#36.400 7/24/72

Memorandum 72-47

Subject: Study 36.400 - Condemnation Law and Procedure (Comprehensive Statute --Comments of State Bar Committee)

BACKGROUND

This memorandum presents the policy questions concerning the Eminent Domain Law raised by the State Bar Committee on Governmental Liability and Condemnation.

We have received extensive comments from the Southern Section of the State Bar Committee (hereinafter referred to as "Southern Section"). The Southern Section has reviewed and commented on substantially all of the Eminent Domain Law that has been tentatively approved by the Commission. We have also received comments of a subcommittee of the Northern Section of the State Bar Committee (herein referred to as "Northern Section"). The subcommittee of the Northern Section consisted of three members of the six-member section.

The State Bar Committee approves much of the Eminent Domain Law as drafted. Only those comments of the committee that do not approve a particular provision as drafted are considered in this memorandum. The Commission considered at the July meeting the State Bar Committee's comments on the problem of excess condemnation, and the Commission will be considering a revised provision on this problem at a future meeting.

ANALYSIS OF COMMENTS

§ 1225.010. Eminent Domain Law

The Eminent Domain Law as presently drafted is part of the Code of Civil Procedure rather than a separate code.

The State Bar Committee (both the Northern and Southern Sections) believe that the new law should be a separate code. The Southern Section states the reasons as follows:

> A general comment was made by the Committee regarding the change from the formerly proposed separate Code for eminent domain law to the renumbering of the Comprehensive Statute and insertion in the Code of Civil Procedure. It was observed that the former proposal for an Eminent Domain Code was anticipated with eagerness by lawyers in the condemnation field. They expected that the consolidation in a separate volume of all substantive and procedural law specially applicable to eminent domain proceedings would be extremely beneficial to the practice and would promote a clearer understanding of this specialized body of the law. The renumbering procedure currently proposed by the Law Revision Commission appears to be confusing and unwieldy. The length of the section numbers alone will add confusion and difficulty in referring to the Code. The Committee regards the Law Revision Commission decision to return to Code of Civil Procedure insertions as unfortunate. The Code of Civil Procedure is already overburdened with substantive law.

The staff believes that there will not be sufficient provisions to justify a separate code. The existing statute consists of approximately 60 pages. Of these, 12 pages (primarily the detailed statements of public uses) will not be continued in the statute. Much of the new statute will consist primarily of recodification of existing provisions. Accordingly, it is doubtful that the general provisions of the new statute will more than double the volume of statutory provisions, in which case the most we can expect is about 100 pages of statutory provisions in the comprehensive eminent domain statute. The numbering system used in the new statute is basically the same system used in other recent revisions of portions of the Code of Civil Procedure. See, e.g., Code Civ. Proc. §§ 410.10 et seq. (jurisdiction and service of process), 422.10 et seq. (pleadings).

We have discussed the matter with the Legislative Counsel. He strongly urges that the new statute not be a separate code. In fact, he says that--while he does not advocate or oppose legislation--he would make an all-out

effort to advise all legislators involved that the new statute should not be a separate code. In view of this, the staff believes that it would be useless to draft the new statute as a separate code.

§ 1240.020. Condemnation permitted where authorized by statute

The Southern Section approved this section, but made the following observation:

> The Committee feels that it should be made clear later in the Statute that when a person as defined by Section 1230.060 can meet the requirements of necessity and public use, he should be able to exercise the power of Eminent Domain as provided in Linggi v. Garovotti, 45 Cal.2d 20.

It has been the Commission's position that condemnation should not be accomplished by private persons, and the Commission has recommended the repeal of Civil Code Section 1001 authorizing such condemnation. Instead, the Commission has proposed that, if a private person desires a sewer connection or a byroad, that person should be able to initiate a request that the local public entity concerned undertake such project, and the condemnation decision is left to the local public entity. See proposed Health & Saf. Code § 4967 (sewer connections) and Sts. & Hwys. Code § 4120.1 (byroads).

Legislation has again been introduced at the 1972 session to make clear the right of a private person to condemn for a byroad. We will consider this question when we review the provisions we propose to add into the Streets and Highways Code dealing with byroads.

§ 1240.050. Condemnation for related or protective purposes

The Southern Section disapproves Section 1240.050:

> This Section should be disapproved as it does not contain specific sufficient standards and is vague and ambiguous to the extent that it raises serious questions of constitutionality and could generate

serious abuses of the power of Eminent Domain; the elements necessary to accomplish the purposes of this proposed Section are included within the basic power of Eminent Domain, thereby making this Section superfluous.

The staff believes that the provision authorizing condemnation for related or protective purposes is neither superfluous nor overbroad. You should read the Comment to Section 1240.050. The following summarizes the previous memoranda that have analyzed this problem extensively. When a condemnor undertakes a public project, such as a building, it may need other property incidental to the project: for example, parking for and access to the building. In the case of site-oriented improvements such as buildings, there will ordinarily be grounds surrounding the buildings with planned setback. In engineering-oriented improvements, property will be necessary for slope, sight-distance, drainage, as well as appearance.

There are numerous statutes, as well as a constitutional provision, authorizing condemnation for these protective and related purposes. Nevertheless, the right to take property for these purposes will be implied in the absence of specific provisions where such right is necessary to protect or preserve a public work or improvement. See, e.g., Flood Control & Water Conservation Dist. v. Hughes, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962) ("taking incidental property to carry out and make effective the principal uses" permitted).

It is desirable to include in the comprehensive statute express statutory authorization for condemnation for related and protective uses for several reasons:

(1) The existence of a clear statutory provision will remove any doubt about the availability of protective condemnation and will minimize the possibility of litigation over such an issue.

(2) The repeal of Code of Civil Procedure Section 1238 involves the repeal of some specific sections that authorize particular incidental or protective uses. See, e.g., § 1238.4 (right to take property for parking and access purposes in connection with public buildings).

(3) The protective condemnation language in the draft statute is more comprehensive than that of the statutes upon which it is based. Compare Govt. Code § 191, Sts. & Hwys. Code § 104.3, and Water Code § 256 ("to protect such public work and improvement and its environs and to preserve the view, appearance, light, air, and usefulness of such public work").

§ 1240.150. Effect of resolution

The Southern Section would give the resolution of necessity a conclusive effect only if adopted by a two-thirds vote of the governing body. The tentatively approved draft requires approval of a majority of the members of the governing body (as distinguished from a majority of those present and voting). See Section 1240.140. The Northern Section approved the Commission's draft and disagreed with the Southern Section.

Under existing law, acquisitions by the state ordinarily require a majority vote to be conclusive; acquisitions by most but not all local public entities require a two-thirds vote to be conclusive. The Commission adopted the majority vote rule on the grounds that it would be anomalous to permit institution of a condemnation action on the basis of a majority vote while requiring a two-thirds vote for conclusive effect.

§ 1240.150. Effect of resolution

The State Bar Committee proposes the addition of the following language to subdivision (a) of Section 1240.150:

> Said resolution shall not be conclusive if its passage was procured by bribery.

The Commission has previously considered this problem at length. The specific issue of bribery was discussed at the April 1971 meeting, and it was decided not to provide an exception to the conclusive effect of the resolution of the resolution in such case.

If it were desired to permit or require a public entity to review a prior action when bribery is established, the matter should be dealt with by a general statute, not by one limited to condemnation. In fact, such a bill has been proposed to the current session. See Exhibit I attached.

§ 1240.220. Future use

The Southern Section recommends that the time for future use be five years or such longer time as is reasonable rather than the seven-year period selected by the Commission. The reason for the Commission's selection of seven years is that that is the period within which construction must commence on highway property acquired for future use under the Federal Aid Highway Act of 1968. The Northern Section did not agree with the Southern Section:

> The subcommittee disagreed with the recommendation of the Southern Section that this be limited to 5 years. There was no unanimity in the subcommittee in support or opposition to this subsection. One member felt that a time limitation was necessary; another had no comments on the matter; and another member felt that no such limitation should be included since this is a matter of discretion within the Executive Branch of the government and should not be legislated on or subject to court decision.

The shorter period suggested by the Southern Section is based primarily upon two considerations:

> 1. Special benefits are almost always delayed in their enjoyment because the construction of the improvement in the manner proposed and putting the public's work to use takes years to accomplish. This period of delay should cause a discount of the benefit for the period of anticipated delay in enjoyment.
>
> 2. If an owner has a productive use for a property not needed by the agency for some years in the future, it seems good public policy to permit continued productive use.

The Southern Section suggests the solutions to these matters:

> 1. Where a claim of special benefits is involved, the Law Revision Commission should consider in compensation determinations . . . a need for discounting special benefits.
>
> 2. That there be a right to use property by the owner on a rental basis pending actual use of the property by the public agency.

The first suggestion is appropriate for all cases where the construction of the project will be delayed. The second solution is a desirable practice, but it would create problems to give the owner a "legal right" to continue in possession and give rise to controversy.

The State Bar Committee has also suggested that the former owner be given a right to repurchase property taken for a future use that does not occur:

> There should be a right to repurchase property on reasonable terms by the owner if the condemning agency does not use the property as declared if the agency classifies the property as surplus and elects to sell it.

The Commission has previously investigated extensively the possibility of permitting a general repurchase right to former owners. The Commission determined not to propose such a right on the ground that its benefits would be outweighed by its burdens. In this connection, it is worth noting that the British Columbia eminent domain study reached the same conclusion. See the extract from the British Columbia report attached as Exhibit II.

§ 1240.330. Substitute condemnation where owner of necessary property could not be adequately compensated in money

The Southern Section disapproves this section in its entirety:

> [T]he Section would authorize a taking for a non-public use which could be subject to potential abuse. If the Section is enacted, it should be done only on the basis of consent of all property owners involved.

Condemnation of property to be exchanged with the owner of necessary property where the owner could not be adequately compensated in money is a recognized

public use. See People v. Garden Grove Farms, 231 Cal. App.2d 666, 42 Cal. Rptr. 118 (1965). Nichols says:

> Under certain extraordinary conditions, the conventional method of compensating an owner whose property is taken by proceedings in eminent domain by paying him the value thereof is completely inadequate. To do complete justice to such an owner and, what is even more important, to meet the practical problems which arise by reason of the taking, it becomes necessary to furnish such owner with other lands as a substitute for the lands which have been taken. The question then arises whether such substituted lands may be acquired by eminent domain by the original condemnor, either in the original or a supplemental proceeding, for the use of the owner who has been forced to give up his property for a conceded public use. Is such secondary acquisition of property to be considered for a public use?
>
> The question has been answered in the affirmative, not only in jurisdictions which subscribe to the liberal interpretation of "public use" but even in those where the narrow doctrine ordinarily prevails. [2A P. Nichols, Eminent Domain § 7.226 (rev. 3d ed. 1970)(footnotes omitted).]

The staff believes that substitute condemnation is not only constitutional but that it is also beneficial. It can be quite helpful in minimizing the burden on a condemnee who, absent an exchange, might be left with landlocked or otherwise unusable property. The State Bar Committee recognizes the desirability of permitting "physical solutions" in severance damage cases and would in fact expand the Commission's proposal for substitute condemnation to provide utilities as well as access to landlocked parcels. See discussion below under Section 1240.350.

§ 1240.350. Substitute condemnation for access

Section 1240.350 is a specialized application of the general power of substitute condemnation provided in Section 1240.330. It lacks the restrictions of Section 1240.330, and the condemnor's resolution of necessity will ordinarily be conclusive. Its purpose is to provide a "physical solution"

for cases that would result in landlocked parcels, enabling the property owner to more fully utilize his land while cutting down the condemnor's liability for severance damages.

The Southern Section would extend this condemnation authority to the right to acquire any property necessary to provide utility service to property cut off from such service by the condemnor's project.

§ 1240.660. Property appropriated to public use by certain local entities

The Southern Section disapproved the inclusion of this section in the Eminent Domain Law:

> [T]he Court should have the power to weigh the comparative necessity of public uses where they are conflicting. Also, the Section as written is discriminatory against school districts and other public agencies not listed.

The Northern Section disapproved the recommendation of the Southern Section. The Commission particularly solicited comments on this section since it was not known whether it is a desirable section and was included only as a recodification of existing law. The staff has no strong feelings about the section one way or another but believes that we should retain the section in the statute and obtain comments from the public agencies involved before taking further action.

§ 1240.810 (et seq.). Preliminary location, survey, and tests

The State Bar Committee suggests that the provisions permitting preliminary entry and examination by the condemnor should be amended in the following manner:

a. The consent referred to in [Section 1240.830(a)] should contain all of the elements of [Section 1240.840(b)]. Accordingly, the written consent referred to in [Section 1240.830(a)] should contain the following:

(1) the nature and scope of the activities proposed;

(2) the purpose of the investigation;

(3) the proposed amount of compensation.

b. The following language should be added at the end of [Section 1240.830]:

"The burden of proof under this subdivision shall be on the acquiring agency, which must give prior notice of any motion or request for any order issued under this subdivision in the manner set forth in CCP Section 1243.5."

The staff notes that the provisions that the State Bar Committee would amend are basically existing law enacted in 1970. At the time of enactment, the committee raised the same objections, and the Commission considered and rejected the proposed amendments. The staff further notes that it has been orally informed that the entry for survey provisions have contributed to overformalization in this area and that private condemnors, at least, are having a more difficult time gaining entry than they once had. Some have suggested the provisions as now drafted are too burdensome.

For these reasons, the staff suggests these provisions be left unchanged.

§ 1255.020. Service of notice of deposit

The Southern Section suggests that Section 1255.020(b) be revised to read:

(b) The notice shall be accompanied by a copy of the statement of valuation data referred to in subdivision (c) of Section 1255.010.

The reasons for this suggestion are as follows:

1. making a copy of information available is unduly burdensome on the property owner;

2. if an alternative procedure is available to the government agency, the lesser disclosure method is likely to be followed;

3. the property owner and public agency will be better informed of details of the basis for valuation of the interest taken.

§ 1255.030. Increase or decrease in amount of deposit

The Southern Section suggests that subdivision (d) of Section 1255.030 be revised to read:

> (d) If the court determines that the probable amount of compensation exceeds the amount deposited and the amount on deposit is not increased accordingly within 30 days from the date of the court's order, the failure to make such deposit shall be deemed to be an abandonment of the eminent domain action.

The reason for this change was as follows:

> The sanction imposed by the Law Revision Commission draft was meaningless in terms of after-judgment needs. A strong sanction is needed to assure timely compliance with the Court order.

The staff believes that there is merit to the suggestion of the Southern Section, but we recommend the following revision of subdivision (c) of Section 1255.030:

> (c) If the plaintiff has taken possession or obtained an order for possession and the court determines that the probable amount of compensation exceeds the amount deposited, the court shall order the amount deposited to be increased accordingly. In such case, if the amount on deposit is not increased accordingly within 30 days from the date of the court's order, the defendant may elect to treat the failure to increase the deposit within such time as an abandonment of the eminent domain action.

We believe that the condemnee should have the election whether to treat the failure to make the increased deposit as an abandonment. Note that he would not have the right to make such election unless the plaintiff has taken possession or obtained an order for possession. Where no order for possession has been obtained or where the condemnee elects not to treat the failure to increase the deposit as an abandonment, the provisions of subdivision (d) would apply.

§ 1255.050. Procedure for withdrawal

The Southern Section suggests that subdivision (e) be amended in the third line of the subdivision to read "the court shall" rather than "the court may". The reason for the suggested change is as follows:

> The bond should be required in order to assure that the owner of an interest whose objection to withdrawal is overruled and is able to show a valid interest ultimately is not deprived of an award, and the condemnor is not required to pay twice.

The problem with the suggestion is that it deprives the court of the power to dispense with the bond in cases where the court concludes that there is little likelihood that the objector will prevail in the trial on the issue of compensation. The section as drafted retains the existing law as found in Code of Civil Procedure Section 1243.7 (bond discretionary with court).

§ 1255.090. Repayment of amount of excess withdrawal

The Southern Section suggests the following revisions in Section 1255.090:

(1) The phrase ", together with legal interest from the date of its withdrawal" should be deleted in lines 4 and 5 of the section.

(2) The section should be modified to provide for a stay of execution on the judgment for the excess for a period of one year after final judgment.

The following are the reasons for the proposed modifications:

1. Interest should not be paid on repayment to the Court of excess of award over the judgment because

(a) the owner is entitled to rely on the affidavit of the State;

(b) the obligation to repay the principal is sufficient;

(c) the owner who withdraws is not normally able to obtain full legal interest.

2. The rule shouldn't apply, however, to excess withdrawals required to be redistributed between parties defendant or to any amount of unused excess withdrawal, or to excess amounts obtained on motion of a party defendant.

3. The one year stay of execution on judgment for the excess would also not apply as between parties defendant.

This modification was approved by the Southern Section by a vote of 3-2. The minority opposed any change in present law (as codified in Section 1255.090). The proposed change insofar as it relates to the one-year delay would present complex drafting problems since the change would apply only between the condemnor and condemnee, not between two condemnees. The provision that there be no interest imposed on the excess amount withdrawn does not present any drafting complications, but the condemnor would have to pay interest to the various condemnees on the difference between the amount they each withdrew and the amount to which they are entitled under the final judgment.

§ 1255.210. Order for possession prior to judgment

The Southern Section suggests that subdivision (a) of Section 1255.210 be revised to add a new paragraph (4) to read:

> (4) Plaintiff shows actual need for possession as of the effective date of the requested order of possession.

The reason for the suggested change is stated as follows:

> It is in the public interest that the plaintiff be required to show an actual timely need for possession prior to judgment. Committee members have experienced cases when possession was sought where no actual need existed.

The Northern Section disapproves the recommendation of the Southern Section:

> The subcommittee disapproved of the recommendation of the Southern Section to add a new subparagraph 4 to Section 1255.210. The recommendation of the Southern Section was that the plaintiff must show actual need for possession as of the effective date of the requested order of possession. The subcommittee of the Northern Section felt that a showing was irrelevant and that the courts should not substitute their discretion for that of a public agency acquiring the property. The subcommittee felt that the need for possession of a particular piece of property should be left to the sound discretion of the persons in charge of the public works program.

The staff does not believe the suggested change is desirable. First, it would not really protect the condemnee since the order is obtained ex parte. Second,

Section 1255.220 provides for a stay of the order for hardship, and this provides the condemnee with an opportunity for a hearing before possession of his property may be taken. (The Northern Section also objected to Section 1255.220.)

§ 1255.220. Stay of order for hardship

The Southern Section unanimously approved Section 1255.220. The Northern Section objected to this section:

> The subcommittee of the Northern Section objected to the inclusion of this section in the proposed eminent domain law. The subcommittee was again of the opinion that the courts should not substitute their discretion for that of administrative or executive officials in determining when property is needed for construction of public improvements. The subcommittee also felt that the court should not have the authority to limit the terms and conditions relating to immediate possession prior to judgment. The subcommittee felt that this provision would not be necessary if other public agencies and other public uses were not authorized to obtain ex parte orders for immediate possession prior to judgment. The subcommittee is of the opinion that the extension of the right of immediate possession to other public agencies and other public uses should be done on a piecemeal basis rather than a blanket authorization by the Legislature.

The Commission, when it previously considered this portion of the statute, considered Section 1255.220 to be of great benefit to the condemnee even though various public entities expressed strong objections. The section has no counterpart in existing law.

§ 1255.260. Deposit for relocation purposes on motion of certain defendants

Section 1255.260 reflects a policy considered important by the Commission and one the Commission thought should apply in all condemnation cases. The section was limited to dwellings in an effort to minimize the objections to the section. The Southern Section suggests the following:

(1) The section be made applicable to all condemnation actions--any condemnee being entitled to have the deposit made.

(2) Failure to make the deposit should constitute an abandonment of the action.

This suggestion (if the condemnee is given the option to treat the failure to make the deposit as an abandonment) certainly is one that proposes what would be the ideal. Perhaps the tentative recommendation should be revised to adopt the suggestion with a view to soliciting comments on the ideal rather than a watered down version of the ideal.

§ 1255.320. Order for possession

This section deals with entry after judgment. The Southern Section proposes that the 10-day period in subdivision (b) be revised to read "not less than 30 days from the date of deposit."

§ 1255.330. Service of order

The Southern Section suggests changing the time period from 10 to 30 days.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 72-47 EXHIBIT I

AMENDED IN ASSEMBLY JUNE 21, 1972

CALIFORNIA LEGISLATURE—1972 REGULAR SESSION

ASSEMBLY BILL No. 1790

Introduced by Assemblyman MacDonald
(Coauthor: Senator Lagomarsino)

March 15, 1972

REFERRED TO COMMITTEE ON CRIMINAL JUSTICE

An act to add ~~Sections 653i and 653j to the Penal Code~~ ARTICLE 4.8 (COMMENCING WITH SECTION 1128) TO CHAPTER 1 OF DIVISION 4 OF TITLE 1 OF THE GOVERNMENT CODE, *relating to bribery ~~involving business~~.*

LEGISLATIVE COUNSEL'S DIGEST

AB 1790, as amended, MacDonald (Crim.J.). Bribery.

Requires public entities to reopen for consideration any of its actions which involve the entry of judgment or order for probation in a case involving conviction of anyone for giving or receiving a bribe or soliciting the offering or receipt of a bribe to executives, ministerial officers, employees or appointees of public entities. Allows public entities to affirm the action in such a case, or as an alternative, have the ~~Authorizes~~ Attorney General ~~to~~ bring *civil proceedings* ~~action~~ to void *such action* ~~contracts entered into in connection with bribery~~. ~~Prohibits business or corporation from doing business with government entity with which the contract was entered into as a result of a bribe by an agent of the business or corporation.~~ *Provides that the Attorney General may institute civil proceedings to void the action of the public entity if such entity has not reaffirmed its action within 90*

days.

Makes related changes.

Vote—Majority; Appropriation—No;
Fiscal Committee—Yes.

The people of the State of California do enact as follows:

~~SECTION 1. Section 653i is added to the Penal Code,~~

SECTION 1. Article 4.8 (commencing with Section 1128) is added to Chapter 1 of Division 4 of Title 1 of the Government Code, to read:

Article 4.8. Bribery Involving Public Entities

1128. After the entry of judgment or an order granting probation in a case involving a conviction of anyone for giving or receiving a bribe or soliciting the offering or receipt of a bribe to an executive or ministerial officer, employee or appointee of the state, a county, city, district or any other public entity in the state, the governmental body whose official action was the subject of the bribe shall reopen consideration, within 30 days, of the original action which the bribe was intended to influence.

Using the same method of making its decision as was employed in taking the original official action, the governmental body shall consider whether it wishes to reaffirm its original action or seek a declaration that it is void.

1128.1. If the governmental body seeks to have its earlier action declared void, it may request the Attorney General to act under the authority provided by this article.

1128.2. If the governmental body fails to reaffirm its original action within 90 days of the entry of judgment or the granting of probation, or if that body requests the Attorney General to act, the Attorney General may bring a civil proceeding to void any action taken or contract entered into by the state or any county, city, district or any other public entity in the state on the grounds that

the action was taken or the contract entered into in connection with the giving or offering of a bribe.

1128.3. In any civil proceeding pursuant to this article, if the Attorney General establishes that a bribe was offered or given, or the receipt of a bribe was solicited or a bribe was accepted in connection with an action or contract, such action or contract shall be void.

In such a civil proceeding, the court, in addition to declaring the action or contract void, may award damages to the state, county, city, district or public entity for any loss suffered as a result of the invalidation of the action or contract.

~~to read:~~

~~653i. (a) If a director, officer, employee, or stockholder acting for or on behalf of a corporation, is found guilty of giving or offering a bribe to, or soliciting the receipt or acceptance of a bribe by, an executive or ministerial officer, employee, or appointee of the state, a county, city, district, or any other public entity in the state, the Attorney General may bring a proceeding to void any action taken or contract entered into by the state or any county, city, district, or any other public entity in the state on the grounds that the action was taken or the contract was entered into in connection with the giving or offering of a bribe.~~

~~(b) If any person in control of any business other than a corporation, who may be a partner in a partnership, a participant in a joint venture, the owner of a sole proprietorship, an employee or agent of any such business, or a person who, in fact, exercises control over the operations of any such business, and who, in the process of conducting its business affairs, is found guilty of giving or offering a bribe to, or soliciting the receipt or acceptance of a bribe by, an executive or ministerial officer, employee, or appointee of the state, a county, city, district, or any other public entity in the state, the Attorney General may bring a proceeding to void any action taken or contract entered into by the state or any county, city, district, or any other public entity in the state on the grounds that the action was taken or the~~

[balance of strikeout omitted.]

EXHIBIT II

EXTRACT, REPORT ON EXPROPRIATION, LAW REFORM COMMISSION OF BRITISH COLUMBIA, pages 118-121 (1971)

3. *Sale*

This problem occurs after expropriation proceedings have been completed. Suppose the expropriating authority no longer needs the expropriated lands, should it be able to dispose of the lands freely or should the former owner be given the first opportunity to acquire them?

On the surface, it may only seem just that a former owner should have priority in these circumstances, but there are difficulties. The McRuer Report points out:[12]

> Where title to land may be affected caution must be exercised in conferring new rights. There are many factors to be considered in giving to previous owners statutory rights concerning land which is no longer required by the expropriating authority. These factors must include:
>
> (1) The length of time which has elapsed since the expropriation;
> (2) The difficulty of locating the former owner or his heir, as the case may be; and
> (3) The enhancement of the value of the surplus land by reason of work performed by the expropriating authority.
>
> We do not think that it is practical to confer actual property rights of a residual nature on former owners of expropriated land. Each case must be treated in the light of its particular facts.

The McRuer Commission then suggested:[13]

> The practical solution would be to require the consent of the appropriate approving authority before any surplus land could be sold by an expropriating authority. . . . Before giving approval to a sale of expropriated land, the approving authority should be required to make inquiry into the circumstances of the proposed sale and the position and desires of former owners, who should be given an opportunity, where practical, to purchase the land on equitable terms. Failure to follow legislative provisions of this sort should not affect the title to the land.

The McRuer Commission recognized that determining the price to be paid by the former owners would not be an easy matter. No precise formula was recommended for that purpose, it being suggested that, as each case arose, the approving authority should consider "all the relevant facts when consenting to a sale at a particular price and that the owner should have a right to be heard and make his claim."[14]

The Ontario statute contains a provision implementing the McRuer recommendation, with one exception.[15] The price at which the former owners can purchase is to be on the basis of the best offer received by the expropriating authority. Manitoba adopted the Ontario provision.[16]

The Ontario and Manitoba provision gives rise to a number of problems:

(*a*) Once property has been expropriated, the provision is applicable. Although the approving authority may consent to a sale to someone other than a former owner, that approval would still have to be obtained if the proposed disposition of the land by the expropriating authority was taking place 5, 20, or 100 years after the date of expropriation.

(*b*) Does the right of the former owner expire on his death (i.e., is it a right personal to him) or does it pass on to his beneficiaries under his estate, and, on their death, to their beneficiaries (i.e., does the provision create a transmissible property right)? One can imagine problems expropriating authorities could face in the future in trying to track down who is entitled to the benefit of the provision.

(*c*) If the owner acquires a transmissible property right under the provision, presumably it would also be transferrable during his lifetime. This could mean that he could sell his right at any

time to persons having a commercial interest in obtaining the property. Is this really the purpose of such a provision?

(*d*) The provision does not apply to persons who settled with the expropriating authority without expropriation proceedings being commenced. These persons settle knowing that, unless they do so, expropriation proceedings will be commenced. Should such persons not be entitled to the same treatment as those against whose property expropriation proceedings were begun?

(*e*) Sometimes the expropriating authority has expropriated the property for a particular purpose which has been completed, such as the construction of a subway, and may now wish to dispose of the property, usually along with other property, for the purpose of redevelopment. This may well be in the public interest. It is true that the approving authority could consent to such a disposition, but can it not be argued that the expropriating authority should have the right to redevelop in this way without going to the approval authority?

(*f*) The procedure of giving the former owner an option to purchase at the best offer received may not be as workable as it appears at first glance, particularly where offers are received under a public tendering system. The fact that the former owner has a right of option may, for example, discourage some persons from tendering who would otherwise put in a bid. In addition, some person interested in acquiring the property may, either in addition to or instead of tendering, attempt to buy the former owner's right (if, indeed, it is transferrable in this way). As a consequence, the normal competitive tendering system might be interfered with.

(*g*) Under the Ontario provision it is not clear who the "owners" are who are given the right to purchase. It appears that "owners" include mortgagees and owners of easements and all other interests in the land. Should all such persons have the right to purchase under such a provision? If not, who should have and on what basis?

In order to avoid the consequences and complexities of the Ontario provision, some expropriating authorities in that province are, we understand, taking waivers from owners with whom they settle after expropriation proceedings have commenced. Whether or not such waivers are valid may be open to question. The expropriating authorities are not, of course, in a position to obtain waivers when the proceedings go on to arbitration and an award is made.

In its working paper the Commission indicated that it was anxious to hear as many views as possible on the question of whether there should be some provision for giving a right to purchase to former owners. We stated

that we recognized that a case could be made for giving such a right, but we wondered whether the complications were such that it would, on balance, be best to omit a provision for repurchase.

The response was somewhat mixed. Expropriating authorities naturally preferred to be free of any requirement to give former owners a right to repurchase. However, there were others who were also opposed to conferring such a residual special right, on the ground that it suggests that the owner has not been treated fairly or received adequate compensation. On the other hand, some felt the former owner should have a right to purchase, particularly in instances where there had been a partial taking. The Council of the Forest Industries of British Columbia, for example, suggested that former owners should have a right of first refusal, which would lapse after a specified period, such as five or ten years, running from the date of expropriation. The Council pointed out that, in respect of a possible right to purchase at the level of the highest bid under a public tendering system, such a "matched tender" system has been used by the Provincial Government in the granting of timber sale contracts. Two individuals proposed that former owners should have the right to purchase at the price which the expropriating authority paid. This would not, in our view, be the correct basis for determining the repurchase price. If there was to be a repurchase procedure, we think the repurchase price should be the market value at the time of the repurchase. Otherwise, if the market value had gone up in the interval, the former owner would receive a windfall. On the other hand, if the value had fallen, the former owner should have the right of repurchase at the current and lower value. Again, if there was to be a repurchase procedure, we think we would prefer the right of first refusal as it is conferred in the Ontario provision as the means of determining the repurchase price. An alternative would be to have the price determined by the general arbitration tribunal on the basis of current market value, but for such a procedure to be workable it would have to be binding upon both parties or at least confer an option on the former owner for a limited time to buy at that price.

However, after the most careful consideration and with some reluctance, we have reached the conclusion that the disadvantage of the complexities involved outweighs the advantage that would be gained on the few occasions when such a provision would be exercised. We should point out, however, that we earlier recommended that the owner should have the right to take his interest back should the expropriating authority decide on abandonment proceedings while the owner has some connection with the property (i.e., he is still in possession, arbitration proceedings are still in process, or he has not yet been paid in full).