

#36.300

8/28/74

Second Supplement to Memorandum 74-45

Subject: Study 36.300 - Condemnation Law and Procedure (Comprehensive Statute--Comments on Tentative Recommendation)

Attached to this memorandum are comments from the City of Los Angeles concerning the Eminent Domain Law. In the interest of getting the comments out sufficiently in advance of the September meeting to allow the Commissioners time to read them, we have not taken the time to provide a written analysis of the comments. We will, however, raise the points of the city in their appropriate place during the discussion at the meeting. We have not included either a copy of the city's July letter referred to in their comments or a copy of the staff's memorandum of the staff-city meeting in August; we will, however, bring copies of these to the September meeting should the Commission wish to see them.

We have also received a communication from the Board of Governors of the State Bar. The board has reviewed the objections to the Eminent Domain Law of the State Bar Standing Committee on Condemnation but has postponed any action on the objections until the Commission has had an opportunity to advise the board of the reasons for its disagreement with the Bar Committee. We will send the board such a letter when the Commission has completed its review of the Bar Committee comments.

Respectfully submitted,

Nathaniel Sterling  
Staff Counsel

Second Supplement to  
Memorandum 74-45

EXHIBIT I  
OFFICE OF  
**CITY ATTORNEY**  
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BURT PINES  
CITY ATTORNEY

August 26, 1974

California Law Revision Commission  
School of Law  
Stanford University  
Stanford, California 94305

Re: Revised Comments by the Office of the  
City Attorney of the City of Los Angeles  
Relating to the Commission's Tentative  
Recommendation on the Eminent Domain Law

Honorable Members:

On July 23, 1974 this office sent to you its comments relative to the Commission's Tentative Recommendations on the Eminent Domain Law. Thereafter, on August 9, 1974, we met with members of your staff to discuss the basic objections and concerns we had set forth in our comments. Pursuant to that meeting your staff submitted a brief memorandum to us of the changes they propose to make to you and in which we concur. We are therefore enclosing the revised comments we have to the proposed revision together with a copy of the memorandum sent to us by your staff and additional copies of our July 23, 1974 comments for your use.

Very truly yours,

BURT PINES, City Attorney

By

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COMMENT REVISIONS

A. Property - Section 1235.170

It is our understanding that the Law Revision Staff will propose moving the detailed "illustrations" of types of property from §1235.170 to §1240.110 and qualifying the reference to "rights to limit the use or development of property" by placing it in the context of open space or natural condition. This qualification of "rights to limit the use or development of property" and the movement of the illustrations will satisfy us that the intent of the statute is not to create rights to compensation for property regulation under the police power that do not presently exist. We are still concerned that this expansion of the definition of property may create compensable interests in property that are presently not compensable in an inverse condemnation action even though you claim §1230.025. is designed to prevent this.

B. Public Use

Sections 1235.210, 1240.010, 1245.230, 1250.310 and  
Government Code §37350.5

In our previous comments to the above sections we expressed our concern and our opposition to the elimination of the public uses set forth in C.C.P. §1238, et seq. and the conflict between setting forth a specific State statute authorizing a public entity to acquire for a particular use (required by §§1240.010, 1245.230 and 1250.31), or merely setting forth the general authority to acquire, i.e. (Gov. Code §37350.5).

It is our understanding that the staff will propose that adjustments be made to these sections and/or comments thereto to make it clear that only a general reference to the condemnation authority of cities and counties (Gov. Code §37350.5) is necessary. If this is approved by the Commission, we would withdraw our objections to the "Public Use" portions of the above-referenced statutes set forth in our comments of July 23, 1974.

C. Statutory Delegation of Condemnation Authority - Section 1240.020

We still object to the repeal of Civil Code §1001 for the reasons stated in our Comments of July 23, 1974. In addition, we do not feel the repeal is sufficiently remedied by your proposed Section 1240.350.

D. Public Necessity Resolution-§§1240.030, 1240.040, 1245.220, 1245.230, 1245.240 and 1245.250

In our Comments of July 23, 1974, we expressed concern as to the effect the above-statutes had on the conclusive presumption rule of People v. Chevalier, 52 C.2d 299 (1959). After discussing this and other of our concerns with the Staff we are satisfied that most of our fears were unfounded and, except as we comment below, we withdraw our objections to these sections. Our additional comments are:

1) Section 1245.230 - It should be stated in this section or the comments thereto that "resolution of necessity" includes ordinances where the Charter or organic laws of the public entity requires that the condemnation power be exercised by ordinance.

2) Section 1245.240 - To avoid a violation of local law that

requires a greater vote than a majority to exercise the power of eminent domain, this section should be amended to include "Charter or ordinance" in addition to statute.

E. Extraterritorial Condemnation - Section 1240.050

As we stated in our comments of July 23, 1974:

We strongly recommend that this section be eliminated. Most public entities cannot provide their residents with electricity, water, sewage disposal, etc. without acquiring property outside of their territorial limits. The Draft negates such power and states that other statutory authority must be found to condemn property outside of its limits. Determining whether the power is "necessarily implied as an incident of one of its other statutory (but not charter powers [?]) powers" would subject each project to lawsuits to define what powers are necessarily implied.

The comment indicates that sewage facilities and water supply services are powers for which extra-territorial condemnation power may be implied. But the authority for this statement is extremely

weak, to wit: dictum in other cases.

Therefore, we would suggest that this section be eliminated entirely. If it is not to be eliminated entirely, there should be an express statement of purposes for which extraterritorial eminent domain power may be exercised, so that the public entity will know what it can and cannot do insofar as acquiring property outside of its territorial limits.

We also recommended that certain changes be made to Section 1240.030 (Public Necessity) as it relates to extraterritorial condemnations. In our comments of July 23, 1974, we stated:

"Where there is no conclusive presumption, as in an extra-territorial acquisition, we believe that three subsections set forth in Section 1240.030 are too restrictive, and are unnecessary. Subsections (a) and (b) can totally defeat a needed public project because one judge, perhaps out of several who may preside at various condemnation proceedings for the project makes a decision that the project is unnecessary, and/or that the design of the project is not one compatible with 'greatest public good and least private injury.'

For example, assume the project is a water pipeline or an electrical transmission line. The Department of Water and Power acquires most of its right of way by negotiated purchase. It must bring a condemnation action for some of the remaining ones. One judge decides that the project is not necessary because, in his view, the City of Los Angeles has enough electrical power or water for the next ten years. He thereby totally destroys the ability to build this project, and makes

the prior acquisitions of right of way a total waste, unless wholly outrageous prices are paid for the <sup>remaining</sup> parcels. Similarly, he could decide that the project should be redesigned or should have some different route.

It appears to us that the law as it exists at this time (that is, that the public entity must establish that the taking is necessary to the public use) should be continued. Any additional requirement would be tantamount to eliminating the ability of a public entity to acquire property outside of its municipal limits for public projects.

Another reason to eliminate subsections (a) and (b) is there is, at present, an opportunity to contest this matter and to determine whether or not the requirements have been met. That is, at the time following the preparation of an Environmental Impact Report. A suit may be brought within a limited period of time to establish either that the project should not be built, or that it should be built in a different manner. If a project is not defeated at that time, it should be conclusive as to all future events, including the right to take real property for the project."

F. Acquisition of Remainders (\$1240.150) and Excess Condemnation (\$1240.410 and 1240.420)

We object to 1240.150 insofar as it limits the taking of an entire parcel where a portion is needed for the public use, and the remainder is a physical or economic remnant. In such cases, public entities should be permitted to take the entire property, whether or not the owner consents to such a taking. This is necessary to avoid situations

where owners will require the public to pay substantially the same as the entire value of the property, but thereafter be left with a nuisance parcel which will never be used. Another possibility is that the partial take would leave the remainder without any access. The owner would refuse to consent to an entire take and receive approximately the entire value of the property through severance damages. Subsequently, the owner acquires an access easement from his neighbor and again has a valuable piece of property. The property owner should not be allowed to have his cake and eat it too.

We also believe that this section, or some other section, should contain authority allowing condemnation of the entire improvement located upon a parcel, even though the remainder of the land will be useful and is not to be taken as an excess parcel or otherwise. Absent this authority, condemnors may be faced with a situation of having to take a portion of a building and physically cut out that portion from the remainder of the building, when in fact such cutting is totally impractical from even a physical point of view. Again, the severance damages paid would be disproportionate to the amount of the building taken.

We would recommend that the language "expressly consented to by the owner" be eliminated from §1240.150 or, in the alternative, that the Court be empowered to determine whether or not the condemnor can take the remainder of the property or the building.

§1240.410 Condemnation of Remnants. As we stated in our comments of July 23, 1974 we feel that this section should be eliminated, or if not eliminated, that subsection (c) should be deleted. This would accomplish the same thing that deletion of the language "expressly consented to by the owner" would accomplish in Section 1240.150.

If the Commission agrees that the issues framed by §1240.150 should be determined by the Court and not be dependent upon the consent of the parties, then the issue of whether or not the condemnor may acquire the remnant set forth in this §1240.410 should be combined with the issues of §1240.150 and all be heard by the Court at the same time.

G. Future Use - Sections 1240.210, et seq.

We are aware that the Commission, at its meeting of July 26, 1974 discussed proposals to shorten the date of use period to five years and to increase it to 10 years and voted to continue it at seven years. We still feel that the seven year period is arbitrary and that the sections be amended for the reasons set forth in our July 23, 1974 comments.

H. Management of Amount Deposited - Section 1245.060

The Staff agreed to investigate our request that the Section be amended to permit a deposit in the County Treasury as authorized by §1255.070.

I. Governing Body Defined - Section 1245.210(a)

See our comments of July 23, 1974 relative to amending §1245.210(a) to include departments within a local public entity that are "independent" of the local public entity's control. An example of this in the City of Los Angeles is the Department of Water and Power. The Department of Water and Power has been given the power of eminent domain pursuant to Los Angeles City Charter Sections 220(1), 220(5) and 228. See also:

Mesmer v. Board, etc., 23 C.A. 578 (1913)

Wehrle v. Board, etc., 211 C. 70 (1930)

§1245.210(a) must be amended to permit these "independent" to perform the functions required of them by the framers of the City Charter.

J. Failure to Initiate Proceeding Within 6 Months - §1245.260

In line with our comments of July 23, the Staff will propose changes to this section to make clear that the public entity may repeal or rescind its resolution prior to commencement of an inverse action and that no cause of action accrues under the section until after the passage of six months. These changes would eliminate our objection to the section.

(SEE ADDITIONAL COMMENTS ON PAGE 16)

K. Joinder of Property - §1250.240

The Staff will propose that severance of separate causes be permitted without requirement of a separate formal motion to sever. This would eliminate our objection.

L. Contents of Complaint - §1250.310

The Staff will propose that the map indicate the general relation of the property taken to the project and qualify the delineation requirement to "as far as practicable." The Comment will make clear that the condemnor may indicate on the map what it believes to be the larger parcel. This would eliminate our objections.

M. Contents of Answer - §1250.320

We strongly oppose the proposal to allow the defendant to omit setting forth the compensation he seeks in the action. On July 23 we stated:

"In order to advise the plaintiff of the nature and amount of all compensation or damages sought by the

defendant, and to avoid the necessity of filing cross-complaints, or counter-claims, the defendant should be required by answer to allege all items of damages which he claims and an estimate of the value and damages to be claimed. This will enable the public entity to be advised of the nature of all claims prior to the appraisal or exchange of appraisal information; therefore, the condemnor may consider such claims in its appraisal. An estimate of damages claimed will aid in reaching settlement."

N. Deposit of Amount of Appraisal Value of Property - §1255.010

We are perhaps more opposed to your proposed subsection (b) than any other section of the Revision. There is no necessity to require that the condemnor give the property owner its complete appraisal report and all supporting data prior to the exchange of appraisal reports provided for in Chapter 7. This subsection is intended to overrule the reasoning and purpose of Swartzman v. Superior Court, 231 C.A.2d 195 (1964). In almost all acquisitions the Relocation Act requires the condemnor to inform the owner as to the amount of the appraisal prior to filing an action. This is sufficient. This subsection (b) should be amended to require a declaration of the appraiser as to the probable just compensation as is presently the practice.

O. Service of Notice of Deposit - §1255.020

We have no objection to the manner of service of the notice of deposit but do object to those who are required to be served.

C.C.P. §1243.5(c) requires that notice be served on record owners and occupants. The deposit only affects those with claims which may enhance in value with the passage of time, normally lessees and owners. Lienholders are only entitled to a fixed amount in any event. Such lienholders are adequately protected by the notice required prior to withdrawal from deposit. (Section 1255.230(c).) There does not appear to be any necessity to serve Trustees of Deeds of Trust, Utility easement holders or other nominal interests with this notice.

P. Increase or Decrease in Amount of Deposit - §1255.030(b)

Your staff will propose an amendment to this section to allow time extensions by the court in appropriate circumstances. This is satisfactory to us.

Q. Deposit for Relocation Purposes, etc. - §1255.040

Your Staff will propose that this section be amended to provide that the deposit is based on the plaintiff's appraisal, that the motion be made within 60 days after commencement of the proceeding, and that the property owner be obliged to indicate good cause for the deposit in place of the existing requirement that the deposit be used for relocation purposes. This would eliminate our objections.

(SEE ADDITIONAL COMMENTS ON PAGE 16)

R. Deposit on Motion of Owner of Rental Property - §1255.050

This section incorporates §1255.040(b) which provides that upon deposit, the plaintiff may apply for an Order of Possession. No provision is made for the various leasehold or tenant's interests

in the property that would become the responsibility of the City if possession is taken. This subsection must be amended to provide for these interests.

What criteria is the Court to use to determine whether or not "the losses are directly attributable to actions of the plaintiff or the pendency of the eminent domain proceeding." All losses would fit into this definition and there would be no incentive for the landlord to mitigate damages. If such additional compensation should be paid, it should be on a basis which is simple to calculate, and which will not require additional complex valuation litigation. We suggest that a measure of damages for failure to make such a deposit be the interest on the award, less the actual rental income received.

S. Repayment of Amount of Excess Withdrawal - \$1255.280

The Staff will propose that a judgment under this section may be recorded and be a lien on the property and that, where the court grants a stay, it may also require security. This is satisfactory to us.

T. Stay of Order for Hardship - \$1255.420

Your Staff will propose that a motion for stay under this section must be made within 30 days after service of order of possession. This will satisfy us.

U. Service of Order - §1255.450

Your Staff will review our background materials on this section to determine the origin of the requirement that all owners of recorded interests be served. (See comments to Sections 1255.020 supra)

V. Chapter 7 - Discovery; Exchange of Valuation Data

Our comments of July 23, 1974 are noted. This Chapter does not affect the City of Los Angeles very often as these topics are governed by the Los Angeles Superior Court Eminent Domain Policy Memorandum.

W. Burden of Proof - §1260.210(b)

As we said in our July 23, 1974 letter:

"We request that subsection (b) be modified to read that the defendant has the burden of proof on the issue of just compensation. The reason for this is as follows:

1. It will continue existing law;
2. The rules of inverse condemnation are covered by the rules of direct condemnation and there can be no question that the inverse condemnation property owner has the burden of proving that there has been a taking or damaging of his property without just compensation having been paid;
3. Under the present trial procedure of condemnation, the property owner goes forward with his evidence first, he argues first and argues last to the jury. This in itself, without specifying who has the burden of proof, gives the property

owner an undue advantage over the condemnor on the issue of just compensation. With this ability for the double argument, the property owner should maintain the burden of proof of just compensation."

X. Goodwill - §§1260.230 and 1263.510

We object to Section 1260.230, subdivision (c). This subdivision adds to the compensation recoverable by a businessman, the goodwill of his business. Though it is somewhat restricted by Section 1263.510, in any case it allows compensation greater than that allowed by federal law and by agreements whereby the federal government reimburses local entities for property acquisition costs. Under the Relocation Assistance Laws a businessman who cannot move his business without a substantial loss of patronage is entitled to one year's net income. We see no reason for California law to provide greater awards than federal law with respect to this item. In addition, the determination of the valuation of goodwill is so esoteric and so speculative as to not be capable of determination in eminent domain cases. We realize there are other cases where goodwill is compensated. However, notwithstanding the arguments to the contrary, they are rare. The fixed standard of the Relocation Assistance Laws of the United States and of the State of California are far preferable to the complex litigation procedures which would be required by this provision.

Y. The following statements by your Staff will satisfy the City as to the following sections:

"§1263.110. Date of valuation fixed by deposit. We will propose conforming changes in this section if the proposed amendment to Section 1255.030 is adopted.

§§1263.140 and 1263.150. New trial and mistrial. We will propose that these sections be amended to indicate that the court may, in the interests of justice, order that the trial date of the original trial be retained. The Comment would indicate that misconduct on the part of a party might subject him to the court's discretion.

§1263.270. Removal of improvements for storage in case of dispute. We will attempt to work out a scheme for early determination of improvement issues so that a section such as this will be unnecessary.

§1263.320. Fair market value. We will propose substitution of a definition based on the definition contained in the Uniform Eminent Domain Code.

§1263.410. Compensation for injury to remainder. We will incorporate in the Comment a reference to the cost to cure as a possible measure of damages in certain circumstances."

Z. Compensation for Damage to Remainder - §1263.420

See our objection to this section in our comments of July 23,

AA. Unexercised Options - §1265.310

Your Staff will adjust the Comment to make clear that the value of the option is determined in the apportionment phase of the proceeding. This is satisfactory.

BB. Repayment of Excess Withdrawal - \$1268.160

Your Staff will propose that this section be amended to make clear that interest accrues during a stay. This is satisfactory.

CC. Date Interest Ceases to Accrue - \$1268.320

This section should be amended to provide that interest on the amount deposited pursuant to \$1255.410 (Order for Immediate Possession) should cease upon the date of deposit.

This would avoid having to pay interest where possession of property is taken but the amount deposited for the taking is not withdrawn by the owner. The right to the money deposited should be deemed to be equivalent to an actual withdrawal of it.

DD. Offsets Against Interest - \$1268.330

The Staff will propose that a provision be added to this section creating a presumption that the value of possession or rents equals the legal rate of interest. This eliminates our objections.

EE. Costs on Appeal - \$1268.720

Costs should be awarded to the prevailing party. Otherwise, the condemnor merely subsidizes an appeal whether or not it has merit.

Respectfully submitted,

BURT PINES, City Attorney

By

Roger D. Weisman  
James Pearson  
Norman L. Roberts  
Leslie R. Pinchuk

### Additional Comments

Subsequent to the preparation of these Revised Comments we received Memorandum 74-45, dated August 16, 1974, prepared by your staff. A review of this memorandum necessitates additional comments to two sections previously discussed.

#### J. Failure to Initiate Proceeding Within 6 Months - §1245.260

To avoid confusion and ambiguities we would propose that subsection (c) of Section 1245.260 be amended to read as follows:

"(c) A public entity may rescind a resolution of necessity as a matter of right at any time prior to commencement of an action by the owner under this section. After commencement of an action by the owner the resolution may be rescinded subject to the same conditions and consequences as abandonment of an eminent domain proceeding."

#### Q. Deposit for Relocation Purposes, etc. - §1255.040

In the Commission's memorandum dated August 16, 1974 we noted that the Staff does not propose to require that the motion for the deposit be made within 60 days after the commencement of the proceeding. We feel that the 60-day provision is necessary and object to this section as it is now written.