

#36.35

11/24/71

Memorandum 71-89

Subject: Study 36.35 - Condemnation (Immediate Possession)

The attached draft of provisions relating to possession prior to judgment in eminent domain proceedings conforms to the Commission's decisions at the November 1971 meeting. Please note the following features:

Section 1269.02. The plaintiff's need for possession prior to judgment is made a factor in determining whether to stay or limit the operation of the order for possession.

Section 1269.04. The definition of "record owner" includes all recorded interests in property, whether legal or equitable. The only place this definition is used is in this section dealing with service of an order for possession.

The provisions for service in subdivision (d) have been amended to provide service on the defendant's chosen agent, where he has indicated an agent for receipt of notice of further proceedings in his answer. (See procedural provisions, Section 2060.)

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

EXHIBIT I

EMINENT DOMAIN CODE § 1269.01

Tentatively approved July 1971
Revised November 1971

§ 1269.01. Order for possession prior to judgment

1269.01. (a) At the time of filing the complaint or at any time after filing the complaint and prior to entry of judgment, the plaintiff may apply ex parte to the court for an order for possession under this chapter, and the court shall make an order authorizing the plaintiff to take possession of the property if all of the following are shown:

- (1) The plaintiff is a public entity or public utility.
- (2) The plaintiff is entitled to take the property by eminent domain.
- (3) The plaintiff has deposited pursuant to Chapter 1 (commencing with Section 1268.01) an amount that satisfies the requirements of that chapter.

(b) The order for possession shall describe the property of which the plaintiff is authorized to take possession, which description may be by reference to the complaint, and shall state the date after which the plaintiff is authorized to take possession of the property.

Comment. Section 1269.01 states the requirements for an order for possession of property prior to judgment and describes the content of the order. With respect to the relief available from an order for possession prior to judgment, see Sections 1269.02, 1269.025, and 1269.03.

EMINENT DOMAIN CODE § 1269.01

Tentatively approved July 1971
Revised November 1971

Subdivision (a). Subdivision (a), like former Code of Civil Procedure Section 1243.5(a), provides an ex parte procedure for obtaining an order for possession prior to judgment.

Subdivision (a) states three prerequisites to issuance of an order for possession:

(1) The plaintiff must be a public entity or public utility. Under former Code of Civil Procedure Section 1243.4, possession prior to judgment was limited to certain public entities; public utilities did not have the right to obtain possession prior to judgment.

(2) The plaintiff must be entitled to take the property by eminent domain. This requirement is derived from former Code of Civil Procedure Section 1243.5(b). However, under former Code of Civil Procedure Section 1243.4, possession prior to judgment was permitted only if the taking was for right of way or reservoir purposes. This limitation is not continued. Likewise, the requirement formerly found in Code of Civil Procedure Section 1243.5(b) that the plaintiff was authorized to take possession prior to judgment is no longer continued since any public entity or utility may take possession in any case in which it is entitled to take by eminent domain.

(3) The plaintiff must have made the deposit required by Chapter 1. This requirement is derived from former Code of Civil Procedure Section 1243.5(b).

The issue of the plaintiff's need for possession prior to judgment is a matter that is incorporated in the provisions of Section 1269.02.

Tentatively approved July 1971
Revised November 1971

It should be noted that the determination of the plaintiff's right to take the property by eminent domain is preliminary only. The granting of an order for possession does not prejudice the defendant's right to demur to the complaint under Section 2050 or to contest the taking under Section 2100. See also Sections 1269.025 and 1269.03. Conversely, the denial of an order for possession does not require a dismissal of the proceeding and does not prejudice the plaintiff's right to fully litigate the issue if raised by the defendant.

Subdivision (b). Subdivision (b) describes the contents of an order for possession. The contents are substantially the same as those of former Code of Civil Procedure Section 1243.5(b). However, the requirement that the order state the amount of the deposit has been eliminated since Section 1268.02 requires that a notice of the making of a deposit be served on interested parties. The requirement that the order state the purpose of the condemnation has been omitted since possession prior to judgment is now authorized for any public use by a public entity or public utility. And, the requirement that the order describe the "estate or interest" sought to be acquired has been omitted as unnecessary since the term "property" includes rights and interests therein. See Section 101 (defining "property").

Subdivision (b) is limited by the requirement of a 30-day or 90-day period following the service of the order before possession can be physically assumed. See Section 1269.04.

It should be noted that the court may, under subdivision (b), authorize possession of all, or any portion or interest, of the property sought to be taken by eminent domain.

§ 1269.02. Stay of order for hardship

1269.02. At any time after the plaintiff has been authorized to take possession of property under Section 1269.01, any defendant or occupant of the property may move for relief from the order if the hardship to him of having possession taken at the time specified in the order is substantial. If the court determines that the hardship to the defendant or occupant is substantial, the court may stay the order or limit by terms and conditions its operation unless, upon considering all relevant information (including the schedule or plan of operation for execution of the public improvement and the situation of the property with respect to such schedule or plan), the court further determines that the plaintiff needs possession of the property within the time specified in the order for possession and that the hardship the plaintiff would suffer as a result of a stay or limitation of the order would not be insignificant.

Comment. Section 1269.02 is new. It permits the court to stay an order for possession issued ex parte under Section 1269.01 or to limit the operation of the order by fixing terms and conditions of the plaintiff's possession. The court may do this only after making a dual finding of fact. The defendant must first demonstrate to the court that having possession taken of the property specified in the order at the time specified in the order would be a substantial hardship. If the defendant demonstrates this fact to the

EMINENT DOMAIN CODE § 1269.02

Staff recommendation December 1971

court's satisfaction, the court next looks to the plaintiff's interest in early possession of the property. If the plaintiff is able to demonstrate to the court that it needs possession of the property at the time specified and that it would suffer significant (as distinguished from trivial) injury from a stay or other limitation of the order, the court must stay or limit the order.

Section 1269.02 gives the court broad authority to draft an order that is appropriate to the circumstances. The court may, for example, impose limitations on the order which will permit the plaintiff and defendant to have possession of portions of the property or to jointly use the property.

EMINENT DOMAIN CODE § 1269.025

Tentatively approved November 1971

§ 1269.025. Stay of order where right to take contested

1269.025. If the plaintiff has been authorized to take possession of property under Section 1269.01 and the defendant has objected, in the manner provided in Chapter 7 (commencing with Section 2100) of Division 8, to the plaintiff's right to take the property by eminent domain, the court, if it finds there is a reasonable probability the defendant will prevail, shall stay the order for possession until it has ruled on the defendant's objections.

Comment. Section 1269.025 is new. Because the sole means by which the defendant may contest the right to take is the statutory objection, Section 1269.025 is intended to permit the court to mitigate the effect of an order for possession pending resolution of the objection in a case where the court believes there is merit to objection. Cf. Section 1269.03(b).

§ 1269.03. Vacating order for possession

1269.03. (a) Except as provided in subdivision (b), if an order has been made under Section 1269.01 authorizing the plaintiff to take possession of property and the court subsequently determines that the conditions specified in Section 1269.01 for issuance of the order are not satisfied, the court shall vacate the order.

(b) Notwithstanding subdivision (a), the court may vacate an order for possession on the ground that the plaintiff is not entitled to take the property by eminent domain only if the defendant has objected, in the manner provided in Chapter 7 (commencing with Section 2100) of Division 8, to the right of the plaintiff to take the property by eminent domain and the court has determined pursuant to that chapter that the plaintiff does not have the right to take the property.

Comment. Because the order for possession is issued following an ex parte application by the plaintiff, subdivision (a) of Section 1299.03 makes clear the court's authority to vacate an order for possession prior to judgment if the court subsequently determines, whether upon motion of the defendant or upon its own motion, that the requirements of Section 1269.01 are not satisfied.

Under subdivision (a), one ground for vacating the order for possession is that the plaintiff is not entitled to take the property by eminent domain. See Section 1269.01. However, the defendant may not raise this issue under

EMINENT DOMAIN CODE § 1269.03

Tentatively approved November 1971

Section 1269.03 but may only do so by objection to the right to take. If the proceeding is dismissed for this or any other ground so that the plaintiff is not entitled to take the property by eminent domain, the order must, of course, be vacated.

Under former statutes, judicial decisions held that an appeal may not be taken from an order authorizing or denying possession prior to judgment. Mandamus, prohibition, or certiorari were held to be the appropriate remedies. See Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950); Weiler v. Superior Court, 188 Cal. 729, 207 P. 247 (1922); State v. Superior Court, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962); City of Sierra Madre v. Superior Court, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961). However, an order for possession following entry of judgment has been held to be an appealable order. San Francisco Unified School Dist. v. Hong Mow, 123 Cal. App.2d 668, 267 P.2d 349 (1954). No change is made in these rules as to orders made under Section 1269.01 or Chapter 3 (commencing with Section 1270.01).

EMINENT DOMAIN CODE § 1269.04

Tentatively approved September 1970

Revised July 1971

Tentatively approved November 1971

§ 1269.04. Service of order

1269.04. (a) As used in this section, "record owner" means the person in whom the legal or equitable title to the fee or any lesser interest in property appears to be vested by recorded deeds or other instruments.

(b) The plaintiff shall serve a copy of the order for possession issued under Section 1269.01 on the record owner of the property and on the occupants, if any. If the property is lawfully occupied by a person dwelling thereon or by a farm or business operation, service shall be made not less than 90 days prior to the time possession is to be taken pursuant to the order. In all other cases, service shall be made not less than 30 days prior to the time possession is to be taken pursuant to the order. Service may be made with or following service of summons.

(c) At least 30 days prior to the time possession is taken pursuant to an order for possession made under Section 1269.06, the plaintiff shall serve a copy of the order on the record owner of the property and on the occupants, if any.

(d) Service of the order shall be made by personal service unless the person on whom service is to be made has previously answered the complaint. If the person has answered the complaint, service of the order for possession may be made by mail upon the person he designates

EMINENT DOMAIN CODE § 1269.04

Tentatively approved September 1970

Revised July 1971

Tentatively approved November 1971

in his answer as his agent for service of notices or, if he fails to so designate in his answer an agent for service of notices, then service by mail may be made upon him.

(e) If a person required to be personally served resides out of the state, or has departed from the state or cannot with due diligence be found within the state, the plaintiff may, in lieu of such personal service, send a copy of the order by registered or certified mail addressed to such person at his last known address.

(f) The court may, for good cause shown on ex parte application, authorize the plaintiff to take possession of the property without serving a copy of the order for possession upon a record owner not occupying the property.

(g) A single service upon or mailing to one of several persons having a common business or residence address is sufficient.

Comment. Section 1269.04 is derived from former Code of Civil Procedure Section 1243.5(c).

Subdivision (a). The definition of "record owner" is broadened to include persons not included under the definition found in former Section 1243.5(c). Under the former provision, "record owner" was defined to include only the persons in whose name the legal title to the fee appeared as of record and the persons in possession of the property under a recorded lease or agreement of purchase.

EMINENT DOMAIN CODE § 1269.04

Tentatively approved September 1970

Revised July 1971

Tentatively approved November 1971

Subdivision (b). The requirement that, in certain instances, service be made not less than 90 days before possession is to be taken conforms to the requirement of Government Code Section 7267.3 (notice under relocation assistance statute). Under former Section 1243.5(c), only 20-days notice was required; and the court, for good cause shown, could shorten this time to not less than three days.

Because the order is obtained ex parte rather than on noticed motion, the time periods under subdivision (b) are computed from the date of service rather than the date of the order. The plaintiff may, of course, obtain a specific date of possession later than the 90-day or 30-day date in his request for an order for possession. The 90-day and 30-day dates also are subject to decrease in case of emergency. See NOTE to this section, infra.

Subdivision (c). Subdivision (c) prescribes the time for service where the order for possession is granted under Section 1269.06. No comparable provision was found in former law because the procedure provided by Section 1269.06 is new.

Subdivision (d). Subdivision (d) requires personal service unless the person on whom service is to be made has answered the complaint. Under former Section 1243.5(c), personal service was not required and mail service was permitted if the person on whom service is to be made had previously appeared in the proceeding or had been served with summons and complaint in the proceeding. If the person has answered the complaint, service may be made

EMINENT DOMAIN CODE § 1269.04

Tentatively approved September 1970

Revised July 1971

Tentatively approved November 1971

upon the person designated in his answer as agent for service of notices (see Section 2060) or, if he has not designated such an agent, upon the person himself. Under former Section 1243.5(c), service both on the person and on his attorney of record, if any, was required. The requirement that an affidavit be filed concerning the reason personal service was not made has been eliminated.

Subdivision (e). Subdivision (e) continues a provision of former Section 1243.5(c). As to the affidavit concerning service by mail, see the Comment to subdivision (d).

Subdivision (f). Subdivision (f) continues the substance of a provision of former Section 1243.5(c).

Subdivision (g). Subdivision (g) continues the substance of a provision of former Section 1243.5(c). The term "address" refers to a single residential unit or place of business, rather than to several such units or places that may happen to have the same street or post office "address." For example, each apartment is regarded as having a separate address although the entire apartment house may have a single street address.

NOTE: The 90-day and 30-day notice requirements do not, of course, apply to an emergency seizure of property, a matter that also is under study.