

# 36

8/5/70

Memorandum 70-99

Subject: Study 36 - Condemnation (General Approach)

Because we have a number of members recently appointed to the Commission, it may be useful to review the past work on eminent domain and to discuss the basic approach the Commission will take on this topic.

LEGISLATIVE DIRECTIVE

In 1956, the Legislature directed the Law Revision Commission to make a study to determine "whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens." In 1965, the Legislature directed that this topic be given high priority and revised the directive to provide that the Commission should make a study to determine "whether the law and procedure relating to condemnation should be revised with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings." In 1965, the Legislature thus determined that the topic should be given high priority, should be fair to "all parties," not just the property owner, and should be conducted with a view to preparing a comprehensive statute.

BACKGROUND STUDIES

The Commission originally obtained a private law firm in Los Angeles to prepare background research studies. This firm hired an outstanding student who had served as a teaching fellow at Stanford Law School. The compensation for the study was based on paying the salary of the person hired who was to work full time on the study until completed. The senior members of the firm agreed to review and revise the material prepared by the new lawyer without

compensation and did, indeed, devote a substantial amount of time to the project. The studies that were prepared provide good general background on the subjects covered but substantial additional staff work is needed to find all pertinent statutes and to cover various matters not covered in the studies.

The Commission retained Professor Ayer of Stanford Law School to prepare a study on the procedural aspects of eminent domain. After he completed a relatively small portion of the study, he asked to be relieved of his obligations under the contract, and the contract was terminated. A contract for the same study was then made with Professor Hogan of Davis Law School, and he has now requested that he be relieved of his obligations under the contract.

We plan to assemble the various research studies dealing with eminent domain, together with other background materials, in a convenient form and to provide each Commissioner with a set of this material.

#### PAST LEGISLATIVE EFFORTS

During the period of 1959-61, the Commission devoted considerable time to the condemnation study. Three recommendations were submitted to the 1961 Legislature. Part of one recommendation--taking possession and passage of title--was enacted. This included provisions on taking possession before judgment and after judgment, deposits and the right to withdraw deposits, interest, risk of loss, proration of taxes, passage of title, making improvements after date of valuation, and abandonment of the condemnation proceeding. Another recommendation--relating to evidence in eminent domain proceedings--was vetoed by the Governor in 1961, was introduced by Senator Cobey in 1963 and again vetoed, and finally--after it was significantly amended and made acceptable to the public entities--was enacted in 1965. The third recommendation--relating to moving expenses--was not approved by the first

committee that considered it because federal law did not permit reimbursement for moving expenses. This recommendation has never been enacted although numerous moving expense statutes have been enacted in California.

In 1963, the Commission submitted a recommendation relating to discovery in eminent domain proceedings. The bill passed the Senate but died in the Assembly Judiciary Committee. A revised bill relating to discovery, which was acceptable to public entities, was submitted to the 1967 Legislature and was enacted.

At the 1968 session, legislation was submitted upon Commission recommendation to provide for increased recovery by the condemnee when an eminent domain proceeding is abandoned. After revisions were made to make the bill acceptable to the public entities, it was enacted by the Legislature.

#### WORK IN PROGRESS

In September 1967, the Commission published its first tentative recommendation relating to condemnation law and procedure. (The Commission has determined that it will follow the same procedure on condemnation law as it followed on evidence. A series of tentative recommendations and related studies will be published covering the entire field, the comments on the various tentative recommendations will be considered, and the entire series of tentative recommendations will be put together in one comprehensive statute. Where a problem that requires immediate attention is discovered, the Commission will submit a recommendation to the Legislature on that problem and not wait until the comprehensive statute has been prepared.) The 1967 tentative recommendation relates to possession prior to final judgment and related problems and includes suggestions for revising Article I, Section 14, of the California Constitution. Within the next few months, the

Commission will be reviewing the comments on this tentative recommendation so that the members of the Commission will become familiar with this aspect of condemnation law and can determine what changes are needed in the tentative recommendation when it is incorporated into the comprehensive statute.

The Commission submitted a recommendation to the 1970 Legislature relating to arbitration of just compensation. This has been enacted as law. In addition, a provision relating to the right to enter upon private property to determine whether it is suitable for public use and the damages that must be paid and the procedure to be followed in such cases is included in the governmental liability recommendation submitted to the 1970 Legislature.

The Commission also has prepared a tentative recommendation on byroads and this has been distributed for comment. The comments have been reviewed. This particular tentative recommendation will be incorporated into a larger tentative recommendation on the right to take insofar as its publication is concerned.

The Commission also has been considering certain special problems of public use. We have distributed a tentative recommendation on "excess condemnation." We have considered and will be considering other aspects of the right to take at future meetings.

The Commission has considered the problem of recovery for litigation expenses in condemnation proceedings and has determined to make no substantial change--that is, the Commission has determined not to adopt a jurisdictional offer provision or a similar provision or to make litigation expenses generally recoverable. In this connection, the Commission should note that legislation to give the homeowner the right to recover reasonable appraisal fees in condemnation actions is likely to be passed by the Legislature. Whether the Governor will sign such legislation is another question.

The Commission has determined that a general statute should be enacted to provide for the recovery of moving expenses as a matter of right. A tentative recommendation to effectuate this decision has been distributed, and it is anticipated that a recommendation will be submitted to the 1971 Legislature.

The Commission has determined that some priority should be given to the preparation of a study on the right of the former owner to repurchase property when it is to be sold by the public entity. Mr. Taylor devoted a considerable amount of time to this problem but never produced anything. Mr. Sterling is now working on a study on this problem.

The Commission has discussed the problem of proximity damage from highway construction--the damage to property not taken but injuriously affected. This problem was considered in the context of inverse condemnation. The problem was deferred for later consideration.

#### SCOPE AND APPROACH OF STUDY

In connection with the eminent domain study, you should note the statement in a letter, dated August 12, 1968, from Roy A. Gustafson, former Chairman of the Commission, who was recently elevated from the Superior Court to the Court of Appeal by Governor Reagan:

In the latest issue of the State Bar Journal, a professor of law from the University of Wyoming notes that the decisions are slanted in favor of the condemnor. The fact is that the law in this area is in a hopeless mess and one can find just about any statement for which he is looking if he reads enough cases. And it is certainly true that both the decisional law and the statutory law heavily favor the condemnor.

When I was on the Commission, studies on eminent domain had already begun. I had great misgivings about approaching the matter on the basis that the existing law was generally satisfactory and that it needed to be patched up only here and there. Now I am convinced that this was the wrong approach and that what is needed is a massive project which starts from scratch.

It is my belief that the Legislature looks to the Commission to prepare a comprehensive statute that will remedy the worst problems in eminent domain law and do so without substantially increasing the overall cost of property acquisition. This may be possible if additional compensation is provided only in those cases where it is most justified and the procedure for condemnation can be improved to reduce the condemnee's ability to delay the proceedings and to permit the condemnor to obtain early possession of the property in appropriate cases. In the light of our past experience with the Governor on eminent domain legislation, it seems extremely unlikely that any Governor (whether a Democrat or Republican) will approve an eminent domain bill that will substantially increase condemnation costs. If this approach is taken, the Commission must guard against including provisions considered detrimental by condemnors unless such provisions can be clearly justified and deal with acute problems of inadequate compensation or grossly unfair procedure.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary