Note. Changes may be made in this tentative agenda. For meeting information, call (415) 497-1731

March 1, 1977

Times

March 10 - 7:00 a.m. - 10:00 p.m.
March 11 - 9:00 a.m. - 5:00 p.m.
March 12 - 9:00 a.m. - 12:00 noon.

Place

State Bar Building
601 McAllister Street
San Francisco 94102

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco March 10-12, 1977

March 10

1. Minutes of February 3-5, 1977, Meeting (sent 2/22/77)

2. Administrative Matters

Contract to Cover Professor Riesenfeld's Travel Expenses

Memorandum 77-5 (sent 2/15/77)

Schedule for Review of Work of Select Committee

Memorandum 77-18 (enclosed)

Report on 1977 Legislative Program Generally

Memorandum 77-6 (enclosed)

3. Study 78.50 - Unlawful Detainer Proceedings (AB 13)

Memorandum 77-7 (enclosed)

4. Study 39.100 - Sister State Money Judgments (AB 85)

Memorandum 77-8 (enclosed)

5. Study 39.32 - Wage Garnishment (AB 393)

Memorandum 77-17 (enclosed)

6. Study 63 - Evidence

Evidence of Market Value of Property

Memorandum 77-16 (sent 2/22/77)
Tentative Recommendation (attached to Memorandum)

Evidence Code Section 791

Memorandum 77-11 (sent 2/15/77)
First Supplement to Memorandum 77-11 (sent 2/22/77)

7. Study 77.100 - Nonprofit Corporations (Religious Corporations)

Memorandum 77-9 (sent 2/15/77)

8. Study 36 - Eminent Domain (Resolution of Necessity)

Memorandum 77-10 (sent 2/22/77)

March 11 and 12

9. Study 39 - Attachment

General Assignment for Benefit of Creditors

Memorandum 77-12 (enclosed)
Draft of Recommendation (attached to Memorandum)

Court Commissioners

Memorandum 77-13 (enclosed)
Draft of Tentative Recommendation (attached to Memorandum)

Lien on Inventory

Memorandum 77-14 (enclosed)

Use of Keeper on Execution

Memorandum 77-15 (sent 2/22/77)
Draft of Recommendation (attached to Memorandum)

Bring to Meeting

Pamphlet containing The Attachment Law with Official Comments (distributed at last meeting)

10. Study 39.250 - Creditors' Remedies (Exemptions)

Memorandum 77-2 (sent 1/27/77)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 77-2 (to be sent)

Note. We will start our discussion with item (8) on page 7 of Memorandum 77-2.

11. Study 39.200 - Enforcement of Judgments (Comprehensive Statute)

Memorandum 77-3 (sent 1/21/77)
Draft Statute (attached to Memorandum)

Note. We will start with Section 703.110.

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

MARCH 10, 11, AND 12, 1977

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on March 10, 11, and 12, 1977.

Present: John N. McLaurin, Chairman
Howard R. Williams, Vice Chairman
John J. Balluff, March 11 and 12
John D. Miller
Thomas E. Stanton, Jr.

Absent: George Deukmejian, Member of Senate
Alister McAlister, Member of Assembly
Bion M. Gregory, ex officio

Members of Staff Present:

John H. DeMoully
Stan G. Ulrich
Nathaniel Sterling
Robert J. Murphy, III

Consultants Present:

Professor Stefan A. Riesenfeld, Creditors' Remedies
March 11 and 12

The following persons were present as observers on days indicated:

March 10

Norval Fairman, Cal. Trans., Legal Division, San Francisco
Kathy Gravel, City of Livermore
Robert E. Leidigh, California Rural Legal Assistance, Sacramento
Robert J. Logan, City of Pittsburgh
Gary B. Reiners, City Attorney, Livermore

ADMINISTRATIVE MATTERS

The Minutes of the February 3-5, 1977, meeting were approved as submitted by the staff.

Future Meetings

The place of the May meeting was changed to Sacramento.

New Commissioners

The Executive Secretary reported that he had been advised that the Governor had appointed two new members to the Law Revision Commission:

Beatrice P. Lawson, Los Angeles, replacing Marc Sandstrom

Professor Jean C. Love, University of California at Davis Law School, replacing Noble Gregory

The Commission requested that the Chairman write to the Governor expressing the Commission's appreciation for these new appointments.

Contract to Cover Professor Riesenfeld's Travel Expenses

The Commission considered Memorandum 77-5. The Commission unanimously approved a contract with Professor Stefan A. Riesenfeld as outlined below. The contract is to cover the travel expenses of Professor Riesenfeld in attending Commission meetings and legislative hearings on Commission recommendations to provide expert advice concerning the subject of creditors' remedies if Contractor finds it convenient to do so when requested by the Commission through its Executive Secretary. Reimbursement for travel expenses is to be on a scale commensurate with that provided in the Rules and Regulations of the State Board of Control for reimbursement of travel expenses of members of boards and commissions appointed by the Governor. The total amount of such expenses to be paid under the contract is not to exceed $1,000. The term of the contract is from February 1, 1977, to June 30, 1979. The Executive Secretary was authorized to execute the contract on behalf of the Commission.

Contract With G. Gervaise Davis III

The Executive Secretary reported that the contract with Jerry Davis, Commission consultant on nonprofit corporation law, terminated on June 30, 1976, but that the work performed, and travel expenses incurred, prior to that date have not yet been paid and that additional

work will be needed on this topic in reviewing the work of the select committee and other comments on the proposed legislation once it has been introduced in the Legislature. Accordingly, the Commission unanimously adopted a motion that the existing contract (Agreement 1974-75(5), dated 13 September 1974) be extended until June 30, 1977, and that an additional $1,500 be added to the amount available for expenditure under the contract. Except for the change in the term of the contract and in the amount of funds available for expenditure under the contract, the terms of Agreement 1974-75(5) shall continue to apply. The Executive Secretary was authorized to execute the necessary contract or addendum or other documents to effectuate the decision of the Commission.

Schedule for Review of Work of Select Committee

The Commission considered Memorandum 77-18 relating to the schedule for review of the work of the Select Committee on Revision of the Nonprofit Corporations Code. The Commission determined to review the ideas of the staff of the Select Committee on an ongoing basis, with the objective of amending the Commission's bill to incorporate any good ideas as discovered. The staff was directed to analyze the materials of the Select Committee as they are prepared and to present to the Commission memoranda that point out the differences between the Commission's bill and the Select Committee drafts and that indicate any new ideas in the Select Committee materials not previously considered by the Commission.

Report on 1977 Legislative Program Generally

The Executive Secretary made the following report concerning the 1977 Legislative Program of the Law Revision Commission:

PASSED FIRST HOUSE

AB 13 - Unlawful detainer actions
See Memorandum 77-7. Set for hearing in Senate on March 29.

ACR 4 - Continues authority to study previously authorized topics; authorizes Commission to drop two topics.
Set for hearing in Senate on March 29.

APPROVED BY COMMITTEE FIRST HOUSE; ON INACTIVE FILE

AB 85 - Sister state judgments
See Memorandum 77-8.

SET FOR HEARING FIRST HOUSE

AB 393 - Wage Garnishment
See Memorandum 77-17. Set for hearing in Assembly on March 17.

INTRODUCED

AB 570 - Liquidated damages
Set for hearing in Assembly on March 31.

LEGISLATIVE COUNSEL PREPARING FOR INTRODUCTION

Nonprofit corporations - proposed Nonprofit Corporation Law
Nonprofit corporations - conforming revisions
Use of keeper on execution

Minutes
March 10, 11, and 12, 1977

STUDY 36 - EMINENT DOMAIN (RESOLUTION OF NECESSITY)

The Commission considered Memorandum 77-10 and the memorandum prepared by Mr. Robert J. Logan (City Attorney, City of Pittsburg) distributed at the meeting (attached as an exhibit hereto), relating to direct attack on a resolution of necessity. After extensive discussion of the issues raised in the memoranda and orally by the observers present at the meeting, the Commission referred the matter back to the staff to draft statutory language, in consultation with Mr. Logan and other interested parties, to which a Comment may be appended that negates the statement in the Comment to Code of Civil Procedure Section 1245.255 that review under Section 1094.5 is the proper remedy for direct attack.

STUDY 36--EXHIBIT 1

Minutes
March 10, 11, and 12, 1977

OFFICE OF
THE CITY ATTORNEY
City of Pittsburg
ROBERT J. LOGAN
CITY ATTORNEY

1901 RAILROAD AVENUE
PITTSBURG, CALIFORNIA 94565
(415) 439-8242

March 9, 1977

California Law Revision Commission
Stanford Law School
Stanford, CA 94305

re: COMMENTS OF MEMORANDUM 77-10
(Nathanial Sterling)

Dear Commission Members:

I appreciate the opportunity to be able to appear at the hearing being conducted to review my letter and comments of February 9. Subsequent to the submission of that letter, a Mr. Nathanial Sterling has prepared Memorandum 77-10 reviewing these comments and analyzing same along with possible solutions to the problem presented.

Since I find myself in disagreement with several of the points taken by Mr. Sterling, I will first address myself to those issues. Mr. Sterling has concluded that a resolution of necessity is a mixed legislative and judicial act. That conclusion is apparently based on language found in the case of Wulzen v. Board of Supervisors (1894) 101 CA 15, a case which, incidentially, is the one used by me for the proposition that the resolution of necessity is simply a legislative act and not a judicial one. Part of the resolution of necessity in that particular matter did involve a judicial determination.

What Mr. Sterling fails to point out is that the Board of Supervisors made the following specific finding in its resolution.

> "The said street, as extended, embracing all the land included in the boundaries hereinafter described, is hereby condemned, appropriated, acquired, set apart and taken for public use, except those portions of said lands included therein, and now held by the city and county as open public streets or highways."
> (Emphasis added)

It is that language that the court was concerned about in making its determination. To the extent the board sought to accomplish

the actual condemnation or acquisition of the property in the resolution, such an act was judicial in character. I could not agree more with that analysis. That is not how property is condemned today. The actual determinations of taking and value are conducted in a judicial forum, not a legislative one. A resolution of necessity, under § 1240.030 of the Code of Civil Procedure, looks only to the intent to condemn the property and does not even imply a finding which goes to the actual condemnation or acquisition of the property. Were it to do so, I would be in total agreement with Mr. Sterling's conclusion.

By removing the finding of the Board of Supervisors in Wulzen that the property is "hereby condemned" totally disposes of the legal analysis in that case pertaining to judicial acts as opposed to legislative acts. As noted on page twenty-one of the case, "The determination as to whether or not the right of eminent domain should be exercised and as to what lands are necessary to be taken in the exercise of that right, is a political and legislative question and not a judicial one." Therefore, the adoption of the resolution of necessity, as required by state law today, is not a mixed legislative and judicial act. It is simply a legislative act.

Secondly, Mr. Sterling apparently did not have a copy of the original slip decision of the Supreme Court in the HFH Limited v. Superior Court (1975) 15 CA3d 508. For your convenience, I have enclosed a copy of the two critical pages of that original decision, along with a copy of the letter which I addressed to the Honorable Donald R. Wright, Chief Justice, and the Associate Justices of the Court. Again Mr. Sterling has singled out comments out of context which tend to cloud the issues rather than clarify them. Moreover, the correction I suggested to the court was in footnote thirteen, not footnote five which Mr. Sterling makes reference to. His reference, however, is excusable since I misspoke myself in the February 9 letter by noting page 513 rather than page 516 (the correct reference). His quote from Selby Realty Co. v. City of San Buenaventura (1973) 10 CA3d 128, is an accurate quote, but does not respond to the problem which I raised in my letter to the court. In the Selby case, one of the questions was the issuance of a permit. § 1094.5 of the Code of Civil Procedure is clearly the appropriate remedy through which to review the issuance of a permit. That is not to say because there was a question of the issuance of a permit that the same review is available to challenge discriminatory zoning. In fact, footnote thirteen indicates otherwise. I believe this issue becomes a little clearer if you review my letter to the Supreme Court and the original comments in the

slip decision which were later changed in its final printing. The two pages of the decision and my letter are attached hereto as Exhibit "A", along with copies of the final decision.

I do not agree with Mr. Sterling that the law on whether administrative mandamus may be used for direct attack on a resolution of necessity is unclear. It has only been made unclear by the legislative committee comment. The assertion in my first letter that perhaps nothing can be accomplished without litigating the issue simply reflects a concern on my part that the comment of the legislative committee is already in print and this matter may end up in a court before anything can be done legislatively.

Under alternatives, Mr. Sterling suggests that § 1094.5 review presents a problem because of the possibility of a de novo review by the court. Though that is a possibility because ownership of property is often considered to be a vested right, the major concern that I am expressing is, even under the standard of substantial evidence review, that public agencies are put in the posture of having to set forth in their resolutions of necessity reasoned findings why they reached a conclusion that a certain piece of property should be taken for public use. Without a recitation of those reasoned findings the court, under § 1094.5 review, will in most instances send back the matter to the reviewing body to make such findings. Preparing findings why acquisition of a particular piece of property is most compatible with the greatest public good and the least private injury seems most difficult if not outright impossible.

The first alternative presented by Mr. Sterling is one of no action. Making a resolution of necessity reviewable under § 1094.5 is simply a misstatement of the law. Whether the legislative committees saw the comment or the comment raised any questions in their minds is obviously purely speculative. I would imagine that most of them assumed the staff information was correct. Were the legislative committees advised of the difficulties which I have presented to your commission, I fully suspect that they would have acted in a different manner.

The second alternative is equally unacceptable. Cleary, legislation can be passed which alters or modifies case law. The legislature's standard of review, "gross abuse of discretion", although somewhat inconsistent with the conclusive effect set forth in § 1245.250 of the Code of Civil Procedure is clearly not a license to conclude that § 1094.5 review is a source of direct attack. If that were intended it could have been clearly stated as it is under CEQA. Moreover, the comment by the committee cannot enlarge

upon the scope of review specifically set forth in the legislation.

I am obviously supportive of alternate three and might even suggest that some combination of alternative three and alternative four might be the best and most practical solution. Unfortunately the standard of "gross abuse of discretion" is vague at best.

As set forth earlier in this letter, I am still of the opinion that the law is clear - that the resolution of necessity is one of a legislative character and therefore is not, under any circumstance, subject to attack under § 1094.5 of the Code of Civil Procedure. Reviewing § 1240.030 of the Code of Civil Procedure makes it clear that in no respect are the findings which are required to be made judicial in character. Although facts can be presented to support one or more of the findings, the findings themselves are still based upon an overall legislative determination of the condemning body as to what is best for the public, health, safety, and general welfare.

I would again suggest that this commission take whatever steps it deems appropriate to clear up this confusion.

Sincerely yours,

ROBERT J. LOGAN
City Attorney
City of Pittsburg

RJL:dk
Attachment (1)

OFFICE OF
THE CITY ATTORNEY
CITY OF LIVERMORE

ROBERT J. LOGAN
CITY ATTORNEY

2250 FIRST STREET
LIVERMORE, CALIFORNIA 94550
(415) 447-2100

Minutes
March 10, 11, and 12, 1977

November 20, 1975

TO THE HONORABLE DONALD R. WRIGHT, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Recently the State Supreme Court rendered its opinion in HFH Ltd., v. Superior Court of Los Angeles County, L.A. 30382, L.A. 30383, in which Justice Tobriner authored the majority opinion. Although the City of Livermore was not a participant in the matter, we have nevertheless followed this case with great interest. We wholeheartedly agree with the conclusions reached in the decision, but feel that one minor point has been raised which, if relied upon by lower courts, could have serious ramifications.

On pages 12 and 13 of the typewritten opinion issued on October 12, 1975, the Court has cited Selby Realty Co. v. City of San Buenaventura, 10 Cal 3d 110, for the proposition that the appropriate method by which to consider a claim alleging discriminatory or arbitrary zoning action by a legislative body is by a proceeding in mandamus under §1094.5 of the Code of Civil Procedure. Footnote 13 of the Opinion on pages 12-13 appears to state rather unequivocally that the remedy for alleged discriminatory zoning is a 1094.5 mandamus action. Furthermore, the note would appear to indicate that the same 1094.5 review is available for allegations of arbitrary or capricious action in the passing of a zoning ordinance.

This characterization appears to be in conflict with other opinions of this Court and the courts of appeal of this state. The general direction of the law to date appears to have been that review of purely legislative acts if by writ of mandamus be brought under the provisions of CCP §1085 rather than §1094.5.

Although §§1085 and 1094.5 both provide for writs of mandate, the Court has heretofore held that the two actions are distinguishable in both their application and the scope of review appropriate to each. To substitute a substantial evidence scope of review under §1094.5 for the traditional scope of

review of legislative actions under the arbitrary and capricious standard of CCP §1085 will have a substantial adverse impact upon the conduct of affairs of all local legislative bodies.

The requirement of detailed findings of fact and review by substantial evidence under CCP §1094.5 for legislative acts would inhibit the exercise of discretion by local legislators in zoning matters and other legislative decisions. To convert these legislative determinations into trial-type proceedings would have the unfortunate effect of restraining legislators from expressing a broad range of considerations which otherwise might enter into the decision for fear of prejudicing the legal position of the legislative body. The standard of review under CCP §1094.5 would tend to make legal and procedural considerations paramount to planning and other legitimate legislative considerations.

This would be unfortunate in a time of increasing challenge to local legislators to provide innovative solutions to increasingly complex planning problems.

Zoning has heretofore been considered a purely legislative act. San Diego Building Contractors Association v. City Council of City of San Diego (1974), 13 C 3d 205 at 212; Topanga Assn. for a Scenic Community v. County of Los Angeles (1974), 11 C 3d 506 at 517; Johnston v. City of Claremont (1958), 49 C 2d 826 at 834-835; Lockard v. City of Los Angeles (1949), 33 C 2d 453 at 460; City of Sausalito v. County of Marin (1970), 12 C A 3d 550 at 563; Hilton v. Board of Supervisors (1970), 7 C A 3d 708 at 714; Richter v. Board of Supervisors (1968), 259 C A 2d 99 at 105; Tandy v. City of Oakland (1962), 208 C A 2d 609 at 611.

The Court has also consistently held that the legislative acts of local bodies are not reviewable under CCP §1094.5. Strumsky v. San Diego County Employees Retirement Association (1974), 11 C 3d 28 at 35, fn. 2; Bixby v. Pierno (1971), 4 C 3d 130 at 137; Pitts v. Perluss (1962), 58 C 2d 824 at 833; Wilson v. Hidden Valley Municipal Water District (1967), 256 C A 2d 271 at 277-279; Broch v. Superior Court (1952), 109 C A 2d 598 at 598 et seq.

We feel the distinction between quasi-judicial and legislative acts as heretofore recognized by this Court is valid and should be maintained.

We recognize that since we are not a party to this action, we cannot request a rehearing or reconsideration. However,

on the assumption that the footnote may have been an error or an oversight, we feel as officers of the court, obliged to inform you of the potential problems which could arise if this particular principle is adopted.

We in no way desire by this letter to interfere with the Court's decision, but feel that the matter is of enough significance to require this extraordinary request for clarification.

Respectfully,

ROBERT J. LOGAN

RJL:jd

cc: Telanoff, Bobrowsky, Wallin & Dilkes
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individuals for losses due to changes in zoning, for within the limits of the police power 'some uncompensated hardships must be borne by individuals as the price of living in a modern enlightened and progressive community.' (Metro Realty v. County of El Dorado [1963] 222 Cal.App.2d 508. . . .)" (247 Cal.App.2d at pp. 602-603; emphasis added.)

We have only recently reaffirmed this principle in Selby Realty Co. v. City of Buenaventura, supra, 10 Cal.3d 110;[13/] we held in that case that a

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mains in the same state as the day the plaintiffs acquired it. Thus we need not here consider the question of a nonconforming use which the zoning authority seeks to terminate or remove; for plaintiffs have alleged that they enjoy a vested right, not in an existing use, but in a mere zoning classification on vacant land. This case therefore raises no issue of the constitutionality of a zoning regulation which requires the termination of an existing use. (Cf. Livingston Rock etc. Co. v. County of Los Angeles (1954) 43 Cal. 2d 121, 127.)

13/ Plaintiffs argue that Selby is distinguishable because that case involved a uniform zoning classification while in the instant case plaintiffs have tendered allegations of discriminatory zoning classification. The asserted distinction lacks substance. Plaintiffs have a remedy in a mandate action against discriminatory zoning. (Code Civ. Proc., § 1094.5.) Both their complaint and their briefs in this case, however, urge that the injury constituting the taking was the reduction in market value of the land. If such a reduction constituted an injury, it would occur regardless of the legality of the zoning action occasioning it; indeed we have held that the

landowner could not employ inverse condemnation to challenge a zoning ordinance which required him to dedicate part of his land to the city as a condition of receiving a building permit: "The sixth cause of action sounds in inverse condemnation and alleges that the city has 'taken' plaintiff's property without compensation. Again, insofar as this cause of action is based upon the adoption of the general plan, there is no 'taking' of the property. . . . The appropriate method by which to consider such a claim is by a proceeding in mandamus under section 1094.5 of the Code of Civil Procedure." (10 Cal.3d at pp. 127-128.)[14/]

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wrongfulness of the state's action is irrelevant in an inverse condemnation case. (E.g., Holtz v. Superior Court (1970) 3 Cal.3d 296, 302.) Thus, if plaintiffs have suffered an injury cognizable under California Constitution, article I, section 19, they stand entitled to compensation regardless of the public agency's wrongfulness in causing the injury. If, on the other hand, the city has acted arbitrarily or discriminatorily in passing the zoning ordinance of which they complain, plaintiffs stand entitled to relief by administrative mandate. Since governmental fault is irrelevant in an inverse condemnation action, Selby's discussion of the impropriety of inverse condemnation as a remedy for allegedly improper zoning is apposite to the instant case.

14/ Neither Selby nor this case presents the distinct problems arising from inequitable zoning actions undertaken by a public agency as a prelude to public acquisition (Klopping v. City of Whittier (1972) 8 Cal.3d 39; Peacock v. County of Sacramento (1969) 271

(1) (See fn. 3.) The trial court sustained a demurrer without leave to amend to plaintiffs' cause of action in inverse condemnation and plaintiffs sought review.[3]

1. (2) *Inverse condemnation does not lie in zoning actions in which the complaint alleges mere reduction of market value.*

The courts of this state have recognized the constitutional values served by actions in inverse condemnation and have not hesitated to validate complaints appropriately employing this theory of recovery.[4] At the same time, we have recognized mandamus as the proper remedy for allegedly arbitrary or discriminatory zoning,[5] and have in appropriate

we concluded that plaintiffs enjoyed a vested right in a previous zoning classification would the city's action have deprived them of a use commensurate with value; our courts have, however, clearly and frequently rejected the position that landowners enjoyed a vested right in a zoning classification. (E.g., *Morse v. San Luis Obispo County* (1967) 247 Cal.App.2d 600 [55 Cal.Rptr. 710].)

[3]The trial court also sustained demurrers to other counts, granting leave to amend for purposes of adding a cause of action in mandate. These counts are not before us, for plaintiffs seek review only of the order sustaining the demurrer to the inverse condemnation count and pray for a writ of mandate directing the trial court to overrule that demurrer.

At oral argument plaintiffs and their amici curiae stressed the trial court's failure to allow amendment of their pleading. We recognize, of course, the requirement of liberality in permitting amendment of pleadings "in furtherance of justice." (Code Civ. Proc., § 473; e.g., *Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 19-20 [108 Cal.Rptr. 906, 135 A.L.R. 318].) Nothing in this policy of liberal allowance, however, requires an appellate court to hold that the trial judge has abused his discretion if on appeal the plaintiffs can suggest no legal theory or state of facts which they wish to add by way of amendment. Speaking to circumstances like those of the instant case, we have said: "[T]he burden is on the plaintiff to demonstrate that the trial court abused its discretion. [Citations omitted.] Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636 [75 Cal.Rptr. 766, 451 P.2d 406]; *Fillice v. Boccardo* (1962) 210 Cal.App.2d 843, 847 [26 Cal.Rptr. 789].) Thus plaintiffs, while implying that they might in an unspecified manner amend their complaint to state a cause of action, fail to suggest any relevant facts with which they could supplement their pleading. We shall therefore determine this question below without reference to other possible facts which might enable them successfully to state a cause of action in inverse condemnation. (Cf. fn. 14, *infra*.)

[4]*Albers v. City of Los Angeles* (1965) 62 Cal.2d 250 [42 Cal.Rptr. 89, 398 P.2d 129]; *Holtz v. Superior Court* (1970) 3 Cal.3d 296 [90 Cal.Rptr. 345, 475 P.2d 441]; *Aaron v. City of Los Angeles* (1974) 40 Cal.App.3d 471 [115 Cal.Rptr. 162]; see generally 10 California Law Revision Commission Reports (1971) California Inverse Condemnation Law.

[5]E.g., *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 128 [109 Cal.Rptr. 799, 514 P.2d 111].

cases struck down land use restrictions which suffered from procedural or substantive deficiencies.[6]

We have never, however, suggested that inverse condemnation lay to challenge a zoning action whose only alleged effect was a diminution in the market value of the property in question. (E.g., *Morse* v. *County of San Luis Obispo* (1967) 247 Cal.App.2d 600 [55 Cal.Rptr. 710].) While this state of the law is sufficiently clear to admit of little doubt, we shall briefly review its development and basis.

Zoning developed slowly in the latter part of the 19th century. In its early stages it was frequently indistinguishable from the power to abate public nuisances,[7] but the first decades of this century saw the enactment of more comprehensive zoning laws and the development of the concept of city planning.[8] Shortly after these changes began to take effect, challenges in both state and federal courts raised the question of the constitutionality of these restrictions of the individual's previous ability to do with his land what he chose, bounded only by the laws of public and private nuisance. While the legal context in which this question arose differed from case to case, the courts of this state and the United States Supreme Court firmly rejected the notion that the diminution of the value of previously unrestricted land by the imposition of zoning could constitute a taking impermissible in the absence of compensation.[9] We have long adhered to that position.[10]

To demonstrate the settled nature of the issue before us we point out that the United States Supreme Court faced the same question in the first major constitutional challenge to modern zoning to come before it. (*Euclid* v. *Ambler Realty Co.* (1926) 272 U.S. 365 [71 L.Ed. 303, 47 S.Ct. 114, 54 A.L.R. 1016].) Tendering allegations almost identical to those

[6] *Broadway, Laguna, etc. Assn.* v. *Board of Permit Appeals* (1967) 66 Cal.2d 767 [59 Cal.Rptr. 146, 427 P.2d 810]; *Hamer* v. *Town of Ross* (1963) 59 Cal.2d 776 [31 Cal.Rptr. 335, 382 P.2d 375]; *Johnston* v. *Board of Supervisors* (1947) 31 Cal.2d 66 [187 P.2d 686]; *Skalko* v. *City of Sunnyvale* (1939) 14 Cal.2d 213 [93 P.2d 93]; *Tustin Heights Assn.* v. *Bd. of Supervisors* (1959) 170 Cal.App.2d 619 [339 P.2d 914].

[7] *In re Hang Kie* (1886) 69 Cal. 149 [10 P. 327]; see *Mugler* v. *Kansas* (1887) 123 U.S. 623 [31 L.Ed. 205, 8 S.Ct. 273].

[8] California enacted its first statewide zoning law in 1917. (Stats. 1917, ch. 734, p. 1419.)

[9] E.g., *Welch* v. *Swasey* (1909) 214 U.S. 91 [53 L.Ed. 923, 29 S.Ct. 567]; *Euclid* v. *Ambler Realty Co.* (1926) 272 U.S. 365 [71 L.Ed. 303, 47 S.Ct. 114, 54 A.L.R. 1016]; *Miller* v. *Board of Public Works* (1925) 195 Cal. 477 [234 P. 381, 38 A.L.R. 1479].

[10] E.g., *McCarthy* v. *City of Manhattan Beach* (1953) 41 Cal.2d 879 [264 P.2d 932]; *Consolidated Rock Products Co.* v. *City of Los Angeles* (1962) 57 Cal.2d 515 [20 Cal.Rptr. 638, 370 P.2d 342]; see *Selby Realty Co.* v. *City of San Buenaventura* (1973) 10 Cal.3d 110 [109 Cal.Rptr. 799, 514 P.2d 111]; *State of California* v. *Superior Court (Veta Co.)* (1974) 12 Cal.3d 237 [115 Cal.Rptr. 497, 524 P.2d 1281].

urged here, the appellee in *Euclid* claimed that "the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path of progressive industrial development; that for such uses it has a market value of about $10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of $2,500 per acre. . . ." (*Id.* at p. 384 [71 L.Ed. at p. 309].) The court upheld the zoning against the claim that it constituted a taking of the property in question, settling some half century ago the question in the instant case.

The record of this court stands equally clear. In one of the seminal zoning cases coming before us, in considering and rejecting a contention that a zoning ordinance forbidding the establishment of a non-conforming use in a residential area unconstitutionally deprived the landowners of their property, we quoted with approval the following language of the Wisconsin Supreme Court: " 'It is thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases any more than he may act in accordance with his personal desires. . . . [I]ncidental damages to property resulting from governmental activities, or laws passed in the promotion of the public welfare are not considered a taking of the property for which compensation must be made.' (Carter v. Harper [1923] 182 Wis. 148 [, 153]. . . .)" (*Miller v. Board of Public Works, supra,* 195 Cal. 477, 488.)

In an attempt to escape the clear import of such rulings plaintiffs emphasize that their complaint sounds in inverse condemnation, and that they therefore need only show some diminution in value rather than the arbitrary or confiscatory action imposed by the line of cases they seek to avoid. Several appellate courts in California have considered and rejected precisely this contention.[11]

The Court of Appeal in *Morse v. County of San Luis Obispo, supra,* 247 Cal.App.2d 600, spoke as follows in affirming a judgment of dismissal following the sustaining of a demurrer to a complaint seeking damages in inverse condemnation for the down-zoning of property:

[11] *State of California v. Superior Court (Veta Co.)* (1974) 12 Cal.3d 237 [115 Cal.Rptr. 497, 524 P.2d 1281]; *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110 [109 Cal.Rptr. 799, 514 P.2d 111]; *Girsh v. County of Madera* (1974) 38 Cal.App.3d 303 [112 Cal.Rptr. 919]; *Morse v. County of San Luis Obispo* (1967) 247 Cal.App.2d 600 [55 Cal.Rptr. 710]; *Smith v. County of Santa Barbara* (1966) 243 Cal.App.2d 126 [52 Cal.Rptr. 292].

"Plaintiffs are apparently attempting to recover profits they might have earned if they had been successful in getting their land rezoned to permit subdivision into small residential lots, but *landowners have no vested right in existing or anticipated zoning ordinances.* (*Anderson* v. *City Council* [1964] 229 Cal.App.2d 79, 88-90 [40 Cal.Rptr. 41].) A purchaser of land merely acquires a right to continue a *use* instituted before the enactment of a more restrictive zoning.[12] Public entities are not bound to reimburse individuals for losses due to changes in zoning, for within the limits of the police power 'some uncompensated hardships must be borne by individuals as the price of living in a modern enlightened and progressive community.' (*Metro Realty* v. *County of El Dorado* [1963] 222 Cal.App.2d 508. . . .)" (247 Cal.App.2d at pp. 602-603; italics added.)

We have only recently reaffirmed this principle in *Selby Realty Co.* v. *City of San Buenaventura, supra,* 10 Cal.3d 110;[13] we held in that case that a landowner could not employ inverse condemnation to challenge a zoning ordinance which required him to dedicate part of his land to the city as a condition of receiving a building permit: "The sixth cause of action sounds in inverse condemnation and alleges that the city has 'taken' plaintiff's property without compensation. Again, insofar as this cause of action is based upon the adoption of the general plan, there is no 'taking' of the property. . . ." (10 Cal.3d at pp. 127-128.)[14]

[12]Plaintiffs have failed to allege any existing use that was in nonconformity with the residential zoning classification now in effect; as far as the allegations of their complaint disclose, the land remains in the same state as the day the plaintiffs acquired it. Thus we need not here consider the question of a nonconforming use which the zoning authority seeks to terminate or remove; for plaintiffs have alleged that they enjoy a vested right, not in an existing *use*, but in a mere zoning *classification* on vacant land. This case therefore raises no issue of the constitutionality of a zoning regulation which requires the termination of an existing use. (Cf. *Livingston Rock etc. Co.* v. *County of Los Angeles* [1954] 43 Cal.2d 121, 127 [272 P.2d 4].)

[13]Plaintiffs argue that *Selby* is distinguishable because that case involved a uniform zoning classification while in the instant case plaintiffs have tendered allegations of discriminatory zoning classification. The asserted distinction lacks substance. Plaintiffs have a remedy in a mandate action against discriminatory zoning. (Code Civ. Proc., § 1085.) Both their complaint and their briefs in this case, however, urge that the injury constituting the taking was the reduction in market value of the land. If such a reduction constituted an injury, it would occur regardless of the legality of the zoning action occasioning it; indeed we have held that the wrongfulness of the state's action is irrelevant in an inverse condemnation case. (E.g., *Holtz* v. *Superior Court* (1970) 3 Cal.3d 296, 302 [90 Cal.Rptr. 345, 475 P.2d 441].) Thus, if plaintiffs have suffered an injury cognizable under California Constitution, article I, section 19, they stand entitled to compensation regardless of the public agency's wrongfulness in causing the injury. If, on the other hand, the city has acted arbitrarily or discriminatorily in passing the zoning ordinance of which they complain, plaintiffs stand entitled to relief by administrative mandate. Since governmental fault is irrelevant in an inverse condemnation action, *Selby*'s discussion of the impropriety of inverse condemnation as a remedy for allegedly improper zoning is apposite to the instant case.

[14]Neither *Selby* nor this case presents the distinct problems arising from inequitable zoning actions undertaken by a public agency as a prelude to public *acquisition*

STUDY 39.100 - SISTER STATE JUDGMENTS (AB 85)

The Commission considered Memorandum 77-8 presenting various matters for Commission consideration in connection with Assembly Bill 85 which was introduced to effectuate the Commission's Recommendation Relating to Sister State Money Judgments.

The following amendments to Assembly Bill 85 (as amended in Assembly February 15, 1977) were approved by the Commission:

AMENDMENT 1

On page 3 of the printed bill as amended in Assembly February 15, 1977, strike out lines 38, 39, and 40, and insert:

judgment.

AMENDMENT 2

On page 4, line 16, after "judgment", insert:

under this section

AMENDMENT 3

On page 4, line 29, after the period, strike out the remainder of the line and all of lines 30, 31, and 32.

AMENDMENT 4

On page 4, following line 39, insert:

(c) Upon the hearing of the motion to vacate the judgment under this section, the judgment may be vacated upon any ground provided in subdivision (a) and another and different judgment entered, including but not limited to another and different judgment for the judgment creditor if the decision of the court is that the judgment creditor is entitled to such different judgment. The decision of the court on the motion to vacate the judgment shall be given in writing and filed with the clerk of court in the manner provided in Sections 632, 634, and 635 except that the court is not required to make any written findings and conclusions if the amount of the judgment as entered under Section 1710.25 does not exceed one thousand dollars ($1,000).

STUDY 39.160 - ATTACHMENT (LIEN ON INVENTORY)

The Commission considered Memorandum 77-14 concerning the extent of the attachment lien on inventory obtained by filing a notice with the Secretary of State and decided that amendatory legislation need not be prepared.

STUDY 39.160 - ATTACHMENT (GENERAL ASSIGNMENT FOR BENEFIT OF CREDITORS AND BANKRUPTCY)

The Commission considered Memorandum 77-12 and the attached staff draft of the Recommendation Relating to the Attachment Law--Effect of Bankruptcy Proceedings, Effect of General Assignments for the Benefit of Creditors. The Commission approved the proposed legislation for introduction in the Legislature subject to the following revisions:

The terminating effect of bankruptcy proceedings should be limited to petitions filed and administered in California in order to minimize the detrimental impact on the position of persons attaching assets of the defendant in California as against persons attaching assets of the defendant in other states whose liens would not be lost under Section 67a(1) of the Bankruptcy Act if obtained while the defendant was solvent.

The terminating effect of assignments should be specifically limited to general assignments for the benefit of creditors which assign all of the defendant's assets not exempt from execution for the benefit of all of the defendant's creditors and which do not contain preferences of one creditor over any other.

The assignee under a general assignment should be subrogated to the rights of the attaching plaintiff so that the termination of the attachment will not benefit a lienholder whose lien is subordinate to the attachment but which is not terminated by the general assignment.

The temporary protective order or attachment should be reinstated if the general assignment is set aside as a fraudulent conveyance or for some other reason, just as a lien which has been voided under the Bankruptcy Act is reinstated if the person is not finally adjudged a bankrupt or if no arrangement or plan is proposed and confirmed.

Section 493.040 should be revised to be consistent with the Bankruptcy Act by providing for the reinstatement of the temporary protective order as well as the attachment.

The Comment to Section 493.040 should note that federal law provides for tolling state statutes of limitation and cite Booloodian v. Ohanesian, 13 Cal. App.3d 635, 91 Cal. Rptr. 923 (1970), applying this principle to an attachment lien.

STUDY 39.160 - ATTACHMENT (COURT COMMISSIONERS)

The Commission considered Memorandum 77-13 and the attached staff draft of the Tentative Recommendation Relating to the Attachment Law--Performance of Judicial Duties by Court Commissioners. The tentative recommendation was approved for distribution for comment subject to editorial revision and the following decisions:

The first sentence of the second paragraph on page one of the tentative recommendation should be revised to read: "The use of court commissioners to perform subordinate judicial duties under the Attachment Law will maximize its efficient and economical administration.

On page two or three, a sentence should be added to the effect that preliminary and uncontested matters may property be designated subordinate judicial duties on the authority of Rooney v. Vermont Investment Corp., 10 Cal.3d 351, 515 P.2d 297, 110 Cal. Rptr. 353 (1973).

The outline of judicial duties under the Attachment Law, attached as Exhibit 1 to Memorandum 77-13, should accompany the tentative recommendation as an exhibit when it is distributed for comment.

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STUDY 39.160 - ATTACHMENT (USE OF KEEPER ON EXECUTION)

The Commission considered Memorandum 77-15 and the attached staff draft of the Recommendation Relating to Use of Keeper Pursuant to Writ of Execution. The Commission approved the recommendation for printing, subject to editorial revision, and for immediate introduction into the Legislature with an urgency clause in order to achieve the earliest possible resolution of the problem.

STUDY 39.200 - ENFORCEMENT OF JUDGMENTS (COMPREHENSIVE STATUTE)

The Commission continued its consideration of Memorandum 77-3 and the attached staff draft of the Enforcement of Judgments Law. Sections in the articles considered were tentatively approved subject to the following decisions:

CHAPTER 3. EXECUTION

Article 1. Writ of Execution; Several Writs; Successive Writs

§ 703.110. Application for writ; several writs; successive writs

Subdivision (c), providing that no writ may be issued in a county until a prior writ has been returned, will have to be revised in accordance with the revision of Section 703.260. The Comment to this section should explain the reason for eliminating alias writs, provided by Section 688(d).

§ 703.130. Property subject to execution; exceptions

Paragraphs (2) and (3) of subdivision (a) should make clear that the lien referred to is one in favor of the judgment creditor.

Paragraph (5) of subdivision (b) should be redrafted to make its meaning clearer.

Paragraph (6) of subdivision (b) should be restricted by the addition of the words "not evidenced by an instrument" or by providing a definition of right to future payments. The Comment to this provision should note that it overrules Meacham v. Meacham, 262 Cal. App.2d 248, 68 Cal. Rptr. 746 (1968), which permitted the sale of a right to future payments (a percentage of profits) under a contract for the marketing of an invention.

Article 2. Levy Procedures

§ 703.250. Levy on property in possession of third person or debts owing by third person; duties; liability

In subdivision (a), the word "due" should be deleted since after judgment a levy of execution reaches noncontingent but not yet due debts. In subdivisions (a), (b), and (c) it should be made clear that the property or debt reachable by garnishment is one that is subject to execution.

In order to avoid liability under subdivision (d) while protecting the interests of the judgment debtor, a garnishee should be permitted to assert that the property or debt is exempt and consequently avoid the duty to pay over under subdivision (b).

Subdivision (c) should provide for a narrowly drawn interrogatory to the garnishee designed to elicit whether he has property in which the debtor has an interest or owes a debt to the debtor, regardless of whether the property or debt is subject to execution. This would provide the judgment creditor with information necessary to select the proper procedure for applying the property to the satisfaction of the judgment. The Comment should note that the garnishee is not precluded from providing additional information which may be desirable to avoid being examined in supplementary proceedings. This interrogatory would not create a lien on the property described which is not reached by garnishment.

§ 703.260. Return of writ of execution

This section should be redrafted to achieve the following results: If the writ is not delivered to the levying officer, it should be presumed returned at the end of one year and 90 days. The judgment creditor should be permitted to return (or redeliver) the writ to the clerk if it has not been delivered to the levying officer. At the latest, the writ should be returned one year after the last levy under the writ. Writs of execution should be leviable during the first 90 days after issuance. In order to facilitate satisfaction of money judgments, and to avoid the problem where the writ is needed to complete the sale of property but can no longer be levied, the law should be revised to permit more than one writ to be outstanding in a county, subject to the limitation that only one writ be leviable at a given time in that county.

§ 703.270. Lien of execution

Subdivision (a) should provide that the lien of execution should expire one year from the date the property is levied upon rather than one year from the date the writ is issued. Subdivision (b) should provide that the lien, rather than the levy, on an interest in personal property of an estate of a decedent is effective until the decree distributing the interest has become final.

STUDY 39.250 - ENFORCEMENT OF JUDGMENTS (EXEMPTIONS)

The Commission concluded its consideration of Memorandum 77-2 relating to the basic policies of the exemption laws and considered the exemption provisions of the proposed Bankruptcy Act attached to the First Supplement to Memorandum 77-2 (erroneously numbered 77-1). The Commission made the following decisions.

Life insurance. The cash value of a life insurance policy should be entirely exempt since the insured should not be forced to lose his insurance and possibly his insurability by cashing in the policy. The loan value of an unmatured life insurance policy should be exempt in the amount of $5,000. Benefits from a matured life insurance policy should be exempt in the amounts provided in the Recommendation Relating to Wage Garnishment when the benefits are paid periodically. The beneficiary should be afforded an opportunity to convert the lump sum benefit into a periodic payment plan in order to take advantage of the exemption.

Health, disability, and unemployement benefits. Public disability and unemployment benefits should be completely exempt. Periodic private health and disability benefits should be exempt in the amounts provided for earnings. However, health benefits should not be exempt as against health care providers.

Tort awards. Damages awarded in personal injury and wrongful death actions should be exempt on the same basis as life insurance benefits, i.e., in the amount earnings are exempt when the award is converted into some sort of periodic payment plan.

Jewelry, heirlooms, works of art. There should be an exemption of $500 worth of jewelry, heirlooms, and works of art.

Burial plot. A burial plot for two persons should be exempt.

Church pews. The church pew exemption should be retained unless the staff finds from consultation with appropriate church bodies that pews are not generally owned by church members.

Retroactivity of exemptions. It was noted that the law in California seems to be that a new exemption or an increase in an existing exemption does not apply to a judgment on a debt which was incurred before the exemption was changed. The staff should research this matter further and consider the manner in which exemptions may be made retroactively effective.

Escalator clause. The staff should draft an escalator clause that would keep exemptions based on dollar amounts in proper relation to the variations in the purchasing power of the dollar.

Judgment lien and claimed homestead exemption. Professor Stefan A. Riesenfeld, the Commission's consultant on creditors' remedies, noted that subdivision (c) of Section 674 (enaced by Cal. Stats. 1976, Ch. 1000, operative July 1, 1977) provides that a judgment is a lien on real property notwithstanding the dwelling exemption provided by Code of Civil Procedure Section 690.31. This provision appears to have the effect of creating a lien on the property which is enforceable against the purchaser if the debtor sells his dwelling. Accordingly, the purchaser will reduce his offer on the property by the amount of the lien, with the result that the debtor's exemption of proceeds in the amount of the dwelling exemption will be meaningless. The staff should prepare proposed legislation in consultation with Professor Riesenfeld to be considered at the April meeting with a view toward seeking an amendment of Section 674 before the new law becomes operative.

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STUDY 63 - EVIDENCE (EVIDENCE CODE SECTION 791)

The Commission considered Memorandum 77-11 and the attached law review article and extract from the study by Professor Friedenthal suggesting a revision of Evidence Code Section 791 and the First Supplement to Memorandum 77-11 and the attached letter from Professor Kaplan joining in the suggestion that Evidence Code Section 791 be revised.

The Commission decided not to recommend any revision of Evidence Code Section 791.

STUDY 63.70 - EVIDENCE (EVIDENCE OF MARKET VALUE OF PROPERTY)

The Commission considered Memorandum 77-16 and the attached draft of a tentative recommendation relating to evidence of market value of property. The Commission approved the draft for distribution for comment, with the following changes:

Section 811. "Value of property" defined. Section 811 was revised to read:

Evidence Code § 811 (amended)

SEC. 3. Section 811 of the Evidence Code is amended to read:

811. As used in this article, "value of property" means ~~the amount of "just compensation" to be ascertained under Section 19 of Article I of the State Constitution and the amount of value, damage, and benefits to be ascertained under Articles 4 (commencing with Section 1263.310) and 5 (commencing with Section 1263.410) of Chapter 9 of Title 7 of Part 3 of the Code of Civil Procedure.~~ market value of any of the following:

(a) Real property or any interest therein.

(b) Tangible personal property.

Comment. Section 811 is amended to broaden the application of this article to all cases where a market value standard is used to determine the value of real property or any interest therein, or of tangible personal property. These cases include, but are not limited to, the following:

(1) Eminent domain proceedings. See, e.g., Code Civ. Proc. § 1263.310 (measure of compensation is fair market value of property taken).

(2) Property taxation. See, e.g., Cal. Const., Art. XIII, § 1, and Rev. & Tax. Code §§ 110, 110.5, 401 (property assessment and taxation based on fair market value or full value).

(3) Inheritance taxation. See, e.g., Rev. & Tax. Code §§ 13311, 13951 (property taxed on basis of market value).

(4) Breach of contract of sale. See, e.g., Com. Code §§ 2708, 2713 (measure of damages for nonacceptance, nondelivery, or repudiation is based on market price). It should be noted that, where a particular provision requires a special rule relating to proof of value, the special rule prevails over this article. See, e.g., Com. Code §§ 2723, 2724.

(5) Fraud in the purchase, sale, or exchange of property. See, e.g., Civil Code §§ 3343 (measure of damages based on actual value of property).

(6) Other cases in which no statutory standard of market value or its equivalent is prescribed but in which the court is required to make a determination of market value.

It should be noted that this article applies only where market value is to be determined. In cases involving some other standard of value, the rules provided in this article are not made applicable by statute. See Section 810 and Comment thereto.

This article applies to the valuation of real property or an interest in real property (e.g., a leasehold) and of tangible personal property. It does not apply to the valuation of intangible personal property which is not an interest in real property, such as shares of stock, a partnership interest, goodwill of a business, or property protected by copyright; valuation of such property is governed by the rules of evidence otherwise applicable. It should be noted, however, that nothing in this article precludes a court from using the rules prescribed in this article in valuation proceedings to which the article is not made applicable, where the court determines that the rules prescribed are appropriate.

Section 817. Leases of subject property. Section 817 should be amended to preclude consideration of leases of the subject property entered into after filing of the lis pendens, in the same manner as Section 815 (sales of subject property).

Section 819. Capitalization of income. The staff was directed to revise subdivision (b)(1) of Section 819 for clarity.

The Commission also received a letter from Chairman McLaurin concerning the draft; a copy of the letter is appended hereto. The Commission directed the staff to bring the letter to the Commission's attention at the time other comments relating to the tentative recommendation are reviewed.

STUDY 63.70--EXHIBIT 1

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LAW OFFICES
HILL, FARRER & BURRILL
[illegible]
LOS ANGELES, CALIFORNIA 90071
[illegible]
[illegible]

March 3, 1977

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

Re: Memorandum 77-16 and Attached Draft of Recommendation

Dear John:

The following are just a few comments with reference to the proposed changes in the Evidence Code.

First, Section 811: The phrase "... or its equivalent" seems to be unnecessary, confusing and unintelligible when used with the phrase "... market value of property..." Your comment states that this section is amended to broaden the application to all cases where a market value standard is used. If this is the purpose, then the phrase "... or its equivalent" is unnecessary. Further, I do not know what the "equivalent" of market value is. Market value is market value. If the phrase "actual value" is deemed an equivalent of market value, then it is unnecessary to use the phrase. If "actual value" is not the same as market value, then it cannot be the equivalent. I would suggest the deletion of the phrase "... or its equivalent" from Section 811 and Section 812.

Second, Section 813(2): I do not believe that the owner of any right, title or interest in the property being valued should be permitted to express an opinion of the entire property being valued other than the value of his right, title or interest, or unless he is otherwise qualified to express such an opinion. The right of an owner to testify

as to the value of his property is predicated upon a presumption that he has knowledge thereof purely by virtue of his ownership. This presumption should not be extended to one who has an ownership of only an interest in the property being condemned for purposes of permitting him to testify to an opinion of the value of the entire property being condemned. This presumption should be limited to its present extent and not extended. To extend it, I believe, would lead to a prolongation of time of trial where there are divided interests and result in unnecessary expense of both money and time by the parties as well as the court.

I believe that the statement in your comment, "This is consistent with Code of Civil Procedure Section 1260.220 (procedure where there are divided interests)" should be omitted. As I read Section 1260.220, it is not consistent. This latter section permits of either a separate assessment of compensation or a determination of the total compensation as between plaintiff and all defendants claiming an interest in the property. In this latter instance, nothing in Section 1260.220 limits the right of a defendant to present during the first stage of the proceeding evidence of the value of or injury to his interest in the property. This section does not permit the owner of any interest in the property to testify as to the value of the entire property being acquired.

Third, Section 813(3): The qualification of an officer, etc. to testify to an opinion of value if he is knowledgeable as to the character and use of the property should be extended as follows: "is knowledgeable as to the character and use of the property and its value." Many individuals are knowledgeable as to the character of property, knowledgeable as to the use of property, but are not knowledgeable with reference to value.

Fourth, Section 817: Unfortunately, I do not understand your comment, "Section 817 is amended to make clear that subdivision (b) is a limitation on subdivision (a)." Nor do I understand your addition of the phrase in subdivision (a), "subject to subdivision (b)...". To my recollection, Section 817 was to permit testimony with reference to leases on the property being taken where there was a fixed rental paid and explicity to permit testimony with reference to a lease where the rental was fixed by a

percentage or other measurable portion of gross sales or gross income. These are two separate categories or types of leases. Consequently, subdivision (b), which is similar to the second sentence in the existing Section 817, cannot be a limitation on subdivision (a). To have subdivision (b) a limitation on subdivision (a) is to limit testimony with reference to existing leases solely to situations where the rent is fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on leased property. It is my recollection that the percentage lease situation was codified for purposes of making it clear that this type of factual situation can be used by the appraiser, as stated in People vs. Frahm.

Fifth, Section 819: I have very serious reservations with reference to the advisability of proposing Section 819 as you have it set forth. In the first instance where this section is applicable, it will call for two trials. The first trial will call for a judicial determination of your two so-called limitations. Also, this trial will have to be held far enough in advance so that if there is an adverse ruling by the trial court, the appraiser who is urging a hypothetical capitalization of income position will have ample time to prepare his appraisal on another basis in conformity with the court's ruling. It will also necessitate interim findings of fact and conclusions of law and, possibly, a judgment with reference to the situation. These findings, etc. may be determined by one judge, whereas the basic issue of compensation will subsequently be determined by another judge unless there is a court rule or court procedure which will require this type of case being assigned to one judge for all purposes.

More importantly, the limitations which you have before the hypothetical capitalization of income can be considered, means that the court is imposing its judgment upon the matter on which an appraiser should be allowed to form an opinion: first, that the existing improvements do not permit use of the property for its highest and best use, and, second, that there is no adequate market data as described in Section 816. Both of these matters are

factual matters which go to the weight of the evidence rather than admissibility. Further, no consideration has been given to the reproduction cost method of analysis of value of the property. Your limitation with reference to a lack of adequate market data seems to place an undue emphasis on a comparable sales approach to value. Additionally, even with your proposed limitations, this method of valuation permits great speculation on the part of appraisers. As you know, it is with reluctance that I mention this latter point.

Sixth, Section 822(g): This subsection seems to restrict the admissibility of a trade or exchange of any property where such includes the property being valued. I do not believe that this was your intent. Additionally, I feel that this limitation is too broad because there are many situations where a trade or an exchange of property is involved, but the parties thereto have placed a total price on the property, and real estate equaling that value has to be purchased. For example, the parties to a purchase of Property "X" agree that Property "X" has a value of $1,000,000. The buyer is then directed by the seller to go out and obtain various types of property or designated properties which will total $1,000,000 in their purchase prices. Those properties then are exchanged for Property "X". This type of a trade has been held in various trial courts to be admissible. Your proposal would eliminate it.

Seventh, Taxation and Revenue Code Section 4986: I do not feel that the deletion as proposed with reference to grounds for mistrial is appropriate. This provision was placed in the Revenue and Taxation Code on the theory that any mention of such is so egregious as to be grounds for a mistrial without any argument or doubt. Therefore, there should be no discretion on the part of the trial court in either granting or denying a motion for mistrial on this basis. One of the theories which was espoused in this situation was that jurors can determine from the taxes the assessed value of the property and, therefore, the assessor's determination of market value by virtue of their mere knowledge of the tax rate. This would then permit them to take into

consideration a matter which is beyond the evidence produced at the time of trial: to wit, the assessor's determination of fair market value. There would be no way by which the injured party could reach or cure this error.

Eighth: By way of interest, existing Code Section 817 with reference to leases of subject property permitting consideration of such leases where they were in effect within a reasonable time either before or after the date of valuation--this section does not contain a limitation with reference to leases of the subject property after the date of valuation which is similar to the limitation on a sale of the subject property which occurs after the date of valuation and after the filing of a lis pendens. It would seem to me that Section 817 should be amended to include a similar limitation.

With warmest regards,

JOHN N. McLAURIN
OF
HILL, FARRER & BURRILL

JNMcL/rs

STUDY 77.100 - NONPROFIT CORPORATIONS (RELIGIOUS CORPORATIONS)

The Commission considered Memorandum 77-9 relating to the application of the nonprofit corporation law to religious corporations. The Commission determined to state in the Comment to Section 5211 that the constitution limits (rather than "may limit") the extent to which the state may regulate religious organizations. The Comment should also refer to Section 7106 of the Pennsylvania Nonprofit Corporation Law of 1972. The Executive Secretary was directed to inform Mr. Helge of this decision.

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STUDY 78.50 - LESSOR-LESSEE RELATIONS
(UNLAWFUL DETAINER PROCEEDINGS)

The Commission considered Memorandum 77-7 (unlawful detainer proceedings) and a staff draft of a revision of Civil Code Section 1952.3 (handed out at a meeting and attached to these Minutes as Exhibit 1).

The Commission determined that Section 1952 should be amended in Assembly Bill 13 to make a technical change, the amended section to read:

1952. (a) Except as provided in subdivision (c), nothing in Sections 1951 to 1951.8, inclusive, affects the provisions of Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure, relating to actions for unlawful detainer, forcible entry, and forcible detainer.

(b) The bringing of an action under the provisions of Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil ~~Procedure~~ Procedure, whether or not such action becomes an ordinary civil action as provided in Section 1952.3, does not affect the lessor's right to bring a separate action for relief under Sections 1951.2, 1951.5, and 1951.8, but no damages shall be recovered in the subsequent action for any detriment for which a claim for damages was made and determined on the merits in the previous action.

(c) After the lessor obtains possession of the property under a judgment pursuant to Section 1174 of the Code of Civil Procedure, he is no longer entitled to the remedy provided under Section 1951.4 unless the lessee obtains relief under Section 1179 of the Code of Civil Procedure.

Section 1952.3, proposed to be added to the Civil Code in Assembly Bill 13, was revised to read in substance as follows:

SEC. 2. Section 1952.3 is added to the Civil Code, to read:

1952.3. (a) Except as provided in subdivisions (b) and (c), if the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been surrendered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action in which:

(1) The lessor may obtain any relief to which he is entitled, including, where applicable, relief authorized by Section 1951.2; but, if the lessor seeks to recover damages described in paragraph

(3) of subdivision (a) of Section 1951.2 or any other damages not pleaded and recoverable in the unlawful detainer proceeding, the lessor shall first amend the complaint pursuant to Section 472 or 473 of the Code of Civil Procedure to state a claim for such damages and shall serve a copy of the amended complaint on the defendant in the same manner as a copy of a summons and original complaint is served.

(2) The defendant may, by appropriate pleadings or amendments to pleadings, seek any affirmative relief, and assert all defenses, to which he is entitled, whether or not the lessor has amended the complaint; but subdivision (a) of Section 426.30 of the Code of Civil Procedure does not apply unless, after giving up possession of the property, the defendant (i) files a cross-complaint or (ii) files an answer or an amended answer in response to an amended complaint filed pursuant to paragraph (1).

(b) The defendant's time to respond to a complaint for unlawful detainer is not affected by the surrender of possession of the property to the lessor; but, if the complaint is amended as provided in paragraph (1) of subdivision (a), the defendant has the same time to respond to the amended complaint as in an ordinary civil action.

(c) If the defendant's default has been entered on the unlawful detainer complaint and such default has not been set aside, the case shall proceed as an unlawful detainer proceeding.

(d) Nothing in this section affects the pleadings that may be filed, relief that may be sought, or defenses that may be asserted in an unlawful detainer proceeding that has not become an ordinary civil action as provided in subdivision (a).

APPROVED

_____
Date

_____
Chairman

_____
Executive Secretary

Civil Code § 1952.3 (added)

SECTION 1. Section 1952.3 is added to the Civil Code, to read:

1952.3. (a) If the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been surrendered to the lessor before ~~trial,~~ ~~(a)~~ the case may proceed as trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil ~~action~~ action in which:

~~(b)~~ (1) The lessor may obtain any relief to which he is entitled, including, where applicable, relief authorized by Section ~~1951.2~~ §§ 1951.2; but, if the lessor seeks to recover damages described in paragraph (3) of subdivision (a) of Section 1951.2, the lessor shall first amend the complaint pursuant to Section 472 or 473 of the Code of Civil Procedure to state a claim for such damages.

~~(c)~~ (2) The defendant may, by appropriate pleadings or amendments to pleadings, seek any affirmative relief, and assert all defenses, to which he is entitled, whether or not the lessor has amended the complaint; but subdivision (a) of Section 426.30 of the Code of Civil Procedure does not apply unless, after giving up possession of the property, the defendant ~~(1)~~ (i) files a cross-complaint or ~~(2)~~ (ii) files an answer or an amended answer in response to an amended complaint filed pursuant to ~~subdivision (b),~~ paragraph (1).

(b) Nothing in this section affects the pleadings that may be filed, relief that may be sought, or defenses that may be asserted in an unlawful detainer proceeding that has not become an ordinary civil action as provided in subdivision (a).

Comment. The introductory clause of subdivision (a) of Section 1952.3 codifies prior case law. If the tenant gives up possession of the property after commencement of an unlawful detainer proceeding, "the action thus becomes an ordinary one for damages." Union Oil Co. v. Chandler, 4 Cal. App.3d 716, 722, 84 Cal. Rptr. 756, 760 (1970). This is true where possession is given up "before the trial of the unlawful detainer action." Green v. Superior Court, 10 Cal.3d 616, 633 n.18, 517 P.2d 1168, 1179 n.18, 111 Cal. Rptr. 704, 715 n.18 (1974). Accord, Erbe Corp. v. W. & B. Realty Co., 255 Cal. App.2d 773, 778, 63 Cal. Rptr. 462, 465 (1967); Turem v. Texaco, Inc., 236 Cal. App.2d 758, 763, 46 Cal. Rptr. 389, 392 (1965). If there is no trial, as, for example, in a default case, the rule is applied up until the entry of judgment.

When the tenant has surrendered possession, the rules designed to preserve the summary nature of the proceeding are no longer applicable. See, e.g., Cohen v. Superior Court, 248 Cal. App.2d 551, 553-554, 56 Cal. Rptr. 813, 815-816 (1967) (no trial precedence when possession not in issue); Heller v. Melliday, 60 Cal. App.2d 689, 696-697, 141 P.2d 447, 451-452 (1943) (cross-complaint allowable after surrender); cf. Bell v. Haun, 9 Cal. App. 41, 97 P. 1126 (1908) (defendant not in possession entitled to same time to answer as in civil actions generally). The limitation of subdivion (a) to unlawful detainer proceedings is not intended to preclude application of the rule stated in the introductory clause in forcible entry or forcible detainer cases.

Paragraph (1) of subdivision (a) makes clear that, when the statutory conditions for the application of Section 1951.2 are met, the damages authorized by that section are among the remedies available to the lessor when an unlawful detainer proceeding has been converted to an ordinary civil action. The paragraph serves, among other purposes, the salutary purpose of avoiding multiplicity of actions. The statutory conditions for the application of Section 1951.2 are that there be a lease, breach of lease by the lessee, and either abandonment by the lessee before the end of the term or termination by the lessor of the lessee's right to possession. Civil Code § 1951.2(a). The lessor is not required to seek such damages in the unlawful detainer proceeding which has been thus converted, but may elect to recover them in a separate action. See Civi Code 1952(b).

If damages for loss of rent accruing after judgment are sought by the lessor pursuant to paragraph (3) of subdivision (a) of Section 1951.2, the additional conditions of subdivion (c) of that section must be met. And, if the lessor seeks such damages, the last portion of paragraph (1) of subdivision (a) of Section 1952.3 requires the lessor to amend the complaint to state a claim for such relief. If the case is at issue, the lessor's application for leave to amend is addressed to the discretion of the court. See Code Civ. Proc. § 473. The court is guided by a "policy of great liberality in permitting amendments at any stage of the proceeding . . . ." 3 B. Witkin, California Procedure, Pleading § 1040, at 2618 (2d ed. 1971). If the lessor amends the complaint, the defendant has a right to answer "within 30 days after service thereof" or within such time as the court may allow. Code Civ. Proc. §§ 471.5, 586.

Paragraph (2) of subdivision (a) makes clear that the defendant may cross-complain and may plead any defenses to the lessor's action for damages. However, under paragraph (2), the defendant is not obliged to "allege in a cross-complaint any related cause of action" (Code Civ. Proc. § 426.30) unless, after giving up possession of the property, the defendant files a cross-complaint or files an answer, or an amended answer, in response to the amended complaint. This will protect the defendant against inadvertent loss of a related cause of action.

Subdivision (b) makes clear that Section 1952.3 has no effect on existing law with respect to unlawful detainer proceedings where possession remains in issue. In such proceedings, there are a number of affirmative defenses the defendant is permitted to raise. See, e.g., Green v. Superior Court, 10 Cal.3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Abstract Investment Co. v. Hutchinson, 204 Cal. App.2d 242, 22 Cal. Rptr. 309 (1962).