal. App.2d 23, 35 Cal. Rptr. 554 (1963); *Flood Control & Water Conservation Dist. v. Hughes*, *supra*. See also *United States v. Bowman*, 367 F.2d 768, 770 (1966). See Capron, *Excess Condemnation in California—A Further Expansion of the Right to Take*, 20 HASTINGS L.J. 571, 589-591 (1969).

Where it is necessary to protect a public work or improvement from detrimental uses on adjoining property, the condemnor has the option either (1) to acquire an easement-like interest in the adjoining property that will preclude the detrimental use or (2) to acquire the fee or some other interest and then—if the condemnor desires—lease, sell, exchange, or otherwise dispose of the property to some other public entity or a private person subject to carefully specified permitted uses.

If a condemnor has the power of eminent domain to condemn property for a particular improvement, Section 1240.120 is sufficient authority to condemn such additional property as is necessary to preserve or protect the attractiveness, safety, and usefulness of the improvement. No additional statutory authority is required, and some of the former specific grants of protective condemnation authority have been repealed as unnecessary. *E.g.*, former CODE CIV. PROC. § 1238(18) (trees along highways). Not all such specific authorizations have been repealed. *E.g.*, STS. & HWYS. CODE § 104(f) (trees along highways), (g) (highway drainage), (h) (maintenance of unobstructed view along highway). Except to the extent that these specific authorizations contain restrictions on protective condemnation for particular types of projects (see GOVT. CODE §§ 7000-7001), they do not limit the general protective condemnation authority granted by Section 1240.120.

In the case of a public entity, the resolution of necessity is conclusive on the necessity of taking the property or interest therein for protective purposes. See Section 1245.250 and

Comment thereto. However, the resolution does not preclude the condemnee from raising the question whether the condemnor actually intends to use the property for protective purposes. If the property is claimed to be needed for protective purposes but is not actually to be used for that purpose, the taking can be defeated on that ground. See Section 1250.360 and Comment thereto. See *People v. Lagiss*, 223 Cal. App.2d 23, 33-44, 35 Cal. Rptr. 554, 560-567 (1963).

Section 1240.120 is derived from and supersedes former Government Code Sections 190-196, Streets and Highways Code Section 104.3, and Water Code Section 256.

* §1240.340. Substitute Condemnation (March 18, 1972,
Minutes, p. 3)

Newton moved to recommend disapproval of the Commission proposal except where there was consent of the owner of the substitute property.

Sullivan seconded.

Mr. Jackson joined the meeting.

Passed 9 votes to 1.

Reason - The owner of the substitute property would have his property taken by eminent domain for a use which was not a public use under the Constitution. This was felt impermissible except with the owner's consent.

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

1240.340. (a) Any public entity authorized to exercise the power of eminent domain to acquire property for a particular use may exercise the power of eminent domain to acquire for that use substitute property if all of the following are established:

(1) The owner of the necessary property has agreed in writing to the exchange and, under the circumstances of the particular case, justice requires that he be compensated in whole or in part by substitute property rather than by money.

(2) The substitute property is in the vicinity of the public improvement for which the necessary property is taken.

(3) Taking into account the relative hardship to both owners, it is not unjust to the owner of the substitute property that his property be taken so that the owner of the necessary property may be compensated by such property rather than by money.

(b) Where property is sought to be acquired pursuant to this section, the resolution of necessity and the complaint filed pursuant to such resolution shall specifically refer to this section.

(c) If the defendant objects to a taking under this section, the court in its discretion, upon motion of the owner of the substitute property, the owner of the necessary property, or the plaintiff, may order that the owner of the necessary property be joined as a party plaintiff. At the hearing of the objection, the plaintiff has the burden of proof as to the facts that justify the taking of the property.

Comment. Section 1240.340 authorizes substitute condemnation where the requirements of Section 1240.320, 1240.330, or 1240.350 cannot be satisfied but, under the circumstances, justice demands that the owner of the necessary property be compensated in land rather than money. Under former law, only certain condemnors were explicitly authorized to condemn for exchange purposes generally. See, e.g., STS. & HWYS. CODE § 104(b) (Department of Transportation); WATER CODE § 253(b) (Department of Water Resources). However, the right to exercise the power of eminent domain for exchange purposes probably would have been implied from the right to take property for the improvement itself in the circumstances contemplated. See *Brown v. United States*, 263 U.S. 78 (1923) (property acquired to relocate town displaced by reservoir); *Pitznogle v. Western Md. R.R.*, 119 Md. 673, 87 A. 917 (1913) (property needed to relocate private road). One of the more common examples of such substitute condemnation is a taking to provide utility service to or access to a public road from property cut off from access by the condemnor's original acquisition. This situation is provided for specifically by Section 1240.350. See Section 1240.350 and the Comment thereto. Similar situations may arise where private activities—such as a nonpublic utility, railroad serving a mining, quarrying, or logging operation or belt conveyors, or canals and ditches—are displaced by a public improvement. However, the authority granted by Section 1240.340 is reserved for only these and similarly extraordinary situations. Paragraph (3) of subdivision (a) requires the court to consider the relative hardship to both owners and to permit condemnation only where both owners can be treated fairly.

Section 1240.340 contains special procedural provisions to help insure complete fairness for the owner of the substitute property. The defendant will receive notice that the condemnor is relying on the authority conferred by Section 1240.340 because the section requires that the condemnation complaint specifically refer to the section. In contrast to the procedure under Sections 1240.320 and 1240.330, the resolution authorizing the taking under Section 1240.340 is never conclusive, the necessity for the taking is justiciable, and the condemnor has the burden of proof of showing that the facts justify the taking of the substitute property. Under subdivision (c) of Section 1240.340, the court may order the person who is to receive the substitute property joined as a party to the action, thereby securing complete representation of all positions. Finally, the owner of the substitute property may recover litigation expenses connected with the taking of the property to be exchanged where the condemnor is unable to justify such taking. See Section 1268.610. The risk of incurring this additional burden should aid in limiting the exercise of this power to those situations where its exercise is appropriate.

* §1245.250. Conclusive Effect of Resolution

Fadem moved that resolutions of necessity be subject to the same judicial review for fraud or collusion as any other governmental action.

Baggot seconded.

Passed 7 to 3.

Reason - Our most fundamental concept of government calls for no governmental action being free of the check and balance of review by the judiciary. The Committee recommends reviewability of resolutions of necessity only in the narrow, but not infrequent, situations where resolutions of necessity have been tainted by fraud or collusion.

Grave miscarriages of justice have occurred because of the conclusive nature of necessity. Recent events prove that no branch of government is free from misconduct and no governmental activity should be free of judicial review.

§ 1245.250. Effect of resolution

1245.250. (a) Except as otherwise provided by statute, a resolution of necessity adopted by the governing body of the public entity pursuant to this article conclusively establishes the matters referred to in Section 1240.030.

(b) If the taking is by a local public entity and the property described in the resolution is not located entirely within the boundaries of the local public entity, the resolution of necessity creates a presumption that the matters referred to in Section 1240.030 are true. This presumption is a presumption affecting the burden of producing evidence.

(c) For the purposes of subdivision (b), a taking by the State Reclamation Board for the Sacramento and San Joaquin Drainage District is not a taking by a local public entity.

Comment. Section 1245.250 provides a uniform rule governing the effect to be given to a resolution of necessity. It continues the conclusive effect given to the resolution in state takings. See, e.g., former GOVT. CODE § 15855. It supersedes numerous sections of various codes that afforded disparate treatment to the resolution of necessity of various types of local public entities and generalizes the conclusive effect given the resolution of certain local public entities by former Section 1241(2).

Subdivision (a). A valid resolution of necessity conclusively establishes the matters of public necessity specified in Section 1240.030 (1) in all takings by local public entities where the property taken is entirely within the boundaries of the condemning entity and (2) in all takings by state entities regardless of the location of the property taken. Giving a conclusive effect to the resolution of necessity has been held constitutionally permissible. *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923), *affg County of Los Angeles v. Rindge Co.*, 53 Cal. App. 166, 200 P. 27 (1921); *City of Oakland v. Parker*, 70 Cal. App. 295, 233 P. 68 (1924). Among the matters encompassed in the conclusive resolution are the extent of and interest in necessary property. See Section 1245.230 and Comment thereto.

A valid resolution precludes judicial review of the matters specified in Section 1240.030 even where it is alleged that such matters were determined by "fraud, bad faith, or abuse of discretion." See *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959). However, the resolution is conclusive *only* on the matters specified in Section 1240.030; it does not affect in any way the right of a condemnee to challenge a taking on the ground that the project is not an authorized public use or on the ground that the condemnor does not intend to put the property to its declared public purpose. See Sections 1240.010 and 1250.360 and Comments thereto. Likewise, the resolution does not affect the right of a defendant to contest the right to take his property on specific statutory grounds provided in the Eminent Domain Law. See Sections 1240.230 (taking for future use), 1240.340 (condemnation for exchange purposes), 1240.420 (excess condemnation), 1240.520 (taking for compatible use), and 1240.620 (taking for more necessary public use). *Cf.* Section 1240.050 (extraterritorial condemnation). Likewise, the condemnor must demonstrate its compliance with any other requirements and regulations governing the institution of public projects. *Cf.* Comment to Section 1240.030.

The initial proviso of Section 1245.230 recognizes that there may be exceptions to the uniform conclusive effect given the resolution of necessity. One important exception is in subdivision (b) (extraterritorial acquisitions by local public entity). As to the effect of the resolution of necessity where the taking is by a city or county for open space, see Government Code Section 6953.

Subdivision (b). Subdivision (b) provides that a resolution of necessity of a local public entity creates a presumption affecting the burden of producing evidence with regard to public necessity if the property described in the resolution is not located entirely within the boundaries of the local public entity. See EVID. CODE § 604.

Subdivision (b) continues the portion of former Section 1241 (2) that denied conclusive effect of a resolution to property lying outside the territorial limits of certain local public entities. Under that provision, necessity and proper location were justiciable questions in the condemnation proceeding. See *City*

of *Hawthorne v. Peebles*, 166 Cal. App.2d 758, 333 P.2d 442 (1959); *City of Carlsbad v. Wight*, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963); *City of Los Angeles v. Keck*, 14 Cal. App.3d 920, 92 Cal. Rptr. 599 (1971). Subdivision (b) extends this limitation on the effect of the resolution of necessity to all local public entities condemning property outside their territorial jurisdiction and also makes the question whether the proposed project is necessary a justiciable question in such a condemnation proceeding.

Subdivision (c). The limitation contained in subdivision (b) is not applicable to acquisitions for the Sacramento and San Joaquin Drainage District. Acquisitions for this district are undertaken by the State Reclamation Board. See WATER CODE § 8590 and Section 1245.210 and Comment thereto. The conclusive effect given resolutions of the board by former Water Code Section 8595 is continued under subdivisions (a) and (c).

* §1255.410. (formerly §1255.210). Order for Possession prior to Judgment (May 20, 1972 Minutes, p. 3)

Newton moved to amend to add to subparagraph (a) "Plaintiff must show an actual need as of the effective date of the requested order of possession."

Sullivan seconded.

Passed 6 to 4.

Reason - Possession should not be given without a showing of a need as of the time possession is being taken.

§ 1255.410. Order for possession prior to judgment

1255.410. (a) At the time of filing the complaint or at any time after filing the complaint and prior to entry of judgment, the plaintiff may apply ex parte to the court for an order for possession under this article, and the court shall make an order authorizing the plaintiff to take possession of the property if the plaintiff is entitled to take the property by eminent domain and has deposited pursuant to Article 1 (commencing with Section 1255.010) an amount that satisfies the requirements of that article.

(b) The order for possession shall describe the property of which the plaintiff is authorized to take possession, which description may be by reference to the complaint, and shall state the date after which the plaintiff is authorized to take possession of the property.

Comment. Section 1255.410 states the requirements for an order for possession of property prior to judgment and describes the content of the order. With respect to the relief available from an order for possession prior to judgment, see Sections 1255.420-1255.440.

Subdivision (a). Subdivision (a), like subdivision (a) of former Section 1243.5, provides an ex parte procedure for obtaining an order for possession prior to judgment.

Subdivision (a) states two prerequisites to issuance of an order for possession:

(1) The plaintiff must be entitled to take the property by eminent domain. This requirement is derived from subdivision (b) of former Section 1243.5. However, under former Section

1243.4, possession prior to judgment was permitted only if the taking was for right of way or reservoir purposes. This limitation is not continued. Likewise, the requirement found in subdivision (b) of former Section 1243.5 that the plaintiff was authorized to take possession prior to judgment is no longer continued since any person authorized to exercise the power of eminent domain may now take possession prior to judgment in any case in which he is entitled to take by eminent domain. Contrast former Section 1243.4 (right to early possession limited to certain public entities).

(2) The plaintiff must have made the deposit required by Article 1. This requirement is derived from subdivision (b) of former Section 1243.5.

The issue of the plaintiff's need for possession prior to judgment is a matter that is incorporated in the provisions of Section 1255.420. Section 1255.410 does not affect any other prerequisite that may exist for taking possession of property. *Cf. 815 Mission Corp. v. Superior Court*, 22 Cal. App.3d 604, 99 Cal. Rptr. 538 (1971) (provision of relocation assistance is not necessarily prerequisite to an order for possession).

It should be noted that the determination of the plaintiff's right to take the property by eminent domain is preliminary only. The granting of an order for possession does not prejudice the defendant's right to demur to the complaint or to contest the taking. Conversely, the denial of an order for possession does not require a dismissal of the proceeding and does not prejudice the plaintiff's right to fully litigate the issue if raised by the defendant.

Under former statutes, judicial decisions held that an appeal may not be taken from an order authorizing or denying possession prior to judgment. Mandamus, prohibition, or certiorari was held to be the appropriate remedy. See *Central Contra Costa Sanitary Dist. v. Superior Court*, 34 Cal.2d 845, 215 P.2d 462 (1950); *Weiler v. Superior Court*, 188 Cal. 729, 207 P. 247 (1922); *State v. Superior Court*, 208 Cal. App.2d 639, 25 Cal. Rptr. 363 (1962); *City of Sierra Madre v. Superior Court*, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961). However, an order for possession following entry of judgment has been held to be an appealable order. *San Francisco Unified School Dist. v. Hong Mow*, 123 Cal. App.2d 668, 267 P.2d 349 (1954). No change is made in these rules as to orders made under Section 1255.410 or Article 3 (commencing with Section 1268.210) of Chapter 11.

Subdivision (b). Subdivision (b) describes the contents of an order for possession. The contents are substantially the same as those of subdivision (b) of former Section 1243.5. However, the requirement that the order state the amount of the deposit has been eliminated since Section 1255.020 requires that a notice of the making of a deposit be served on interested parties. The requirement that the order state the purpose of the condemnation has been omitted since possession prior to judgment is now authorized for any public use by an authorized condemnor. And, the requirement that the order describe the "estate or interest" sought to be acquired has been omitted as unnecessary since the term "property" includes rights and interests therein. See Section 1235.170 (defining "property").

Subdivision (b) is limited by the requirement of a 30-day or 90-day period following the service of the order before possession can be physically assumed. See Section 1255.450.

It should be noted that the court may, under subdivision (b), authorize possession of all, or any portion or interest, of the property sought to be taken by eminent domain.

* §1263.110. Date of Valuation (August 24, 1973 Minutes
p. 3)

Fadem moved that the date of value is the date of trial or the date of deposit, whichever is sooner.

Baggot seconded.

Passed 9 to 1.

Reason - Tying value to a past time works against the owner in a market in California which has for a generation now been generally rising and which in the current picture is inflationary.

It is always difficult to find the latest sales, which tend to be the higher priced ones. This is a penalty in itself as to the owner, but unavoidable. But valuing the property at a time before it is taken is avoidable.

An Owner should have his property valued as close as possible to the time that the owner actually loses his property. Under the statutory scheme proposed by the Commission, the date of trial most closely approaches this, or where there has been an order of possession, the date that there has been a deposit which permits the owner to withdraw his compensation substitute for the property seemed to most closely approach the ideal.

§ 1263.110. Date of valuation fixed by deposit

1263.110. (a) Unless an earlier date of valuation is applicable under this article, if the plaintiff deposits the probable compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 6, the date of valuation is the date on which the deposit is made.

(b) Whether or not the plaintiff has taken possession of the property or obtained an order for possession, if the court determines pursuant to Section 1255.030 that the probable amount of compensation exceeds the amount previously deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 and the amount on deposit is not increased accordingly within 30 days from the date of the court's order, no deposit shall be deemed to have been made for the purpose of this section.

Comment. Section 1263.110 permits the plaintiff, by making a deposit, to establish the date of valuation no later than the date the deposit is made. The rule under the language contained in former Section 1249 was to the contrary; neither the making of a deposit nor the taking of possession had any bearing on the date of valuation. See *City of Los Angeles v. Tower*, 90 Cal. App.2d 869, 204 P.2d 395 (1949). The date of valuation may be earlier than the date of the deposit (see Section 1263.120), and subsequent events may cause such an earlier date of valuation to shift to the date of deposit (see Section 1263.130). But a date of valuation established by a deposit cannot be shifted to a later date by any of the circumstances, including subsequent retrial, mentioned in the following sections.

Although the making of a deposit prior to judgment establishes the date of valuation unless an earlier date is applicable, subdivision (b) denies that effect if the amount deposited is determined by the court to be inadequate and is not increased in keeping with the determination. *CF.* Section 1255.030(b) (when failure to increase deposit may result in abandonment).

* §1263.220. Business Equipment (August 24, 1973 Minutes
p. 5)

Sullivan moved to substitute "personal property designed for business purposes located" in place of "equipment designed for business purpose that is installed".

Jackson seconded.

Passed unanimously

Reason - "Equipment" was felt to be capable of being interpreted more narrowly than "personal property". "Installed" was felt to be capable of narrower interpretation than "located".

The Committee felt this salutary recommendation should be given full effect and as little opportunity as possible provided by language choice for narrowing its effectiveness.

§ 1263.220. Business equipment

1263.220. Equipment designed for business purposes that is installed for use on the property taken or damaged and cannot be removed without a substantial loss in value shall be deemed to be an improvement pertaining to the realty for the purposes of compensation regardless of the method of installation.

Comment. Section 1263.220 requires that business equipment installed for use on the particular property be taken into account in determining compensation. See Section 1263.210. Section 1263.220 creates a special category of improvements pertaining to the realty for certain equipment without regard to the classification of the equipment under the general provisions of Section 1263.210.

Section 1263.220 supersedes the provisions of former Section 1248b which applied only to equipment designed for manufacturing or industrial purposes. Section 1263.220 applies to equipment designed for "business purposes" in its most general sense and thus applies to commercial as well as to manufacturing and industrial enterprises.

The basic test under Section 1263.220 to determine if business equipment installed for use on the property taken or damaged must be taken into account for purposes of determining compensation is whether the equipment can be removed without a substantial loss in value. If the equipment can be removed without substantial impairment of its value, the

equipment is not classified as an improvement pertaining to the realty under this section even though its removal may damage the structure in which it is installed. In such a case it may, however, be classified as an improvement pertaining to the realty under Section 1263.210. See also Sections 1263.270, 1263.280.

One effect of classification of equipment as an improvement pertaining to the realty is that such equipment located on the property taken must also be taken and paid for by the condemnor of the realty. As a consequence, the condemnor acquires title to the equipment rather than merely paying for loss of value on removal and has the right to realize any salvage value the equipment may have and must bear the resultant burden. Where such equipment is located on the remainder, it may receive severance damages. See, e.g., *City of Los Angeles v. Subatasso*, 3 Cal. App.3d 973, 83 Cal. Rptr. 898 (1970).

Losses on personal property used in a discontinued business may be recoverable under Government Code Section 7262.

* §1263.240. Improvements after Service of Summons
(August 24, 1973 Minutes, p. 11)

Baqqot moved to recommend disapproval unless all of (c) is deleted except for the first sentence.

Sullivan seconded.

Passed unanimously.

Reason - The Committee approves of a court being empowered to permit good faith improvements and feels that the limitation in the sentences recommended to be deleted should not be enacted as they limit the scope of the basic idea of the section.

§ 1263.240. Improvements made after service of summons

1263.240. Improvements pertaining to the realty made subsequent to the date of service of summons shall not be taken into account in determining compensation unless one of the following is established:

(a) The improvement is one required to be made by a public utility to its utility system.

(b) The improvement is one made with the written consent of the plaintiff.

(c) The improvement is one authorized to be made by a court order issued after a noticed hearing and upon a finding by the court that the hardship to the defendant of not permitting the improvement outweighs the hardship to the plaintiff of permitting the improvement. No order may be issued under this subdivision after the plaintiff has deposited the amount of probable compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 6. A deposit of probable compensation subsequent to issuance of an order under this subdivision shall operate neither to preclude the

defendant from completing the authorized improvement nor to deny compensation based thereon.

Comment. Section 1263.240 in no way limits the right of the property owner to make improvements on his property following service of summons; it simply states the general rule that the subsequent improvements will not be taken into account in valuing the property and specifies those instances in which subsequent improvements will be considered in valuing the property. It should be noted that, although subsequent improvements may be precluded from consideration in valuing the property under this section, if the improvements were necessary to protect the public from risk of injury, their cost may be recoverable as a separate item of compensation under Section 1263.620.

The introductory portion of Section 1263.240, which adopts the substance of the last sentence of former Section 1249, requires that, as a general rule, subsequent improvements be uncompensated regardless of whether they are made in good faith or bad. See *City of Santa Barbara v. Petras*, 21 Cal. App.3d 506, 98 Cal. Rptr. 635 (1971). For exceptions to this rule, see subdivisions (a)-(c) and Section 1263.250 (harvesting and marketing of crops).

Subdivision (a) codifies a judicially recognized exception to the general rule. *Citizen's Util. Co. v. Superior Court*, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963).

Subdivision (b), allowing compensation for subsequent improvements made with the consent of the plaintiff, is new. It permits the parties to work out a reasonable solution rather than forcing them into court and makes clear that the condemnor has authority to make an agreement that will deal with the problem under the circumstances of the particular case.

Subdivision (c) is intended to provide the defendant with the opportunity to make improvements that are demonstrably in good faith and not made to enhance the amount of compensation payable. The subsequent improvements might be compensable under the balancing of hardships test, for example, where an improvement is near completion, the date of public use of the property is distant, and the additional work will permit profitable use of the property during the period prior to the time it is actually taken for public use.

* §1263.310. Measure of Compensation (August 24, 1973
Minutes, p. 6)

Jackson moved to insert "just" as the first word of the section and to insert "normal" as the second word of the second sentence of the proposed sentence.

Sullivan seconded.

Unanimously passed.

Reasons - The word "just" is felt to make clear the philosophy of justice to the owner whose property is taken.

The word "normal" is recommended because there are cases where market value is not available as a test. Particularly, this is true where a property is a unique one. There, recourse must be had to ancillary tests such as cost of reproduction.

§ 1263.310. Compensation for property taken

1263.310. Compensation shall be awarded for the property taken. The measure of this compensation is the fair market value of the property taken.

Comment. Section 1263.310 provides the basic rule that compensation for property taken by eminent domain is the fair market value of the property. Compensation for the property taken, however, is only one element of the damages to which a property owner may be entitled under this chapter. See Section 1263.010 and the Comment thereto (right to compensation). See also Section 1263.410 (injury to remainder) and Section 1263.510 (goodwill).

* §1263.320. Fair Market Value (August 24, 1973 Minutes, p. 6)

Fadem moved that the definition of market value be retained in its present form with its reference to "the highest price".

Keagy seconded.

Passed unanimously.

Reason - The power of eminent domain is a drastic one generally contrary to our fundamental concept of the right of ownership of private property. Yet, we must recognize that the common good requires that property be taken under certain circumstances.

But where private property must be taken, it seems that the definition in use in California for nearly a century, that the owner receive the highest price that his property would have brought is most conformable with the spirit of the just compensation clause of the Constitution.

Additionally, an owner deprived of his property at an arbitrary date determined by the condemnor may well have irretrievably lost an expectancy of gain. There are many intangible losses when property is taken from an owner, such as the cost of acquiring a new property, and the application of entrepreneurial or personal time to the search for an adequate substitute property. These losses are uncompensated and are a further reason why the owner should receive the highest price his property would have brought on the date of value.

§ 1263.320. Fair market value

1263.320. The fair market value of the property taken is the price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

Comment. Section 1263.320 is new. It codifies the definition of fair market value that has developed through the case law. See, e.g., *Sacramento etc. R.R. v. Heilbron*, 156 Cal. 408, 409, 104 P. 979, 980 (1909); *Buena Park School Dist. v. Metrim Corp.*, 176 Cal. App.2d 255, 263, 1 Cal. Rptr. 250, 255-256 (1959). Although the phrase "the highest price estimated in terms of money" has been utilized in the case law definitions of fair market value, Section 1263.320 omits this phrase because it is confusing. No substantive change is intended by this omission.

The phrase "in the open market" has been deleted from the definition of fair market value because there may be no open market for some types of special purpose properties such as schools, churches, cemeteries, parks, utilities, and similar properties. No substantive change is intended by this deletion. All properties, special as well as general, are valued at their fair market value. Within the limits of Article 2 (commencing with Section 810) of Chapter 1 of Division 7 of the Evidence Code, fair market value may be determined by reference to (1) the market data (or comparable sales) approach, (2) the income (or capitalization) method, and (3) the cost analysis (or reproduction less depreciation) formula.

The standard provided in Section 1263.320 is the usual standard normally applied to valuation of property whether for eminent domain or for any other purpose. The evidence admissible to prove fair market value is governed by the provisions of the Evidence Code. See especially EVID. CODE § 810 *et seq.* Where comparable sales are used to determine the fair market value of property, the terms and conditions of such sales may be shown in an appropriate case. See EVID. CODE § 816.

For an adjustment to this basic fair market value standard in case of changes in value prior to the date of valuation, see Section 1263.330.

* §1263.510 Goodwill Loss (August 24, 1973 Minutes, p. 10)

Fadem moved that the Committee recommend that "going concern value" should be substituted for "goodwill".

Sullivan seconded.

Passed 7 to 3.

Reasons - "Goodwill" and "going concern value" are not synonymous. It is the "going concern value" which is lost and therefore should be the measure of compensation.

§ 1263.510. Loss of goodwill

1263.510. The owner of a business conducted on property acquired by eminent domain, or on the remainder if such property is part of a larger parcel, shall be compensated for the loss of goodwill to the extent that such loss is caused by the acquisition of the property or the injury to the remainder and cannot reasonably be prevented by a relocation of the business and by taking those steps and adopting those procedures that a reasonably prudent person would take and adopt in preserving the goodwill.

Comment. Section 1263.510 is new to California eminent domain law. Under prior court decisions, compensation for business losses in eminent domain was not allowed. See, e.g., *City of Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 153 P. 705 (1915). Section 1263.510 provides compensation for loss of goodwill in both a whole or a partial taking. See BUS. & PROF. CODE § 14100 (goodwill is the expectation of continued public patronage). Goodwill loss is recoverable under Section 1263.510 only to the extent it cannot reasonably be prevented by relocation or other efforts by the owner to mitigate.

The determination of loss of goodwill is governed by the rules of evidence generally applicable to such a determination and not by the special rules relating to valuation in eminent domain contained in Article 2 (commencing with Section 810) of Chapter 1 of Division 7 of the Evidence Code. See EVID. CODE § 811 and Comment thereto. Thus, the provisions of Evidence

Code Sections 817 and 819 that restrict admissibility of income from a business for the determination of value, damage, and benefit in no way limit admissibility of income from a business for the determination of loss of goodwill.

Section 1263.510 compensates for goodwill loss only to the extent such loss is not compensated by Government Code Section 7262 (moving expense and moving losses for relocated business or farm operations; in-lieu payments for business or farm operation that cannot be relocated without a substantial loss of patronage). See Section 1263.010 (no double recovery).

* §1263.620. Work to Protect Public from Injury (August 24, 1973 Minutes, p. 11)

Sullivan moved to strike the word "other".

Newton seconded.

Passed unanimously.

Reason - It was felt that the salutary purpose of this section should be extended to the property itself, as well as to other property.

§ 1263.620. Partially completed improvements; performance of work to protect public from injury

1263.620. (a) Where construction of an improvement is in progress on the property taken or damaged at the time of service of summons and the owner of such property ceases the construction due to such service and the uncompleted improvement creates a risk of injury to persons or to other property, the owner shall be compensated for any expenses reasonably incurred for work necessary to protect against such risk.

(b) The plaintiff may agree with the owner as to the amount of compensation payable under this section.

(c) The plaintiff may agree with the owner that the plaintiff will perform work necessary for the purposes of this section.

Comment. Section 1263.620 provides that the owner of property on which construction is interrupted by eminent domain may be compensated for any expenses reasonably incurred for work necessary to protect the public against injury without requirement of prior approval by the plaintiff or the court. *Cf.* Section 1263.240 (improvements made after service of summons). In addition, Section 1263.620 authorizes public entities to agree with the owner to perform the work or as to the amount of compensation payable for such work.

It should be noted that the measure of compensation under Section 1263.620 is the amount of "expenses reasonably incurred for work necessary to protect against such risk." The amount, if any, by which such improvements enhance the value of the property is not the measure of value and is not considered in determining compensation under Section 1263.620. If compensation is sought on the basis of the enhanced value of the property, the improvement must be one that may be taken into account under Section 1263.240.

* §1268.140. Withdrawal of Deposit

Sullivan moved that the comment be augmented by adding that this is an alternative procedure where there was no right to an order of possession.

Jackson seconded.

Passed unanimously.

§ 1268.140. Withdrawal of deposit

1268.140. (a) After entry of judgment, any defendant who has an interest in the property for which a deposit has been made may apply for and obtain a court order that he be paid from the deposit the amount to which he is entitled upon his filing either of the following:

(1) A satisfaction of the judgment.

(2) A receipt for the money which shall constitute a waiver by operation of law of all claims and defenses except a claim for greater compensation.

(b) If the award has not been apportioned at the time the application is made, the applicant shall give notice of the application to all the other defendants who have appeared in the proceeding and who have an interest in the property. If the award has been apportioned at the time the application is made, the applicant shall give such notice to the other defendants as the court may require.

(c) Upon objection to the withdrawal made by any party to the proceeding, the court, in its discretion, may require the applicant to file an undertaking in the same manner and upon the conditions described in Section 1255.240 for withdrawal of a deposit prior to entry of judgment.

(d) If the judgment is reversed, vacated, or set aside, a defendant may withdraw a deposit only pursuant to Article 2 (commencing with Section 1255.210) of Chapter 6.

Comment. Section 1268.140 is based on subdivision (f) of former Section 1254 but provides notice requirements to protect the other defendants where money is to be withdrawn.

Former Section 1254 was construed to permit the defendant to withdraw any amount paid into court upon the judgment whether or not the plaintiff applied for or obtained an order for possession. See *People v. Gutierrez*, 207 Cal. App.2d 759, 24 Cal.

Rptr. 781 (1962); *San Francisco Bay Area Rapid Transit Dist. v. Fremont Meadows, Inc.*, 20 Cal. App.3d 797, 97 Cal. Rptr. 898 (1971). That construction is continued in effect by Section 1268.140.

For purposes of withdrawal of deposits, a judgment that is reversed, vacated, or set aside has no effect; withdrawal may be made only under the procedures provided for withdrawing deposits prior to entry of judgment. This is made clear by subdivision (d).

Under Section 1268.140, the defendant may retain his right to appeal or to request a new trial upon the issue of compensation even though he withdraws the deposit. This may be accomplished by filing a receipt which constitutes a waiver of all claims and defenses except the claim to greater compensation. See subdivision (a). *Cf. People v. Gutierrez*, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

* §1268.310. Date interest commences to accrue (September 28,
1973 Minutes
p. 8)

Jackson moved to delete the word "legal".

Baggot seconded.

Passed 7 to 3.

Reason - The legal rate of interest of 7% does not represent just compensation at this time. This has been the situation since 1970, may continue for an indefinite period, and may occur in the future. Therefore the market interest rate adopted in In re Manhattan Civic Center Area 229 NYS 2d 675 and State of New Jersey v. Nordstrom, 253 Atl 2d 163 of using the market rate of interest where it exceeds the legal rate seems necessary to make compensation just.

§ 1268.310. Date interest commences to accrue

1268.310. The compensation awarded in an eminent domain proceeding shall draw legal interest from the earliest of the following dates:

(a) The date of entry of judgment.

(b) The date the plaintiff takes possession of the property.

(c) The date after which the plaintiff is authorized to take possession of the property as stated in an order for possession.

Comment. Section 1268.310 is the same in substance as subdivision (a) of former Section 1255b except that the phrase "or damage [to the property] occurs" has been deleted from subdivision (2). The deleted phrase was inadvertently included in the 1961 revision of Section 1255b. See *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings*, 3 CAL. L. REVISION COMM'N REPORTS B-1, B-9, B-20 (1961). The 1961 revision was not intended to and has not been construed to require computation of interest on severance damages from a date prior to the earliest date stated in Section 1268.310. The deletion of this phrase is not intended to affect any rules relating to the time of accrual of interest on a cause of action based on inverse condemnation, whether raised in a separate action or by cross-complaint in the eminent domain proceeding. See, e.g., *Youngblood v. Los Angeles County Flood Control Dist.*, 56 Cal.2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961); *Heimann v. City of Los Angeles*, 30 Cal.2d 746, 185 P.2d 597 (1947). For an exception to the rules stated in Section 1268.310, see Section 1255.040 (deposit for relocation purposes on motion of certain defendants).

* §1268.320. Date interest stops (May 17, 1974 Minutes,
p. 9)

Fadem moved to modify subsection (a) and (b)
that deposit does not stop interest if there is a challenge
to public use and no withdrawal occurs.

Sullivan seconded.

Passed unanimously.

Reasons - There are cases such as Morris v. Regents where there are legitimate questions of the right to take which are forced to be waived for the owner to withdraw the deposit. This in effect, either forces the owner to accept a year's long loss of return on his award, or give up his right to challenge the constitutionality of the taking.

Putting an owner to such an election is incompatible with the rights of the individual.

§ 1268.320. Date interest ceases to accrue

1268.320. The compensation awarded in an eminent domain proceeding shall cease to draw interest at the earliest of the following dates:

(a) As to any amount deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 (deposit of probable compensation prior to judgment), the date such amount is withdrawn by the person entitled thereto.

(b) As to the amount deposited in accordance with Article 2 (commencing with Section 1268.110) (deposit of amount of award), the date of such deposit.

(c) As to any amount paid to the person entitled thereto, the date of such payment.

Comment. Section 1268.320 continues the substance of subdivision (c) of former Section 1255b. For an exception to the rule stated in subdivision (a), see Section 1255.040 (deposit for relocation purposes on motion of certain defendants). Subdivision (b) of Section 1268.320 supersedes paragraphs (2) and (4) of subdivision (c) of former Section 1255b. Unlike the former law, there is now only one procedure for payments into court after entry of judgment. See Section 1268.110 and Comment thereto.

Memorandum 75-12

EXHIBIT II

Board of Governors
State Bar of California
601 McAllister Street
San Francisco, California 94102

Dear Board Members:

The California Law Revision wishes to thank you for the opportunity to comment on the report of the State Bar Standing Committee on Condemnation with regard to the Eminent Domain Law proposed by the Law Revision Commission.

Enclosed are the comments of the Law Revision Commission. In one or two cases, you will note that the Commission has adopted the recommendations or suggestions of the Committee on Condemnation. In the other cases, the Commission hopes its comments will prove useful to you in your deliberations.

For your information, the Eminent Domain Law has been introduced in the Legislature as AB 11, along with 10 other bills containing conforming changes. We are hopeful that hearings on the bills will commence early in 1975.

Thank you very much for your cooperation.

Sincerely,

Marc Sandstrom
Chairman

cc: Messrs. Eades, Jefferis,
Bradford, Malone

Repeal of Civil Code § 1001

Civil Code Section 1001 authorizes a person to condemn for a public use specified in Section 1238 of the Code of Civil Procedure if the person is a person in charge of that use. Section 1238 is to be repealed.

An important objective of the revision of eminent domain law is to restrict condemnation authority to those persons who are authorized to exercise it by statute and to provide clear statements of such statutory authority. A careful study has been made to assure that the repeal of Sections 1001 and 1238 will not take away from any public entity any existing condemnation authority.

It is believed that the objection of the State Bar Committee goes to the possible restriction of the right of private persons to condemn property that might be granted by Sections 1001 and 1238. Condemnation by private persons is of dubious constitutionality since condemnation may only be for a "public use." The Commission has found that, in nearly every case in which private condemnation was attempted, the courts have found the attempt violative of the Constitution. The only exception is the case of Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955), relating to condemnation by a private person for a sewer easement.

The Commission believes that condemnation of property is a right that should not be freely granted because of its severe impact upon the rights of citizens to full ownership of their property. One major means of controlling condemnation is to limit its exercise to public entities (which are responsive to the public good) and to those few private persons which are quasi-public in character (i.e., regulated public utilities, nonprofit educational institutions of collegiate grade, nonprofit hospitals, limited dividend housing corporations, and mutual water companies).

The Commission recognizes that repeal of Civil Code Section 1001 may create a problem in the sewer easement area, which has public health implications. To remedy this problem, the Commission has also proposed the addition to the Health and Safety Code of a provision enabling a private person to initiate a sewerage extension proposal, which request may not be denied without a public hearing.

The other possible area where private condemnation might constitutionally be permitted is the acquisition of "byroads" to provide access to landlocked property. The Commission knows of no instance where private condemnation for a byroad was permitted in California. However, a number of bills have been introduced in Sacramento to authorize the exercise of the power of eminent domain for this purpose and the Legislature has disapproved the bills. It would be undesirable to include such a controversial grant of eminent domain authority in the bills proposed by the Commission. The Commission's decision not to propose such a grant of condemnation authority was made after a staff background study was prepared and a tentative recommendation was distributed to approximately 500 persons for review and comment.

If there are any areas where the State Bar believes that private persons should be authorized to exercise the power of eminent domain, the Commission suggests that narrowly drawn bills to grant such authority be proposed by the State Bar for legislative consideration.

§ 1240.120. Right to acquire property to make effective the principal use

This section, which supersedes a number of statutes that apply to various public entities, enables condemnation, for example, for extra property along a highway right of way for sight or drainage purposes, or near a reservoir for prevention of erosion, subsidence, and the like. In addition, it permits

condemnation for necessary adjuncts to public projects, e.g., a parking lot adjacent to a courthouse, or a right of way for access to a park.

The courts have time and again held that condemnation to acquire property to make the principal use effective is for a public use. Such authority is essential to the proper construction, maintenance, and use of public projects. Should the property owner whose land is sought to be taken under Section 1240.120 suspect abuse of the power, he may challenge the necessity for the acquisition if the condemnor is a public utility or other nonpublic entity condemnor. In the case of a public entity condemnor, he must show that the property will not be devoted to the public use for which it is sought to be taken.

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

The Committee on Condemnation objects that substitute condemnation is not for a public use. The Commission drew this section from existing statutes, which have stood for many years, and have never been held unconstitutional. See, e.g., Sts. & Hwys. Code § 104(b)(Department of Transportation) and Water Code § 253(b)(Department of Water Resources). See also cases cited in Comment to Section 1240.340.

§ 1245.250. Effect of resolution

This section, providing the resolution of necessity conclusive effect, codifies existing law under People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959). The Committee on Condemnation would change existing law to permit an exception for "fraud or collusion."

The Commission has considered recommending such a change on many occasions, but has consistently refused to do so. The Commission believes that the decision whether to undertake a project, where to place the project, and what

property is necessary for the project, is basically a legislative and planning decision. It lies entirely within the sound discretion of the public entity which has been entrusted with the responsibility of making precisely this sort of decision. To allow a judge to substitute his own wisdom for that of the public body, which has made its decision after public hearings and taking into account the needs of the whole community (including environment, budget, recreation, and the like), is to destroy the fundamental separation of legislative and judicial functions.

Moreover, as a practical matter, the Commission has determined that allowing judicial review of such decisions will unnecessarily clog the courts. Extensive Commission review of decisions in California and other states in which "fraud or collusion" was alleged has revealed few if any meritorious claims. Opening the resolution of necessity to attack will provide the recalcitrant landowner with a weapon for delay, with little corresponding benefit.

The Commission has provided for challenge of the taking in certain areas where abuse of the right of eminent domain is commonly alleged--condemnation outside the territorial limits of the public entity, condemnation by private condemnors such as public utilities, condemnation for future use, substitute condemnation, excess condemnation, and condemnation of property already appropriated to public use.

§ 1255.410. Order for possession prior to judgment

The Commission agrees with the Committee on Condemnation that a requirement of "need" should be incorporated in the immediate possession provisions. The only question is how it should be incorporated.

The Commission determined not to require a showing of need in this section for three reasons:

(1) Since the order for possession is made on an ex parte hearing, little or no showing would be required.

(2) A determination of need made by the court on ex parte hearing might be difficult to subsequently overturn since judges are not fond of reversing themselves once they have made their determinations.

(3) Since in the usual case the property owner will not be contesting the taking of immediate possession, the requirement of a showing of need in every case will impose a needless burden on the condemnor.

Under the scheme recommended by the Commission, the condemnor obtains the order for possession as a matter of right on ex parte motion. Then, under Section 1255.420 (stay of order for hardship), if the defendant will suffer a hardship by early dispossession, the court may stay or delay the dispossession unless the condemnor makes a dual showing of need for early possession and substantial hardship if possession is delayed. The Commission believes that this scheme not only provides a more practical procedure than that proposed by the Committee on Condemnation, but it also more effectively protects the rights of the property owner, which is the end sought by the committee.

§ 1263.110. Date of valuation

Existing law provides for the date of valuation basically to be the date of issuance of summons in the eminent domain proceeding, unless the proceeding is brought to trial more than one year after the issuance of summons, in which case the date of valuation is the date of trial. The major change recommended by the Commission in the existing law is that the condemnor may establish a valuation date earlier than the date of trial by making a deposit of probable compensation.

The Committee on Condemnation agrees with this change but suggests the Commission go one step further and recommend that, absent a prejudgment deposit by the condemnor, the date of valuation in all cases is the date of trial. The Commission has rejected this approach for two basic reasons:

(1) The existing provision for valuation as of date of the issuance of summons is more convenient from a practical viewpoint since it is a fixed early date and enables the appraisers to formulate their opinions of value on the basis of comparable sales.

(2) The Commission's recommendation is, frankly, a compromise solution of a touchy problem, and further change in the existing law would not be generally acceptable.

§ 1263.220. Business equipment

The Commission has adopted the Committee on Condemnation's suggestion that the phrase "equipment designed for business purposes" be broadened to include other personal property. The provision recommended by the Commission now reads:

As used in this article, "improvements pertaining to the realty" include any facility, machinery, or equipment installed for use on property taken by eminent domain, or on the remainder if such property is part of a larger parcel, that cannot be removed without a substantial economic loss or without substantial damage to the property on which it is installed, regardless of the method of installation.

The Commission believes that the language of "installation" is essential in this connection in order to preserve the "fixture" concept of the section and not to open the way to compensation for purely personal property that might happen to be situated on the premises.

§ 1263.240. Improvements made after service of summons

Subdivision (c) of this section is designed to aid the property owner by giving him something he does not now have--the right to make improvements

after service of summons and be compensated based on the value of the property as improved. The property owner may take advantage of this provision by showing the court that the hardship to him of not being able to make the improvement is greater than the hardship to the condemnor of allowing the improvement.

Subdivision (c) is intended to cure the hardship case where the property owner is stuck with property badly in need of improvement. The pending eminent domain proceeding practically precludes the property owner from making necessary improvements on the property, yet he cannot move from the property because he has no money to move or to acquire replacement property. The hardship of this situation is eliminated, however, where the condemnor makes a deposit of probable compensation, for the property owner now has a fund which he may use to relocate. Consequently, the right to make improvements and receive compensation under subdivision (c) is limited to cases where no prejudgment deposit has been made.

§ 1263.310. Compensation for property taken

In drafting the Eminent Domain Law, the Commission has eschewed use of the phrase "just compensation," since "just compensation" is the term used in the state Constitution. The statute purports to provide more than the "just compensation" required by the state Constitution.

The fair market value of property is not "normally" the measure of compensation for the property taken; it is always the measure of compensation. As the Comment to Section 1263.310 makes clear, fair market value may be determined by a variety of valuation techniques, but it is always the standard of compensation whether the property be normal or "special."

§ 1263.320. Fair market value

The Commission omitted the phrase "the highest price" from the definition of fair market value because it is misleading. The fair market value of

property is the price that a knowledgeable buyer and seller would agree to on the open market; it is not the highest price that could be obtained under a peculiar set of circumstances. The phrase "the highest price" is also misleading because it implies that, where there is a range of appraisal testimony, the trier of fact must accept the highest appraisal estimate, rather than the appraisal estimate that appears most closely to approximate fair market value.

§ 1263.510. Loss of goodwill

The Commission's recommendation that a property owner be compensated for the loss of goodwill of his business is a major change from existing law which precludes such compensation. There is already substantial opposition to this change. The change can be justified partly on the basis that the term "goodwill" has a defined meaning, is litigated in other proceedings, and is limited in character.

"Going concern value" is a new and undefined term and could impose unknown liabilities on public agencies.

The Commission has changed slightly the wording of its draft section to compensate for loss of goodwill so that it duplicates the comparable language of the Uniform Eminent Domain Code of the National Conference of Commissioners on Uniform State Laws. There is a fair chance that the federal government will pay compensation for loss of goodwill in federally-aided projects in states that have a provision equivalent to the Uniform Code provision. A change in concept to "going concern value" would negate any such possibility.

§ 1263.620. Partially completed improvements; performance of work to protect public from injury

The Commission has adopted the Committee on Condemnation's suggestion in part by providing for expenses "To protect the partially installed machinery or equipment from damage, deterioration, or vandalism." As far as

the need to protect the premises themselves goes, the property owner who will suffer a hardship may get a court order permitting compensation for improvements under Section 1263.240(c)(discussed above).

§ 1268.140. Withdrawal of deposit

The suggestion of the Committee on Condemnation that a sentence be added to the Comment to the effect that the section provides an alternate procedure for withdrawal is apparently based on a misunderstanding of the Commission's recommendation. While it is true that existing law does provide two alternate procedures for withdrawal, the Commission has recommended that they be replaced by one uniform postjudgment withdrawal procedure. The Commission has added a sentence to the Comment to this section to make this clear.

§ 1268.310. Date interest commences to accrue

The Commission believes not only that the legal rate of interest on judgments--seven percent--is fair, but also that using a market rate is impractical. The market rate of interest can fluctuate rapidly; it may be at a different rate for different investments, different investors, and different security; and it may be to the detriment of property owners should it drop below seven percent.

§ 1268.320. Date interest ceases to accrue

This section merely continues existing law. The Committee on Condemnation would have the Commission recommend a change in existing law to enable the property owner better to appeal right to take issues. The Commission has not recommended this change because the number of appeals on right to take issues are few and are seldom successful and because the Commission does not believe that the condemnor should be required to finance the property owner's appeal.