file

#34(L) and #36(L) 10/22/64

Memorandum 64-100

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1 - Divisions 6, 7, and 9)

and

Study No. 36(L) - Condemnation Law and Procedure (Opinion Testimony on Value, Damages, and Benefits)

At its January 1964 meeting, the Commission approved (for distribution to interested persons for comment) a tentative recommendation on opinion testimony on value, damages, and benefits in eminent domain and inverse condemnation proceedings. Attached (blue cover) is a copy of this tentative recommendation.

During the last eight months we have received 21 letters commenting on this tentative recommendation. It is obvious from the letters, many of which contain detailed comments, that this subject is one of considerable controversy and complexity. The 21 letters are attached as Exhibits I to XXI.

SUGGESTED ACTION ON TENTATIVE RECOMMENDATION

The staff suggests that the Commission not recommend the enactment of a detailed statute relating to evidence in eminent domain proceedings at the 1965 legislative session. There are several reasons for this recommendation:

First, because of its controversial nature and complexity, this subject would require considerable Commission time and we believe that the time is better devoted to the Evidence Code recommendation and to the clean up bill on Sovereign Immunity.

Second, on June 22, 1964, Governor Scranton signed into law a new Eminent Domain Law in Pennsylvania. This law contains the substance of the Commission's 1961 recommendation on evidence in eminent domain proceedings,

except that almost all of the limitations on admissibility of evidence contained in our 1961 bill were deleted when the Pennsylvania law was prepared. We believe that this new Pennsylvania law should be given careful study before we make any recommendation on this subject.

Third, we believe that the California courts will develop rules of evidence that will be more favorable to property owners than our tentative recommendation. For example, a recent case decided by the District Court of Appeal apparently held that offers on comparable property are admissible in evidence, while our tentative recommendation excludes all offers--whether on the subject property or comparable property--except when they are offered as admissions of the property owner. See People ex rel. Department of Public Works v. Kawamoto, 230 A.C.A. 18 (September 1964). The staff has long been of the opinion (an opinion not shared by attorneys for public entities) that the Supreme Court will declare rules of evidence in eminent domain proceedings that will be much more favorable to property owners if and when a case is presented to the Supreme Court that provides the court with an opportunity to state such rules. Perhaps an appeal will be taken in the Kawamoto case and the Supreme Court will have an opportunity to clarify the law in this field. Frankly, we do not believe that Section 1845.5 of the Code of Civil Procedure (continued as Section 830 of the Evidence Code) will prevent the court from developing the rules governing the admissibility of evidence in eminent domain cases.

We would like to advise interested persons of the Commission's decision on this tentative recommendation, giving the reasons for such decision as stated above.

If this staff recommendation is not acceptable to the Commission, we will prepare a detailed memorandum to analyze the various comments we received on the tentative recommendation. If the staff recommendation is acceptable, we plan to suggest this matter as a suitable project for the 1967 legislative session.

COMMENTS THAT ARE PERTINENT TO PREPRINT SENATE BILL NO. 1

Some of the comments we received on the tentative recommendation are pertinent to Preprint Senate Bill No. 1 because the tentative recommendation included some general provisions that are found in the Preprint Bill. The pertinent comments are presented and discussed below.

Evidence Code Section 721

Evidence Code Section 721(a) is the same in substance as Section 1273.2 of the tentative recommendation. There were no objections to this provision.

Evidence Code Section 722

Evidence Code Section 722 is the same in substance as Section 1273.4 of the tentative recommendation except that we deleted the phrase "as relevant to the credibility of such witness and the weight of his testimony" which formerly appeared at the end of subdivision (a). This deletion was made in response to a suggestion of the Department of Public Works. The office of the County Counsel of the County of San Diego (Exhibit XXI, pages 26-27) also suggests that the deleted words be deleted and has no objection to the subdivision if these words are deleted. The office of the County Counsel of Santa Barbara County (Exhibit XV, pages 16-18) objected to the

subdivision before the deleted words were deleted and possibly his office would object to subdivision (a) as it is contained in the Preprinted Bill. See his comments.

It would appear that subdivision (a) in its present form represents a reasonable compromise on this matter.

There were no objections to subdivision (b) because this subdivision restates the substance of Code of Civil Procedure Section 1256.2 which applies only to condemnation proceedings. However, the staff suggests that the words "by the party calling him" be inserted before the word "to" at the end of line 28 on page 31 of Preprint Senate Bill No. 1 to retain the effect of language now found in C.C.P. Section 1256.2. Mr. Baggot (Exhibit VI, page 2) raises the following question with respect to subdivision (b):

> . . . Subdivision (b) is unclear with respect to the extent and latitude to be allowed in the examination of the expert witness with respect to the compensation paid or to be paid to him. Is such compensation limited to the case at trial or does it include all other compensation paid by the party to the proceeding to the witness?

We have retained the language of existing C.C.P. Section 1256.2 in subdivision (b) and have provided the answer to Mr. Baggot's question in the Comment to Section 722. Is this satisfactory?

Evidence Code Sections 800-805 Generally

Two of the 21 writers expressed some concern as to: "What is the difference between a 'reason for an opinion' and 'a matter upon which an opinion is based'? Is this not a distinction without a difference?" See Exhibit XVII - Hackett and Exhibit XIX - McLaurin.

We believe that the distinction is this: The "matter" upon which the opinion is based are the facts, data, opinions of others (when opinions of others are a proper basis for an opinion), training, experience, and the like. The "reasons" for the opinion would seem to be a broader term which would include not only these "matters" but also the expert's evaluation of the "matters," that is, his reasoning based on such "matters."

Moreover, we believe that the revisions that have been made in Sections 800 to 805 have eliminated any difficulty that the two writers believe existed.

Evidence Code Section 802

Section 1270.2 of the tentative recommendation is an early version of what is now Evidence Code Section 802.

We added to Section 802 (upon the suggestion of the Department of Public Works) the language "unless he is precluded by law from using such reasons or matter as a basis for his opinion." This addition would seem to meet the objections to Section 1270.2 expressed in Exhibit XXI (San Diego County Counsel). Thus, with the language previously added, Evidence Code Section 802 would appear to be satisfactory to those commenting on the evidence-in-eminent-domain-proceedings tentative recommendation.

Evidence Code Section 803

Section 1272.6 of the tentative recommendation is an early version of what is now Evidence Code Section 803.

Section 803 states existing law. Only one of the twenty-one writers objected to the what is now Section 803. The City Attorney of San Diego

commented:

> The interpretation of the term "in whole or in significant part" would seem to be a source of future difficulty. It requires the court to interpret what would amount to a significant part. The question arises whether "significant" in this context means the greater part of the whole or some part of the whole of an appraiser's opinion. If the appraiser's opinion would differ by the elimination of consideration of the improper part, whether it is a significant part or not would seem to be the proper test of the admissibility of the appraiser's original opinion. The improper part itself should always be stricken.

It should be noted that we have revised Evidence Code Sections 801 and 802 to prevent an expert from relying upon improper matter and to prevent him from stating such matter on direct examination. If he states improper matter on direct examination, it could be stricken under Section 802. Hence, we suggest no change be made in Section 803.

Evidence Code Section 804

Evidence Code Section 804 is basically the same as Section 1272.8 of the tentative recommendation. No one objected to Section 1272.8.

Evidence Code Sections 1152 and 1154

Section 1273 of the tentative recommendation is the same in substance as Evidence Code Sections 1152 and 1154. A significant change in existing law is made by Section 1273 and also is made by Evidence Code Sections 1152 and 1154: The words "including any conduct or statements made in negotiations thereof" will exclude evidence of admissions made in compromise negotiations. Three writers objected to this change in existing law: Exhibit VII (Bianco), Exhibit XVI (City of Oakland), and Exhibit XVII (Hackett).

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo. 64-100 EXHIBIT I

DISTRICT ATTORNEY

Ventura County

April 21, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California

Re: Comments on Tentative Recommendations of Law Revision Commission on Condemnation Law and Procedure - Opinion Testimony on Value, Damages, and Benefits (Rev. Jan. 31, 1964).

Gentlemen:

In regard to the tentative recommendations of the Law Revision Commission relating to condemnation law and procedure (Number 5--Opinion Testimony on Value, Damages, and Benefits, Rev. Jan. 31, 1964), my primary comment is to question the necessity of the proposed legislation. With but few exceptions, the proposals purport to be enactments of existing law. To the extent that this is true, my objection to the proposed legislation would be that frequently an attempted codification of existing case law introduc new and unforseen problems which require additional litigation to resolve. The possibility of new and unforeseen problems together with the actual changes which the proposed legislation makes in existing law require me to object to the adoption of this legislation. Although existing case law is far from perfect, there are sufficient well-reasoned decisions extant to provide reasonably adequate guide-lines for courts and litigants at the present time. The proposed legislation would cast doubt upon the validity of these decisions as well as introduce new elements of uncertainty.

The following are some specific comments upon the proposed legislation. Although there are some sections which I would approve (e.g., section 1272.4, especially subsection (b) relating to offers), I feel that the disadvantages of the proposed legislation outweigh the few advantages.

Section 1270.8. Opinion must be based upon matter that would be considered in open market transaction.

This proposed section standing alone would undoubtedly provide a basis for argument that noncompensable elements of damage such as speculative or subjective considerations of purchasers may be testified to. See Rose v. State of California, 19 C.2d 713 (1942); Sacramento & San Joaquin Drainage Dist. v. Reed, 215 A.A.A. 59, 63 (1963); Frustuck v. City of Fairfax, 212 C.A.2d 345, 368 (1963). The fact that this section is subject to limitati

found in subsequent sections would have to be expressedly indicated.

Section 1271. Sales of Subject Property.

Sales and executory contracts to sell are equated in this and subsequent sections without comment or citation of authority. A contract to sell whether of the subject property or comparable property is not a sale and cannot be treated the same as a sale. Contracts to sell are in many respects similar to offers in that they may involve so many contingencies as to make them objectionable both from the standpoint of reliability and from the standpoint of raising too many time consuming collateral issues.

For example, a contract to sell the subject property may be entered into with the condition that escrow shall close only if the prospective purchaser is able to secure a change of zoning. The agreed sale price natually reflects the changed zoning. If the property is condemned before the requested zone change is acted upon by the local governing body, the issue of whether the zone change would or would not have been granted is introduced into the condemnation action. It is, of course, impossible for the court or jury to make any kind of determination as to whether the zone change would or would not have been granted since this is the exclusive province of the local governing body. This situation should be distinguished from the situation in which the property owner contends that there is a reasonable probability of a change in zoning. The issue of reasonable probability of a zone change goes to the question of highest and best use. The issue of whether a local governing body in the foregoing example would have in fact granted a zone change goes directly to a prospective sale of the subject property which would carry more weight than virtually any other indication of value. In the foregoing example, the property owner would naturally contend that a reasonable probability of a change in zoning is equivalent to the actual change of zoning required as a condition to the sales agreement. That a reasonable probability is in fact not equivalent to an actual zone change is evident from the many instances in which local governing bodies deny requested zone changes in areas where eventually the zone change is reasonably probable, but for one reason or another is not appropriate under the circumstances of the request.

Because of the fact that unexecuted contracts to sell will likely involve as many contingencies and collateral issues as would offers of sale, it is my recommendation that they be subject to the same exclusionary rules as are offers. If they were to be admitted in evidence, they should be dealt with in a separate code section and accompanied with appropriate safeguards (e.g., not being subject to contingencies other than payment of purchase price and production of deed). Contracts to sell should not be lumped in with completed sales and treated as equvalent to completed sales.

Section 1271.2. Comparable Sales.

The foregoing objection to executory contracts to sell applies with even greater force to contracts to sell comparable property. To permit a court of jury to speculate upon whether a contract will result in a sale is virtually the same as permitting them to speculate upon whether an

offer to purchase would result in a sale. Both are subject to the same collateral inquiries and elements of uncertainty such as to make the dangers of their admissibility outweigh the advantages.

The last sentence of the proposed section relating to testimony as to sales which the witness believes are comparable should be omitted. This provision makes it mandatory that the court permit the witness a wide discretion. The words "subject to section 1270.4" serve merely to create an ambiguity since section 1270.4 merely gives the court permissive discretion to limit testimony. A legislative directive that the court shall permit the witness a wide discretion in testifying will only afford a convenient ground for appeal if the court does exclude any testimony of a valuation witness. The courts presently are quite liberal as to the admission of evidence on comparable sales. A statutory rule requiring them to be even more liberal is unwarranted and unnecessary and would in practice virtually eliminate any exercise of discretion on admissibility of comparable sales.

The foregoing comments by no means exhaust the possible objections to the proposed legislation. They are illustrative of some of the problems which would arise if this legislation were adopted. The main point I should like to make, however, is that there does not appear to be any compelling necessity for the adoption of this legislation. Its adoption would, in the absence of any such necessity, merely inject uncertainty into a field of law which is becoming less and less uncertain.

Very truly yours,

WOODRUFF J. DEEM
District Attorney

KDL:nb
cc: Spencer Williams
County Counsel

Memo 64-100

EXHIBIT II

CITY OF SACRAMENTO
CALIFORNIA

March 25, 1964

John R. McDonough, Jr., Chairman
California Law Revision Commission
School of Law
Stanford University
Stanford, California

Dear Sir:

I have examined the proposed draft of RECOMMENDATION relating to CONDEMNATION LAW AND PROCEDURE on proof of value, damages, and benefits in condemnation proceedings, and to date have no specific changes to suggest.

It seems to be a very fair statement of applicable laws and court decisions to be followed by the condemner and property owner in the trial of eminent domain proceedings in California.

Therefore, I approve the revised draft dated January 31, 1964, as to form and content insofar as the City Attorney's Office of Sacramento is concerned.

Very truly yours,

EVERETT M. GLENN
City Attorney

EMG:DF
cc: League of California Cities
Attention Mr. Jack D. Wickware

Memo 64-100 EXHIBIT III

Office of
The City Manager

CITY OF RICHMOND
California

April 6, 1964

Mr. John H. DeMoully, Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Sir:

A thorough review has been made of the tentative recommendation you forwarded to this office under date of March 5, 1964 with respect to testimony in eminent domain and inverse condemnation proceedings.

Our present analysis indicates we do not believe that any revisions are needed that would particularly benefit the City. In the main the recommendations codify case law relating to evidence in eminent domain and inverse condemnation proceedings, especially as they relate to opinion testimony on value, damages and benefits. A clear set of evidence rules benefits both parties in a condemnation action. Also the recommended legislation includes provisions designed to expedite the trial, and keeps down the expense.

We wish to thank you for the opportunity to review this recommendation.

Very truly yours,

Forrest J. Simoni
City Manager

FJS:gb
cc: City Attorney

Memo 64-100 EXHIBIT IV

The City of San Diego
Office of City Attorney
Room 271 Civic Center
San Diego, California 92101
April 21, 1964

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

Recommendation relating to Condemnation Law and Procedure, Number 5--Opinion Testimony on Value, Damages, and Benefits

Gentlemen:

This office has reviewed the above-referenced recommendation and desires to make certain comments thereon.

At the outset, it may be said that in general we would concur in and support the position of the Department of Public Works, Division of Contracts and Rights of Way (Legal), as reflected in that letter dated March 16, 1964, to Mr. John H. DeMoully, Executive Secretary, California Law Revision Commission, from Emerson W. Rhyner, Deputy Chief.

As to particular sections, the following comments are offered:

Section 1271.2. Comparable sales. An appraiser should not be given the last word as to the comparability of a particular market transaction. This is properly the court's province. Any weakening of the court's power in this area can only lead to the unscrupulous use of sales having comparability only in the mind of the appraiser. The result would be to confuse and mislead a jury.

Section 1271.6. Comparable leases. This section introduces a novel concept to the law of condemnation and would appear to open the door to consideration of matters that are remote and speculative. Cross-examination of an appraiser whose opinion of value is based in whole or in part on comparable leases would be extremely difficult and time-consuming. Necessarily, the leases themselves would have to be introduced and their various provisions analyzed. Books or accounts of the lessor or lessee would have to be made available. Furthermore, percentage leases would present considerable problems. The opportunity for digression far afield would be limitless. In our opinion, the adoption of this section would not speed up litigation, but would only result in greatly delaying it.

Section 1272.4. Matter upon which opinion may not be based. The need for adoption of subdivision (a) would seem to be rather limited. As the Commission has commented, its adoption would change existing California law. Certainly, there exist voluntary sales between a public entity with the power of condemnation and sellers. So long as that element of voluntariness is established, the sale ought to be admissible. It is our belief that the consideration of sales to condemnors does not introduce "aggravating and time consuming collateral issues tending to promote confusion rather than clarity." A condemnor may have purchased property for a particular use, such as a library, and later on have been required to condemn property in the same area for street purposes. The library transaction, if it can be shown to be voluntary and to meet the tests of comparability, ought to be admissible for the purposes of establishing the value of property required for street purposes.

Section 1272.6. Opinion based on incompetent matter. The interpretation of the term "in whole or in significant part" would seem to be a source of future difficulty. It requires the court to interpret what would amount to a significant part. The question arises whether "significant" in this context means the greater part of the whole or some part of the whole of an appraiser's opinion. If the appraiser's opinion would differ by the elimination of consideration of the improper part, whether it is a significant part or not would seem to be the proper test of the admissibility of the appraiser's original opinion. The improper part itself should always be stricken.

Yours very truly,

EDWARD T. BUTLER, City Attorney

By s/
Robert S. Teaze, Chief Deputy

RST:rjt

cc: Mr. Jack D. Wickware
Assistant Legal Counsel
League of California Cities
Hotel Claremont
Berkeley, California

Memo 64-100

EXHIBIT V

STATE OF CALIFORNIA—HIGHWAY TRANSPORTATION AGENCY

EDMUND G. BROWN, Governor

DEPARTMENT OF PUBLIC WORKS

DIVISION OF CONTRACTS AND RIGHTS OF WAY (LEGAL)

1120 N STREET, SACRAMENTO

March 16, 1964

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

Dear John:

Recommendation Relating to
Condemnation Law and Procedure
Number 5--Opinion Testimony on
Value, Damages, and Benefits

The tentative agenda for the March meeting includes a request for approval to print the Tentative Recommendation on Expert and Other Opinion Testimony. As you know, we are concerned with the inclusion in the proposed legislation of a provision (Section 1271.8(a)(2)) allowing the capitalization of hypothetical improvements and you are already aware of our reasons in support of this position. In addition, there are other provisions in the proposed legislation which we are concerned with and which in some instances go beyond the scope of S.B. 129.

Section 1270.6 concerning hearsay evidence should be amended to incorporate the commission's own comment to clearly state the exception to the hearsay rule, making hearsay inadmissible where it is "entirely unsupported and unreliable". We would suggest that Section 1270.6 be amended as follows:

> "A witness may state the matter upon which his opinion is based, whether or not he has personal knowledge thereof, for the limited purpose of showing the basis for his opinion unless the court determines that the hearsay is entirely unsupported and completely unreliable; and his statement of such matter is subject to impeachment and rebuttal."

The commission's comment to Section 1271.4 concerning inadmissibility of profits should be expressly stated

as a part of the section. We agree with the commission that evidence of profits derived from a business conducted on the property has been considered by the California courts to be too speculative, uncertain and remote in determining market value. As you know, the department has objected to the provision (Section 1271.4) which allows the capitalization of gross sales or gross income from a percentage lease. Our concern is based on the fact that a percentage lease is a profit showing arrangement and the estimate of value derived from such income is subject to great fluctuation, depending upon managerial competency and the business cycle. The provision on percentage leases should be deleted.

In Section 1271.6 the commission has broadened the scope of admissibility of comparable leases. The legislation that was introduced at the 1963 session (S.B. 129) limited capitalization of rent from comparable property only to situations where a leasehold interest was the subject of valuation. We do not believe that rent based upon gross sales or gross income from a business conducted on comparable property should be admissible where a fee interest is valued. This provision would permit an appraiser to arrive at the value of comparable property by considering rent from a percentage lease based upon gross sales or gross income from a business conducted thereon. After having arrived at his opinion of value of comparable property in this fashion he is permitted then to compare it to the subject property. This approach has long been held by the courts to be too remote and speculative. The provision is also objectionable in that it might well be held to require the owner of the so-called comparable property to open up his books at the instance of either the condemnor or condemnee. Thus property owners and business competitors not concerned in the appraisal process or litigation would be subject to attendance at depositions and trials and what has been considered their right of business privacy would be invaded. The commission in its comment has concluded that California trial courts seldom permit comparable rentals to be used in determining reasonable net rental for the purpose of a capitalization of income approach to arrive at market value. The case of People v. Frahm, 114 Cal. App. 261, cited in the commission's note, was concerned with a valuation of a sublease and is only indicative of the rule that this method of valuation should be used only when a leasehold interest is the subject of valuation.

In addition, the broadened Section 1271.6 is in conflict with Section 1272.4(f), which provides that

the capitalized value of the income rental from any property or property interest other than that being valued is inadmissible.

Section 1272.4(a) restricts the inadmissibility of purchases by a condemnor to those made by a "public entity". S.B. 129 introduced at the 1963 session of the Legislature did not so restrict such purchases to a public entity but made it applicable to purchases by all condemnors. The commission's comment to this section refers to "persons" generally that have the power of condemnation. We suggest that this provision be modified so that the scope of the purchases encompassed would include purchases by all condemnors, whether public entities or not.

We feel that the last three lines of proposed Section 1272.4(b) concerning offers and allowing their introduction as admissions and also providing that"but nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 1270" are ambiguous. An admission is generally direct evidence on an issue. It is possible that these sentences could be construed to totally disallow the use of listings as admissions to test the credibitility of witnesses. It would seem that if the intent is, as stated on page 34, that such matters may be inquired into as going to the weight to be given the witness's testimony this should be directly stated in the section.

The word "may" appearing in the first and second lines of proposed Section 1272.4 should be changed to "shall". The purpose of this change is to make mandatory the disallowance of an opinion based in part on inadmissible matter.

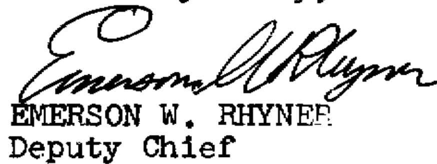
We disagree with proposed Section 1273.4(a) since it allows the fact of the appointment of an expert witness by the court to be revealed to the trier of fact as relevant to his credibility. We do not believe that the appointment of an expert witness by the judge should have this added weight over other witnesses produced by either party who are qualified to express an expert opinion.

Because of the short time that we have had to analyze the recommendation and the fact that the 1961 and 1963 legislation has been recast into a different format, we may have further comments for the commission before

the 1965 session of the Legislature.

If you desire to hold a meeting with the Attorney General's office on this matter prior to the March meeting of the commission, I would suggest that we meet while you are in Sacramento to appear before the Senate Judiciary Subcommittee on Wednesday, the 18th. I would also appreciate knowing whether the commission will consider in detail each section in this recommendation.

Yours very truly,



EMERSON W. RHYNER
Deputy Chief

THOMAS G. BAGGOT
Attorney at Law
Los Angeles, California

March 18, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Attention: Mr. John H. DeMoully
Executive Secretary

Gentlemen:

This is in reply to your invitation to comment regarding the recommendation of the California Law Revision Commission relating to condemnation law and procedure and particularly Study No. 5 thereof regarding opinion testimony on value, damages and benefits.

I am in accord with the recommendations of the Commission with the following exceptions:

1. Proposed § 1272.4 would exclude from evidence a bona fide offer to purchase or lease the property being valued. On page 33 of the study the statement is made "The existing California law regarding the admissibility of offers to buy or lease the subject property or comparable property is not clear." I believe the law regarding this subject is clear. It is that bona fide offers made to purchase the subject property are admissible in evidence but that offers to purchase comparable properties are not admissible because they are too collateral to the matter in issue. I say the law is clear as to the admissibility of a bona fide offer because of the following California cases so holding:

Pao Ch'en Lee v. Gregoriou, 50 Cal.2d 502, 505;
County of Los Angeles v. Faus, 48 Cal.2d 672;
Muller v. Railway Co., 83 Cal. 240, 243;
Los Angeles City H.S. Dist v. Kita, 169 Cal. App.2d 655 (Proper foundation must be laid as to good faith and ability to perform.)
People v. Pera, 190 Cal. App.2d 497, 500-507.

2. Proposed § 1273.4, subdivision (b) is unclear with respect to the extent and latitute to be allowed in the examination of the expert witness with respect to the compensation paid or to be paid to him. Is such compensation limited to the case on trial or does it include all other compensation paid by the party to the proceeding to the witness?

Yours very truly,

S/

THOMAS G. BAGGOT

TGB:jt

MACK, BIANCO, KING, EYHERABIDE, MEANS & COONEY

1107 Truxtun Avenue

Bakersfield, California 93301

March 10, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Attention: Mr. John H. DeMoully
Executive Secretary

Re: Recommendation Relating to Condemnation
Law and Procedure, Opinion Testimony, etc.

Gentlemen:

I have reviewed with great interest the tentative recommendation forwarded in your letter of March 5, 1964.

In my opinion I seriously doubt the necessity for legislation on this subject, as almost all of the matter contained therein has already been established as law by the decisions in this State.

I do feel that the addition of the proposed Section 1273, Re Offers to Compromise is ill-advised, insofar as it proposes to change the rule of People v. Forster, 58 Cal. 2 257. In this connection, I do not follow the reasoning of your statement that "the existing rule that permits such statements to be admitted prevents the complete candor between the parties that is most conducive to settlement". Under a constitution a condemning authority is enjoined to pay "just compensation". In practice the condemning authority always has the advantage in that the property owner is not a free agent in negotiating. As a rule the condemning authority appraises or has the property appraised preliminary to negotiating for its purchase. The representation is made that the property has been appraised and the offer is based upon the appraisal. All that the rule the Forster case does is to enjoin upon the condemning authority the duty of making an honest appraisal and of complying with the law to offer just compensation. This I conceive to be the complete candor which should exist at least on the part of the condemning authority, and which would be conducive to settlement. I say this for the reason that I do not believe that it is the province of a condemning authority to try to buy the property as cheaply as possible in view of the constitutional provision that it pay just compensation. In other words, they are not in a position of a private person

wanting to buy the property. They have the right to acquire the property against the will of the owner provided they comply with the constitutional provision to pay just compensation. Hence, they should not be ashamed of the offers which they make in settlement if predicated upon a bona fide appraisal. Wherever the contrary is the case, then the property owner should be able to demonstrate that the condemning authority itself is not abiding by the law.

Yours very truly,

D. BIANCO

MACK, BIANCO, KING, EYHERABIDE, MEANS & COONEY

1107 Truxtun Avenue

Bakersfield, California 93301

March 17, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Attention: Mr. John H. DeMoully
Executive Secretary

Re: Tentative Recommendations re
Condemnation Law and Procedure

Gentlemen:

Thanks very much for your letter of March 11, 1964.

Notwithstanding your comments I still feel strongly in connection with any change of the rule of People v. Forster, as expressed in my letter of March 10.

Yours very truly,

D. BIANCO

Memo 64-100

EXHIBIT VIII

ALBERT THOMAS HENLEY
Attorney at Law
Porter Building
San Jose 13, California
Area Code 408-295-7574

March 12, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford, California

Gentlemen:

I have reviewed with great interest your tentative recommendation for revision of the law relative to value opinions in condemnation actions.

The only area in which I disagree is that of proposed Section 1272.4(a). It seemed to me when California began to allow consideration of purchases by a condemning authority that this represented the same kind of common sense as permitting testimony to comparables on direct. It is the fact, according to my experience, that real bargaining often does take place in an attempted purchase by a public agency and if the seller is worried about possible trial costs so is the buyer worried about such costs as well as possible out-size awards. The trial court ought to be able to control admissibility here.

Faithfully,

S/

Albert T. Henley

ATH:o

Memo 64-100

EXHIBIT IX

TIMOTHY W. O'BRIEN
Attorney at Law
Ukiah, California

March 20, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Re: Condemnation Proposals
Recommendations Relating to Condemnation
Law and Procedure

Gentlemen:

I have reviewed, with interest, the transmittal of March 5, 1964 with attached proposal.

I have serious reservations concerning the proposed Section 1270. In this Section, it is stated that value of property may be shown only by the opinions of witnesses qualified to express such opinions. Narrowly construed, this Section could limit testimony to the professional appraiser.

I feel this Section should be restudied because there are many situations where severance damages can be shown by using witnesses who can testify as to the increased cost of operation; but, would not be qualified to express an opinion as to the value of the property being taken.

As examples, one should consider the increase in the cost of operation of a ranch or industrial property by reason of having the property severed by a freeway or an expressway. In agricultural valuations, there frequently arises a problem of increased cost of operation by reason of reducing the size of the economic unit. Witnesses used in this situation frequently have no ability to express an opinion regarding the value of the property but can definitely show that the reduction of the size of the economic unit imposes upon the owner of the remaining property not taken a greater cost of unit operation than previously existed.

It is also frequently the practice in agricultural counties to have adjoining landowners who operate in similar agricultural enterprises to express opinions as to values. It is possible that the condemning agency would claim that 1270 as proposed bars such testimony.

March 20, 1964

In the more rural counties, the availability of the so-called "expert appraiser" is limited. The condemning agency, such as the State, have access to a wide selection of experts. In the rural counties, the defendants frequently do not have the same advantage. Any serious reduction, or limitation, upon existing practice in securing testimony for the defendant, could lead to a great penalty to the defendant.

I feel that testimony should be limited to those who can shed light upon the issues in the case and not limited to those who can shed light upon property valuation. In severance, direct valuation is frequently not the primary problem being considered.

Thank you for affording me the opportunity to comment.

Very truly yours,

S/

TIMOTHY W. O'BRIEN

TWO'B:kic

EXHIBIT X

Law Offices
FADEM AND GRAVES
5455 Wilshire Boulevard
Los Angeles, California 90036

April 15, 1964

Stanford University
Palo Alto, California

Attention: John R. McDonough, Jr.

Re: Recommendation Relating to Condemnation Law Procedure No. 5, Opinion Testimony on Value, Damages and Benefits

Gentlemen:

I appreciate the opportunity to comment on your recommendations as revised to January 31, 1964.

A word of identification might be in order as I feel that strive for objectivity as I may, that I, as each of us, am a captive of my experience. Thus, my background may help you to understand and evaluate my comments hereafter set forth.

I was a business administration undergraduate with studies in real estate economics and a minor in economics. I spent three years with the Corps of Engineers, Real Estate Division which was concerned with the acquisition, management and disposal of real property for the Army, Air Force and Atomic Energy Commission in Southern California, Nevada, and Arizona. I have been in practice some ten years and my practice is, in the most part, real property law with most of that falling within condemnation and title problems. I presently represent three title companies in Los Angeles County. I served as the chairman of the committee that produced the Continuing Education of the Bar Program on condemnation in the handbook. I am presently chairman of the CEB committee doing the supplement thereto.

I wish to say that the efforts of your Commission are exemplary and appreciated by this member of the bar. Any criticisms appearing hereafter must be viewed in the light of my appreciation of the enormity of your task, its difficulty, and the obviously sincere effort that you have made to provide just rules. On the theory that I have the best chance of being properly understood if I speak bluntly, my comments follow:

Section 1268 should not restrict the rules to condemnation proceedings. The fewer things that are special in the law, the easier it is to administer. Few attorneys acquire high competence in this field of law and fewer judges.

Human beings, all, they will fall back upon the analogies to personal injury cases, fraud measure of damages, and the other more commonly encountered problems. Thus, you are fighting upstream when you seek to compartmentalize the law of eminent domain.

Section 1270, following the final semicolon, seems unwise as I have often encountered so called plans of the plaintiff are not accurate or do not reveal the true nature of the construction or the use to be made of it. In such an event the plans themselves or the person testifying about them should be subject to impeachment and rebuttal. Said another way, just because the condemnor says the improvement is thus and such should not prevent showing that it is something else.

Section 1270.6. This section is excellent. If an opinion is to be evaluated, the trier of fact must hear upon what it is based. If it is based on improper matter, that can be shown by cross examination or rebuttal.

Section 1270.8 is very good and comes close to stating my ultimate philosophy in these matters. That is that the jury should be permitted to hear anything which the market place would be interested in. The condemnation trial should be an attempt to obtain the judgment of the trier of fact as to what the market would do. Thus, anything the market would consider should be considered by the trier of fact. The language on 1270.8 could be sharpened a bit to express this philosophy if it is shared by you. Your use of the term "open market" is use of an inexact term and has permitted many an appraiser a place of refuge because of its uncertainty. I do not feel that my suggestion is the only possible improvement but I believe that the phrase "without duress" would be more readily understood and precise.

Section 1271 is excellent, especially in its clarification of the McNulty rule to indicate that a purchase price of the subject property must be within a reasonable time before the date of valuation before it is admissible.

Section 1271.2 should have language paralleling 1270.8 as I believe it is possible to cause some judge or jury to believe that a sale made under duress was freely made unless you adopt a term to make it clear that though one acts voluntarily the sale should not be admissible if the actor was under some sort of duress. So, again, I would suggest the use of a phrase like "without duress." The second sentence, reference to improvements, is unfortunate. I have no difficulty recalling attorneys who have argued that because the property being compared to was improved and the property on which the sale was being offered was unimproved, or vice versa, or that the improvements were different in kind, that the comparable sale should not be admitted. Very, very often the improvements are of no significance to the value of the property or are of such a nature that the value of the improvements can be easily calculated and removed from the purchase price thus permitting the use of the sale essentially as a bare land sale. Your listing with commas and an "and" before improvements which seem to indicate

that there must be similarity in all these particulars before the comparable can come in. I believe some language indicating that these are factors that can be considered when appropriate would help to take care of those situations where a sale would be useful for many reasons but it lacks comparability in improvements. I also dislike the term in that sentence "shedding light". I know it comes from some cases but it certainly is colloquial and when analyzed says very litte, if anything. May I suggest "aiding".

Section 1271.8(b)(1) is bad. It conflicts with your philosophy and mine that if the market place would take such things into consideration, the trier of facts should. I can appreciate your commission's concern for "blue sky" type approaches. But my experience has been that you don't sell them if they are too big a chunk of sky. You either trust the trier of fact or you don't. If you trust them, as I do, then you give them all the tools to work with that the market would have.

Section 1271.8(b)(2) would be better phrased positively if it is possible to do so. I have not been able to do so but maybe some of you people can.

Section 1272.2 should have the words "and value" added in the third line after the word "nature". This would correspond with present §1845.5 which I believe has been found most workable.

Section 1272.4(b), I cannot agree with. I believe an opinion should be able to be based upon offers for the property. These great concerns about spurious offers are no harder to deal with in condemnation than in other fields of law. When you have had the experience of having appraisers testify that the property is worth substantially less than amounts that you know have been bona fide offered for it you will understand my objections to 1272.4(b).

Section 1272.4(d) I do not understand the reason for, if the market would consider the value of another property then the trier of facts should be able to consider it. These fears about the length of trials are like the fears about offering other sales prices under direct testimony. Once it has been tried, it has been found to have been an illusory fear. If these things are present in the market place, they will come out in cross examination, if not on direct. How much more logical it is to offer the proof of these matters as a part of the direct case rather than cross examination.

Section 1272.4(e) cuts both ways but is too simple. It is often impossible to exclude items that are noncompensable from one's consideration as they are there. The list of noncompensable items is going to be a subject upon which I am going to write in the supplement to the CEB handbook. It is so long and so comprehensive and many of the items are so real that no honest appraiser could avoid being influenced by them.

If you are then to strike under § 1272.6, an opinion in which an appraiser honestly admits he cannot separate out the influence of a noncompensable item which is patently present, it will simply force appraisers into dishonesty. This is obviously undesirable and all that can be done should be done to keep appraisers from being sophists or untruthful.

Section 1272.8(3) is good as it recognizes again the practicalities of life.

Section 1273.4(a) should read "court" instead of "judge" as some nit picker like me will say that the use of the article "the" before judge means only the judge before whom the case is being tried.

There you have it. It's unvarnished and honest. I hope it is objective. I especially hope it will be helpful to you.

Again, my genuine thanks for your devotion to a most worthwhile endeavor.

Sincerely yours,

JERROLD A. FADEM
of
FADEM AND GRAVES

JAF:rcc

Memo 64-100 EXHIBIT XI

THE COUNTY COUNSEL

John B. Heinrich
County Counsel

Of Sacramento County

April 30, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford,University
Stanford California 94305

Attn: Mr. John H. DeMoully
Executive Secretary

Re: Recommendations on Condemnation Law and Procedure.

Gentlemen:

Reference is made to your letter of transmittal dated March 5, 1964, and to the enclosures which included certain legislative recommendations relating to condemnation law and procedure. We have reviewed these recommendations and are making the following comments and suggestions.

It is our feeling that the recommendations proposed will not substantially shorten the trial of condemnation cases except that by codifying existing la.., such codification might have some use in eliminating argument which might otherwise occur in certain instances by making the law clear on the points covered. Since this is apparently one of the intended purposes of the proposed legislation, we make the following suggestions:

There is some confusion in my mind as to whether proposed Section 1270 is intended to provide that the verdict must be within the range of expert opinion as distinguished from a verdict within the valuation testimony of the owner of the property. We recently experienced a situation in which judgment against the County of Sacramento was in excess of the valuation testimony of the landowner's expert but within the owner's opinion of the value. If the verdict is to be within range of the expert's opinion, then Section 1270 should make this clear. Also, an indicated purpose of proposed Section 1270 is to make the law clear that a view of the property does not become evidence in the sense that it has independent probative value upon the issue of market value. However, we do not believe that Subdivision (b) is clear on this point, and we believe that a sentence should be added to Subdivision (b) which states that such a view cannot be considered as having probative value.

Section 1270.4 as proposed will apparently give the judge the power to limit direct examination, including the extent to which a witness may state on direct examination "the other matter upon which his opinion is based". Although the recommendations include comment on Subdivision (a) of this section relative to the number of comparable sales which can be used, little or no comment is made as to the meaning of Subdivision (b) which actually could be, in our opinion, one of the most important procedures in expediting condemnation cases. In the trial of condemnation cases, we have found that an enormous amount of time is often expended in objections and argument relative to the admissibility of studies, plans, exhibits, maps and other documents and matters which the appraiser relies on which have been prepared by third parties, agencies and commissions, etc., and which the appraiser states assisted him as to his conclusion of highest and best use and his opinion of value. In many instances, attempted reliance upon a document or study which is objectionable may not be immediately clear and a continuing battle with respect to their admissibility arises until finally at a certain point in the case, the matter is permanently resolved. Also, by the time such controversy is finally resolved, irreparable damage may have resulted to one of the parties because of the conflict before the jury. It is, therefore, our belief that definite procedures should be devised which will determine the admissibility of such matters upon which a witness will rely prior to the giving of such testimony to a jury considering the case. We realize the difficulties involved in requiring a witness to set forth in advance of his direct testimony the studies, documents, etc., upon which he relies. However, we feel that a hearing before the Court on such matters will considerably expedite and shorten the time of trial as well as eliminate the possibility of prejudicial error. Perhaps Subdivision (b) of proposed Section 1270.4 can be revised and expanded to make it more clear as to "the other matter" which is referred to, and whether or not a consideration of "such other matter" before the Court outside the presence of the jury is contemplated in the same manner in which the Court considers in advance the comparable sales which the valuation expert is relying upon.

Related to the matter discussed in the previous paragraph is the fact that the landowner very seldom has actually obtained a completed appraisal by an expert witness until the time of trial itself. It is our feeling that the time for pretrial of a condemnation case should be immediately in advance of trial, and not months before as sometimes occurs under present procedures. Pretrial conferences in condemnation cases are valueless at the present time in any situation where the landowner has not completed his appraisals.

We would also suggest the following additions to Section 1272.4 relating to matters upon which opinion may not be based.

> "(g) The increase, if any, in the value of the property by reason of the proposed improvement which is to be made on the land of the condemnor."

This addition follows present law (Nichols on Eminent Domain Section 12.3151; City of San Diego vs. Boggeln, 164 C.A. 2d 1) and is essential since it is overlooked in many instances in consideration of influences on the neighborhood, land uses in the area and "comparable sales" which includ-

an increment of value because of the improvement. We believe that trials will be expedited by this addition since counsel and appraisers are not always completely aware of the affect of this point. (See excellent discussion and outline in Nichols.)

"(h) The influence upon the value of the property being valued of any physical use for which the property is not adaptable and available within the reasonably near future."

This follows present law, but makes it clear that the word "use" relates to a physical use. We have found that a difficult problem exists in determining the "highest and best use" of a parcel being taken in situations where property is in a transitional stage in the sense that a higher and better use is probably in store for the property ten to twenty years hence (population growth, proposed and adopted freeways, and other factors may establish or indicate this expectation), thereby giving rise to an investment or speculation increment of value in the property over and above the real value of the property for the physical uses for which the land is adaptable and available within the reasonably near future.

We believe that any use which is ten to twenty years away is a speculative use which should not be considered with reference to a determination of the "highest and best use" of the property as this term is used.

The proposed addition will ensure that only physical uses for which the property is available and adaptable within the reasonably near future is the basis upon which the property is to be valued. At the same time, the property owner is assured full market value for his property since the market data approach will always reflect the price of similar type property in the surrounding area. We believe that this addition to proposed Section 1272.4 will expedite trial time since it will eliminate a great deal of argument and confusion on the meaning of the word "use". There is very little land any place in California which doesn't carry with it some additional increment of value, however small, based upon the possibility of a higher use in the future. People do speculate and invest in real property with this thought in mind, and it does have the tendency to push prices of land up over and above what is considered to be its value (using the income approach) based on the physical uses for which it is available and adaptable within the reasonably near future. This is particularly true of farm land which is ten to twenty miles from rapidly expanding metropolitan areas, and though it will remain farm land for ten years or more, enjoys the almost certainty of a higher and better urban use at some indefinite time in the future.

We will be most happy to discuss with you at anytime the matters covered herein. We also believe that the Law Revision Commission has done an excellent job in attempting to deal with a most difficult subject.

Very truly yours,

JOHN B. HEINRICH
County Counsel

By
LAWRENCE E. VIAU, JR.
Deputy County Counsel

LEV:dt

Memo 64-100 EXHIBIT XII

COUNTY COUNSEL
County of Monterey
P.O. Box 1587
Salinas, California

April 20, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford, California

Gentlemen:

We recently received from Mr. Spencer M. Williams, County Counsel of Santa Clara County, a copy of your Letter of Transmittal dated March 5, 1964, transmitting a copy of your Tentative Recommendation to the 1965 Legislature concerning Opinion Testimony on Value, Damages, and Benefits in eminent domain and inverse condemnation proceedings. Mr. Williams invited us to review your tentative recommendation and forward to you any comments thereon which we might have.

Since our only aim in writing this letter is to assist you in carrying out your assigned task, we must confess that we do not think that our present comments will be of much help to you. Our reasons for so believing are twofold: (1) While we have had a little experience with eminent domain proceedings, it has not been nearly as extensive as that of many other attorneys. (2) We feel, philosophically, that an increase of legislation brings an increase of confusion, and neither speeds, simplifies, nor otherwise improves the administration of justice.

Be that as it may, our comments follow. We think that your proposed legislation has been very skillfully done, and that it constitutes an excellent codification of many of the rules of evidence relating to valuation in eminent domain, which is evidently your intention. Those rules, however, have already been established by case law, and the need for codifying them is not too clear to us. Such a codification, we think, would be of benefit only to those lawyers, judges, and appraisers who have little or no experience in the field.

If this proposed legislation is enacted we do not think that awards will be any fairer after its enactment than before, nor do we think that any trial time will be saved.

With respect to Section 1271.8, entitled, "Capitalization of Income Study," it strikes us that its meaning is partly obscure, in that Paragraph (2) of Subdivision (a) seems at first to be inconsistent with Paragraph (1) of Subdivision (b). We say "at first" because after about six readings the apparent intention becomes clearer.

If these proposed rules of evidence, or any rules of evidence on the subject, are calculated to govern an investigation of the fair market value of real property we see no reason why they should not be made applicable to all court proceedings involving the valuation of real property where the issue in that regard is its fair market value.

Very truly yours,

WILLIAM H. STOFFERS

(Signed)
John O. Thornberry
Assistant County Counsel

JOT:jr

cc: Mr. Spencer M. Williams
County Counsel
70 West Rosa Street
San Jose 10, California

Memo 64-100 EXHIBIT XIII

OFFICE OF CITY ATTORNEY

CITY OF BURBANK

April 8, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Re: Proposed Legislation Respecting Eminent Domain and Inverse Condemnation Proceedings.

Gentlemen:

Your January, 1964, report entitled "Recommendation relating to Condemnation Law and Procedure" which was transmitted with your letter of March 5, 1964, has been received and read carefully.

Your Commission is to be commended for its admirable restatement and proposed codification of existing law respecting opinion testimony on value, damages and benefits in eminent domain and inverse condemnation proceedings. Your proposals for workable rules in valuing leasehold interests are especially necessary and helpful because there is now no unanimity in the trial courts respecting the rules to be followed in determining the value of the lessee's interest.

However, we do not believe that proposed Section 1272.4, which would nullify the decisional law of People v. The City of Los Angeles (September 18, 1963), 220 A.C.A. 353, 366, 367, 33 Cal. Rptr. 797, 804-805, respecting the admissibility in evidence in a condemnation proceeding of comparable sales to other condemning bodies upon the laying of the proper foundation, should be adopted. More particularly, this office does not agree that the underlying assumptions and your reasoning therefrom to this proposed change in law are valid. Regardless of the actual percentage of cases wherein a condemnation proceeding does not involve a willing buyer and a willing seller, and of the "costs, risks and delays of litigation" to which you allude, it is certainly true that sales to condemners do not introduce any more collateral issues than are involved in any other comparable sale. Every sale must be evaluated in the light of attendant circumstances and other relevant factors, and a sale in the open market may be a distress transaction, therefore to be excluded from consideration, while one to a condemner may not. If the seller was indeed unwilling to sell does it accord with human nature to presume that therefore he sold his property for less than otherwise would be the case?

Your Commission's proposed change in law would exclude evidence of fair market value sales to condemning bodies based upon the highest and best use of the land, to take an example special purpose parcels, while permitting evidence of sales to others in the open market. Yet these open market sale prices, which for one reason or another were acceptable to the sellers, may very well not have been based upon the highest and best use of the land and would therefore be less reliable indicators of value than sales to condemning bodies.

The proposed change in law could very well leave the trier of the fact with inadequate or non-representative sales data. In this connection we emphasize that the present rule works both ways, and the case law proposed to be changed involved a sale to a condemning body to which that agency itself objected.

It is worthy of note that the decisional law proposed to be annulled by Section 1272.4 involved a sale by Walt Disney Productions. The District Court of Appeal clearly was not convinced, and it hardly could be conceived, that Walt Disney Productions was under any pressure or compulsion to sell its property, or concerned at all with the costs, risks and delays of litigation, and no such evidence was introduced.

It is submitted, and experience demonstrates, that in truth a sale to a condemning body is no more difficult to evaluate than any other sale and presents no additional collateral issues or complexities but that in fact the opposite is the case. The rule of People v. The City of Los Angeles of course does not exclude the possible situation of a sale to a condemner which for one reason or another is not a true representative of market value. We do not minimize such a possibility but see no need, in effect, to throw out the baby with the bath water.

We therefore respectfully disagree with proposed Section 1272.4 and the arguments in support thereof and submit that the rule of People v. The City of Los Angeles should be retained.

Very truly yours,

S/SAMUEL GORLICK
SAMUEL GORLICK
City Attorney

Memo 64-100

EXHIBIT XIV

JACKSON & ADAMS
16 East Third Avenue
P.O. Box 1776

San Mateo, California

May 25, 1964

John R. McDonough, Jr.
California Law Revision Commission
School of Law
Stanford University
Palo Alto, California

Dear Mr. McDonough:

Since our firm does a considerable volume of eminent domain trial work, we were keenly interested in the California Law Revision Commission's recommendation relating to Condemnation Law and Procedure No. 5 (Opinion Testimony on Value, Damages and Benefits) published January 1964 by you.

On the whole, we concur with the proposed legislation set forth therein wholeheartedly. Our trial volume of eminent domain cases varies between some 50 to 100 cases per year and, therefore, we presume to offer one suggestion.

Regarding your proposed §1272.4(b), we agree that oral offers to purchase property should be held inadmissible. However, we feel a distinction should be made and a recommendation framed to permit admissibility of written offers, particularly on the very property or a portion thereof in question or on immediately adjacent (physically contiguous) property, provided that a foundation is laid by the party offering such evidence that the offer was in good faith. Such a proper foundation might include submitting the respective parties' testimony concerning the bona fide nature of the transaction. The obvious relevancy of such data, particularly where an adequate foundation is laid, should be sufficient for its admissibility.

Respectfully,

JESS S. JACKSON

JSJ:ja

Memo 64-100

EXHIBIT XV

County Counsel
Santa Barbara County

June 5, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Attention: Mr. John H. DeMoully
Executive Secretary

Gentlemen:

Mr. Spencer Williams, County Counsel of Santa Clara County and President of the District Attorneys' and County Counsels' Association of the State of California, sent me a copy of the Recommendation Relating to Condemnation Law and Procedure, drafted by the California Law Revision Commission. I submitted the draft to Mr. Thomas M. Dankert, who specializes in eminent domain matters and who also handles eminent domain cases for the County of Santa Barbara, and who handles eminent domain for the County of Ventura and the Highway Department of the State of California. Mr. Dankert is now in private practice and is primarily representing defendants in eminent domain matters, so that he has had a well-rounded experience on the subject, both from the plaintiffs' and the defendants' standpoint.

Mr. Dankert has carefully read the recommendation of the Law Revision Commission and has submitted his comments and recommendations thereon. I think his analysis of the laws proposed by the Law Revision Commission is very good and I concur with the comments and recommendations which Mr. Dankert makes. He, as an expert in appraisal matters, and I are both particularly concerned with the changes in the law of evidence and with the provision relating to capitalization of rental income based on a percentage of gross receipts and also with the provision placing the court-appointed expert on a special level so that a jury probably would give his testimony more weight than that of other expert witnesses and appraisers regardless of his competence or possible bias.

I would appreciate it very much if your Law Revision Commission would study and consider the comments and recommendations of Mr. Dankert with the view to correcting provisions of the proposed laws which in the future could cause confusion, unfairness and delay in eminent domain proceedings.

Respectfully submitted,

ROBERT K. CUTLER
COUNTY COUNSEL

RKC:W

cc: Mr. Spencer Williams
Mr. Thomas M. Dankert

c) Direct and cross examination of expert witnesses in all types of proceedings, and certain other witnesses on matters of opinion.

It is recognized, however, that the rules of valuation in eminent domain proceedings are based upon more than a conventional buyer-seller concept. Considerations of policy are involved. Thus, the courts will balance the property owner's right to just compensation against the problem of the cost of the proposed improvement to the public, People vs. Ayon, 54 Cal.2d 217. Nonetheless, on reflection it should be apparent that proving the valuation of property, whether real or personal, is not limited to condemnation proceedings.

To get down to specifics, it would seem that the revisers have not fully taken into consideration the commonness of at least some of the problems upon which they proposed to deal with in special sections dealing with eminent domain, such as:

a) Proposed CCP Section 1270: Owners of property and other qualified witnesses, historically, in all types of proceedings, where valuation was an issue, have generally been permitted to express opinions of value on their property (real or personal) or property interest.

b) Proposed Section 1270.2 likewise states a common rule of evidence that a witness may generally give his reasons for his opinion. In addition, subdivision (b) of that proposed section seems to be defective in failing to require that the witness be required to lay a foundation to express an opinion although this is probably implied from the language of the section. In any event, this section is unnecessary because this rule merely states the existing principle of trial procedure that apposing counsel may question the witness on anything relating to his qualifications to testify.

c) Proposed Section 1270.4: This gives the judge the power to limit certain matters on direct examination. It is merely an understandable application of the conventional rule of evidence that the trial judge has the power to limit cumulative evidence. This has been held to be true in condemnation cases. (See for example the case of City of Los Angeles vs. Frew 139 Cal.App.2d 859, Witkin, California Evidence, sec. 564.)

d) Proposed Section 1270.6: This is a conventional application of an old standby rule of evidence that a witness may state the matter on which his opinion is based, and his statements (as are most statements of a witness) are subject to impeachment and rebuttal. A shortcoming in this section is illustrated by the comment (draft, p.12), suggesting that the witness may not testify upon hearsay that is completely unsupported and completely unreliable. The revisers then proceed to quote from People vs. Alexander, 212 Cal.App.2d 84 94-96 in support of this (relying on People vs. Donovan, 57 Cal.2d 346). Nothing in the Alexander case suggests any guide for determining the proper limits, within which facts acquired by hearsay may be used. If such a section is to be enacted at all it should contain a statement that the trial judge should have the power to exclude hearsay based upon hearsay, and any other type of hearsay matter which in the exercise of a reasonable discretion he finds to be inherently untrustworthy or unreliable.

e) Proposed Section 1272.6: This is the general rule of evidence that a witness may not base his opinion on improper matters.

f) Proposed Section 1272.8: (Statements of a witness based upon the opinions of third persons) The sole remedial change apparently effected by this section would be to permit cross examination of a person upon whom the witness's opinion was based. This section belongs in a general evidence section

and is a rule which would seem equally applicable to all types of expert testimony. The revisers note that this section would be unnecessary if the comprehensive evidence statute were enacted.

If a special section dealing with eminent domain is to be enacted it is suggested that all of the above sections could be eliminated. It is further suggested that many of the other sections not discussed above, should be placed in the general law of evidence for use in all cases where the valuation of property or property interests is in issue. The list compiled (supra) is not exhaustive; it is only illustrative. Absent special policy considerations, would it not be better if the rules of evidence applicable to valuation of property and property interests be the same in condemnation proceedings as in other types of land valuation trials? It is respectfully urged that uniformity in the law, when possible, is desirable.

II

COMMENTS ON SPECIFIC SECTIONS

a) Proposed Section 1268.2: This section purports to define the value of property as:

> "...the amount of 'just compensation' to be ascertained under Section 14 of Article 1 of the State Constitution and the amount of value, damage, and benefits to be ascertained under subdivisions 1, 2, 3, and 4, of Section 1248."

This section is confusing. It should be completely rewritten--as part of a general evidence statute defining market value. Article 1, section 14, embraces all of the elements set forth in the subdivisions of C.C.P. 1248 above referred to, plus additional elements. To understand this section of the California Constitution would require an understanding of almost every condemnation case decided in California.

As part of a general evidence statute, the classical definition of "market value" used in Sacramento etc. R. R. Co. vs. Heilbron, 156 Cal. 408, could be expanded and clarified in accordance with the very complete analysis in Joint Highway Dist. No. 9 vs. Ocean Shore, 128 Cal.App. 743, and subsequent cases such as, Buena Park School Dist. v. Metrim Corp., 176 Cal.App.2d 265, and People vs. Johnson, 203 Cal.App.2d 712, to clarify some of the following points:

(1) The "highest price" paid is that paid by purchasers generally, rather than a single purchaser, and

(2) The definition includes a "willing buyer" and a "willing seller".

As the proposed statute presently stands it is too ambiguous for even a condemnation specialist. It contributes nothing to existing law and should be eliminated.

b) Proposed Section 1270: In addition to the comments previously made upon this section, it should be noted that if this section[1] is to be used at all it would be useful to define the term "owner of property or property interest"

For example if a closely held corporation were the property owner would the principal stock holders of the corporation, or some corporation officer such as the president, or vice president be permitted to testify as to the value of property interest? Existing case law seems generally to limit testimony by an owner to a natural person, who owns the property or property interest in question, and excludes agents of the owner, Cf. Redwood City etc. Dist. vs. Gregoire, 128 Cal.App.2d 766. It may be that the revisers after considering this matter would feel some further clarification on this subject would be desirable.

[1]See part 1.

c) Proposed Section 1270.2: This section has been commented upon before.[2] In addition, it should be noted that 1270.2(b) should be more specifically drafted if this section is to be used to clearly state that the appropriate foundation should be required before the witness may testify as to matters of opinion. Furthermore, such requirements of a foundation should be as an issue which can be raised by adverse counsel and the reference to the judge as the party who may raise same should be supplemented or eliminated.

d) Proposed Section 1270.4: This section speaks of "contracts" as well as comparable sales. This term "contracts" is also used in Sections 1271, 1271.2. The use of this term shall be discussed in connection with those sections. At this point a question is merely raised as to the advisability of inserting this term in any of these sections.

e) Proposed Section 1270.6: This section[3] would seem to require an additional sentence or sentences giving the trial judge a power to exclude hearsay based upon hearsay and such other hearsay as he in the exercise of his discretion deems lacking in any real semblance of reliability.

From the comments of the revisers (draft, p. 12, 13) and their discussion of the case of People v. Alexander, 212 Cal. App.2d 84, 95-96, it would seem that the revisers themselves had in mind the insertion of such a provision in the section. It is believed that such an addition would be useful not only in the law of eminent domain but in the field of evidence in general. It is apparent that some hearsay is so lacking in inherent reliability that the trial judge should have the power to exclude such evidence. While the trial court may have the power to exclude such under existing law, the case of

[2]This section is also discussed, supra, in Part 1.
[3]See F.N.[2]

People vs. Alexander, supra, fails to prescribe even general standards.

f) Proposed Section 1270.8: This section as is explained by the comments of the revisers (draft, p. 14) would permit the witness to consider all the things which buyers and sellers in the open market would consider. Because of policy reasons and other practical considerations overlooked by the revisers, existing case law clearly dictates that this is not, and should not be, the law (Cf. Sacramento Etc. Dist. vs. State Recl. Bd., 215 Cal. App.2d 60, at 69;[4] People vs. Ayon, 54 Cal.2d 217. While the revisers have inadvertently failed to acknowledge it, this section coupled with the comments of the revisers opens the door for the introduction of much vague and speculative testimony, (Cf. Sacramento Etc. Dist. vs. State Recl. Bd. 215 Cal. App.2d 60 at 69) and would permit the witness to consider elements of damage not properly considered under present law, such as evidence of blight caused by the proposed improvement (Cf. People vs. Pera, 190 Cal. App.2d 497; People vs. Lucas 155 Cal. App.2d 1; Elements of damage arising out of the exercise of police powers (Cf. People vs. Symons, 54 Cal.2d 855) (Cf. People vs. Ayon, supra.) and increased market value caused by the proposed improvement. (Cf. County of Los Angeles vs. Hoe, 138 Cal. App.2d 74. While this list is not complete, it is illustrative of some of the problems that probably are created by the language of this section coupled with the revisers' comments.

[4]There the court stated:

"The ruling of the trial court permitted indirect use, in the formulation of value testimony, of factors not directly permitted. The theory, in apparent reliance on Pacific Gas & Elec. Co. v. Hufford, supra, was that a valuation witness may state as a 'reason' for his opinion any detrimental factor which the witness might choose to attribute to a prospective purchaser, so long as the detriment in some way arises from the project in suit.

The Hufford case warrants no such approach. The approach ignores the fact that the "prospective purchaser" is an abstraction, a

g) Proposed Sections 1271.2 as well as 1271 and 1270.4: These sections make use of the term "contract" or "contract of sale" with the inescapable conclusion that the revisers are adopting a law which would make contracts to sell admissible in evidence in support of the witness's opinion of value, on the same basis as comparable sales. There is a dearth of authority in California case law on the admissibility of such inchoate transactions. (Compare language in People vs. Nahabedian, 171 Cal. App.2d 302, at 309-310 with Covina etc. Dist. vs. Jobe, 174 Cal. App.2d 340.) The general American rule, however, is that they are apparently inadmissible except in the case of a contract for the sale of the subject property itself. (Orgel, Valuation of Law Under Eminent Domain, 2nd Ed. 1953, Vol. 1. p. 627; Nichols on Eminent Domain 2nd Ed. 1952, Vol. 5., Sec. 215 p. 307; School District of Clayton v. Kelsey, 355 Mo. 478, 196 S.W. 2d 860; Arizona v. McDonald, 352 Pac. 2d (Ariz.) 343.

Perhaps the strongest case dealing with the inadmissibility of such inchoate transactions is Suburban Land Company v. Arlington, 107 N.E.2d (Mass.) 532. There land was being acquired for park purposes. The subject property was part of a large tract which had been purchased by the condemnees. The principal question raised on appeal was the exclusion in evidence by the trial court of the aggregate contract price under a land contract for some adjacent 115 lots which were part of the original tract. The court stated at page 433:

"We are of the opinion that this evidence was properly excluded. . . The price paid at the recent sales of similar land in the vicinity

[4](Continued)
ventriloquist's dummy who speaks only with the voice of the flesh-and-blood valuation witness. In feeding words to the fictional buyer, the witness--be he appraiser or landowner--is confined only by his own imagination and by such narrower limits as the law may impose on him. (6) A condemnation trial is a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner."

was admissible and was admitted in the case. Such a noncompulsory sale between a willing buyer and a willing seller is ordinarily regarded as a good test or criterion to aid the jury in determining the value of the land in controversy. The opinion of the buying public so expressed in a free market is what usually determined value. But there must be an actual sale. Without it, the price fixed in a mere agreement to sell adjoining land is not admissible. Chapin v. Boston & Providence RR Co., 6 Cush. 422."

A variation of this rule is found in Illinois where the prices expressed in such contract are admissible if no completed sales are available, City of Chicago v. Pridmore, 147 N.E.2d (Ill.) 54.

A second defect of this section is that the formula suggested for more admissibility fails to add a provision that the question of comparability or the exercise of the judge's discretion should be based upon the availability of market data generally. Thus, in a situation where there was very little market data even a fair application of the suggested formula would exclude all market data.

In the case of Monterey County etc. Dist. v. Hughes, 201 Cal. App.2d 197, sales occurring some seven to fourteen years before the date of value were admitted in evidence by the trial judge over objection of appellant. On appeal one of the questions raised was the staleness of these transactions. The Appellate Court quite reasonably took the view that because of the complete lack of any sale in recent years that the trial judge was reasonable in permitting the witness to testify to such transactions. The court specifically comments on the lack of current data at page 215.

In addition, it perhaps might be well to revise the last part of this section to direct the court to exercise a liberal discretion in permitting

the witness to testify to his opinion as to which sales a witness believes to be comparable. As the section is presently worded in this portion there are some who would undoubtedly argue that it is the witness, not the judge who is given the discretion.

h) Proposed Section 1271.4: This section permits the use of leases of property in their terms whether such leases are in effect before or after the date of value. A policy question is presented as to whether or not leases entered into after the initiation of the lawsuit should be considered. Obviously such a lease, if properly attacked, should be of questionable evidentiary value because of the obvious self-serving nature of the circumstances timewise under which such lease is made. This provision could be a direct invitation to fraud. It is arguable in reply, however, that the property owner usually knows when his property is going to be acquired and would have the power to enter into a new lease if he wished to do so before any suit was filed.

Furthermore, the proposed rule may conflict with the rule that the property owner may not be compensated for any improvements made after the issuance of Summons, CCP 1248. It may create a possible ambiguity in the law. Thus, if lease calls for the erection of improvements, the witness may under this provision perhaps consider the valuation created by improvements erected pursuant to a post-litigation lease.

A most serious question is presented by that portion of this section and section 1271.8, which apparently authorize the use of, and capitalization of, a lease based on a percentage of gross sales. The case of People v. Dunn, 46 Cal.2d 639 cited by the revisers (draft, pp.23, 25) in partial support of this proposition does not deal with the capitalization of a percentage of gross

sales or gross income. Furthermore, outside of the case of People vs. Frahm, 114 Cal. App.2d 61 (1952), extensively cited by the revisers, there is apparently no California case which permits the capitalization of a lease based on a percentage of gross receipts. Furthermore, the Frahm case is a dispute between the lessor, lessee-sublessor, and sublessee over the distribution of the award. This is the second phase of a condemnation trial authorized by C.C.P. 1246.1. It is not a contest between the public agency and the property owner.

The trial court case of People v. Stevenson and Co., Superior Court Case No. 705457 cited at p. 22 by the revisers is probably the subsequent Appellate Court case of People v. Stevenson and Co., 190 Cal. App.2d 103. The Appellate Court upheld the exclusion of testimony based upon this "gross" capitalization approach. It does so however, on the theory that no proper foundation was laid for the admission of such testimony. This case is neither authority for or against the admissibility of the capitalization of leases based upon percentages of gross receipts.

This part of this section, construed with Section 1271.6 and 1271.8, opens an avenue of valuation the traffic upon which avenue may be extremely difficult to control. The sole criterion apparently for the use of such gross income data is that of "custom". Therefore, the moment when witnesses testify that this is the custom in the community then this evidence becomes admissible.

Possibilities for the dishonest under this clause, while it may not seem so to the naive, are virtually unlimited. Furthermore, the gross sales or gross income includes income attributable to such elements as:

1. Management. (Including personality)
2. Advertising.

3. Brand name or brand merchandizing.

4. National reputation of the leasing company.

5. Presence or absence of competition or similar competitive franchises in the same community.

The shortcomings of the capitalization of gross income are illustrated by the following examples:

1. A owns a dress shop in an older shopping center adjacent to a freeway where gross income is a factor in fixing rentals. Furthermore, it is the custom in shopping centers in the particular metropolitan area to base rentals upon gross receipts with a minimum guarantee. (The existence of this custom will be assumed in all examples to follow.) A has many years experience in the clothing business, has a good personality and is a good buyer and merchandiser. A sells to B, a salesman working for him. B is a good salesman, but does not understand the value of maintaining good customer relations. [illegible] lazy, and hesitates to spend money for advertising. Within a year after B has purchased the business he is merely a marginal operator and the fine business A has built up is gone. The Division of Highways has been studying for several years the need for improving off-ramp facilities in the area. The most feasible way to do this is to cut across one side of the shopping center and take out A's (B's) shop at the tail end of the center. If the division files its suit during A's ownership, a capitalization study based on percentages of gross income will probably include elements of value attributable to A's particular abilities. The value of the real estate will be substantially inflated. If suit is filed after B has operated the property for several years (if he hasn't gone bankrupt), the condemner could use such a study to purchase the property at a figure below its fair market value.

2. Standard Oil operates a filling station on a corner at the California-Vincent off ramp on the edge of a shopping center in West Covina, California. It is a fine commercial location. In the first few years of their operation they have very little nearby competition. Other oil companies eventually realize that there is a market they are overlooking. Richfield Oil places a station on a lot contiguous to the shopping center at the opposite end of it. An independent supermarket type of gas station opens up across California Street near the Richfield station. Standard's gallonage falls from 80,000 gallons per month to 30,000 gallons per month. Assuming a royalty rate of 1-1/2¢ per gallon rental income drops from $1,200.00 to $450.00 per month, the minimum guarantee. The California-Vincent off ramp was an underdesigned ramp. The Division of Highways, even before Standard completed its station began studying this problem. At one state it was decided that Standard Oil and a nearby restaurant-coffee shop cocktail lounge would have to go. The time when suit is filed will probably be a very significant factor in determining the value of this off-ramp corner, because of the competitive build-up, if we use a capitalization of percentages of gross income. Yet, the corner in question is a fine location and would be extremely valuable for either retail or restaurant uses. If the condemnation action is filed (summons is issued) after the competitive build-up, even though land prices have risen in the area, valuation on such an approach could result in a substantially lower award. (This is an actual example with some slight modifications and a guess as to gallonages. This off-ramp remodeling was a subject of study by the Division for many years before the money was appropriated for actual remodeling.)

3. C has a restaurant at the corner of two paved rural roads on the edge of town. C's restaurant is part of a ten-acre holding. D school district buys

the adjacent ten acres. Because of the influx of workers for a new defense plant D decides to condemn C's property. C is an experienced restauranteur, has lived in the community for a number of years, and has been active in active in community affairs. C's restaurant rental is based upon gross receipts with a minimum guarantee. C sells to E, the local chief of police who has decided he can use his retirement money to get rich in the restaurant business. E is a good amateur chef, but does not have a good personality and does not understand many of the problems of running a restaurant business. After two years, the rent has fallen from $300.00 per month to the minimum of $150.00. Who is operating the restaurant at the time suit is filed under the proposed sections will be a significant factor in valuing the property.

In the three examples above-cited, the value of the property is affected by elements that perhaps should not enter into a condemnation suit. Some appraisers would make adjustments for these extrinsic forces. These would be difficult to make. Some appraisers would ignore these extrinsic factors out of ignorance, dishonesty or the difficulty of making an adjustment. If time permitted, more and better examples of the type of Pandora's Box the revisers propose to open could be developed.[5]

This method presents a radical departure from conventional appraisal methods. The conservative appraiser while he might capitalize such income would make a sincere effort to segregate income which is attributable to the land and its basic characteristics from the factors above listed. In fact, it is readily apparent that since we are valuing the real property or the interest in real property any method which requires the segregation of so

[5]Obviously, from the preceding examples, loss of business income has indirectly become an element of compensation. This is contrary to existing law, People v. Ayon, supra. Such a policy change should be made only after an extremely careful consideration of the hazards involved. Note also that personal labor is involved in two of these examples.

many other elements is bound to be a near technical impossibility. The only way such elements could logically be segregated is to study existing sales of comparable property and relate those sales to a hypothetical reasonable rental income figure, such rental income figure could then be used as the basis for segregating elements of income attributable to the real estate itself from those attributable to the above listed extrinsic factors.

Then after we have done this surely some astute appraiser is going to ask:

> "Would it not be simpler and less hazardous merely to use a simpler comparable sales or reproduction cost approach???"

Therefore, it would seem that a compromise solution is to permit the use of such data only when there is no other market data of any type available. Furthermore, such determination of "availability" should be left to the discretion of the trial judge.

i) Proposed Section 1271.6: This section coupled with sections 1271.8 and 1270.2(a), in spite of the suggested limitations of 1270.4(b) and 1272.4(f), may open the door for the use of rental income as a sort of comparable sale. If nothing else, there is at least an inconsistency between sections 1272.4(f), 1271.6, and 1270.2(a). Section 1271.6 states that the witness may take into account as a basis for his opinion the rent and other terms of comparable leases, including leases where the rental is fixed on a gross sales formula. Section 1270.2(a) says:

> "Subject to Section 1270.4, a witness testifying in terms of opinion may state on direct examination the reasons for his opinion and the matter upon which it is based."

These last two sections when read together are inconsistent with the limitations of section 1272.4(f), which would prohibit the use of capitalized

values of comparable rentals as comparable sales. Obviously, if the witness is permitted to base his opinion on comparable rentals, such rentals may be capitalized, and such capitalized rentals being part of his reasons may be admissible, in spite of 1270.4(f), under the doctrine of "multiple admissibility". (Witkin, California Evidence, pp. 138, 158, 179, and esp. 249.)

This combined with the provisions dealing with the permissibility of capitalizing percentages of gross receipts presents unlimited possibilities for the ingenious appraiser. Assuming, under the sections in question, the trial judge would at least indirectly permit the capitalization of percentages of gross receipts of comparable properties to be used as a sort of comparable sale, an inept or dishonest appraiser would have a Roman Holiday. The harm that could be done, the confusion to the jury which might result, and the incalculable unfairness of such a result, is simply impossible to estimate.

Worse yet, we are in an area where business income arising out of factors extrinsic to the valuation of the land itself, could work havoc with conventional principles of condemnation law and appraisal, by permitting indirectly the use of gross receipts (business income) as a partial basis for valuing property. The line of cases in California repudiating business income as a basis for estimation of compensation is so long, and so well-established, that it would hardly seem necessary either to cite authority, or to remind the committee of the serious policy questions raised by this proposal. (But, Cf. People v. Ayon, 54 Cal.2d 217)

j) Proposed Section 1273.4: Subdivision (a) of this subsection states:

"The fact of the appointment of an expert witness by the judge may be revealed to the trier of fact as relevant to the credibility of such witness and the weight of his testimony."

In support of this subsection, the revisers refer to the cases of People vs. Cornell, 203, Cal. 144 and People vs. Strong, Cal. App. 522. It is doubtful that these two cases should be cited as authority for a proposition relating to appointment of experts in civil cases generally under C.C.P. 1871. The revisers have apparently overlooked that these two cases are both criminal cases and involve appointment of an alienist under the provisions of Penal Code 1027. This section could never be used for civil cases because this section is by its own expressed wording applicable to the situation where a criminal defendant enters a plea of not guilty by reason of insanity.

Furthermore, in People vs. Cornell, supra, the question raised by the defendant was that the court's appointment of the witness amounted to an endorsement of him and that such an appointment should not have been made since the defendant had witnesses of his own. This case is simply not authority for the asserted proposition.

The case of People vs. Strong, supra, cites extensively from the Cornell case, and is not authority for the asserted proposal because of its reliance on the Cornell case, and also because of the proposition asserted by the revisers not being raised in the trial court.

If the rule of law proposed by the revisers is supported by existing authority, a fact which has not yet been demonstrated, then the rule of law should be changed. Judges are not appraisers, nor do they normally have special training in the field of real estate appraisal. They are not condemnation specialists, and, many of them only occasionally see a condemnation case. The usual practice following in this type of situation is for the judge to appoint someone whose name he has heard mentioned favorably, or of whom he knows personally. There is no reason to suppose, nor has it in fact been demonstrated in practice, that judges are such substantially better selectors

of appraisers than either public agencies, or the property owners as to give their appointee such a lofty status.

Therefore, to cloak such an appointee with the protection of a rule of law that places him on a special plateau over and above other appraisers in the same case, who may in fact be his intellectual and professional superior, does not seem to be a wise rule of law.

k) Proposed Section 1272.4: This section would modify existing law contrary to a now well-established line of California cases only one of which (People vs. City of Los Angeles, ____ Cal. App.2d ____ 1963.) is cited by the revisers. (draft, p. 31). If this section is adopted, in many cases, the only available comparable transaction will be eliminated. Thus, in cases involving flight easements, flood control easements and sewage easements, the only really comparable sales are sales of the same type of property interests to public agencies.

Since there is no market data the easement case then becomes a matter of guess work based upon a presumed (without any evidence) percentage of depreciation of the underlying fee. There is, of course, very little factual basis for the application of such a percentage.

We also have the occasional case in which such transactions are the only current market information of any type available.

The case where there have been no sales of similar property, except to the agency condemning the fee in question, or some other condemning agency, requires the utilization of sales to a public agency to provide the jury with some evidence of market value. The result of the rule advocated would be to reduce the appraisal problem to the tossing of a coin. There being no market data the whole case becomes a battle of adjectives and emotions rather than a battle of facts and law.

It is suggested, therefore, that if this section be adopted, the trial judge be given discretion to permit the introduction of such acquisitions when there is:

1) A lack of comparable market transactions, and

2) A showing of "voluntariness".

The argument that sales to condemnors often involve partial takings made by the revisers (draft, p. 32) does not answer the issue in those cases that are complete takings, and no such difficulty exists. Furthermore, the revisers have completely overlooked the fact that not all partial takings are as complex as they seem to feel. For example take a street widening case in which a strip of land 10 feet wide is taken for a distance of several hundred feet from a large undeveloped commercial property. In this type of a case there is no real severance damage problem, and the problems of segregation, of which the revisers speak, are non-existent. Yet, a street widening case is a common condemnation situation.

Another example is the situation of a taking of a school site from a large tract of agriculturally used land on the edge of a town. In many of these cases there is no severance damage problem and the problem the revisers are concerned about does not exist.

Another example is a partial taking of a drainage easement for the improvement of an existing natural channel. It is difficult to say that this situation in the usual case presents any problem of segregation. Yet in this type situation there is the least likelihood of finding comparable market transactions.

1) Proposed Section 1271.8(b)(1): Consideration should be given to adding to this section a proviso that a capitalization of income from an assumed rental from a hypothetical improvement on the property or property interests being valued would be permitted where either:

a) Both parties agree that the highest and best use of the property is to replace the existing improvements thereon, and, a dispute develops as to what type of an "after" use is economically permissible, or

b) The property is vacant and a dispute develops as to whether or not a use proposed by either party would be economically feasible.

If either of the exceptions were present, their use would be limited to proof of the asserted highest and best use of the property being acquired.

III

CONCLUSION

It is respectfully urged, therefore, that the committee give serious consideration to the advisability of:

a) The wisdom of having special legislation on a number of topics, the scope of which is proposed to be limited to the condemnation field but which in many cases is equally applicable to:

1) The law of evidence generally,

2) The rules of direct cross examination applicable to expert witnesses of all types,

3) Land valuation trials of many types of cases where, absent policy consideration, the rules of land valuation should be uniform.

b) Provisions permitting the capitalization of rental income based upon a percentage of gross receipts which may ultimately lead to the capitalizing of business income, and other factors extrinsic to the inherent value of the real property itself.

c) Other provisions dealing with the capitalization of income, and

d) Placing the court-appointed expert on a special level.

It is hoped that if further hearings are to be held on these provisions before being submitted to the California Legislature, notice be given of the time and place of such hearing.

Dated: Jun 5 1964

Respectfully submitted,

S/
Thomas M. Dankert

Memo 64-100

EXHIBIT XVI

CITY OF OAKLAND
CALIFORNIA

City Hall
Oakland, California 94612

June 17, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford, California

Re: California Law Revision Commission
Recommendation relating to
Condemnation Law and Procedure

Gentlemen:

You have asked us to comment on the proposed recommendation relating to Condemnation Law and Procedure.

Your first question was whether any legislation is needed on the subject. In response thereto it is our belief that some of the proposed legislation would be beneficial to clarify and change some of the topics which you have considered. However, in regard to other topics where no change is made in the present law, and the law is not is dispute, the necessity of attempting to codify the law is questioned.

Our comments as to the specific recommendation relating to the proposed legislation are as follows:

Section 1268 - these rules of evidence should apply to all proceedings relating to valuation of real property. It does not make good sense to apply different rules depending on the type of litigation where the question involved is value of real estate.

Section 1270 - since this is merely a statement of existing law, except as to the last clause in (b), no necessity for it appears. As to the last clause in (b) relating to evidence of the character proposed to be constructed by the plaintiff, the comment refers to the condemnor making structural alterations or construction changes that were not planned at the time the award was made, and if there are additional damages as a result, these may be recovered in an inverse condemnation action under present law. The comment gives the inference that the statute will prevent a condemnee from claiming further damages as a result of changes in the work. Such a change without compensation would appear to be unconstitutional as taking property without just compensation.

Section 1270.4 - if the judge limits the number of comparable sales on direct examination, on cross-examination the appraiser may be made to

appear to have overlooked other comparable sales and not considered them worthy of consideration. The present law appears to have more merit.

Section 1271 - consideration of a sale after the date of valuation should not be admissible. Such a sale would ordinarily be too clouded with problems to represent a true picture of open market sale.

Section 1271.2 - it is believed that the present law whereby the judge preliminarily determines comparability assists in preventing the jury from becoming confused as to what is comparable property. This proposed change could lead to abuses where no real restraint is imposed except numbers of sales.

Section 1272 - it is not believed that this section will accomplish the purpose for which it was intended. The language states "When relevant". The reproduction approach will, under the Klinker case and City of Oakland v. Partridge case, still not be relevant in most instances where the property may be valued by other approaches.

Section 1272.4 - except for subsection (a), there appears no necessity for the other subsections, since they merely reflect what is the present law under the cases.

Sections 1272.6 and 1272.8 are not considered necessary, particularly if they are to be codified elsewhere.

Section 1273 - this section will still permit the calling of the governmental body's staff appraisers where in settlement negotiations the opposing side is informed that the offer is based on such appraisal. Complete candor will still be unavailing.

As to your question 3 - this has been discussed above - that the rules should apply to all court proceedings for the valuation of real property.

As to your question 4 - no revisions in your comments are suggested except as noted in our comments.

Very truly yours,

HILTON J. MELBY
City Attorney

By s/
Ralph R. Kuchler
Deputy City Attorney

By s/
Mark B. Shragge
Deputy City Attorney

RRK:bc
cc: League of California Cities

Memo 64-100 EXHIBIT XVII

LAW OFFICES OF
BANCROFT, AVERY & McALISTER
TWA BUILDING
240 STOCKTON STREET
SAN FRANCISCO, CALIFORNIA 94108

JAMES R. BANCROFT
JAMES H. McALISTER
LUTHER J. AVERY
LEO R. ANDRADE, JR.
ALAN D. BONAPART
HENRY L. GLASSER
MICHAEL J. MALONEY
NORMAN A. ZILBER
ARTHUR L. SILBERMAN
STEPHEN W. HACKETT

TELEPHONE
AREA CODE 415
YUKON 2-7526
CABLE ADDRESS: BAM

June 27, 1964

California Law Revision Commission
Room 30
Crothers Hall
Stanford University
Stanford, California 94305

Attention: Mr. John H. De Moully
Executive Secretary

Proposed 1965 Eminent Domain Legislation

Dear Mr. De Moully:

I have had an opportunity to review at some length the recommendations of the California Law Revision Commission relating to the suggested revision of condemnation law and procedure. As I have a particular interest in the field of Eminent Domain, I appreciate your extending to me the opportunity to express my analysis of the Commission's proposal.

I feel very strongly that legislation is needed in the area of Eminent Domain practice, particularly as relates to the trial phase thereof. The volume of public work projects, and the attendant land acquisition activities, are bound to increase in number as California "enjoys" its continued population boom. While the lawyer twenty years ago might have experienced a feeling of unfamiliarity when confronted with a condemnation proceeding, this is no longer the case with today's more sophisticated and knowledgeable practitioners. Similarly, today's typical property owner is less awed by the prospect of condemnation litigation where his property is the subject of some public project. All of these factors lead me to the conclusion that the volume of condemnation litigation is definitely increasing and will continue to increase during the foreseeable future.

Even during the relatively limited period of time in which I have been closely connected with condemnation litigation, I have detected a growing trend for condemnation actions to become more prolonged in

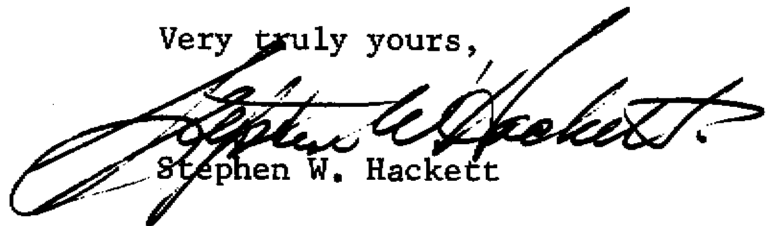
ES
AES
AC
AA

duration, and more sophisticated in their presentation. Although I have seen this happen, I am not convinced that this is necessarily the result of increased complexity of condemnation actions so much as it results from the lack of suitable statutory guidance for the courts, attorneys and participants in a condemnation proceeding.

I have attached hereto some random comments which generally follow the order of presentation in the Commission's Recommendations. With some few exceptions, my reactions are most favorable to the suggested revisions. Any criticisms as I may have voiced in the attached Memorandum are intended to be constructive in nature, and I hope are so accepted by yourself.

Thank you for the opportunity of reviewing this proposed legislation.

Very truly yours,



Stephen W. Hackett

SWH/cb

Enclosure

MEMORANDUM OF ANALYSIS OF THE
CALIFORNIA LAW REVISION COMMISSION RECOMMENDATIONS
RELATING TO CALIFORNIA CONDEMNATION LAW AND PROCEDURE

Section 1263.2. "Value of Property" defined. This section is somewhat confusing in its present phraseology, for it seems to imply that the "value of property" is "just compensation" plus the matters set forth in C.C.P. 1248. This, of course, is not true, as the matters set forth in subsection 1, 2, 3, and 4 of C.C.P. 1248 merely refine and interpret the term "just compensation" as set forth in the constitution.

Section 1270. (A). I do not believe the term "qualified" should be used in an attempt to distinguish between the ordinary valuation witness and the "owner". I do not believe that an owner should be described as other than "qualified" or imply that an owner is something less than "qualified".

I feel strongly that the last provision in this proposed section is not proper, or at least it is not clear. If this section, which provides "and such evidence, except evidence of the character of the improvement. . . .proposed to be constructed by plaintiff in an eminent domain and rebuttal", is intended to preclude inquiry into the necessity for the particular public improvement, (that is the necessity for its being constructed at a given location, the necessity

for it being constructed in a given fashion, or the necessity for these types of improvements generally), I would agree that such matters would have no bearing or significance in an Eminent Domain proceeding. However, the details of construction as they bear upon the element of severance damages in a "partial taking" situation are most significant and should definitely be an area for appropriate investigation by the property owner's counsel. In other words, while the details of construction as they relate to "necessity" or as they relate to a "total taking" situation are not relevant or material in a condemnation proceeding, still where there is partial taking and a construction of some public improvement on a portion of the part that is taken, the details of that construction are of definite significance in assessing the severance damages that result from "...the construction of the improvement in the manner proposed by the plaintiff;" (C.C.P. 1248(2)). By way of illustration, the height of a fill or cut, or the height of a power line, or the clearance that would be afforded under a power line, all might be deemed merely "characteristics" of a proposed public improvement and under the language of the proposed section, might be excluded by the court, whereas, such factors are of great significance in assessing severance damages by the property owner. I feel that some modification must be made to the last portion of the proposed Section 1270 so as to eliminate this confusion. Should the details of construction not be

known to the condemnor at the time of the proceedings, then the property owner should be entitled to rely upon the provision of law that states that the construction is to be considered in the most adverse fashion. (See Los Angeles County Flood District v. Jan, (1957) 154 Cal. Ap. 2d, 389. See, also, California Condemnation Practice (Continuing Education of the Bar), Section 4.10, page 68). In the comment following the proposed Section 1270, the author states on page 8, "...the defendant in such a case is not permitted to impeach or rebut evidence as to the character of the improvements supposed to be constructed". My question is, what is the meaning of the term "character"? If this means the same as "the details", then I believe this is improper and my counter-question is, "Why should the property owner not be entitled to impeach and rebut evidence as to such details?" If, on the other hand, the term "character" relates to a "necessity", then I agree with the proposition. The term "character" is too nebulous and will lead only to confusion in the courts. I would suggest changing the term "character" to "necessity" or revising the entire last paragraph of this proposed section. In similar fashion, a property owner should be permitted to establish that, in fact, the condemnor does not have any firm details of construction in mind at the time of the condemnation.

Section 1270.2. The question that I have concerning this proposed section is one relating to sematics more

than anything else: What is the difference between a "reason for an opinion" and "a matter upon which an opinion is based"? Is this not a distinction without a difference?

Section 1270.2(b). Is it envisioned that such a preliminary inquiry be effected in, or out of, the presence of the jury? If it is a matter of judicial discretion, should not the section clearly state this?

Section 1270.4. I concur with the intended purpose of this section; however, feel that by specifically listing two areas for the exercise of judicial discretion for accelerating condemnation proceedings, a conservative court may consider they have lost its discretion in other areas under the old maxim that the expression of one thing acts to the exclusion of all others. I would suggest that the commencement of Section 1270.4 be modified to indicate that the "Court ...may prescribe reasonable limitations on all phases of the trial proceeding, including..."

Section 1270.6. I believe this section is well conceived and drafted. The only observation I would have would relate to the author's comment on page 13 where he indicates that the "defendant in an Eminent Domain action is not permitted to impeach or rebut evidence as to the character of the improvement proposed to be constructed." My comments relative to Section 1270 above apply equally to this statement.

Section 1270.8. I approve of the principle underlying this section, however, I feel that there will be some confusion in applying the two-fold rule of "relevancy" and "matters which a willing buyer and seller would consider". I can foresee the "relevancy" test being relegated to insignificance under the analysis that anything that a knowing buyer and seller might consider, would be "relevant" and conversely, if the knowing buyer and seller would not consider the matter at hand, then that matter is not "relevant". In other words, to what extent does the term "relevance", and its requirement, assist the court and the parties in an Eminent Domain action? Unless "relevant" would be defined as something other than what a knowing buyer and seller would consider, then the term is meaningless in this context. The lists set forth in Sections 1271 and 1272.2 and in Section 1272.4, do not clarify this, for these too are qualified by the undefined term "when relevant".

Section 1271. I agree with the import of this Section, but feel that it is possibly too limited; it relates solely to a "sale or contract to sell and purchase" the subject property or some portion thereof. I believe that this should be broadened to include any transaction that relates to the property or its valuation as, for example, to include leases and listings by the owner. Possibly listings by the owner would be otherwise admissible as an admission against interest, but leases would have particular significance rela-

tive to commercial properties and the capitalization of rental income.

Section 1271.4. This section seems to remedy a part of the criticism I had relative to Section 1271. I believe, however, that this section should be enlarged to include the lease of comparable properties where pertinent and would assist in determining a fair rental value. I approve of the permissive consideration of percentage lease arrangements, particularly in light of the fact that such leases are most common in the commercial field today.

Section 1271.8. The subject of this proposed section is an extremely complex one and I believe by and large the proposed section is well conceived. Certain questions come to my mind, however, relative to the phraseology of this section, as, for example, in the typical condemnation action where a capitalization approach is used, that approach is predicated upon the "fair rental value of the premises in question". Would the term "reasonable rental value" lead to confusion; is it something different than fair rental value, or is it the same? Possibly some definition of the term "reasonable net rental value" would be in order here.

The language in Section (b)(1) is somewhat confusing. If this section is intended to permit a witness to present evidence of assumed rental from hypothetical improvements under the guise of showing the highest and best use of the property in question, then the effect will be to permit

presentation of this type of evidence at any time as a practical matter, regardless of the limiting language in the section that such evidence would not be admissible for any purpose if comparable sales were to be introduced by or on behalf of the same party. I can see very little justification for permitting the capitalization of income from hypothetical improvements to support a contention on highest use. I would favor the removal of the clause "other than showing the highest and best use of the property or property interest" and restrict the instances where such a type of evidence can be presented to those where the party claims that there are no comparable sales or where it is introduced as a rebuttal to such a contention.

I believe that this section will have a greater significance to the practitioner than the author of the comment contemplates. Contrary to his contention that it is a "very unusual case" where the party claims there are no comparable sales, I have experienced a number of condemnation proceedings where that very claim was made and hypothetical improvements were then erected and hypothetical incomes then computed for the property with a land residual approach then adopted to establish the value of the bare land. The author, on page 27, indicates that "with the very stringent limitations it provides...Section 1271.8 provides a desirable certainty that does not now exist." Permitting the introduction of evidence of hypothetical income from hypothetical improvements under the guise of establishing highest use does not

constitute a "stringent limitation"; quite the contrary, it would open the door to the introduction of this type of evidence at any time, even though comparable sales are acknowledged to exist and are otherwise introduced by the party seeking to introduce the "hypothetical" evidence.

Section 1272. This section uses the two terms "replacing" and "reproducing" without distinguishing them. Typically, these terms have different meanings; "reproduce" signifies the creation of an identical structure, board for board and nail for nail. "Replace" signifies the creation of a functional equivalent. It is the matter of replacement cost that usually is of permanent significance in arriving at an indicated value of improvements. (Reference - Condemnation Appraisal Handbook; Schmutz - Rams., 1963 Ed., pub. by Prentice Hall, p. 51 et seq.). (See, also, California Condemnation Practice, Continuing Education of the Bar, §2.22, p. 34).

Section 1272.4. In my opinion, this section presents the greatest defect, and most objectionable portion of the proposed legislation.

Subsection (a). I believe very strongly that sales to condemning agencies should not be deemed inadmissible in court solely because of their involving a public authority as purchaser. I believe that a sale to any condemning agency should be admissible or inadmissible based upon the same

criteria used to determine the comparability of any other sale. Public agencies are certainly "knowing buyers", and almost without exception rely upon an appraisal, whether staff or independent, in making a purchase. Likewise, I would hazzard the guess that all public agencies claim to act fairly and uniformly in their dealings with the owners from whom property is sought. Similarly, I do not feel that any public agency would endorse a proposition to the effect that owners with whom a settlement is negotiated should receive a premium, or something more than fair market value, while those owners who resort to a condemnation trial should receive something less.

The typical argument holds that a sale to a condemning agency involves a risk that the agency acquired the property at less than fair market value by reason of the agency's statue, financial position and the threat of condemnation. Certainly, such might be the case in any given situation, however, is it sound to assume this of every negotiated public acquisition?

As a practical matter, where a public authority acquires a piece of property by negotiated acquisition, the price that it paid could be one of three things: (1) at market value, (2) in excess of market value, or (3) less than market value. Obviously, if the consideration in fact represents fair market value, then there would and should be no objection by anyone with the use of this sale as evidence of value. (By

way of passing, I would estimate that all public authorities who acquire property through negotiated acquisition without exception, claim that such acquisitions reflect fair market value and are not depressed or inflated in amount). If the price paid by the condemnor for the negotiated acquisition of the sale was too low, then as a practical matter, the condemnee would not seek to introduce the sale; rather, it would be the condemnor seeking to introduce the sale to support its position. In this situation, the condemnee would be able to examine into the nature of the transaction between the public body and the seller, and even bring in evidence of the duress or compulsion that prompted a deflated price. This is not a difficult burden and I would assume that the court would permit reasonable inferences to be made from even limited evidence of compulsion. This does not represent, in my mind, a serious threat to a condemnee.

On the other hand, if the price that the condemning authority is alleged to have paid for the comparable property was too high, then clearly, the condemnor in the action at hand would not introduce the sale, rather, the condemnee might seek to introduce it. It is, however, anomalous to anticipate a payment that is "too high", for such implies any one, or combination, of the following: (1) that the owner is in the position to force the condemnor to pay more than the fair market value, or (2) that persons who settle--that is, effect a negotiated sale to a condemning authority--

should receive a bonus or more than one who litigates, or (3) that the condemnor in the negotiated acquisition made a mistake, or (4) it might be claimed that the condemning authority was not a "knowing purchaser" when it acquired the property which is the subject of the comparable sale, and as a result thereof paid more than fair market value. Except for the argument that the condemnor paid too much by mistake, the other arguments are without merit and in most instances specious at best.

All public authorities, I believe, without exception, claim that their negotiated acquisitions are predicated upon the fair market value concept and that the determination of fair market value is the same, regardless of whether a given parcel of property is acquired by negotiations or acquired by condemnation. I feel very strongly that sales to condemning authorities should be on the same footing with any other sale between private parties.

Section 1272.4. The exclusions of offers and listings except as an admission against interest is also ill advised. The bona fides of an offer of listing are in no wise different than the bona fides of a negotiated transaction, excepting that in a sale situation, one must look into the bona fides of two parties, whereas, in the offer or listing situation, it is the bona fides of a single party that must be investigated. I acknowledge that the court will have to exercise close supervision over proffered evidence relating to offers and listings. However, there can be no denying the

fact that a well-informed and knowledgeable property owner or prospective purchaser, making an offer to sell or to buy an acknowledged comparable piece of property, (and the results that they obtained from such an offer or listing), would be of some significance in attempting to ascertain the fair market value of the subject properties. It is acknowledged that such evidence should not be "direct evidence of value", any more than the evidence of any particular comparable sale is "direct evidence". However, information on bona fide offers, listings and the like, should be admissible on direct evidence as reasons for the expert's opinion, just as sales of comparable properties would be admissible.

Subsection (e) does not appear to be helpful, for it fails to attempt to describe what is a "non-compensable item of value, damage or injury". The other subsections of this section set forth matters which are inadmissible in evidence and this subsection really says that "non-compensable items are inadmissible". The reverse of this is equally true.

Subsection (f) appears to be questionable for in the capitalization approach of valuation, I believe, it is generally accepted practice for the appraiser to use capitalized income of comparable properties which have not sold as a check upon the indicated risk rates, depreciation rates and capitalized value of the subject property.

The "comments" at the end of this proposed section are subject to argument. Without going into excessive detail, I believe that sales to condemning agencies may or

may not be "fair" just as any other sale may or may not be fair; that such merely goes to the weight of the evidence; that permitting the opposing party to investigate the details of the transaction and present these details to the court or jury will afford him sufficient protection; that this procedure would not cause confusion or "lost time"; and no more collateral issues are developed here than with a sale not involving a public body. In essence, I feel that a condemnee has little to fear from a "below market value" sale to a public agency, and that the blanket exclusion of all sales to public agencies would eliminate a broad and oftentimes very helpful area of potential evidence.

I will acknowledge, however, that "partial" acquisitions by public agencies, that is, the acquisition of a portion of an entire property, would be of limited worth as a comparable sale, when attempting to value an entire property <u>unless</u> the specifics of "take" and "severance" were separately negotiated by the parties or otherwise clearly delineated in the documentation of the transaction. This possible objection does not justify exclusion of all public acquisitions for many are total acquisitions, not involving severance damages.

<u>Section 1273.</u> I disagree with the proposition that <u>People v. Forrester,</u> 58 Cal. 2, 257, should be reversed in the matter of admissibility of statements of fact made during negotiations. Certainly, negotiations leading to

settlement should be encouraged, and no one can deny the desirability of the public policy favoring the same. However, statements of fact that are relevant and material to a case, and not constituting concessions for the sake of argument during negotiations should be admissible in a condemnation proceeding, whether they are the product of the appraiser's investigation or eminate from the condemnor as statements of intended purpose, construction design, or the like. I would exclude the clause "...including any conduct or statements made in negotiations thereof..."

EXHIBIT XVIII

OFFICE OF
CITY ATTORNEY
CITY HALL
LOS ANGELES 12, CALIFORNIA

ROGER ARNEBERGH
CITY ATTORNEY

June 19, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Re: Proposed Legislation Respecting Proceedings in Eminent Domain and Inverse Condemnation - Proposed Section 1272.4(a) CCP

Gentlemen:

In the report of the California Law Revision Commission of January 19, 1964, entitled, "Recommendation Relating to Condemnation Law and Procedure Respecting Proceedings in Eminent Domain and Inverse Condemnation" is contained a proposed amendment to the Code of Civil Procedure, being Section 1272, Subdivision 4(a). The undersigned is opposed to the proposed legislation for the following reasons:

The above section makes the following matter inadmissible as evidence and declares it not a proper basis for an opinion as to the value of property.

(a) "The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was made by a public entity for a public use for which the property might have been taken by that entity by eminent domain."

Proposed Section 1272.4(a) is based on the false assumption that the sale to a person having the power of eminent domain does not and cannot involve a willing buyer and a willing seller. In theory, the condemner is obligated to pay and should be willing to pay condemnee the fair market

AES	
AC	
AA	

value for the property taken or damaged. The condemner causes a fair market value appraisal to be made and in all fairness should offer the condemnee that amount for the property taken or damaged. At this point, costs, risks, and delays of litigation have not been incurred, and therefore they cannot be considered as factors which affect the ultimate price. If the owner or condemnee accepts the amount of the condemner's offer and there are no factors present to indicate that the price offered and accepted is not voluntary, or that it does not represent a reasonable index of value as required by the law as it now stands, the condemner should not be heard to complain if the sale is admitted into evidence.

If the condemner has been required to pay condemnee a price which is and which he considers to be in excess of the market value, then the sale is not one where there is a willing purchaser and is not a reasonable index of value. Before the evidence could be introduced, the condemner would be given an opportunity to show that there was coercion present and that the sale is not a reasonable index of value.

On the other hand, if the condemnee has been forced to accept the condemner's offer under circumstances which indicate that he was subject to coercion and that the sale price was, in fact, less than the market value and was not sufficiently voluntary to be a reasonable index of value, the party offering the sale into evidence will not be able to make the requisite showing to permit its admission. A condemnee in a subsequent action is unlikely to offer such a sale as a comparable sale if the price is low and if such condition exists the condemnee will be unable to make the requisite showing of lack of coercion and that the price paid was sufficiently voluntary to be a reasonable index of value.

Under the law as it now stands, as established by County of Los Angeles v. Faus, 48 Cal. 2d 672, p. 676, et seq., which has been followed by People ex rel. Dept. of Public Works v. Murata, 161 Cal. App. 2d 369; People ex rel. Dept. of Public Works v. University Hill Foundation, 188 Cal. App. 2d 327; People ex rel. Dept. of Public Works v. City of Los Angeles, 220 Cal. App. 2d 353, evidence of the prices paid for similar property in the vicinity including prices paid by the condemner is admissible, but wide discretion must be granted the trial judge in determining the admissibility of evidence of other sales; that the laying of appropriate foundations should be

required to keep admission of such evidence within safeguarding limits and the evidence of the price paid by a condemner should be admitted as evidence of value only after the trial judge has been satisfied that the price paid was sufficiently voluntary to be a reasonable index of value. The safeguards imposed under existing case law are amply sufficient to assure that sales to entities having the power of eminent domain, will only be admitted when they do in fact represent a reasonable index of value.

The absolute prohibition of sales to any condemner is contrary to the present trend of law of eminent domain which is to admit into evidence any matter which will tend to actually establish the value of the proposed taking. In the past, certain condemning bodies have been able to withhold facts from the judge or jury which, if admitted into evidence, would establish the true value of the properties taken or damaged. By exercising command control over their appraisers and thus withholding evidence, the true picture never is exposed.

In 1961 the State Legislature passed Section 1265, CCP, which provides as follows:

> "Whenever a public agency acquires real property by eminent domain, purchase, or exchange, the purchase price or other consideration paid by such agency shall be public information made available upon request from the agency concerned."

This section was made necessary because certain agencies refused to divulge any information concerning prices paid other condemnees. Thus, the condemner was able to take inconsistent positions with respect to value of properties taken and no way was open to condemnee of comparable properties to show the inconsistencies.

For example, in the case of People ex rel. Dept. of Public Works v. City of Los Angeles, 220 A.C.A. 353 (1963) the State Highway Department acquired for freeway purposes, among other things, 10.0589 acres of two parcels totalling 17.3959 acres owned by The City of Los Angeles and located in the City of Burbank which was zoned M-1. Directly across the street was a tract of land owned by Walt Disney Productions

which was also in the City of Burbank and zoned M-1. The State Highway Department acquired for freeway purposes by purchase Parcels 2A and 2B which contained 93,136 square feet and 1800 square feet, respectively. For Parcel 2A, it paid $1.28 per square foot, and for Parcel 2B it paid $1.25 per square foot. The appraiser employed by Los Angeles made repeated requests to the State to obtain the price paid and sales data concerning the Disney purchase by the State Highway Department, but were given the run around by the officials of the State Highway Department and were never furnished the sales data. (Note: This was prior to the effective date of Section 1265, CCP.)

A Subpoena Duces Tecum was secured requiring the production in Court of the State Highway Department's files concerning said sale, and the District Right of Way Agent for the State Division of Highways in the Los Angeles office was subpoened as a witness. Attorneys for the State Highway Department objected to his testifying as to whether the Disney sale to the State was under any compulsion and the objection was sustained by the trial Court. The State's attorneys failed to produce the records of the sale which had been subpoened as required by the subpoena and only produced them when forced to do so in the middle of the testimony of the State's negotiating agent. They further contended that the sale might have been under compulsion and therefore was inadmissible.

The Appellate Court found in People ex rel. Dept. of Public Works v. City of Los Angeles, supra, pp. 366, 367, that Parcels 2A and 2B, which were a part of the property being condemned, were sold by Disney to plaintiff for the exact amount of the State's appraisal, $142,075.00. There was evidence that the State was satisfied with the deal and so was the Disney corporation as shown by statements of its attorney who negotiated the deal. There was no evidence of pressure brought by either side or of ultimate dissatisfaction with the deal.

The State Highway Department was successful in keeping the Disney sale out of evidence, but the District Court held that in view of the showing made in the evidence that the Disney sale was sufficiently voluntary to afford a reasonable index of value, the proffered evidence of the

price paid to Walt Disney Productions for its land should have been admitted.

One of the results of the exclusion of the Disney sale at the trial of the action was that because of erroneous rulings of the trial Court, the State Highway Department was permitted to place a valuation witness upon the stand who testified to 40¢ per square foot, or less, for the M-1 land taken from The City of Los Angeles.

Had the jury been permitted to know that the market value established and paid by the State Highway Department for the Disney property was more than three times the amount testified to by the State valuation witnesses, the award allowed by the jury would, no doubt, have been materially increased.

The condemnees should be protected against the practice of some condemning agencies to sponsor a valuation witness who testifies to much less than market value in the hope that the jury will be deceived and render a compromise verdict which is, in fact, less than the market value, or the value which the condemner has willingly, without coercion, offered and paid for similar parcels.

Proposed Section 1272.4(a), CCP, specifically excludes from evidence, in addition to the price paid by the condemner, the terms and conditions of the acquisition. An example of the type of abuse which would be fostered by said section is found in the case of People ex rel. Dept. of Public Works v. Forster, 58 Cal. 2d 257. The decision in that case shows that at the first trial of the action in 1959, the jury awarded for the land taken, $77,240.80, or $800.00 per acre, and $25,660.00 for severance damages.

Prior to the first trial in 1959, the State Highway Department allegedly based on the market value determined the property was worth and offered the owner $218,000.00 for 96.551 acres, or approximately $2,260.00 per acre. At the first trial in 1959, skillfully using the element of surprise and relying upon the fact that the offer of $218,000. was an offer to compromise and not admissible into evidence, the State produced a valuation witness who testified to considerably less than the offer. As a result the jury awarded only $800.00 per acre which was about a third of the State's market value offer.

At the second trial of the action, the trial Court permitted the 1958 offer of $218,000.00 to go into evidence as an admission that the offer represented market value. The owner's valuation witness testified to $3,500.00 per acre, or a total of $337,750.00, and severance damages at $113,450. The defendant owner testified to $4,000.00 to $4,500.00, or a total of $400,000.00, and severance damages of $100,000.

At the second trial, the valuation witnesses for condemner testified respectively to $400.00 per acre, or a total of $38,620.00 and to approximately $455.00 per acre, or a total of $43,500.00 for the land taken.

An independent expert witness appointed by the Court valued the land at $2,750.00 per acre, or a total of $265,512.50, and placed severance damages at $49,300.

The jury at the second trial awarded $333,000.00, or approximately $3,450.00 per acre, and $30,000.00 severance damages which is more than eight times the condemner's valuation testimony and more than 4.3 times the award in the first trial.

Had the condemnee been prohibited from showing the admission of the State that the market value was many times the amount actually testified to by the State's valuation witnesses, the second trial might have resulted in the jury finding the same values as those found in the first trial. The condemnee would not get fair market value, but would be penalized because the law is so framed as to exclude evidence which would produce the truth. Skillful withholding of evidence should not be rewarded.

If proposed Section 1272.4(a), CCP, is passed by the Legislature, it would be possible for a condemner to pay one condemnee what is considered to be a fair price for a given property based upon its appraisal of market value, and another property owner a third or an eighth of such fair market price for properties which are so comparable as to be almost identical in value.

The law as it now stands has ample protection for the condemner who has in good faith "bought his peace" or has been coerced into paying more than the market value.

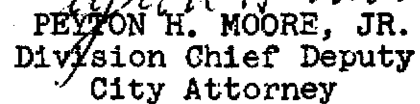
Proposed Section 1272.4(a), CCP, should not be used as a means of hiding gross inconsistencies in valuation of comparable properties which are being acquired by entities having the power of eminent domain.

It is recommended that proposed Section 1272.4(a) not be enacted into law.

Very truly yours,

ROGER ARNEBERGH
City Attorney

By



PEYTON H. MOORE, JR.
Division Chief Deputy
City Attorney

PHM:lmb

A. J. HILL 1881-1953
VINCENT MORGAN 1882-1946
BENJAMIN F. BLEDSOE 1874-1938
CHARLES P. McCARTHY 1881-1950
STANLEY S. BURRILL 1902-1957
WM. H. FARRER
C. M. GOULD
WILLIAM S. SCULLY
ROBERT NIBLEY
CARL A. STUTSMAN, JR.
MARK E. TRUE
WILLIAM C. FARRER
RAY L. JOHNSON, JR.
WILLIAM McD. MILLER
LEON S. ANGVIRE
FRANK D. MacDOWELL
JOHN N. McLAURIN
ALBERT J. DAY
VINCENT C. PAGE
EDWIN H. FRANZEN
M. B. JACKSON
A. J. CATHCART
STANLEY E. TOBIN
JOHN J. WILSON
RICHARD W. WALDEN
WILLIAM S. SCULLY, JR.
JACK R. WHITE
MALCOLM A. MISURACA
ALAN E. JOHNSON
MORGAN J. CALLAHAN
CECIL E. RICKS, JR.
J. DOUGLAS BROWNE

LAW OFFICES
HILL, FARRER & BURRILL
411 WEST FIFTH STREET
LOS ANGELES, CALIFORNIA 90013
CABLE ADDRESS "HIMOF" (BENTLEY'S CODE)
TELEPHONE 620-0460
(AREA CODE 213)

OSCAR A. MELLIN
ASSOCIATE COUNSEL IN PATENT CAUSES

JOHN J. COURTNEY
ASSOCIATE COUNSEL - WASHINGTON, D. C.
TELEPHONE 332-8030
(AREA CODE 202)

OUR FILE NO. ______

July 9, 1964

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford, California

Dear Mr. DeMoully:

This is with reference to your letter of March 5, 1964, concerning the proposed evidence statute for eminent domain proceedings. The following are my own personal comments concerning several sections of the proposed statutes.

I do not know if the Commission intends to expand and broaden the scope of permissible evidence under the hearsay exceptions pertaining to experts. If this is the intention, then some of my comments are not pertinent. Assuming, however, this is not the intention it seems that the pertinent proposed statutes dealing with this subject matter are subject to an interpretation which would permit hearsay evidence not presently admissible.

Section 1272.4 sets forth matters which are inadmissible evidence and are not a proper basis for a valuation opinion. Subdivision (d) thereof recites that "an opinion as to the value of any property . . . other than that being valued" as being inadmissible evidence and an improper basis for a valuation opinion. This provision by inference makes a hearsay opinion or statement of value of the subject property admissible evidence and a proper basis for a valuation opinion by the witness. My reasons for this possible interpretation are because this proposed section lists improper matters and no where do the proposed statutes prohibit a witness from (1) testifying that his opinion of value is based upon some other person's opinion of value, and (2) stating such opinion as a reason in support of the witness's valuation.

Another reason is based upon a reading of this subdivision with Sections 1270.2(a), 1270.6, 1270.8, and 1272.8(1), having in mind the following language contained in these statutes:

1. 1270.2(a) permits a valuation witness to state his reasons <u>and</u> the matter upon which it is based.

2. 1270.6 permits a valuation witness to state <u>the matter</u> upon which his opinion is based, whether or not <u>he has personal knowledge</u> thereof.

3. 1270.8 permits a valuation witness to base his opinion upon matters that would be considered open market transactions.

4. 1272.8(1) refers to "the opinion or statement of another person" for the purposes permitted in that statute.

The above terminology may be subject to an interpretation that the present concept of permissible hearsay evidence under C.C.P. 1872 is expanded. My reasons for this possible interpretation are that C.C.P. 1872 refers only to reasons for the opinion, whereas 1270.2(a) uses the conjunctive, "reasons for his opinion and the matter upon which it is based".

This indicates that reasons and the matter upon which an opinion is based are not the same, but something different. The use of the word "matter" could include statements of value opinions by persons other than the witness. Section 1270.8 permits the witness' valuation opinion to be based upon matters considered in the open market and valuation opinions are considered by purchasers and sellers in arriving at a price to be paid for property in the open market.

Also, the procedure set forth in 1272.8(1) seems to infer that a valuation witness on direct examination may state that his opinion is based upon an opinion of value expressed by someone else. Assuming that my interpretation is correct, subdivision (2) of 1272.8 affords little, if any, protection because it refers to this particular section only. As you

know, People vs. Alexander, 212 Cal.App.2d 84, at page 96, flatly states that the hearsay exception with reference to valuation testimony does not permit hearsay of the opinion of other persons as to value. This seems to exclude testimony of hearsay opinions of value of the property being condemned. However, it must be read in conjunction with the facts of the case which relate this statement only to an opinion of value of a comparable sale. Hope vs. Arrowhead and Puritas Water Inc., 174 Cal.App.2d 222, 230, properly states the rule that an expert's opinion cannot be predicated on an opinion of another, but that it is proper for an expert to express his own opinion based on facts testified to by another expert or on tests made by other experts.

The above arguments can be used for taking a position that hearsay statements other than hearsay valuation opinions may be admissible and proper factors upon which to base an opinion of value. As you know, People vs. Alexander, supra, page 95, states the rule of law with which these statutes treat. It states, "an expert may detail the facts upon which his conclusions or opinions are based, even though his knowledge is gained from inadmissible or inaccurate sources. (Citations omitted)"

This rule confines itself to detailing only facts obtained by or from persons other than the witness. Also, the basis of this doctrine with reference to comparable sales is one of practicality. The definition of the word "matter" may be broader than the definition of the word "fact" and encompass subjects and statements other than statements of fact. This broader definition is somewhat substantiated by Section 1270.8 which recites in part that the witness' opinion must be based upon matter considered in open market transactions.

The basis of the expert's opinion includes many things other than facts. The phrase "statement of another person" found in 1272.8(1) may broaden the hearsay concept concerning permissible hearsay evidence in condemnation cases. A possible result could be an interpretation which would permit the opinion witness to recite statements found in appraisal textbooks or magazines, statements other than statements

of fact found in articles dealing with real estate trends and activity in the area, and even statements other than statements of fact contained in another appraiser's appraisal of similar properties in the area. Such categories of evidence are inadmissible. (Furtado vs. Montebello Unified School District, 206 Cal.App.2d 72, 78, et seq.)

Again the use of the conjunctive in 1270.2(a) as contrasted with C.C.P. 1872 when read in conjunction with the other statutes, gives rise to an inference that such categories of hearsay evidence may be admissible. Although the condemnation cases which recite the rule concerning this matter (People vs. Alexander, supra, and others) permit testimony as to the details of comparable sales, there has been a diversity of rulings in the trial courts with reference to the admissibility of detailing other types of hearsay evidence, e.g. financial statements of real estate trends, real estate activity trend statements, bank deposits, postal receipts, and general Chamber of Commerce information.

Assuming a valuation witness can state that his opinion is based upon someone else's opinion of value of the subject property or is based on statements of another person and such opinion or statements are admissible, Section 1272.8(1) affords little protection unless extensive discovery is indulged in. A number of condemnation cases do not warrant the use of extensive discovery proceedings. In such instances the party faced with this type of testimony would be caught by surprise at the time of trial and the person who gave such extra-judicial opinion or statement may not be available to be summoned into court and cross-examined. At the very least, it would be necessary to interview the person making such extra-judicial statement or opinion before placing him on the witness stand. Also, subdivision (2) of this section should prohibit the admissibility of a "statement of another person" where otherwise inadmissible.

I have some difficulty with Section 1270.4, as it seems to me that before reasonable limitations can be prescribed, the court must first know the extent of the appraisal problems involved, and the entire concept of value of the property being condemned. Without such knowledge, the

limitations could be arbitrary and unduly restrict either party's presentation of their case. For example, where the property was purchased a few years prior to date of value, it may be vital to establish the trend of the real estate market or lack of any trend, in order to sustain the value opinion. Such cases necessitate the introduction into evidence of a great number of comparable sales. Also, certainly before a court can limit the direct examination on the matters upon which an opinion is based, the court first must have before it all of the elements, facts and factors upon which the opinion is based. It would seem to me that the subject matter of this statute could be dealt with best at pre-trial. For example, the number of sales and even the comparability or lack thereof could be better determined by a pre-trial hearing. Another example is that a motion to exclude sales or other matters considered by the appraiser could be made at the pre-trial stage. Also the policy of the Central Division, Los Angeles County Superior Court, requiring an exchange of appraisal--like for like--and a determination of issues other than the issue of compensation could well be utilized in the place and stead of such a statute. To set forth this type of statute in the field of condemnation alone, I believe would give undue emphasis to the matter, and the court presently has sufficient powers for the purpose of limiting evidence.

The provision in Section 1271.2 which permits comparable sales within a reasonable time after the date of valuation is an excellent provision, in view of the diversity of rulings in the trial courts. The other portions of this section seem to be a codification of the case law and its application in the trial courts. However, it may have an implication that before any sale can be comparable, it must have all of the elements of comparability set forth in the statute, and if not, it therefore is inadmissible. More often than not, the comparable sales do not have each and every element set forth in the statute.

With reference to Section 1273, I am in accord that offers to compromise or settle litigation are and should be inadmissible evidence. However, I cannot agree to making inadmissible admissions which are made during settlement

negotiations. The rule stated in People vs. Forster, 58 Cal.2d 257, under the facts and circumstances of that case seem to be fair. This case in my experience has not prevented complete candor in settlement proceedings between the parties in condemnation actions. Settlements have neither failed nor been hindered because of the rule in the Forster case.

Public agencies are required to pay just compensation. This term has been equated with fair market value, and in situations where the public agency has a value based upon a legitimate and proper appraisal, it seems that such evidence should be admissible. The admissibility of such evidence affords protection to the property owner in instances where the public agency disagrees with its appraiser, merely because in the public agency's opinion the opinion of value is too high, and not because the appraisal is based upon improper or illegal considerations.

Although offers to sell the property being condemned or listings of such property in the open market are admissible as admissions against the owner, it seems to me that if 1273 were to be enacted, then such offers or listings by the owner should be inadmissible. On many occasions, the offer to sell or listing by the owner in the open market does not represent the true value of the property, because of lack of knowledge thereof. The instances where such offers or listings are introduced into evidence arises only where there is a discrepancy between such and the expert appraiser's opinion of value. Many times such discrepancies are legitimate because of the owner's lack of knowledge of value when he listed his property for sale or because his circumstances required a sale at less than the proper fair market value. In simple language, what is sauce for the goose is sauce for the gander.

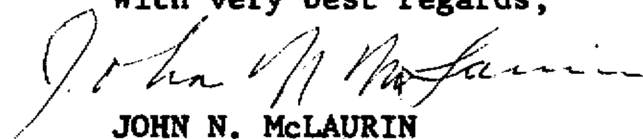
These are some of my personal comments concerning the proposed statutes for whatever they may be worth. If you feel them worthy of some consideration, I hope that they have not arrived too late.

If possible, I would appreciate your sending to me copies of the recommendations and studies relating to the uniform

rules of evidence. Please advise as to the cost and I will remit the same.

Hope to see you again in the near future.

With very best regards,



JOHN N. McLAURIN
OF
HILL, FARRER & BURRILL

JNM:oim

Memo 64-100

EXHIBIT XX

JOHN A. NEJEDLY
DISTRICT ATTORNEY
JOHN B. CLAUSEN
ASSISTANT DISTRICT ATTORNEY
GEORGE W. McCLURE
CHIEF CIVIL DEPUTY
DONALD R. WALKER
CHIEF CRIMINAL DEPUTY
INVESTIGATORS
DAVID COOK JR., CHIEF
JACK W. FRANCIS
JOSEPH J. HALASZ
CHARLES A. NYHRE
WILLIAM R. PRICE

OFFICE OF DISTRICT ATTORNEY

CONTRA COSTA COUNTY

HALL OF RECORDS, ROOM 512
P. O. BOX 670
MARTINEZ, CALIFORNIA, 94554
PHONE: 228-3000 (AREA CODE 415)

DEPUTIES:
PRENTICE K. BANCROFT
WILLIAM H. BARTLETT
ROBERT L. BOAGS
STANLEY K. DODSON
JOHN D. HATZENBUHLER
CHARLES L. HEMMINGS
WILLIAM R. HIGHAM
LARRY F. HOLDRICH
HAMMOND K. HOLT
SAMUEL H. MESNICK
LINDSAY M. MICKLES
WILLIAM A. O'MALLEY
VERNE H. PYNN
DOUGLAS M. QUINLAN
RALPH R. REIS
LYDIA L. SNYDER
DONALD R. WALKER
JOHN E. WALTZ
VICTOR J. WESTMAN

July 24, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Attn: John H. DeMoully
Executive Secretary

Re: Recommended Legislation on Condemnation
Law and Procedure

Gentlemen:

We agree with the tentative comments made in the forward that any rules of evidence and procedure adopted in the area of condemnation law should apply to matters of valuation in probate proceedings and to hearings before the Public Utilities Commission involving acquisition of utility properties by other governmental agencies. Consideration might also be given to applying the same standards of valuation to assessment practice covered by the Revenue and Taxation Code.

We have rather serious reservations as to the use of the word or words "matter", "other matter" and "subject matter" in various sections of the proposed legislation. These words are used in the following sections: 1270.2(b) at page 9, 1270.4(b) at page 11, 1270.6 at page 12, 1270.8 at page 14, 1272.3 at page 30, 1272.4 at page 30, 1272.6 at page 36, 1272.8 at page 37, 1273.2 at page 40. It appears that the word "matter" has too broad a meaning and would allow at least some appraisers to range too far afield in justifying their opinions and in many cases result in prolonging the trial by requiring examination into collateral matters not at issue in the proceeding. It would appear that the intent of the legislation is to require expert opinion to be based on facts and data relating to valuation and generally affecting the judgment of persons dealing with property in the market. It would be more precise to use the words "facts and data" rather than "matter" or at least to include a clause defining what the term "matter" means in relation to this particular statutory scheme.

EL	
AES	
AC	
AA	

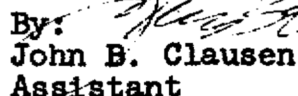
We believe that further consideration should be given to placing greater restrictions in Section 1271.8 on the use of projected or hypothetical improvements as a means of determining value by the capitalization of income approach. Most local zoning ordinances allow several kinds of uses in each zone either with or without the granting of a land use permit. There is a tendency on the part of appraisers, especially for property owners, to assume as the highest and best use of the property any authorized use (whether or not a use permit may be required) which allows the most concentrated development of the property or which hypothetically produces the greatest income, without any real demonstration of market demand for the hypothetical use and without any real showing that such use could be made at a profit. The capitalization approach is used most times not as an independent means of valuing property but as a means of justifying the opinion of the appraiser based primarily on certain comparable sales data. A suggested control in this area might consist of requiring the trial court to initially determine whether or not comparable sales data is available to serve as a basis of valuation of property and if the court so determines then either prohibit or limit the use of capitalization of income approach.

An area not covered by the commission's proposed rules in which opinion is based on opinion is in the area of "reasonable probability of re-zoning" (State v. Dunn, (1956) 46 C. 2d 639). The courts appear to be more liberal in this area than appears necessary to assure to the property owner payment of the fair market value for his property. The courts have allowed appraisers to base their opinion as to value, at least to some extent, on the reasonable probability of re-zoning being granted on the subject property. It appears that some standard should be established to determine what may be reasonably probable. The least that should be required is a showing that the claimed zoning classification is authorized on a master plan or that a requested re-zoning has at least cleared the first hurdle in its consideration, that is, approval by the local planning commission, before an appraiser is allowed to consider such re-zoning as reasonably probable. As a matter of fact a great majority of properties which are involved in sales of this nature are made on the basis of options to purchase subject to a particular zoning classification being obtained. The value of the property is then established not on any reasonable probability but on actual approval.

The sales contract is only effective when the zoning is actually obtained. It appears that this area may be subject to abuse and might be considered as an area worthy of further exploration.

Very truly yours,

John A. Nejedly
District Attorney

By: 
John B. Clausen
Assistant

JBC:dq
cc: Spencer Williams, County Counsel
Santa Clara County

Memo 64-100 Exhibit XXI

BERTRAM McLEES, JR.
COUNTY COUNSEL

County of San Diego

OFFICE OF
COUNTY COUNSEL

302 CIVIC CENTER
SAN DIEGO, CALIFORNIA 92101

ROBERT G. BERREY
ASSISTANT COUNTY COUNSEL

DEPUTIES
DUANE J. CARNES
DONALD L. CLARK
DAVID B. WALKER
JOSEPH KASE, JR.
FREDRIC G. DUNN
JAMES E. MILLER
RUSSELL W. WALKER
LAWRENCE KAPILOFF
STANLEY FRIEDMAN
FRANK L. ASARO

July 29, 1964

Professor John R. McDonough, Jr., Chairman
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Attn: John H. DeMoully
Executive Secretary

Dear Mr. DeMoully:

Re: California Law Revision Commission Tentative Recommendations for Legislation Pertaining to an Evaluation of Property

In reply to your request of March 5, 1964, we have undertaken a detailed study of the California Law Revision Commission tentative Recommendations relating to Condemnation Law and Procedure, Number 5--Opinion Testimony on Value, Damages, and Benefits (January 1965) and state as follows:

I

Question: WHETHER ANY LEGISLATION IS NEEDED ON THIS SUBJECT.

Our answer to Question One may be summarized as follows:

The legislative process is not needed to solve evidential problems arising in eminent domain cases.

It is improbable that a legislative committee could give sufficient consideration to the selection of the rules of evidence which will adequately cover the vast majority of condemnation proceedings, and at the same time provide workable rules for the courts, attorneys and appraisers. Enacting rules of appraisership in an eminent domain case would be tantamount to prescribing the rules of practice of the medical profession. It does not appear that we have reached the state of technological proficiency where the judgment of man concerning the value of a piece of real estate can be delineated with the specificity which the recommendations purport to effectuate.

The desirability of a set of legislatively promulgated evidential rules in condemnation cases is questionable. Section 1270.4 would provide that the court, in the exercise of its sound discretion, may limit the extent to which a witness may state on direct examination "other matter upon which his opinion is based." Rules such as this one which would grant a large escape hatch should be avoided. An amplified statement of this rule was succinctly put by Judge Friedman in Sacramento, Etc. Drainage Dist. ex rel. State Reclamation Bd. v. Reed, 215 Cal.App.2d 60, 29 Cal.Rptr. 847 (1963):

> "The ruling of the trial court permitted indirect use, in the formulation of value testimony, of factors not directly permitted. The theory, in

> apparent reliance on Pacific Gas & Elec. Co. v. Hufford, supra, was that a valuation witness may state as a 'reason' for his opinion any detrimental factor which the witness might choose to attribute to a prospective purchaser, so long as the detriment in some way arises from the project in suit.
>
> "The Hufford case warrants no such approach. The approach ignores the fact that the 'prospective purchaser' is an abstraction, a ventriloquist's dummy who speaks only with the voice of the flesh-and-blood valuation witness. In feeding words to the fictional buyer, the witness--be he appraiser or landowner--is confined only by his own imagination and by such narrower limits as the law may impose on him. A condemnation trial is a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner. (See Kratovil and Harrison, Eminent Domain--Policy and Concept, 42 Cal.L.Rev. 596, 626.) There is a limit to imaginative claims even when described in terms of a prospective buyer's mental reactions. To say that only the witness' valuation opinion has probative value, that his 'reasons' have none, ignores reality. His reasons may influence the verdict more than his figures. To say that all objections to his reasons go to weight, not admissibility, is to minimize judicial responsibility for limiting the permissible arena in condemnation trials. The responsibility for defining the extent of compensable rights is that of the courts. (People ex rel. Dept. of Public Works v. Symons, supra, 54 Cal.2d at p. 861; People v. Ricciardi, supra, 23 Cal.2d at p. 396.)" (Id. at 69.)

As a guideline, the above statement taken in context with the facts of the case is more meaningful than the vague standard of judicial discretion contained in Section 1270.4.

The Commission purports to chart a course sufficiently flexible to encompass a subject as complex as society's relation to its property and at the same time provide a ready

index to the evidential rules in eminent domain actions. If definitive rules of evidence are to be enacted, then the chore will approximate that undertaken by Nichols, The Law of Eminent Domain (3rd ed. Sackman and Van Brunt, 1950). We doubt that the Legislature or the Commission wishes to undertake legislation on that scale. The "index" approach is preferable since it avoids the fixity of rules relating to a constantly evolving subject matter. However, an index is a research tool which should not be utilized as a vehicle for definitive treatment of the ultimate evidential problem. For example, Section 1271.8 relating to the use of assumed rentals on hypothetical improvements violates the index concept in that it singles out a specific type of evidence as supportive of the capitalization approach (lease income from a percentage of gross sales).

We suggest that the Commission not undertake to propose any legislation stating the evidential rules in eminent domain proceedings. We further suggest that if any legislation is proposed, that it be of the "index" type rather than of the "formulary" type.

II

Question: WHETHER THE LEGISLATION CONTAINED IN THE TENTATIVE RECOMMENDATION IS SATISFACTORY OR WHAT SPECIFIC CHANGES SHOULD BE MADE IN IT?

Our answer may be summarized as follows:

To a large extent, the tentative recommendations would codify some of the horn-book law appertaining to real estate valuation. However, the recommended legislation would change the law relating to the use of business profits as evidence of value. The capitalization of income approach, while proper under some circumstances, is greatly expanded by the recommendations to include speculative evidence and irresponsible valuation procedures.

While we reserve our general objections to any legislation in the field, we set forth the following specific changes using strike out type to indicate the deletions and underscoring to indicate the additions. We have omitted reference to sections with which we are in general accord.

1268.2. "Value of Property" defined.

As used in this title, "value of property" means the amount of "just compensation" to be ascertained under Section 14 of Article I of the State Constitution and ~~the amount of value, damage,~~

~~and-benefits-to-be-ascertained-under-subdivisions 1,-2,-3,-and-4-of-Section-1248,~~ is that sum of money which the property sought to be valued would bring as of the date of valuation after the same has been exposed for a reasonable length of time, if sold on the open market in the community wherein it is situated by a willing seller, not forced to sell, to a willing and able buyer, not forced to buy, who have had a reasonable opportunity to investigate the property, its neighborhood, the community and the general market conditions, and who have full knowledge of all the uses and purposes to which the property is reasonably adapted and for which it is legally available.

COMMENT

Cases such as Long Beach City H.S. Dist. v. Stewart, 30 Cal. 2d 763, 185 P.2d 585 (1947); Sacramento Etc. R.R. Co. v. Heilbron, 156 Cal. 408, 104 Pac. 979 (1909); County of Los Angeles v. Faus, *supra*; and Metropolitan Water Dist. v. Adams, 16 Cal.2d 676, 107 P.2d 618 (1940) support the above definition of fair market value.

The term "value of property" is not the equivalent of the terms "damages" and "benefits". Additional sections defining "damages" and "benefits" should be considered.

Section 1270.2. Statement of basis of opinion on direct examination.

1270.2. (a) Subject to Section 1270.4, a witness testifying in terms of opinion may state on direct examination the reasons for his opinion and the matter upon which it is based~~,~~ provided on direct examination such witness may not testify as to any matter which is irrelevant, remote, speculative or noncompensable.

(b) [No change.]

COMMENT

The revision suggested above will retain the good aspects of both the pre-*Faus* rule and the decision of the *Faus* case.

Section 1270.4. Judge's power to limit direct examination.

1270.4. In order to avoid unnecessary delay in the determination of the issues at the trial, the court, in the exercise of its sound discretion, may prescribe reasonable limitations on:

(a) The number of comparable sales or contracts, as defined in Section 1271.2, to which a witness may testify on direct examination by limiting the area or time within which the sales or contracts shall have occurred. ~~and by prescribing reasonable limitations on the number of such comparable sales and contracts.~~

(b) [No change.]

COMMENT

Limiting the number of comparable sales without relating the limitation to elements of comparability raises some problems which the section does not resolve. First, in order to know how many sales should be allowed, the judge would have to review in considerable detail the total range of comparable sales. This approach raises the procedural problem of how and when this "court trial of noncomparability" may be had. Should this hearing be had during the trial on the special issues, before the jury is empaneled, or at some point during the jury phase of the case? Secondly, by what standard is the judge to determine which party should be allowed how many sales?

Certainly it is the duty of all counsel and the judge to

eliminate unnecessary delay. We question, however, whether there will be a net savings in judicial time if the judge exercises his discretion after he has reviewed the evidence of all sales.

Some cases by their nature require a great many comparable sales. For instance, take the case involving five different parcels. One parcel, a total taking of about an acre in size, has a present use of floriculture, but has a highest and best use for division into two building sites. Parcel 2, a total take, consists of a three acre parcel with a very old and greatly depreciated house on it. The highest and best use of this property is to combine with the adjoining land for single family residential subdivision use. The third parcel involves a rather extensive avocado grove with a large single family residence and several out-buildings on it. The part taken includes some of the minor improvements and contains a portion with quite severe topographical and drainage problems. The highest and best use of this parcel is to hold for future residential subdivision purposes, either alone, or in conjunction with other property. The fourth parcel consists of a narrow and very deep parcel, the rear portion containing an avocado grove, and the remainder with a modest family-sized residence. The fifth parcel contains about 1 1/2 acres. Portions of it are devoted to agricultural

uses. The condemnation takes the garage from the residence and severs several leech lines. This property is in an unincorporated area of the county where ownerships are held in very irregularly sized parcels. Five of the parcels, as a whole property, require at least fifteen sales, and the three remaining properties each require additional sets of comparable sales to show their after value. The plaintiff has approximately 30 comparable sales and the defendant has 10 additional sales. The mere limitation of the number of sales in the absence of a full trial on the issue of comparability would not subserve justice in this case.

In any given case involving several properties, the question often arises as to the manner in which the parcels will be tried, whether separately or together. The decision as to separation or consolidation must be made before the action reaches the trial department. In making this decision, should the law and motion judge review the comparability of sales for the purpose of limiting the number?

The problem of time consumption in eminent domain actions is not so serious as to require legislative solution. The courts have ample power to control judicial business. Sacramento & San Joaquin Drainage Dist. v. Reed, 215 Cal.App.2d 60, 29 Cal.Rptr. 847 (1963); County of Los Angeles v. Bean, 176 Cal.App.2d 521, 527, 1 Cal.Rptr. 464 (1959).

Section 1270.6. Purpose of stating matter upon which opinion is based; impeachment and rebuttal.

1270.6. A witness may state the matter upon which his opinion is based, whether or not he has personal knowledge thereof, for the limited purpose of showing the basis for his opinion; and his statement of such matter is subject to impeachment and rebuttal. The judge may require the witness, as part of the foundation for any hearsay statement, to identify the sources of information upon which such statements are based.

COMMENT

By what rationalization can one justify the admission of hearsay statements "as a basis for opinion" and yet not admit the same for purposes of showing the fact to be true? This problem was aptly commented upon in the study of Hill, Farrer and Burrill, California Law Revision Commission Recommendation and Study Relating to Evidence in Eminent Domain Proceedings, October 1960.

> "First, the practice and pattern of labeling particular evidence as going to credibility rather than to the truth of the fact is well known and entrenched in many areas of the law. But in condemnation trials, at least, such a practice is conducive to confusion and devoid of meaningful distinction to almost any jury. It complicates rather than clarifies the issues." (*Id.* at A-52)

It would appear that the rule which creates this unreal situation results from an attempt of the court to limit the jury's reliance upon evidence which is of secondary worth. To a large extent the trial judge can achieve the objective of weeding out the unreliable hearsay from the reliable by

requiring the witness to state as a foundation, where he got the information. If the appraiser is content to rely upon tertiary hearsay reports, vague statements of neighbors, or perhaps the revenue stamps on the deed, then hearsay testimony probably should be admitted only for the limited purpose of supporting his opinion.

Section 1270.8. Opinion must be based upon matter that would be considered in open market transaction.

1270.8. The opinion of a witness as to the value of the property must be based upon matter that is relevant in the particular case to the determination of the value of the property and which a willing purchaser and a willing seller, dealing with each other in the open market and with a full knowledge of all the uses and purposes for which the property is reasonably adaptable and available, would take into consideration and substantially rely upon in determining as of the date of valuation the price at which to purchase and sell the property or property interest being valued.

COMMENT

Most appraisers will testify quite readily that they took everything into consideration which was disclosed as a result of their investigation. It is one thing to consider a fact and it is another thing to rely upon it. For example, an appraiser might consider that a prospective purchaser would realize that there is a freeway next to the subject property and that someday a car may come crashing into the house. This consideration

certainly has no status in a condemnation trial which is a sober inquiry into the value of the real property not based upon some unforeseen threat to which most members of the public are equally exposed.

Additionally, the hypothetical sale should be related to the date of valuation. This section would not be necessary if a definitional section such as we propose under Section 1268.2 is adopted.

Section 1271. Sales of subject property.

> 1271. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase which included the property or property interest being valued, or any part thereof, if the sale or contract was freely made in good faith within a reasonable time before ~~or after~~ the date of valuation~~,~~ and made without knowledge of the plan or general design of the plaintiff which included the property being valued.

COMMENT

The first objection to the proposed section is that it would allow into evidence sales which were made in view of and with knowledge of the plan of the condemnor. Such sales have been universally excluded and should continue to be excluded, notwithstanding that they are alleged to have been made in "good faith."

County of Los Angeles v. Hoe, 138 Cal.App.2d 74, 78, 291 P.2d 98 (1955); San Diego Land Etc. v. Neale, 78 Cal. 63, 75, 20 Pac. 372 (1888), on subsequent appeal, 88 Cal. 50, 62, 25 Pac. 977 (1891); United States v. Miller, 317 U.S. 369 (1942).

Secondly, we suggest that there are some trial departments which would probably allow the sale in on a superficial showing of good faith; thus the condemnor would be left to dredge up facts evidencing bad faith. For a condemnor to prove a condemnee was not in good faith when he bought the property would be like proving that a couple were not in love when they got married. "Good faith" are weasel words, and their importation into the law should be avoided.

The comment suggests that a sale of the remainder after the date of valuation might be relevant to reduction of severance damages. If the sword would cut in the direction of reduction of severance damages, it would logically cut in the direction to increase severance damages.

An additional objection would be that an "after sale" of this kind would put the condemnee in a position to drive down a one-way street; if the sale aided his case he would disclose it, but if it was harmful, he would not disclose it. Since the facts are entirely within his preregative to disclose, such a rule would be grossly misapplied to the prejudice of the condemnor. Minute by minute discovery until the trial date is no

solution to this problem.

Section 1271.2. Comparable sales.

> 1271.2. When relevant to the determination of the value of the property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase comparable property if the sale or contract was freely made in good faith, a fair market transaction and occurred within a reasonable time before ~~or-after~~ the date of valuation. ~~In-order-to-be-considered-compar-able,-the-sale-or-contract-must-have-been-made sufficiently-near-in-time-to-the-date-of-valu-ation,-and-the-property-sold-must-be-located~~ Before the sale price of property is admitted, it must appear that the property sold is located sufficiently near the property being valued, and ~~must-be~~ is sufficiently alike in respect to character, size, topography, location, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable ~~in-value~~ and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued; but, subject to Section 1270.4, the court shall permit the witness a wide discretion in testifying to his opinion as to which sales and contracts the witness believes are comparable.

COMMENT

The proposed section would permit evidence of post-date of valuation sales. This species of evidence presents a theoretical Chinese wire puzzle. If the concept of fair market value presumes that the willing buyer and seller enter into a hypothetical sale of the subject property on the date of valuation, how is it possible that such parties could take into consideration any fact which was not capable of being ascertained on the date of valuation? Under Code of Civil Procedure Section 1249, the

parties are entitled to litigate within the one year period the issue of value based on a fixed date. Preparation to meet last minute evidence is expensive and frustrating. To allow in evidence which occurred up to the date of trial is a blatant subterfuge of the date of valuation concept.

The court in County of Los Angeles v. Hoe, 138 Cal.App.2d 74, 291 P.2d 98 (1955) did not solve the Chinese wire puzzle. We suggest that the rule proposed by the Commission should be modified so as not to exceed the rule of the Hoe case regarding after sales by the addition of the following sentence:

> "Sales or contracts for sale for the property being valued and for comparable properties entered into after the date of valuation shall not be admissible unless the court finds that: (a) the sale or contract for sale was entered into and concluded within a reasonable time after the date of valuation, and that the probative value of sales which occurred before the date of valuation would not furnish a reasonable basis upon which to form an opinion of value, or that (b) the sale is relevant to the value of the remainder after the taking and construction of the public improvements."

The last sentence of the proposed section indicates that while the witness should be given wide discretion in the selection of the comparable sales, the court can limit the number of sales to prevent an undue consumption of time. We suggest that there are several factors other than the number of comparable sales which affect the length of condemnation trials:

1) The total value of the property;

2) The spread between defendants' and plaintiff's appraisers--the more at stake the harder the parties fight, resulting in a deeper penetration of the evidence;

3) The number of expert witnesses and the extent of the examination of the second witness;

4) Complexity of the case: Whether the case involves a whole taking or a partial taking; whether commerical or farm land; the number of parcels involved; the difference between parcels; whether any special studies must be made, e.g., land surveys, engineering surveys, hydraulic and drainage analysis, soil and foundation engineering surveys; the nature and scope of special issues which require disposition before the jury trial is commenced; the number of different uses that could be made of various portions of properties; the rate at which larger parcels will be developed to their highest and best use; the nature and extent of interests sought to be taken, e.g., fee title, road easement, sewer easement, avigation easement, utility easement; and the extent to which the neighborhood requires analysis, e.g., a neighborhood in rapid transition is generally more difficult to appraise than a static neighborhood.

5) The nature of comparable sales--degree of improvement; amount of financial "water"; contingencies (*e.g.*, zone change, variances, approval of title reports);

6) Several other factors enter into the time consumed in the trial of the action which can affect the length of trial. The use or nonuse of discovery may affect the length of trial. The manner in which the pre-trial hearing is held and the fruits of the hearing can affect the length of trial.

7) Questions of law relating to the admissibility of evidence often consume time during the trial on the issue of valuation. The length of trial can vary greatly depending upon the practice of the trial court in determining known evidential issues in advance of the jury trial. The use of a written "Notice of Motion to Exclude Evidence" was approved by the court in Sacramento and San Joaquin Drainage Dist. v. Reed, 215 Cal.App.2d 60, 68, 29 Cal.Rptr. 847 (1963).

The comment proposes that trial time will be reduced if the witness is allowed to select which sales are comparable. If the trial courts virtually abdicate their duty to decide

comparability, then of what consequence is the statement of criterion of comparability contained in Section 1271.2?

The heart of any appraisal and of any condemnation case should be evidence of the subject property and of the comparable sales; this evidence should occupy a prominent place in the trial. Reduction of the number of comparable sales should be the last limitation the trial judge imposes upon the parties in order to save time.

<u>Section 1271.4. Lease of subject property.</u>

> 1271.4. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the rent reserved and other terms and circumstances of any lease which included the property or property interest being valued or any part thereof which was in effect within a reasonable time before ~~or after~~ the date of valuation~~,~~. ~~including-but-not limited-to-a-lease-providing-for-a-rental-fixed by-a-percentage-or-other-measurable-portion-of gross-sales-or-gross-income-from-a-business-conducted-on-the-leased-property.~~

COMMENT

The Commission's comment, "this section is limited to rental income (as distinguished from income or profit attributable to a business conducted on the property)," is inconsistent with the portion of Section 1271.4 struck out above. Gross income is most definitely the result of entrepreneurship. We recognize that there may be circumstances where due to the complete absence of any comparable sales, the only available

measure of value would be that provided by percentage lease. We do not feel that the automatic inclusion of this species of evidence in every condemnation trial is just. The judge has now and should continue to have ample discretion to restrict admission of evidence which does not reflect real property values, but rather the business ability of the lessee.

Section 1271.6. Comparable leases.

> 1271.6. For the purpose of determining the capitalized value of the ~~reasonable~~ net rental ~~value~~ income attributable to the property or property interest being valued as provided in Section 1271.8 or determining the value of a leasehold interest, a witness may take into account as a basis for his opinion the rent reserved and other terms and circumstances of any comparable lease of comparable property if the lease was freely made in good faith within a reasonable time before ~~or-after~~ the date of valuation~~,~~. ~~including-but-not-limited-to-a-lease providing-for-a-rental-fixed-by-a-percentage-or other-measurable-portion-of-gross-sales-or-gross income-from-a-business-conducted-on-such-property in-cases-where-the-rental-is-customarily-so-fixed,~~

COMMENT

The section qualifies the admission of percentage of gross income leases of comparable property in cases "where the rent is customarily so fixed." It is fairly obvious that if an appraiser uses a lease of comparable property he will testify that rentals are "customarily so fixed." Such term does not provide any substantial protection against admission of evidence of the business acumen of the lessee. We would rather see this problem remain in the hands of the trial court where

percentage leases of comparable property could be admitted if such leases afford the only basis upon which an opinion could be formed.

People v. Dunn, 46 Cal.2d 639, 297 P.2d 964 (1956) does not hold that evidence of gross income percentage leases is admissible. People v. Frahm, 114 Cal.App.2d 61, 249 P.2d 588 (1952) is not authority for the admission of such evidence in a case where the total value of the property is in dispute. The problem was to apportion the award. This specialized situation should not determine the general rule that evidence of entrepreneural acumen should be admitted to show the fee simple value of property. We concur in the analysis of Professor Orgel which was quoted in California Law Revision Commission *Recommendation and Study Relating to Evidence in Eminent Domain Proceedings*, October 1960, p. A-57.

Section 1271.8. Capitalization of income study.

1271.8. (a) When relevant to the determination of value of property, a witness may take into account as a basis for his opinion the capitalized value of the property based on the ~~reasonable~~ *actual* net rental ~~value~~ *income* attributable to the property or property interest being valued (as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon)*.* ~~which,-subject-to-subdivision-(b)-may-be-based-on-a consideration-of:~~

~~(1)--The-reasonable-net-rental-value-of-the land-and-the-existing-improvements-thereon,-and~~

~~(2)--The-reasonable-net-rental-value-of-the property-or-property-interest-if-the-land-were~~

~~improved-by-improvements-that-would-enhance-the value-of-the-property-or-property-interest-for its-highest-and-best-use.~~

(b) In determining the ~~reasonable-net-rental~~ capitalized value of the property for the purposes of this section:

(1) A witness may not base his calculation on an assumed rental of ~~hypothetical~~ improvements on the property or property interest being valued, nor shall any evidence of assumed income from hypothetical improvements be admissible for any purpose. ~~other-than-showing-the-highest-and best-use-of-the-property-or-property-interest, if-the-party-on-whose-behalf-the-witness-is-called has,-or-intends-to-have,-any-witness-testify-regarding-any-comparable-sales-or-contracts,-as-defined-in-Section-1271.2.--This-paragraph-does-not apply-where-the-sole-purpose-of-basing-the-capitalization-on-an-assumed-rental-of-hypothetical-improvements-is-to-rebut-valuation-testimony-based on-a-capitalization-of-an-assumed-rental-of-hypothetical-improvements-used-by-an-opposing-party.~~

(2) A witness may not base his calculation of the capitalized value on a ~~an-assumed~~ rental under an assumed lease which is fixed by a percentage or other measurable portion of gross sales or gross income from a business on the property or property interest being valued. ~~unless-rentals of-property-for-that-kind-of-business-are-customarily so-fixed.~~

COMMENT ON SUBSECTION (a)

The traditional formula for capitalizing a stream of income depends first upon the analysis of that net stream of income. The proposed section uses the term "reasonable net rental value." The appraiser does not capitalize rental value to obtain a capitalized value, but he does capitalize rental income. Capitalized value based on an opinion of rental value is opinion on opinion,

and is not a responsible approach to fair market value.

We are particularly concerned with Section 1271.8(a)(2), which appears to allow a witness to testify to profits to be derived from improvements which exist only as a matter of imagination as of the date of valuation. It would appear that the concept of the date of valuation would lose substantial significance if this species of evidence were admitted. Code of Civil Procedure Section 1249 specifically provides that "no improvements put on the property subsequent to the date of the service of the summons shall be included in the assessment of compensation or damages." How is it possible, then, that an appraiser, while disregarding actual post-date-of-service improvements could nevertheless be allowed to speculate as to the nature of improvements which might be placed on the property after the date of service for the purpose of fortifying his opinion of compensation or damages?

COMMENT ON SUBSECTION (b)

This proposed subsection would permit condemnation cases to become an arena for feasibility experts, rather than for appraisers if testimony concerning assumed rentals of hypothetical improvements were permitted for any purpose. The qualifying phrase which would limit testimony of assumed rentals of hypothetical improvements for the purposes of showing highest and best use is useless. The concept of highest and best use should not be a springboard foı speculation concerning future profits. No

jury, let alone appraisers and judges, is going to believe that the capitalization value based on future rents from a castle in the air is admitted only for the purpose of showing highest and best use, and not for the purpose of establishing value.

This section would allow any condemnee, his attorney or appraiser, to build his office building, find the tenants, establish the rentals, show his profit and walk away with an award far in excess of what a willing buyer in the market would pay for the raw land as it exists. The law should not allow the use of the capitalization approach on vacant land.

The term "highest and best use" should not be expanded so that opinions of value are based on value for a specific use. Olson v. United States, 292 U.S. 246, 255 (1933). The rule set forth in the Heilbron case that value should be found based upon all of the uses but not for a specific use should be retained as the law in this state.

The "feasibility approach to value" was expressly condemned by the court in People ex rel. State Park Com. v. Johnson, 203 Cal.App.2d 712, 22 Cal.Rptr. 149 (1962). Section 1271.8(b)(2) as proposed, would appear to overrule the Johnson case. If the Commission is concerned with limiting the length of condemnation trials, clearly this species of imaginative evidence should be excluded in all but the most extenuating circumstances. This type of feasibility study may be suitable for promoters who

are willing to gamble their time and other people's money, but it is not a suitable basis for a sober inquiry into the fair market value of real property as of a historical date of valuation.

If this section is enacted, we predict that the time consumed in trying condemnation cases involving rental property will greatly increase. The use of this type of speculative evidence necessarily would require the appraiser to form an estimate of the type of construction of the improvements, the height, width and lot coverage; the cost of the improvements, both initial and long term maintenance and management. In addition, he would be required to make a rental survey and would have to project rental income over expenses for the probable economic life of the improvements. Concerning the problem of the building design alone, there would be as many possibilities as there are architects.

Section 1272.4. Matter upon which opinion may not be based.

1272.4. Notwithstanding the provisions of Sections 1270.8 to 1272.2, the following matter is inadmissible as evidence and is not a proper basis for an opinion as to the value of property:

(a) [No change.]

(b) [Delete proposed paragraph and substitute:] The price at which an offer, listing or option to purchase, sell or lease the property or property interest being valued or any part thereof or for

other comparable property unless such offer, listing or option is introduced as admission against an opposing party in the proceeding or for the purpose of impeaching or rebutting the opinion of value expressed by a valuation witness who has testified in the proceeding.

(c) [Delete proposed paragraph (c).]

(d) [No change.]

(e) [No change.]

(f) [No change.]

(g) Evidence of the construction or proposed construction of the public agency's improvement upon the property of other persons for purposes of computing damages to the remainder.

COMMENT ON SUBSECTION (b)

We suggest that one other exception ought to be recognized: Evidence concerning what a willing seller would take for comparable property should be admitted to impeach the opinion of a valuation witness who has expressed a higher opinion per unit rate for the subject property. No one can ignore the law of supply and demand. Under County of San Mateo v. Bartole, 184 Cal.App.2d at 440, a listing of comparable property at a lower unit rate than the opinion held by the property owner's appraiser was held admissible to impeach the witness. The theory of substitution comes into play here. Why should a reasonably informed buyer pay $3.00 a square foot for the subject property when he can go next door and buy comparable property

for $1.62 a square foot, without having made any effort to bargain the owner downward from his asking price? It simply stands to reason that the "fair market sale" of the subject property is not likely to occur if other property owners are asking much less for their comparable property. Where the listing price is less than the expert's opinion of value, it certainly should be admissible to indicate a ceiling on value, as well as for impeachment purposes.

COMMENT ON SUBSECTION (c)

Under City of Los Angeles v. Deacon, 119 Cal.App. 491, 493, 7 P.2d 378 (1932) and Central Pacific Ry. Co. v. Feldman, 152 Cal. 303, 310, 92 Pac. 849, 852 (1907), the assessed value of property is admissible on cross-examination. This rule should be continued. We should point out that Revenue & Taxation Code Section 4986(2)(b) provides that the mere mention of the amount of current taxes constitutes grounds for a mistrial.

COMMENT ON NEW SUBSECTION (g)

This statement of existing law should be preserved in any statutory scheme stating rules of evidence in condemnation cases. See Sanitation Dist. No. 2 v. Averill, 8 Cal.App.2d 556, 47 P.2d 786 (1935); People v. Symons, 54 Cal.2d 855, 9 Cal.Rptr. 363 (1960).

<u>Section 1273.4. Credibility of expert witness.</u>

1273.4. (a) The fact of the appointment of an expert witness by the judge may be revealed to

the trier of fact. ~~as relevant to the credibility of such witness and the weight of his testimony.~~

(b) The amount of compensation and expenses paid or to be paid to an expert witness ~~not~~ appointed by the judge ~~is a proper subject of inquiry as relevant to his credibility and the weight of his testimony.~~ shall not exceed the sum set forth in Section 1266.2 of this code unless the parties otherwise agree.

COMMENT

Subsection (b) as proposed is unnecessary in view of Code of Civil Procedure Section 1256.2. We would have no objection to the section as modified.

III

Question: WHETHER THE LEGISLATION SHOULD BE LIMITED TO EMINENT DOMAIN AND INVERSE CONDEMNATION PROCEEDINGS OR SHOULD APPLY TO ALL COURT PROCEEDINGS (EXCLUDING, FOR EXAMPLE, ADMINISTRATIVE PROCEEDINGS) FOR THE VALUATION OF REAL PROPERTY EXCEPT WHERE A STATUTE PROVIDES FOR A DIFFERENT VALUATION STANDARD IN THE PARTICULAR COURT PROCEEDING.

Our suggestion is that the rules of evidence proposed should apply only to proceedings in eminent domain or actions commenced under Article I, Section 14. While the problem of the valuation of real property is common to many types of law suits, e.g., fraud, tax, probate and bankruptcy, the public policies which are brought into play in these latter types of cases have little application

to condemnation actions. Rules developed in non-condemnation cases would be more likely to confuse than clarify the evidential rules in eminent domain proceedings.

IV

Question: WHETHER ANY REVISIONS SHOULD BE MADE IN THE COMMENTS CONTAINED UNDER THE SECTIONS OF THE LEGISLATION TENTATIVELY RECOMMENDED.

At such time as the "legislative history" (*e.g.*, Report of the Senate Committee on Judiciary on Senate Bill No. 43; S.J. July 31, 1963, p. 192) of the proposed legislation is in draft form, we would appreciate an opportunity to comment thereon prior to its adoption by the Legislature. If an appearance before the Commission of a member of our office would be of any assistance in amplifying our views expressed herein, we would be pleased to arrange such appearance.

Very truly yours,

BERTRAM McLEES, JR., County Counsel

By
JAMES E. MILLER, Deputy

JEM:kig