

#36.300

5/5/75

First Supplement to Memorandum 75-39

Subject: Study 36.300 - Eminent Domain (AB 11 and Related Bills)

Attached as Exhibit I (green) is a copy of a letter from the County of Los Angeles indicating opposition to AB 11 unless it is amended to make the changes set out at pages 7-9 of the exhibit. Most of the concerns of the county have been previously made known to and considered by the Commission. New matters are limited to the following:

(1) Section 1240.410. Excess condemnation. The county would prefer to keep the excess condemnation authority of the Los Angeles County Flood Control Act, which permits condemnation of the remainder where the taking will "interfere with reasonable access to the remainder, or will otherwise cause substantial damage to the remainder." Los Angeles County Flood Control Act (Cal. Stats. 1915, Ch. 755), Section 16-5/8. (added Cal. Stats. 1953, Ch. 856, § 3). See discussion at page 2.

(2) Section 1263.260. Removal of improvements pertaining to the realty. The county opposes this section which permits a property owner to remove improvements pertaining to the realty if the owner gives the condemnor notice of his intent to remove and the condemnor does not oppose its removal. In such a case, the condemnor pays only the removal and relocation cost of the improvement, not to exceed its fair market value. See discussion at page 6.

(3) Section 1263.320. Fair market value. The county would define fair market value to refer to the price of the property "in terms of money." See discussion at page 2.

Respectfully submitted

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT I

COUNTY OF LOS ANGELES

OFFICE OF THE COUNTY COUNSEL

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JOHN H. LARSON, COUNTY COUNSEL

DONALD K. BYRNE, CHIEF DEPUTY

May 1, 1975

Honorable Alister McAlister
Assemblyman, 25th District
State Capitol, Room 3112
Sacramento, California

Re: Assembly Bill 11, relating
to acquisition of property
for public use.

Dear Assemblyman McAlister:

The Board of Supervisors of the County of Los Angeles, on April 22, 1975, adopted a position to oppose, unless amended, your Assembly Bill 11.

Attached hereto is the recommendation of the Los Angeles County affected departments upon which the Board acted.

Mr. Ambrose of the County Counsel's office has previously furnished you information indicating in substance our problems with the bill.

If you have any further questions regarding our position on Assembly Bill 11, please let us know.

Very truly yours,


Jerald E. Wheat
Legislative Representative

JEW:jk

Enclosure

cc: Assemblyman John Miller, Chairman
Assembly Judiciary Committee

BILL (AUTHOR): AB 11 (McAlister)

SUBJECT: EMINENT DOMAIN

STATUS: 12/3/74-Referred to Assembly Judiciary Committee

Affected Departments: Road, Flood Control, Facilities, County Counsel

Effect on County: Major Operational; Major Fiscal

Recommended Position: OPPOSE UNLESS AMENDED

Analysis: Similar to AB 278 (McAlister); AB 131 (McAlister)

AB 11 is a comprehensive revision of existing statutory provisions relating to eminent domain. It is the major bill in a series of proposals recommended by the California Law Revision Commission. Two "satellite" bills, AB 278; AB 131 would delete and revise eminent domain provisions in various codes to conform with AB 11.

Following is an analysis of the major provisions of the series of bills. Code sections refer to those sections of the Code of Civil Procedure either added to or amended by AB 11.

The Right to Take. (Sections 1240.010-1240.160)

Current law sets out a host of "public uses" the government can condemn property for. AB 11 deletes these sections but provides that the only limitation on the power to condemn is that the property be taken for a public use. AB 278 provides a very general and broad authority to condemn for counties, cities, and school districts. AB 131 revises the L.A. County Flood Control District Charter. The District retains its eminent domain powers; however, its powers of condemning excess property and of condemning an entire house rather than a portion of a house are repealed, and the District will be able to condemn excess property only on the same basis as all other public jurisdictions as set out in AB 11.

Future Condemnation (Article 3, Sections 1240.210-1240.230)

These sections permit the County to condemn or acquire property for future use if there is a reasonable probability that its "date of use" of the property will be within seven years from the date the complaint is filed "or within such longer period as is reasonable." This section would be beneficial to the County.

Substitute Condemnation (Sections 1240.310-1240.350)

Under Section 1240.340 one public agency can, in lieu of paying money to the second public agency for its property, condemn for the second public agency substitute property (held by a third person) where the court feels justice requires such action. The court can, in determining whether it will permit the condemnation of the substitute property, consider the hardship imposed on the owner. This Section can only be used when the other sections for substitute condemnation cannot be complied with. It should be noted that in condemning property, the substitute property does not necessarily have to be used for a public use. This section merely provides a vehicle to compensate the public entity who is losing "necessary property" by paying to him substitute property. This section could invite substantial litigation.

Section 1240.350 provides for the condemnation of additional property in order to mitigate severance damages. This section would permit County access to landlocked property.

Excess Condemnation (Section 1240.410-1240.430)

These sections pertain to the condemnation of "remnants". Section 1240.410 provides that a "remnant" (remaining property of little market value) may be condemned; however, the owner may defeat the taking if he can prove that his property need not be condemned because "the public entity has a reasonable means to prevent the property from becoming a remnant. This would permit an owner to litigate other means to build a project without making his property a remnant. The State Department of Transportation and the L.A. City Attorney oppose this section. Passage would mean increased severance damages to the County in many situations.

Litigation Expenses (Section 1235.140)

This section defines litigation expenses as those which are "reasonable attorneys fees, appraisal fees, and fees for the services of other experts...whether such fees were incurred for services rendered before or after the filing of the complaint." This definition permits the award of fees paid by an owner to prevent the acquisition of his property in an eminent domain action. The definition of litigation expenses is too broad, and the cost to the County if these fees must be paid will greatly increase the cost of condemnation.

Condemnation for Compatible Use (Sections 1240.510-1240.530)

These sections permit the exercise of the power of eminent domain to acquire use of property already appropriated to a public use if the new proposed use will not unreasonably interfere with or impair the continuance of the existing public use or use that "may reasonably be expected to exist in the future." (Joint compatible public uses)

It is of a vital necessity that this section be adopted if the County and the Flood Control District are to have a way to condemn rights-of-way across property belonging to the State of California and appropriated to a public use.

Condemnation of More Necessary Public Use (Sections 1240.610-1240.700)

These sections pertain to condemnation of property for a more necessary public use. Section 1240.640 provides that State property "appropriated to public use" is a more necessary public use over all others. Current law on this is uncertain, although County Counsel believes that the Flood Control District has a right under current law to condemn necessary rights-of-way through State property. If 1240.610 is adopted, the County and Flood Control District can only condemn State property if our use is "compatible" with theirs. If a Road project goes through State property and is incompatible with the State use of the property, the County cannot acquire the State property. The State, however, has complete power to condemn any County property despite our use of the property and the State's proposed use of the property.

Section 1240.610 permits "any person authorized to acquire property for a particular use by eminent domain" to acquire any property (except the State's) appropriated to a public use if it is sought for a "more necessary public use". Thus, a city can condemn county property and vice versa if the use, for which the property is to be taken "is a more necessary public use than the use to which the property is appropriated." This is a departure from existing law. The current law is that certain public entities cannot condemn property from each other. The City Attorney of L.A. is concerned that this could start a "war" between various jurisdictions.

AB 11 (Cont'd)

Date of Valuation. (Sections 1263.110-1263.150)

These Sections pertain to the date of valuation in the trial. The new basic concept is that the date of valuation in all cases will be the date on which the plaintiff makes a deposit of just compensation whether or not the plaintiff has taken or seeks to obtain an order for possession. This is a concept that the County should support.

Measure of Compensation for Property Taken. (Section 1263.320)

Section 1263.320 defines fair market value but does not contain the word "highest price in terms of money."

The definition of fair market value should continue the words "in terms of money." The County pays in money for the property it acquires in an eminent domain case, and the jury should be legally instructed that fair market value is value "in terms of money".

Possession Prior to Judgment. (Sections 1255.010-1255.480)

As mentioned earlier, immediate possession will now be available in all condemnation projects no matter what public use is planned for the property being condemned. Possession cannot be taken for 90 days when the property is a residence, farm or commercial property. The time limit is 30 days for all other properties. Current law provides for a 20-day waiting period. To obtain possession, the agency must deposit the amount of just compensation it has established for the particular parcel.

A minor difficulty with the provision for immediate possession is the requirement the owner be served with a written statement or summary of just compensation. This duplicates the process in that the owner already received a summary of just compensation before the action is filed pursuant to Government Code Section 7267.2.

An aspect that could cause the County and other public jurisdictions problems in obtaining immediate possession is Section 1255.420, which provides the court may stay the order of possession if possession will cause the owner a substantial hardship. The court in ruling will consider the need of the public agency and the substantial hardship if the order is stayed. This section makes obtaining possession at a specific time somewhat unpredictable. We could have difficulty establishing our "need" for possession for an individual parcel. Since the property owner has 90 days before he must move after being served with an order of immediate possession, this should be sufficient time for the owner to relocate.

Burden of Proof--Procedures for Determining Right to Take and Compensation (Sections 1260.210-1260.240)

Section 1260.210 changes existing law in that it provides that neither party has the burden of proof. However, the new law retains existing law by giving the defendant the right to present his evidence on the issue of compensation first and allows him to commence and conclude the argument.

AB 11 (Cont'd)

Current law places the burden of proof upon the property owner and, therefore, Section 1260.210 places the condemnor in a more disadvantageous position than under existing law (property owner will not have burden of proof and he gets to open and close).

The last sentence of Paragraph 6 in Section 1260.220 permits a defendant to present evidence during the first stage of the proceeding "of the value of, or injury to, his interest in the property". This permits the "stacking" or "pyramiding" of separate interests in the total fee and make the public entity's election to have the property valued "as between plaintiff and all defendants" a nullity.

Compensation for Improvements.

Section 1263.205 provides for compensation for improvements pertaining to the realty (commonly called "fixtures" under current law). The problem with 1263.205 is that the section defines "improvements pertaining to the realty" to include any "facility, machinery or equipment installed for use on property taken... or on the remainder if such property is part of a larger parcel, that cannot be removed without a substantial economic loss leaves uncertain what kind of loss is to be considered; e.g., loss to the property and equipment or economic loss to the owner-operator. The term "facility" is extremely broad and is a term that has not been defined by the courts in eminent domain cases.

Assembly Bill 11 further provides in 1263.260 that the owner of improvements pertaining to the realty may elect to remove such improvements by serving on the plaintiff a notice. If the plaintiff fails to respond within a certain time, the owner may remove such improvements and shall be compensated for their reasonable removal and relocation costs, not to exceed the market value of the improvements. This section, when viewed in light of the section described above which defines improvements pertaining to the realty, will greatly increase the cost of acquisition and will greatly increase the litigation expense involved, and we would oppose these new provisions of Assembly Bill 11.

Compensation for Loss of Goodwill. (Section 1263.510)

This is probably the most controversial of all the provisions of Assembly Bill 11. Our experience and contact with all other public agencies is that they are unanimously opposed to this section. 1263.510 provides that the owner of a business on the property taken or on the remainder may be compensated for loss of goodwill. This means that even in a partial taking case; e.g., widening of a street resulting in the taking of a portion of land but none of the building, a claim for loss of goodwill can be made. An owner can claim loss of goodwill in almost any type of taking with this section.

If this section is adopted, the increase in acquisition price for property needed by the County of Los Angeles will skyrocket. We are at a serious disadvantage in disproving loss of goodwill against the owner-entrepreneur.

AB 11 (Cont'd)

Options.

Section 1265.310 provides that unexercised options are terminated on the filing of an eminent domain action, but the option holder will be entitled to the value of his option. This is a significant change over existing law, and there is a question with this new proposal as to whether the option price may be testified to during the valuation trial. The option holder will be able to appear and defend his option, and the determination of the value of the option appears to be a problem. This section will increase the acquisition costs of the County, and we believe it is an unnecessary section.

Future Interest. (Section 1265.410)

Future interest holders are compensable under a complicated section. This section appears to open up another avenue of litigation and another additional cost to the public agency in acquiring property. Our experience has resulted in no serious problem with future interest holders under current law, and the addition of this section expressly providing for the compensation for future interest holders can again only increase the cost to the County for the acquisition of property.

Because of the problems discussed above, it is recommended that the County adopt the following positions with regard to the three bills. If the recommended amendments are not included in these bills, they should be opposed.

The Right to Take

- (1) Delete those provisions of AB 131 which limit the powers of the Flood Control District to condemn excess property;

Future Condemnation

- (2) Support Article 3, Sections 1240.210-1240.230 of AB 11 which permits the County to condemn for future use;

Substitute Condemnation

- (3) Delete Section 1240.340 of AB 11 which permits a local agency to condemn property for a second agency in lieu of payment of funds;
- (4) Support Section 1240.350 of AB 11 permitting condemnation for utility of access;

Excess Condemnation

- (5) Delete Section 1240.10 of AB 11 which permits a property owner to litigate other means to build a project without making his property a "remnant";

AB 11 (Cont'd)

Litigation Expenses

- (6) Delete the definition of litigation fees in Section 1235.40 which permits the award of fees paid by an owner to prevent the acquisition of his property in an eminent domain action;

Condemnation for Compatible Use

- (7) Support Article 6 pertaining to joint compatible public uses;

Condemnation of More Necessary Public Use

- (8) Delete Section 1240.640 which states that State property "appropriated to public use" is a more necessary public use over all others;
- (9) Delete Section 1240.610 which would provide that the County and Flood Control District could only condemn State property if our use is "compatible" with theirs, and would allow local jurisdictions to condemn each others' property;

Date of Valuation

- (10) Support Sections 1263.110 et al.

Measure of Compensation for Property Taken

- (11) Amend Section 1263.230 to include the words "in terms of money" in the definition of fair market value;

Possession Prior to Judgment

- (12) Eliminate the requirement in AB 11 that the owner be served with a written statement of just compensation;
- (13) Eliminate Section 1255.420 which provides that the court may stay the order of possession;

Burden of Proof

- (14) Amend Section 1260.210 to provide that neither side will have the burden of proof; however, the condemning agency should be given the right to commence and conclude the argument;
- (15) Delete the last sentence of Paragraph 6, Section 1260.220, which permits a defendant to present evidence during the first stage of the proceeding of the "value of/injury to" his interest in the property;

Compensation for Improvements

- (16) Amend Section 1263.205 to add the following phrase to limit the items for which compensation would have to be paid:

"But not including any items placed upon the property for the purpose of sale, or inducing the sale of similar items, to the public";

- (17) Delete Section 1263.260 which provides that the owner of improvements may elect to remove them;

Compensation for Loss of Goodwill

- (18) Delete Section 1263.510 pertaining to loss of goodwill;

Options

- (19) Delete Section 1265.310 permitting the option holder to appear and defend his option;

Future Interest

- (20) Delete Section 1265.410 making future interest holders compensable.