

#36

6/27/73

Memorandum 73-49

Subject: Study 36 - Comprehensive Statute (Approval of Chapters 1, 2, 4, and 6 for Printing)

Attached to this memorandum are two copies of revised versions of the following chapters of the Comprehensive Eminent Domain Statute:

- Chapter 1 - General Provisions
- Chapter 2 - Principles of Construction; Definitions
- Chapter 4 - Precondemnation Activities
- Chapter 6 - Deposit and Withdrawal of Probable Compensation; Obtaining Possession Prior to Judgment

The staff has renumbered all of the provisions included in the above chapters. Some editorial changes have been made and revisions have been made to reflect the reorganization of the comprehensive statute. (See Memorandum 73-58 and attached outline.) Except for a few sections, the material in these chapters has been previously considered and tentatively approved. Accordingly, we are hopeful that it will not require a great deal of time at the meeting to consider and approve this material for sending to the printer. Please mark your editorial changes on one copy for the staff. If you have suggested changes that are not strictly editorial, please bring these changes up at the meeting.

Sections not previously approved are: 1230.030, 1235.140, 1245.260, 1255.080, 1255.440, and 1255.460. As previously indicated, editorial or technical changes have been made in other sections.

Respectfully submitted,

John H. DeMouilly
 Executive Secretary

EMINENT DOMAIN LAW § 1230.010

Tentatively approved April 1970
Renumbered July 1973

Sec. . Title 7 (commencing with Section 1230.010) is added
to Part 3 of the Code of Civil Procedure to read:

TITLE 7. EMINENT DOMAIN LAW

CHAPTER 1. GENERAL PROVISIONS

§ 1230.010. Short title

1230.010. This title shall be known and may be cited as the
Eminent Domain Law.

Comment. Section 1230.010 is similar to comparable sections in recently
enacted California laws. E.g., Civil Code § 4000 (The Family Law Act).

EMINENT DOMAIN LAW § 1230.020

Tentatively approved October 1971
Renumbered July 1973

§ 1230.020. Law governing exercise of eminent domain power

1230.020. Except as otherwise specifically provided by statute, the power of eminent domain may be exercised only as provided in this title.

Comment. Section 1230.020 is the same in substance as the second sentence of former Section 1237. The provisions of the Eminent Domain Law govern all acquisitions by eminent domain except to the extent that specific provision is otherwise made by statute.

Instances of specific provision otherwise are (1) where the Public Utilities Commission may determine just compensation (see Pub. Util. Code §§ 1206-1218 and 1401-1421); and (2) where the state has expressly provided that federal law controls (see, e.g., County of Marin v. Superior Court, 53 Cal.2d 633, 349 P.2d 526, 2 Cal. Rptr. 758 (1960)).

EMINENT DOMAIN LAW § 1230.030

Staff draft July 1973

§ 1230.030. Exercise of eminent domain power discretionary

1230.030. Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.

Comment. Section 1230.030 makes clear that whether property is to be acquired by purchase or other means, or by exercise of the power of eminent domain, is a discretionary decision. Nothing in this title requires that the power of eminent domain be exercised; but, if the decision is that the power of eminent domain is to be used to acquire property for public use, the provisions of this title apply except as otherwise specifically provided by statute. See Section 1230.020. Compare Govt. Code § 15854 (property acquired pursuant to Property Acquisition Law).

EMINENT DOMAIN LAW § 1230.040

Tentatively approved June 1973
Renumbered July 1973

§ 1230.040. Rules of practice in eminent domain proceedings

1230.040. Except as otherwise provided in this title, the rules of practice that govern civil actions generally are the rules of practice for eminent domain proceedings.

Comment. [to be supplied]

§ 1230.050. Court may enforce right to possession

1230.050. The court in which a proceeding in eminent domain is brought has the power to:

(a) Determine the right to possession of the property, as between the plaintiff and the defendants, in accordance with this title.

(b) Enforce any of its orders for possession by appropriate process. The plaintiff is entitled to enforcement of an order of possession as a matter of right.

Comment. Section 1230.050 is new. In general, the section codifies judicial decisions which hold that, after an eminent domain proceeding is begun, the court in which that proceeding is pending has the exclusive power to determine the respective rights of the plaintiff and of the defendants to possession and to enforce its determination. See, e.g., Neale v. Superior Court, 77 Cal. 28, 18 P. 790 (1888); In re Bryan, 65 Cal. 375, 4 P. 304 (1884); San Bernardino Valley Municipal Water Dist. v. Gage Canal Co., 226 Cal. App.2d 206, 37 Cal. Rptr. 856 (1964). In addition to the writs of possession or writs of assistance which the court may issue and enforce in exercise of its general jurisdiction (see Marblehead Land Co.

EMINENT DOMAIN LAW § 1230.050

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v. County of Los Angeles, 276 Fed. 305 (S.D. Cal. 1921); 3 B. Witkin, California Procedure Enforcement of Judgment § 64 (1954)), orders for possession contemplated by the section include those made under Article 3 (commencing with Section 1255.410) of Chapter 6 and Article 5 (commencing with Section 1268.410) of Chapter 11.

EMINENT DOMAIN LAW § 1230.060

Tentatively approved April 1973

Revised June 1973

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§ 1230.060. Public Utilities Commission jurisdiction preserved

1230.060. Nothing in this title affects any other statute granting jurisdiction over any issue in eminent domain proceedings to the Public Utilities Commission.

Comment. Section 1230.060 preserves such jurisdiction as the Public Utilities Commission may have over issues in eminent domain proceedings. It supersedes the portion of former Section 1243 of the Code of Civil Procedure which provided that the jurisdiction of the Public Utilities Commission to ascertain just compensation was not affected by eminent domain law.

The Public Utilities Commission has concurrent jurisdiction over certain eminent domain proceedings. See, e.g., Pub. Util. Code § 1401 et seq. (local public entities may petition Public Utilities Commission to acquire public utility property by eminent domain) and Pub. Util. Code § 1351 (Public Utilities Commission may ascertain value of public utility property in such proceeding). Cf. Cal. Const., Art. XII, § 23a (legislative power to grant Public Utilities Commission jurisdiction to ascertain just compensation).

The Public Utilities Commission has exclusive jurisdiction over railroad crossings. See, e.g., Pub. Util. Code § 1201 et seq. and Northwestern Pac. R.R. v. Superior Court, 34 Cal.2d 454, 211 P.2d 571 (1949) (Public Utilities Commission jurisdiction over crossings extends to eminent domain proceedings in superior court); cf. Cal. Const., Art. XII, § 23 (legislative power to

EMINENT DOMAIN LAW § 1230.060

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grant Public Utilities Commission control of public utilities) and Pub. Util. Code § 7537 (farm and private crossings). In addition, there may be specific grants of jurisdiction to the Public Utilities Commission over certain issues involved in particular eminent domain acquisitions. See, e.g., Pub. Util. Code §§ 861 (Public Utilities Commission jurisdiction over controversies concerning relocation of utility improvements), 30503 (Public Utilities Commission review of acquisition of railroad property by Southern California Rapid Transit District), and 102243 (Public Utilities Commission jurisdiction in proceedings of Sacramento Regional Transit District). Whether the Public Utilities Commission has jurisdiction over the place and manner of relocation of utility property generally is not clear. Compare Pub. Util. Code § 851 (Public Utilities Commission approval required before utility property may be disposed of) with People v. City of Fresno, 254 Cal. App.2d 76, 62 Cal. Rptr. 79 (1967)(Section 851 not applicable in condemnation of public utility property). See also Govt. Code §§ 55300-55367 (joint project for construction of conduit or line).

EMINENT DOMAIN LAW § 1230.070

Tentatively approved October 1971

Renumbered July 1973

§ 1230.070. Effect of enactment of title on prior proceedings

1230.070. No proceeding to enforce the right of eminent domain, or judgment rendered pursuant thereto, commenced prior to the enactment of this title and the repeal of former Title 7 of this part, is affected by such enactment and repeal.

Comment. Section 1230.070 has a dual effect. It makes clear that the repeal of the eminent domain provisions of this code and the enactment of new provisions of the Eminent Domain Law in no way affect the validity of proceedings and judgments rendered prior thereto. In addition, it makes clear that pending proceedings are to be completed under old law and are not affected by enactment of the Eminent Domain Law. For a comparable provision, see former Section 1261.

EMINENT DOMAIN LAW § 1235.010

Tentatively approved April 1970
Renumbered July 1973

CHAPTER 2. PRINCIPLES OF CONSTRUCTION; DEFINITIONS

Article 1. Construction

§ 1235.010. Construction of title

1235.010. Unless the provision or context otherwise requires, these preliminary provisions and rules of construction shall govern the construction of this title.

Comment. Section 1235.010 is a standard provision in the various California codes. E.g., Evid. Code § 4; Veh. Code § 6. Unless otherwise provided in this title, the preliminary provisions of the Code of Civil Procedure are applicable. See, e.g., Code Civ. Proc. § 17 ("words used in the masculine gender include the feminine and neuter; the singular number includes the plural and the plural the singular"). See also Code Civ. Proc. § 5 (construction of provisions as continuation of existing statutes). See also Govt. Code § 9604.

EMINENT DOMAIN LAW § 1235.020

Tentatively approved April 1970
Renumbered July 1973

§ 1235.020. Effect of headings

1235.020. Chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions of this title.

Comment. Provisions similar to Section 1235.020 appear in almost all of the existing California codes. E.g., Evid. Code § 5; Veh. Code § 7.

EMINENT DOMAIN LAW § 1235.030

Tentatively approved April 1970

Renumbered July 1973

§ 1235.030. References to statutes

1235.030. Whenever any reference is made to any portion of this title or to any other statute, such reference shall apply to all amendments and additions heretofore or hereafter made.

Comment. Section 1235.030 is a standard provision in various California codes. E.g., Evid. Code § 6; Veh. Code § 10.

EMINENT DOMAIN LAW § 1235.040

Tentatively approved April 1970

Renumbered July 1973

§ 1235.040. "Chapter," "article," "section," "subdivision," and "paragraph"

1235.040. Unless otherwise expressly stated:

(a) "Chapter" means a chapter of this title.

(b) "Article" means an article of the chapter in which that term occurs.

(c) "Section" means a section of this code.

(d) "Subdivision" means a subdivision of the section in which that term occurs.

(e) "Paragraph" means a paragraph of the subdivision in which that term occurs.

Comment. Section 1235.040 is similar to Evidence Code Section 7.

Compare Code Civ. Proc. § 17(8).

EMINENT DOMAIN LAW § 1235.050

Tentatively approved April 1970
Renumbered July 1973

§ 1235.050. Construction of tenses

1235.050. The present tense includes the past and future tenses;
and the future, the present.

Comment. Section 1235.050 is a standard provision in various California
codes. E.g., Evid. Code § 8; Veh. Code § 12. Compare Code Civ. Proc. § 17.

EMINENT DOMAIN LAW § 1235.060

Tentatively approved April 1970

Renumbered July 1973

§ 1235.060. "Shall" and "may"

1235.060. "Shall" is mandatory and "may" is permissive.

Comment. Section 1235.060 is a standard provision in various California codes. E.g., Evid. Code § 11; Veh. Code § 15.

EMINENT DOMAIN LAW § 1235.070

Tentatively approved April 1970
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§ 1235.070. Constitutionality

1235.070. If any provision or clause of this title or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the title that can be given effect without the invalid provision or application, and to this end the provisions of this title are declared to be severable.

Comment. Section 1235.070 is the same as Section 3 of the Evidence Code and Section 1108 of the Commercial Code.

EMINENT DOMAIN LAW § 1235.110

Tentatively approved April 1970
Renumbered July 1973

Article 2. Words and Phrases Defined

§ 1235.110. Application of definitions

1235.110. Unless the provision or context otherwise requires, these definitions govern the construction of this title.

Comment. Section 1235.110 is a standard provision found in the definitional portion of recently enacted California codes. See, e.g., Evid. Code § 100; Veh. Code § 100. Unless otherwise provided in this title, the definitions in the preliminary portion of the Code of Civil Procedure are applicable. See, e.g., Code Civ. Proc. § 17.

EMINENT DOMAIN LAW § 1235.120

Tentatively approved April 1970

Renumbered July 1973

§ 1235.120. City

1235.120. "City" includes city and county.

EMINENT DOMAIN LAW § 1235.130

Tentatively approved April 1970
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§ 1235.130. County

1235.130. "County" includes city and county.

EMINENT DOMAIN LAW § 1235.140

Staff draft July 1973

§ 1235.140. Law

1235.140. "Law" includes constitutional, statutory, and decisional law, including charter provisions and ordinances.

Comment. Section 1235.140, which is similar to the definition of "law" in Evidence Code Section 160, makes it clear that a reference to "law" includes the law established by judicial decisions as well as by constitutional and statutory provisions. The phrase "including charter provisions and ordinances" is included in Section 1235.140 because the definition of "statute" in Section 1235.210 specifically excludes a charter provision or ordinance.

EMINENT DOMAIN LAW § 1235.150.

Tentatively approved April 1970
Renumbered July 1973

§ 1235.150. Local public entity

1235.150. "Local public entity" means any public entity other than the state.

EMINENT DOMAIN LAW § 1235.160

Tentatively approved April 1970
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Renumbered July 1973

§ 1235.160. Person

1235.160. "Person" includes any public entity, individual, association, organization, partnership, trust, or corporation.

Comment. Section 1235.160 provides a broad definition of "person."
Compare Code Civ. Proc. § 17.

EMINENT DOMAIN LAW § 1235.170

Tentatively approved April 1970
Renumbered July 1973

§ 1235.170. Property

1235.170. "Property" includes real and personal property and any right, title, or interest therein and, by way of illustration and not by way of limitation, includes submerged lands, rights of any nature in water, subsurface rights, airspace rights, flowage or flooding easements, aircraft noise or operation easements, rights to limit the use or development of property, right of temporary occupancy, public utility facilities and franchises, and franchises to collect tolls on a bridge or highway.

Comment. Section 1235.170 is intended to provide the broadest possible definition of property and to include any type of right, title, or interest in property that may be required for public use. If the property authorized to be taken is limited by the statutory grant of condemnation authority to property of a certain type, an attempt to take property other than the type designated in the grant of condemnation authority is precluded by Section 1240.020. See Section 1240.020 and Comment thereto.

Section 1235.170 eliminates the need for duplicative listings of property types and interests subject to condemnation. Cf., e.g., former Code. Civ. Proc. § 1240 (real property, tide and submerged lands, franchises for any public utility, rights of way and any and all structures and improvements thereon) and former Code Civ. Proc. § 1238(3) ("ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes, lands, water system plants, buildings, rights of any nature in water, and any other character of property necessary" for certain purposes).

EMINENT DOMAIN LAW § 1235.180

Tentatively approved July 1970

Renumbered July 1973

§ 1235.180. "Property appropriated to public use"

1235.180. "Property appropriated to public use" means property either already in use for a public purpose or set aside for a specific public purpose with the intention of using it for such purpose within a reasonable time.

Comment. Section 1235.180 defines "property appropriated to public use" in accordance with prior California decisions. See East Bay Mun. Util. Dist. v. Lodi, 120 Cal. App. 740, 750-758, 8 P.2d 532, (1932). The general concept of "public use" is discussed in connection with Section 1240.010. See Section 1240.010 and Comment thereto.

It should be noted that appropriation to a public use does not require actual physical use, but may be satisfied by formal dedication or facts indicating a reasonable prospect of use within a reasonable time. See, e.g., Woodland School Dist. v. Woodland Cemetery Ass'n, 174 Cal. App.2d 243, 344 P.2d 326 (1959)(property formally dedicated but not yet used by corporation for cemetery purposes); City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992 (1916)(property assembled by electric railway for planned subway). Moreover, property may be appropriated to public use even though it is owned by a private individual or corporation. E.g., Woodland School Dist. v.

EMINENT DOMAIN LAW § 1235.180

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Woodland Cemetery Ass'n, supra; City of Los Angeles v. Los Angeles Pac. Co., supra. Conversely, property may be owned by a public entity but not be appropriated to public use. Deseret Water, Oil & Irr. Co. v. State, 167 Cal. 147, 138 P. 981 (1914); rev'd on other grounds, 243 U.S. 415, and 176 Cal. 745, 171 P. 287 (1917).

The term defined in Section 1235.180 is used primarily in Article 6 (commencing with Section 1240.510) and Article 7 (commencing with Section 1240.710) of Chapter 3. (These articles relate to a taking for a more necessary or a compatible use.)

EMINENT DOMAIN LAW § ~~1233.290~~

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§ 1235.190. Public entity

1235.190. "Public entity" includes the state, a county, city, district, public authority, public agency, and any other political subdivision in the state.

EMINENT DOMAIN LAW § 1235.200

Tentatively approved April 1970
Renumbered July 1973

§ 1235.200. State

1239.200. "State" means the State of California and includes the Regents of the University of California.

EMINENT DOMAIN LAW § 1235.210

Tentatively approved April 1970
Renumbered July 1973

§ 1235.210. Statute

1235.210. "Statute" means a constitutional provision or statute, but does not include a charter provision or ordinance.

CHAPTER 4. PRECONDEMNATION ACTIVITIES

Article 1. Preliminary Location, Survey, and Tests

§ 1245.010. Right to make examinations and tests

1245.010. Subject to requirements of this article, any person authorized to acquire property for a particular use by eminent domain may enter upon property to make studies, surveys, examinations, tests, soundings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use.

Comment. Section 1245.010 continues without substantive change the provisions of subdivision (b) of former Code of Civil Procedure Section 1242.

§ 1245.020. Liability for damages

1245.020. (a) The liability, if any, of a public entity for damages to property that arise from the entry and activities mentioned in Section 1245.010 is determined by Section 816 of the Government Code.

(b) Any person, other than a public entity, authorized to acquire property for a particular use by eminent domain is liable for damages to property that arise from the entry and activities mentioned in Section 1245.010 to the same extent that a public entity is liable for such damages under Section 816 of the Government Code.

Comment. Section 1245.020 continues without substantive change the provisions of subdivisions (c) and (d) of former Code of Civil Procedure Section 1242.

§ 1245.030. Consent or court order required in certain cases

1245.030. In any case in which the entry and activities mentioned in Section 1245.010 will subject the person having the power of eminent domain to liability under Section 1245.020, before making such entry and undertaking such activities, the person shall secure:

(a) The written consent of the owner to enter upon his property and to undertake such activities; or

(b) An order for entry from the superior court in accordance with Section 1245.040.

Comment. Except as noted in the Comment to Section 1245.070, Sections 1245.030-1245.070 continue without substantive change the provisions of former Code of Civil Procedure Section 1242.5.

§ 1245.040. Court order permitting entry; deposit of probable compensation

1245.040. (a) The person seeking to enter upon the property may petition the court for an order permitting the entry and shall give such prior notice to the owner of the property as the court determines is appropriate under the circumstances of the particular case.

(b) Upon such petition and after such notice has been given, the court shall determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use.

(c) After such determination, the court may issue its order permitting the entry. The order shall prescribe the purpose for the entry and the nature and scope of the activities to be undertaken and shall require the person seeking to enter to deposit the probable amount of compensation in the manner provided in Section 1255.070.

Comment. See the Comment to Section 1245.030.

§ 1245.050. Modification of court order

1245.050. At any time after an order has been made pursuant to Section 1245.040, either party may, upon noticed motion, request the court to determine whether the nature and scope of the activities reasonably necessary to accomplish the purpose of the entry should be modified or whether the amount deposited is the probable amount of compensation that will be awarded. If the court determines that the nature and scope of the activities to be undertaken or the amount of the deposit should be modified, the court shall make its order prescribing the necessary changes.

Comment. See the Comment to Section 1245.030.

§ 1245.060. Management of amount deposited

1245.060. The court shall retain the amount deposited under this article for a period of six months following the termination of the entry. Such amount shall be deposited in the Condemnation Deposits Fund in the State Treasury and shall be held, invested, deposited, and disbursed in accordance with Article 10 (commencing with Section 16429.1) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code.

Comment. See the Comment to Section 1245.030.

§ 1245.070. Recovery of damages and expenses

1245.070. (a) The owner is entitled to recover from the person who entered his property the amount necessary to compensate the owner for any damage which arises out of the entry and for his court costs in the proceeding under this article. In the interests of justice, the court may award the owner, in addition to his court costs, reasonable attorney's fees in an amount fixed by the court.

(b) Where a deposit has been made pursuant to this article, the owner may, upon noticed motion made within six months following the termination of the entry, request the court to determine the amount he is entitled to recover under this section. Thereupon, the court shall

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determine such amount and award it to the owner and the money on deposit shall be available for the payment of such amount.

(c) Nothing in this section affects the availability of any other remedy the owner may have for the damaging of his property.

Comment. Section 1245.070 continues without substantive change the provisions of subdivision (e) of former Code of Civil Procedure Section 1242.5 except that Section 1245.070 permits the award of reasonable attorney's fees only in the interests of justice—*e.g.*, where the person who entered or sought to enter acted arbitrarily and without any reasonable justification—whereas former Section 1242.5 contained no such limitation on the award of reasonable attorney's fees.

Article 2. Resolution of Necessity

§ 1245.210. "Governing body" defined

1245.210. As used in this article, "governing body" means:

- (a) In the case of a taking by a local public entity, the governing body of the local public entity.
- (b) In the case of a taking by the Sacramento and San Joaquin Drainage District, the State Reclamation Board.
- (c) In the case of a taking by the State Public Works Board pursuant to the Property Acquisition Law, Part 11 (commencing with Section 15850) of Division 3 of Title 2 of the Government Code, the State Public Works Board.
- (d) In the case of a taking by the Department of Public Works (other than a taking pursuant to Section 30100 of the Streets and Highways Code), the California Highway Commission.
- (e) In the case of a taking by the Department of Public Works pursuant to Section 30100 of the Streets and Highways Code, the California Toll Bridge Authority.
- (f) In the case of a taking by the Department of Water Resources, the California Water Commission.
- (g) In the case of a taking for the University of California, the Regents of the University of California.

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Comment. Section 1245.210 defines the term "governing body" as used in this article.

Subdivision (a). A local public entity is any public entity other than the state. Section 1235.150. The governing bodies of such entities are specified by statute. E.g., Govt. Code §§ 23005 (board of supervisors governs county) and 34000 (legislative body of municipal corporation is board of trustees, city council, or other governing body).

Subdivision (b). The San Joaquin Drainage District, while by definition a local public entity (Section 1235.150), is comparable in some ways to an agency of the state. Its work is in the interest of the entire state. See San Joaquin Drainage Dist. v. Riley, 199 Cal. 668, 251 P. 207 (1926). It is partially funded by the state. See Water Code § 8527. Its management and control are vested in a state agency--the Reclamation Board--which is its governing body. See Water Code § 8502.

Subdivision (c). Takings for all general state purposes (other than state highways, toll bridges, state water projects, and the University of California) are made by the State Public Works Board under the Property

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Acquisition Law (Govt. Code § 15850 et seq.). Under former law, there may have been cases where the Department of General Services or other state agencies could condemn on behalf of the state under authority formerly found in Government Code Section 14661 or other provisions (basically where an appropriation was made not subject to the Property Acquisition Law), but this authority is not continued. See Govt. Code § 15855 and Comment thereto. It should be noted that the Public Works Board may condemn property only with the approval of the agency concerned. Govt. Code § 15853.

Subdivision (d). Takings for state highway purposes are accomplished on behalf of and in the name of the state by the Department of Public Works. Sts. & Hwys. Code § 102. The governing body for the Department of Public Works in such takings is the California Highway Commission. This continues a provision formerly found in Streets and Highways Code Section 102.

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Subdivision (e). Takings for toll bridges and other transportation facilities designated by Streets and Highways Code Section 30100 are accomplished on behalf and in the name of the state by the Department of Public Works. Sts. & Hwys. Code § 30400. The governing body for the Department of Public Works in such takings is the California Toll Bridge Authority. Sts. & Hwys. Code § 30400. See also former Sts. & Hwys. Code § 30404.

Subdivision (f). Takings for state water and dam purposes and for the Central Valley Project are accomplished on behalf and in the name of the state by the Department of Water Resources. Water Code §§ 250 and 11575. The governing body of the Department of Water Resources is the California Water Commission. This supersedes provisions formerly found in Sections 250 and 11581 of the Water Code that required a declaration of necessity by the Director of Water Resources with the concurrence of the Water Commission.

Subdivision (g). The Regents of the University of California, while comparable to an agency of the state, is a separate corporation administering the public trust known as the University of California. The Regents is authorized to condemn property for the university in its own name and is, therefore, the governing body of the university for purposes of Section 1245.220. See Cal. Const., Art. IX, § 9 and Educ. Code § 23151. Cf. Educ. Code §§ 23201 and 23204.

EMINENT DOMAIN LAW § 1245.220

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§ 1245.220. Resolution of necessity required

1245.220. A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of this article.

Comment. Before a public entity begins condemnation proceedings, its governing body must adopt a resolution of necessity that meets the requirements of Sections 1245.230 and 1245.240. See Section 1240.040 and Comment thereto.

It should be noted that failure to commence an eminent domain proceeding within six months after adoption of a resolution of necessity constitutes a cause of action for inverse condemnation. Section 1245.260.

EMINENT DOMAIN LAW § 1245.230

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§ 1245.230. Contents of resolution

1245.230. The resolution of necessity shall contain all of the following:

(a) A general description of the proposed project with a reference to the specific statute or statutes authorizing the public entity to acquire property for such project.

(b) A description of the property to be acquired for the proposed project and its use in the proposed project.

(c) A declaration that the governing body of the public entity has found and determined each of the following:

(1) The public interest and necessity require the proposed project.

(2) The proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(3) The property described in the resolution is necessary for the proposed project.

Comment. Section 1245.230 prescribes the contents of the resolution of necessity by a public entity. The resolution is an administrative determination that the statutory prerequisites for taking particular property have been met. Section 1245.230 supersedes various provisions that required a resolution of necessity by different public entities.

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Subdivision (a). The resolution of necessity must contain a general description of the proposed project. A statement, for example, that the project is an "elementary school and grounds" or "right of way for a free-way" would satisfy this requirement.

The resolution also must make reference to the specific statute or statutes authorizing the exercise of the power of eminent domain for the project. Only persons authorized by statute to condemn for a particular public use can condemn for that use. Section 1240.020. Such authorizing statutes may be of several types. The state, the University of California, cities, counties, and school districts, for example, may condemn any property necessary to carry out any of their powers or functions. See, e.g., Educ. Code §§ 1047 (school districts), 23151 (Regents of the University of California); Govt. Code §§ 15853 (Public Works Board), 25350.5 (counties), 37350.5 (cities). Many special districts have similar broad authority, but some may condemn only for limited or special purposes. Additionally, if the condemnor is acquiring property under authority of certain general public uses, it must specify that authority. E.g., Sections 1240.220 (future use), 1240.320 and 1240.330 (substitute), 1240.420 (excess), 1240.510 (compatible use), 1240.610 (more necessary use).

EMINENT DOMAIN LAW § 1245.230

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Renumbered July 1973

Subdivision (b). The resolution of necessity must contain a description of the property, right, or interest to be taken. See Section 1235.170 ("property" defined). The description must be sufficiently precise to enable the owner to determine the physical extent of the taking and the interest sought. The resolution must also indicate in what way the property will be used for the proposed project.

Subdivision (c). The resolution of necessity must contain a declaration that the governing body of the public entity has found and determined the existence of each of the three elements of public necessity required by Section 1240.030 to be established for a taking. See Section 1240.030 and Comment thereto. This provision is modeled after similar provisions formerly applicable to various condemnors. See, e.g., former Code Civ. Proc. § 1241(2), former Water Code § 8595, former Sts. & Hwys. Code § 25052.

EMINENT DOMAIN LAW § 1245.240

Tentatively approved May 1970

Revised April 1971

Revised December 1971

Renumbered July 1973

§ 1245.240. Adoption of resolution

1245.240. Except as otherwise provided by statute, the resolution must be adopted by a vote of a majority of the members of the governing body of the public entity.

Comment. Section 1245.240 states the general rule that, to be valid, the resolution of necessity must be adopted by a majority of all of the members of the governing body of the entity, not merely a majority of those present at the time of adoption. In the past, it was not clear whether a majority of those present could authorize condemnation. Cf. 52 Ops. Cal. Atty. Gen. 56 (1969)(majority of those present needed for city ordinance).

Section 1245.240 continues the majority vote requirement for takings by the state. See, e.g., former Govt. Code § 15855 and Sts. & Hwys. Code § 102. Section 1245.240 also continues the majority vote requirement formerly applicable to most takings by local public entities under numerous specific provisions superseded by Section 1245.240. Section 1245.240 supersedes the provision of former Code of Civil Procedure Section 1241(2) that made the resolutions of certain local public entities conclusive on necessity if the resolution was adopted by a two-thirds vote.

The introductory proviso of Section 1245.240 recognizes that differing vote requirements may be imposed by special statute. See, e.g., Educ. Code § 23151 (two-thirds vote required for taking by Regents of the University of California).

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§ 1245.250. Effect of resolution

1245.250. (a) Except as otherwise provided by statute, a resolution of necessity adopted by the governing body of the public entity pursuant to this article conclusively establishes the matters referred to in Section 1240.030.

(b) If the taking is by a local public entity and the property described in the resolution is not located entirely within the boundaries of the local public entity, the resolution of necessity creates a presumption that the matters referred to in Section 1240.030 are true. This presumption is a presumption affecting the burden of producing evidence.

(c) For the purposes of subdivision (b), a taking by the State Reclamation Board for the Sacramento and San Joaquin Drainage District is not a taking by a local public entity.

Comment. Section 1245.250 provides a uniform rule governing the effect to be given to a resolution of necessity. It continues the conclusive effect given to the resolution in state takings. See, e.g., former Govt. Code § 15855. It supersedes numerous sections of various codes that afforded disparate treatment to the resolution of necessity of various types of local public entities and generalizes the conclusive effect given the resolution of certain local public entities by former Code of Civil Procedure Section 1241(2).

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Tentatively approved May 1970

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Subdivision (a). Under Section 1245.250, a valid resolution of necessity conclusively establishes the matters of public necessity specified in Section 1240.030 (1) in all takings by local public entities where the property taken is entirely within the boundaries of the condemning entity and (2) in all takings by state entities regardless of the location of the property taken. The conclusive effect afforded the resolution of necessity is constitutionally permissible. Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923), aff'g County of Los Angeles v. Rindge Co., 53 Cal. App. 166, 200 P. 27 (1921); City of Oakland v. Parker, 70 Cal. App. 295, 233 P. 68 (1924). Among the matters encompassed in the conclusive resolution are the extent of and interest in necessary property. See Section 1245.230 and Comment thereto.

A valid resolution precludes judicial review of the matters specified in Section 1240.030 even where it is alleged such matters were determined by "fraud, bad faith, or abuse of discretion." See People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959). However, the resolution is conclusive only on the matters specified in Section 1240.030; it does not affect in any way the right of a condemnee to challenge a taking on the ground that the project is not an authorized public use or on the ground that the condemnor does not intend to put the property to its declared public purpose. See Sections 1240.010 and 1250.320 and Comments thereto. Nor does the conclusive presumption granted the resolution on matters of necessity affect the right of a defendant to contest the right to take his property on specific statutory grounds provided in the Eminent Domain

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Law. See Sections 1240.220 (future use), 1240.340 (substitute), 1240.420 (excess), 1240.510 (compatible), and 1240.610 (more necessary). Likewise, the condemnor must demonstrate its compliance with any other requirements and regulations governing the institution of public projects. Cf. Comment to Section 1240.030.

The initial proviso of Section 1245.250 recognizes that there may be exceptions to the uniform conclusive effect given the resolution of necessity. One important exception is in subdivision (b)(extraterritorial acquisitions by local public entity). As to the effect of the resolution of necessity where the taking is by a city or county for open space, see Government Code Section 6953.

Subdivision (b). Subdivision (b) provides that a resolution of necessity of a local public entity creates a presumption affecting the burden of producing evidence with regard to public necessity if the property described in the resolution is not located entirely within the boundaries of the local public entity. See Evid. Code § 604.

Subdivision (b) continues the portion of former Code of Civil Procedure Section 1241(2) that denied conclusive effect of a resolution to property lying outside the territorial limits of certain local public entities. Under that provision, necessity and proper location were justiciable questions in the condemnation proceeding. See City of Hawthorne v. Peebles, 166 Cal. App.2d 758, 333 P.2d 442 (1959); City of Carlsbad v. Wight, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963); City of Los Angeles v. Keck, 14 Cal. App.3d

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920, 92 Cal. Rptr. 599 (1971). Subdivision (b) extends this limitation on the effect of the resolution of necessity to all local public entities condemning property outside their territorial jurisdiction and also makes the question whether the proposed project is necessary a justiciable question in such a condemnation proceeding.

Subdivision (c). The limitation contained in subdivision (b) is not applicable to acquisitions for the Sacramento and San Joaquin Drainage District. Acquisitions for this district are undertaken by the State Reclamation Board. See Water Code § 8590 and Section 1245.210 and Comment thereto. The conclusive effect given resolutions of the board by former Water Code Section 8595 is continued under subdivisions (a) and (c).

§ 1245.260. Failure to initiate eminent domain proceeding: within six months from adoption of resolution

1245.260. (a) If a public entity has adopted a resolution of necessity that meets the requirements of this article and is authorized to exercise the power of eminent domain to acquire the property described in the resolution but does not commence an eminent domain proceeding to acquire such property within six months after the date the resolution was adopted, the owner of the property may bring an action in inverse condemnation requiring the taking of such property and a determination of the compensation for such taking. In such inverse condemnation action, the court may, in addition, or in the alternative, if it finds that the rights of the owner have been interfered with, award damages for any such interference by the public entity.

(b) This section does not affect any authority a public entity may have to do any of the following:

- (1) Institute an eminent domain proceeding.
- (2) Take possession of property pursuant to Article 3 (commencing with Section 1255.410) of Chapter 6.
- (3) Rescind a resolution of necessity and abandon the eminent domain proceeding.

Comment. Section 1245.260 continues without substantive change the provisions of former Code of Civil Procedure Section 1243.1.

CHAPTER 6. DEPOSIT AND WITHDRAWAL OF PROBABLE COMPENSATION;
POSSESSION PRIOR TO ENTRY OF JUDGMENT

Article 1. Deposit of Probable Compensation

§ 1255.010. Deposit of amount of appraised value of property

1255.010. (a) At any time after filing the complaint and prior to entry of judgment, the plaintiff may deposit with the court the amount indicated by the appraisal referred to in subdivision (b) to be the compensation for the property for which the deposit is made. The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so.

(b) Before making a deposit under this section, the plaintiff shall have an expert qualified to express an opinion as to the value of the property (1) make an appraisal of the property and (2) prepare a statement of valuation data justifying the appraisal. The statement of valuation data shall set forth all amounts, opinions, and supporting data required by Section 1258.220 to be included in a statement of valuation data with respect to the compensation required by Chapters 9 (commencing with Section 1263.010) and 10 (commencing with Section 1265.010).

(c) Notwithstanding subdivision (b), upon ex parte application, the court may make an order permitting the plaintiff to defer preparation of the

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statement of valuation data for a reasonable time not exceeding 50 days from the date the deposit is made if the plaintiff, by affidavit, presents facts showing that an emergency exists and that the statement of valuation data cannot reasonably be prepared prior to making the deposit.

Comment. Section 1255.010 is new. In contrast with subdivision (a) of former Section 1243.5, (1) the deposit may be made without obtaining the court's order therefor and without regard to an order for possession and (2) the amount of the initial deposit is determined by an appraisal obtained by the plaintiff rather than by the court upon ex parte application of the plaintiff. Under Section 1255.030, however, the amount deposited may be determined or redetermined by the court on motion of any interested party.

The appraisal and the statement of valuation data required by subdivision (b) may be made either by a member of the condemnor's appraisal staff or by an independent appraiser. The statement of valuation data is necessary to enable the plaintiff to comply with Section 1255.020 which requires the notice of the deposit to be accompanied by or to refer to the statement of valuation data which justifies the amount of the deposit. The required statement must contain all the information required to be included in a statement of valuation data. See Section 1258.220, which requires that such a statement set forth the appraiser's opinions as to the compensation for the property and specified items of supporting data--such as "comparable transactions"--to the

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Tentatively approved September 1970

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extent that the opinions are based thereon. An appraisal report containing all of such information could be used as a statement of valuation data. See Section 1258.220(f).

The making of a deposit by the plaintiff, and any subsequent possession of the property by the plaintiff, does not waive its right to appeal in the proceeding. See Sections 1255.090 and 1255.470. Cf. Section 1268.480 and Annot., Eminent Domain: Payment or Deposit of Award in Court as Affecting Condemnor's Right to Appeal, 40 A.L.R.3d 203 (1971).

Under emergency circumstances, it may be possible to make only a rough, preliminary appraisal of the property. In such cases, subdivision (c) permits the plaintiff to apply ex parte to the court for an order permitting the plaintiff to defer preparation of the statement of valuation data for a reasonable time not exceeding 50 days from the date of the deposit. Even where the plaintiff obtains such an order, the order does not relieve the plaintiff from depositing an amount based on an initial appraisal of the property.

EMINENT DOMAIN LAW § 1255.020

Tentatively approved September 1970
Revised September 1972
Revised May 1973

§ 1255.020. Service of notice of deposit

1255.020. (a) On making a deposit pursuant to Section 1255.010, the plaintiff shall serve a notice of deposit on all parties to the proceeding who have an interest in the property for which the deposit was made. The notice of deposit shall state that a deposit has been made and the date and the amount of the deposit. Service of the notice of deposit shall be made in the manner provided in Section 1255.450 for service of an order for possession.

(b) The notice of deposit shall either (1) be accompanied by a copy of the statement of valuation data referred to in Section 1255.010 or (2) state the place where and the normal business hours during which such statement may be inspected and copied and also state that, upon written request, the plaintiff will send the party a copy of the statement. If the notice is not accompanied by the copy of the statement, the plaintiff shall, at the places and times indicated in the notice, make the statement available for inspection and copying to any party who has an interest in the property and also shall, within 10 days after receipt of a written request from any such party, send that party a copy of the statement.

(c) If the plaintiff has obtained an order under Section 1255.010 deferring completion of the statement of valuation data, the plaintiff shall comply with subdivision (a) on making the deposit and shall comply with subdivision (b) upon completion of the statement.

EMINENT DOMAIN LAW § 1255.020

Tentatively approved September 1970

Revised September 1972

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Comment. Section 1255.020 is new. It requires that notice of the deposit be given in all cases to facilitate motions to change the amount of the deposit (Section 1255.030) or applications to withdraw the funds deposited (Section 1255.210 et seq.).

EMINENT DOMAIN LAW § 1255.030

Tentatively approved September 1970
Revised September 1972

§ 1255.030. Increase or decrease in amount of deposit

1255.030. (a) At any time after a deposit has been made pursuant to this article, the court shall, upon motion of the plaintiff or of any party having an interest in the property for which the deposit was made, determine or redetermine whether the amount deposited is the probable amount of compensation that will be awarded for the taking of the property.

(b) 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 to the amount determined to be the probable amount of compensation and, if the amount on deposit is not increased accordingly within 30 days from the date of the court's order, the defendant may serve on the plaintiff a notice of election to treat such failure as an abandonment of the proceeding. If the plaintiff does not cure its failure within 10 days after receipt of such notice, the court shall, upon motion of the defendant, enter judgment dismissing the proceeding and awarding the defendant his recoverable costs, disbursements, and damages as provided in Chapter 12 (commencing with Section 1270.010).

(c) After any amount deposited pursuant to this article has been withdrawn by a defendant, the court may not determine or redetermine the probable amount of compensation to be less than the total amount already withdrawn.

EMINENT DOMAIN LAW § 1255.030

Tentatively approved September 1970
Revised September 1972

Nothing in this subdivision precludes the court from making a determination or redetermination that probable compensation is greater than the amount withdrawn.

(d) The plaintiff may at any time increase the amount deposited without making a motion under this section. In such case, notice of the increase shall be served as provided in subdivision (a) of Section 1255.020.

Comment. Section 1255.030 is new. It supersedes subdivision (d) of former Section 1243.5, which provided for redetermination of the amount of probable compensation. As to the duty of the plaintiff and the power of the court to maintain the deposit in an adequate amount, see G.H. Deacon Inv. Co. v. Superior Court, 220 Cal. 392, 31 P.2d 372 (1934); Marblehead Land Co. v. Superior Court, 60 Cal. App. 644, 213 P. 718 (1923).

Subdivision (b) requires that the plaintiff increase the amount of the deposit in accordance with the court's order. Failure to so increase the deposit while in possession may result in an abandonment with attendant costs, fees, and damages. Cf. Section 1263.110 (effect on date of valuation of failure to increase deposit).

Section 1268.440 provides for recovery of any excessive withdrawal after final determination of amounts in the eminent domain proceeding. No provision is made for recovery, prior to such final determination, of any amount withdrawn. Accordingly, subdivision (c) prevents determination or redetermination of the amount of probable compensation to be less than the total sum withdrawn.

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Tentatively approved September 1970
Revised September 1972

Subdivision (d) is included to make clear that the deposit may be increased without the need for a court determination under this section.

EMINENT DOMAIN LAW § 1255.040

Tentatively approved September 1970
Revised May 1973

§ 1255.040. Deposit for relocation purposes on motion of certain defendants

1255.040. (a) If the property to be taken includes a dwelling containing not more than two residential units and the dwelling or one of its units is occupied as his residence by a defendant, and, if the plaintiff has not made a deposit that satisfies the requirements of this article, such defendant may move the court for an order determining the amount of such compensation for the dwelling and so much of the land upon which it is constructed as may be required for its convenient use and occupation. The notice of motion shall specify the date on which the moving party desires the deposit to be made. Such date shall not be earlier than 30 days after the date noticed for the hearing of the motion and may be any later date. The motion shall be heard and determined in the same manner as a motion made to modify a deposit under Section 1255.030.

(b) The court shall make its order determining the probable compensation if the court determines that the defendant will use the amount deposited for relocation purposes only. Notwithstanding Section 1268.220, if the plaintiff deposits the amount stated in the order on or before the date specified by the moving party, (1) interest upon that amount shall not accrue and (2) the plaintiff may, after making the deposit and upon ex parte application to the court, obtain an order for possession that authorizes the plaintiff to take possession of the property 30 days after the date for the deposit specified by the moving party.

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Tentatively approved September 1970
Revised May 1973

(c) Notwithstanding Section 1268.210, if the deposit is not made on or before the date specified by the moving party, the compensation awarded in the proceeding to the moving party shall draw legal interest from that date. The moving party is entitled to the full amount of such interest without offset for rents or other income received by him or the value of his continued possession of the property.

(d) If the proceeding is abandoned by the plaintiff, the interest under subdivision (c) may be recovered as costs in the proceeding in the manner provided for the recovery of other costs and disbursements on abandonment. If, in the proceeding, the court or a jury verdict eventually determines the compensation that would have been awarded to the moving party, then such interest shall be computed on the amount of such award. If no such determination is ever made, then such interest shall be computed on the amount of probable compensation as determined on the motion.

(e) The filing of a motion pursuant to this section constitutes a waiver by operation of law, conditioned upon subsequent deposit by the plaintiff of the amount determined to be probable compensation, of all claims and defenses in favor of the moving party except his claim for greater compensation.

(f) Notice of a deposit made under this section shall be served as provided by subdivision (a) of Section 1255.020. The defendant may withdraw the deposit as provided in Article 2 (commencing with Section 1255.210) on condition that the deposit is used for relocation purposes only.

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Tentatively approved September 1970
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(g) No motion may be made by a defendant under subdivision (a) after entry of judgment unless the judgment is reversed, vacated, or set aside and no other judgment is entered.

Comment. Section 1255.040 is new. Section 1255.040 makes available to homeowners a procedure by which probable just compensation may be determined, deposited, and withdrawn for relocation purposes within a relatively brief period after the beginning of the proceeding. For a comparable but much broader provision, see Pa. Stat. Ann., Tit. 26, § 1-407(b)(Supp. 1966).

Except as provided in this section, the depositing of probable just compensation pursuant to this article or the taking of possession pursuant to this chapter is optional with the plaintiff; if a deposit is not made and possession is not taken, a defendant is not entitled to be paid until 30 days after final judgment. Section 1270.030.

The reference in subdivision (a) to the amount of land required for the "convenient use and occupation" of the dwelling is taken from Section 1183.1 of the Code of Civil Procedure which deals with mechanic's liens. The limitation precludes application of this section to land owned in common with the dwelling but unnecessary to the convenient use of the dwelling.

Under subdivision (b), the timely making of a deposit under this section entitles the plaintiff to an order for possession effective 30 days after the date for the making of the deposit specified in the notice of motion served by the moving party.

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Tentatively approved September 1970
Revised May 1973

Subdivisions (b) and (c) provide special rules governing when interest commences to accrue and ceases to accrue. If the deposit is not made on or before the date specified by the moving party, interest commences to accrue on the date specified by the moving party. On the other hand, if the required deposit is made on or before the date specified by the moving party, interest on the amount deposited does not accrue. If a deposit is thereafter made, subdivision (a) of Section 1268.220 provides that interest ceases to accrue on the date such amount is withdrawn by the person entitled thereto.

Under subdivision (c), abandonment by the plaintiff entitles the defendant to recover interest in the manner provided for recovery of other costs, as prescribed in Chapter 12 (commencing with Section 1270.010). The plaintiff may not abandon, however, if the defendant, to his detriment, has substantially changed his position in justifiable reliance upon the proceeding. Section 1270.040.

§ 1255.050. Deposit on motion of owner of rental property

1255.050. (a) If the property to be taken is subject to a leasehold interest and the plaintiff has not made a deposit that satisfies the requirements of this article, the lessor may move the court for an order determining the amount of compensation for the property in the same manner and subject to the same procedures and conditions as a motion pursuant to Section 1255.040 except that, upon the plaintiff's failure to make any deposit so ordered, interest shall not commence to accrue.

(b) If the plaintiff fails to make any deposit ordered pursuant to subdivision (a), the court shall include in the compensation awarded in the eminent domain proceeding or the damages on abandonment the lessor's net rental losses occurring after the date specified in the order to the extent that the losses are directly attributable to actions of the plaintiff or the pendency of the eminent domain proceeding.

Comment. Section 1255.050 is new to California law. Section 1255.050 provides for recovery of rental losses only where the lessor has obtained an order requiring a deposit prior to judgment and the plaintiff fails to comply. Compare Klopping v. City of Whittier, 8 Cal.3d 39, ___ P.2d ___, ___ Cal. Rptr. ___ (1972)(rental losses may be recovered in cases of unreasonable delay or other unreasonable conduct by plaintiff).

Section 1255.050 incorporates the procedures and conditions of the motion for deposit under Section 1255.040 (deposit for relocation purposes). Under

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the latter section, the sanction for failure to comply is accrual of interest; Section 1255.050 does not incorporate this sanction, but instead provides for recovery of rental loss in case of failure to comply.

EMINENT DOMAIN LAW § 1255.060

Tentatively approved September 1970

§ 1255.060. Limitation on use of evidence submitted in connection with deposit

1255.060. The amount deposited pursuant to this article shall not be given in evidence or referred to in the trial of the issue of compensation.

Comment. Section 1255.060 restates the substance of a portion of subdivision (e) of former Section 1243.5. Cf. Section 1255.270 (amount withdrawn). Its purpose is to encourage the plaintiff to make an adequate deposit by preventing the amount deposited from being given in evidence on the issue of compensation. This section does not prevent the defense either from using the appraisal data for impeachment purposes or from calling the appraiser as an expert witness on its own behalf. See People v. Cowan, 1 Cal. App.3d 1001, 81 Cal. Rptr. 713 (1969); People v. Douglas, 15 Cal. App.3d 814, 93 Cal. Rptr. 644 (1971).

§ 1255.070. Deposit in State Treasury unless otherwise required

1255.070. When money is deposited as provided in this article, the court shall order the money to be deposited in the State Treasury or, upon written request of the plaintiff filed with the deposit, in the county treasury. If money is deposited in the State Treasury pursuant to this section, it shall be held, invested, deposited, and disbursed in the manner specified in Article 10 (commencing with Section 16429.1) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that article. As between the parties to the proceeding, money deposited pursuant to this article shall remain at the risk of the plaintiff until paid or made payable to the defendant by order of the court.

Comment. The first two sentences of Section 1255.070 are the same in substance as former Section 1243.6. The last sentence is based on the first two sentences of subdivision (h) of former Section 1254.

§ 1255.080. Effect on deposit of entry of judgment

1255.080. Any amount deposited under this article shall, upon entry of judgment, be deemed to be an amount deposited pursuant to Article 5 (commencing with Section 1268.410) of Chapter 11.

Comment. Section 1255.080, which is new, provides that amounts deposited by the plaintiff prior to judgment are automatically applied to a deposit on the judgment. See also Section 1255.260 (amount withdrawn prior to judgment credited on judgment).

EMINENT DOMAIN LAW § 1255.090

Tentatively approved September 1970

§ 1255.090. Deposit does not waive right of appeal

1255.090. The plaintiff does not abandon or waive the right to appeal from the judgment or to request a new trial by depositing the probable compensation pursuant to this article.

Comment. Section 1255.090 is new. For comparable provisions, see Sections 1255.470 (possession prior to judgment) and 1268.480 (deposit and possession after judgment).

Article 2. Withdrawal of Deposit

§ 1255.210. Application for withdrawal of deposit

1255.210. Prior to entry of judgment, any defendant who has an interest in the property for which a deposit has been made under this chapter may apply to the court for the withdrawal of all or any portion of the amount deposited. The application shall be verified, set forth the applicant's interest in the property, and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff.

Comment. Section 1255.210 is derived from subdivisions (a) and (c) of former Section 1243.7.

EMINENT DOMAIN LAW § 1255.220

Tentatively approved September 1970

§ 1255.220. Order permitting withdrawal

1255.220. Subject to the requirements of this article, the court shall order the amount requested in the application, or such portion of that amount as the applicant may be entitled to receive, to be paid to the applicant.

Comment. Section 1255.220 continues the substance of the second sentence of subdivision (a) of former Section 1247.3.

§ 1255.230. Objections to withdrawal

1255.230. (a) No withdrawal may be ordered until 20 days after service on the plaintiff of a copy of the application or until the time for all objections has expired, whichever is later.

(b) Within the 20-day period, the plaintiff may file objections to withdrawal on any one or more of the following grounds:

(1) Other parties to the proceeding are known or believed to have interests in the property.

(2) An undertaking should be filed by the applicant as provided in Section 1255.240 or 1255.250.

(3) The amount of an undertaking filed by the applicant under this chapter or the sureties thereon are insufficient.

(c) If an objection is filed on the ground that other parties are known or believed to have interests in the property, the plaintiff shall serve or attempt to serve on such other parties a notice that they may appear within 10 days after such service and object to the withdrawal. The notice shall advise such parties that their failure to object will result in waiver of any rights against the plaintiff to the extent of the amount withdrawn. The notice shall be served in the manner provided in Section 1255.450 for service of an order for possession. The plaintiff shall file, and serve on the applicant, a report setting forth (1) the names of parties served and the dates of service and (2) the names and last known addresses of parties who have neither

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appeared in the proceeding nor been served with process and whom the plaintiff was unable to serve personally. The applicant may serve parties whom the plaintiff has been unable to serve. Parties served in the manner provided in Section 1255.450 shall have no claim against the plaintiff for compensation to the extent of the amount withdrawn by all applicants. The plaintiff shall remain liable to parties having an interest of record who are not so served but, if such liability is enforced, the plaintiff shall be subrogated to the rights of such parties under Section 1255.280.

(d) If any party objects to the withdrawal, or if the plaintiff so requests, the court shall determine, upon hearing, the amounts to be withdrawn, if any, and by whom.

Comment. Section 1255.230 continues portions of subdivisions (c), (e), and (f) of former Section 1243.7. Unlike the provisions on which it is based, Section 1255.230 does not forbid withdrawal of the deposit if notice of the application cannot be personally served upon all parties; it authorizes the court to exercise its discretion as to the amount to be withdrawn in such cases.

Nothing in this section precludes withdrawal of the deposit upon stipulation of all parties having an interest in the property for which the deposit was made.

§ 1255.240. Security where conflicting claims to amount withdrawn

1255.240. (a) If the court determines that an applicant is entitled to withdraw any portion of a deposit that another party claims or to which another person may be entitled, the court may require the applicant, before withdrawing such portion, to file an undertaking. The undertaking shall secure payment to such party or person of any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with interest as provided in Section 1255.280. If withdrawal is permitted notwithstanding the lack of personal service of the application for withdrawal upon any party to the proceeding, the court may also require that the undertaking indemnify the plaintiff against any liability it may incur under Section 1255.230. The undertaking shall be in such amount as is fixed by the court, but if executed by an admitted surety insurer the amount shall not exceed the portion claimed by the adverse claimant or appearing to belong to another person. The undertaking may be executed by two or more sufficient sureties approved by the court, and in such case the amount shall not exceed double such portion.

(b) Unless the undertaking is required primarily because of an issue as to title between the applicant and another party or person, if the undertaking is executed by an admitted surety insurer, the applicant filing the undertaking is entitled to recover the premium reasonably paid for the undertaking as a part of the recoverable costs in the eminent domain proceeding.

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Tentatively approved September 1970

Comment. Section 1255.240 continues the substance of subdivision (c) of former Section 1247.3. Subdivision (a) of Section 1255.240 permits the court to exercise its discretion whether to require an undertaking in cases where there are conflicting claims to the amount to be withdrawn.

Subdivision (b) permits recovery of the bond premium as costs in the proceeding unless the necessity for the undertaking arises primarily from an issue of title. For use of the same distinction in assessing the costs of apportionment proceedings, see Section 1265.030 and People v. Nogarr, 181 Cal. App.2d 312, 5 Cal. Rptr. 247 (1960).

§ 1255.250. Security when amount in excess of original deposit is withdrawn

1255.250. (a) If the amount originally deposited is increased pursuant to Section 1255.030 and the total amount sought to be withdrawn exceeds the amount of the original deposit, the applicant, or each applicant if there are two or more, shall file an undertaking. The undertaking shall be in favor of the plaintiff and shall secure repayment of any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with interest as provided in Section 1255.280. If the undertaking is executed by an admitted surety insurer, the undertaking shall be in the amount by which the total amount to be withdrawn exceeds the amount originally deposited. The undertaking may be executed by two or more sufficient sureties approved by the court, and in such case the undertaking shall be in double such amount, but the maximum amount that may be recovered from such sureties is the amount by which the total amount to be withdrawn exceeds the amount originally deposited.

(b) If there are two or more applicants, the applicants, in lieu of filing separate undertakings, may jointly file a single undertaking in the amount required by subdivision (a).

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(c) The plaintiff may waive the undertaking required by this section or may consent to an undertaking that is less than the amount stated by this section.

(d) If the undertaking is executed by an admitted surety insurer, the applicant filing the undertaking may recover the premium reasonably paid for the undertaking as a part of the costs in the eminent domain proceeding.

Comment. Section 1255.250 is the same in substance as subdivision (b) of former Code of Civil Procedure Section 1243.7 except that the former two-percent limitation of the amount recoverable for a premium on an undertaking has been replaced by the "reasonably paid" limitation. Withdrawal by one or more defendants of an amount in excess of the original deposit is possible if the deposit has been increased as provided for by Section 1255.030.

§ 1255.260. Withdrawal waives all defenses except claim to greater compensation

1255.260. If any portion of the money deposited pursuant to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation. Any amount so paid to any party shall be credited upon the judgment in the eminent domain proceeding.

Comment. Section 1255.260 restates the substance of subdivision (g) of former Section 1243.7. In addition to the defendant's waiving claims and defenses other than the claim to greater compensation, withdrawal of the deposit may also entitle the plaintiff to an order for possession. See Section 1255.460. Cf. People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

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§ 1255.270. Limitation on use of evidence submitted in connection with deposit

1255.270. No amount withdrawn pursuant to this article shall be given in evidence or referred to in the trial of the issue of compensation.

Comment. Section 1255.270 restates the substance of a portion of subdivision (e) of former Section 1243.5. See Section 1255.060 and Comment thereto.

§ 1255.280. Repayment of amount of excess withdrawal

1255.280. (a) Any amount withdrawn by a party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid to the parties entitled thereto. The court that ordered the withdrawal shall enter judgment accordingly.

(b) The judgment so entered shall not include interest except in the following cases:

(1) Any amount that is to be paid to a defendant shall include legal interest from the date of its withdrawal by another defendant.

(2) If the amount originally deposited by a plaintiff was increased pursuant to Section 1255.030 on motion of a party obligated to pay under this section, any amount that is attributable to such increase and that is to be repaid to the plaintiff shall include legal interest from the date of its withdrawal.

(c) If the judgment so entered is not paid within 30 days after its entry, the court may, on motion, enter judgment against the sureties, if any, for the amount of such judgment.

(d) The court may, in its discretion, grant a party obligated to pay under this section a stay of execution for any amount to be paid to a plaintiff. Such stay of execution shall not exceed one year following entry of final judgment in the eminent domain proceeding.

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Comment. Section 1255.280 supersedes former Section 1243.7. Unlike former Section 1243.7, which required the payment of interest upon the return of excess amounts withdrawn, Section 1255.280 requires payment of interest only where the excess is to be redistributed among defendants or where the excess is to be repaid to a plaintiff to the extent the excess was procured upon motion for increased deposit by a defendant.

Section 1255.280 also provides for a stay of execution on the return of the excess for a period of up to one year. See subdivision (d). It should be noted, however, that the stay is available only as against amounts to be repaid to a plaintiff. Moreover, because the judgment has been stayed, interest will accrue during the period of the stay regardless of the means by which the excess was obtained. Cf. Bellflower City School Dist. v. Skaggs, 52 Cal.2d 278, 282, 339 P.2d 848, (1959).

Section 1255.280 requires repayment of excess amounts withdrawn only after the judgment in an eminent domain proceeding is final. See also Section 1255.030(c)(court may not redetermine probable compensation to be less than amount withdrawn).

EMINENT DOMAIN LAW § 1255.410

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Article 3. Possession Prior to Judgment

§ 1255.410. Order for possession prior to judgment

1255.410. (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 article, and the court shall make an order authorizing the plaintiff to take possession of the property if the plaintiff is entitled to take the property by eminent domain and has deposited pursuant to Article 1 (commencing with Section 1255.010) an amount that satisfies the requirements of that article.

(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 1255.410 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 1255.420-1255.440.

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

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

(1) The plaintiff must be entitled to take the property by eminent domain. This requirement is derived from subdivision (b) of former Section 1243.5. However, under former 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 found in subdivision (b) of former Section 1243.5 that the plaintiff was authorized to take possession prior to judgment is no longer continued since any person authorized to exercise the power of eminent domain may now take possession prior to judgment in any case in which he is entitled to take by eminent domain. Contrast former Section 1243.4 (right to early possession limited to certain public entities).

(2) The plaintiff must have made the deposit required by Article 1. This requirement is derived from subdivision (b) of former Section 1243.5.

The issue of the plaintiff's need for possession prior to judgment is a matter that is incorporated in the provisions of Section 1255.420. Section 1255.410 does not affect any other prerequisite that may exist for taking possession of property. Cf. 815 Mission Corp. v. Superior Court, 22 Cal. App.3d 604, 99 Cal. Rptr. 538 (1971)(provision of relocation assistance is not necessarily prerequisite to an order for possession).

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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 or to contest the taking. 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.

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 was held to be the appropriate remedy. 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 in made in these rules as to orders made under Section 1255.410 or Article 5 (commencing with Section 1268.410) of Chapter 11.

Subdivision (b). Subdivision (b) describes the contents of an order for possession. The contents are substantially the same as those of subdivision (b)

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of former Section 1243.5. However, the requirement that the order state the amount of the deposit has been eliminated since Section 1255.020 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 an authorized condemnor. 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 1235.170 (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 1255.450.

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.

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§ 1255.420. Stay of order for hardship

1255.420. At any time after the plaintiff has been authorized to take possession of property under Section 1255.410, 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 impose terms and conditions limiting its operation unless, upon considering all relevant facts (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 (a) that the plaintiff needs possession of the property within the time specified in the order for possession and (b) that the hardship the plaintiff would suffer as a result of a stay or limitation of the order would be substantial.

Comment. Section 1255.420 is new. It permits the court to stay an order for possession issued ex parte under Section 1255.410 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 court must first find that having possession of the property specified

in the order taken at the time specified in the order would be a substantial hardship to the defendant. If the court finds this fact, it next looks to the plaintiff's interest in early possession of the property. If it finds both that the plaintiff needs possession of the property at the time specified and that the plaintiff would suffer substantial (as distinguished from trivial) injury from a stay or other limitation of the order, the court may not stay or limit the order.

Section 1255.420 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 that will permit the plaintiff and defendant to have possession of portions of the property or to use the property jointly.

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§ 1255.430. Stay of order where right to take contested

1255.430. If the plaintiff has been authorized to take possession of property under Section 1255.410 and the defendant has objected 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 1255.430 is new. It is intended to permit the court to mitigate the effect of an order for possession pending resolution of the defendant's objections in a case where the court believes there is merit to the objections. Cf. Section 1255.240(b). Because objections to the right to take are expeditiously resolved in the normal course of events (see Article 2 (commencing with Section 1260.110) of Chapter 8), a stay will not be necessary unless the objections are not finally resolved by the date of possession specified in the order.

EMINENT DOMAIN LAW § 1255.440

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§ 1255.440. Vacating order for possession

1255.440. If an order has been made under Section 1255.410 authorizing the plaintiff to take possession of property and the court subsequently determines that the conditions specified in Section 1255.410 for issuance of the order are not satisfied, the court shall vacate the order.

Comment. Because the order for possession is issued following an ex parte application by the plaintiff, Section 1255.440 expressly authorizes the court to vacate an order for possession prior to judgment if it subsequently determines, whether upon motion of the defendant or upon its own motion, that the requirements of Section 1255.410 are not satisfied.

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§ 1255.450. Service of order

1255.450. (a) As used in this section, "record owner" means the owner of the legal or equitable title to the fee or any lesser interest in property as shown by recorded deeds or other recorded instruments.

(b) The plaintiff shall serve a copy of the order for possession issued under Section 1255.410 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 pursuant to Section 1255.040, 1255.050, or 1255.460, 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 except that:

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(1) If the person on whom service is to be made has previously appeared in the proceeding or been served with summons in the proceeding, service of the order may be made by mail upon such person and his attorney of record, if any.

(2) If the person on whom service is to be made resides out of the state, or has departed from the state or cannot with due diligence be found within the state, service of the order may be made by registered or certified mail addressed to such person at his last known address.

(e) 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.

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

Comment. Section 1255.450 is derived from subdivision (c) of former Section 1243.5.

Subdivision (a). The definition of "record owner" is broadened to include persons not included under the definition found in subdivision (c) of former Section 1243.5. Under the former provision, "record owner" was defined to include only the persons in whose name the legal title to the fee appeared

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as of record and the persons in possession of the property under a recorded lease or agreement of purchase.

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 land acquisition guidelines). Under subdivision (c) of former Section 1243.5, 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.

Subdivision (c). Subdivision (c) prescribes the time for service where the order for possession is granted under Section 1255.040 (deposit for relocation purposes), 1255.050 (deposit in case of rental property), or 1255.460 (possession after vacation of property or withdrawal of deposit). No comparable provision was found in former law because the procedures provided by Sections 1255.040, 1255.050, and 1255.460 are new.

Subdivision (d). Subdivision (d) requires personal service except in certain limited situations. Paragraphs (1) and (2) of subdivision (d)

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specify the situations where personal service need not be made. These paragraphs continue provisions of subdivision (c) of former Section 1243.5. The requirement that an affidavit be filed concerning the reason personal service was not made has been eliminated.

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

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

§ 1255.460. Right of plaintiff to take possession after defendant's consent
or withdrawal of deposit

1255.460. (a) Upon ex parte application, the court shall make an order authorizing the plaintiff to take possession of the property if the court determines that the plaintiff has deposited probable compensation pursuant to Article 1 (commencing with Section 1255.010) and that each of the defendants entitled to possession has done either of the following:

(1) Expressed in writing his willingness to surrender possession of the property on or after a stated date.

(2) Withdrawn any portion of the deposit.

(b) The order for possession shall:

(1) Recite that it has been made under this section.

(2) Describe the property to be acquired, which description may be by reference to the complaint.

(3) State the date after which plaintiff is authorized to take possession of the property. Unless the plaintiff requests a later date, such date shall be the date stated by the defendant or, if a portion of the deposit is withdrawn, the earliest date on which the plaintiff would be entitled to take possession of the property under subdivision (c) of Section 1255.450.

Comment. Section 1255.460 is new. Article 1 (commencing with Section 1255.010) permits the plaintiff to deposit probable compensation whether or not it obtains an order for possession. This section makes applicable to

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withdrawal of a deposit made prior to judgment the analogous rule that applies when a deposit made after judgment is withdrawn. Cf. People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962). It also permits the plaintiff to take possession of the property after each of the defendants entitled to possession has in writing expressed his willingness to surrender it on or after a date certain. Service of the order for possession is required by subdivision (c) of Section 1255.450.

§ 1255.470. Taking possession does not waive right of appeal

1255.470. The plaintiff does not abandon or waive the right to appeal from the judgment or to request a new trial by taking possession pursuant to this chapter.

Comment. Section 1255.470 is the same in substance as subdivision (f) of former Section 1243.5. The language has been changed to preclude implied waiver of appeal or right to new trial by taking possession pursuant to any order obtained under this chapter, including orders under Sections 1255.040 and 1255.050. Under Section 1255.260, the defendant also retains his right to appeal or to request a new trial upon the issue of compensation even though he withdraws the deposit made by the plaintiff. However, such withdrawal does waive all claims and defenses other than the claim to compensation.

§ 1255.480. Police power not affected

1255.480. Nothing in this article limits the right of a public entity to exercise its police power in emergency situations.

Comment. Section 1255.480 is new. It makes clear that the requirements of this article--such as obtaining and serving an order for possession--do not limit the exercise of the police power. See Surocco v. Geary, 3 Cal. 69 (1853). See generally Van Alstyne, Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction, 20 Stan. L. Rev. 617 (1968), reprinted in Van Alstyne, California Inverse Condemnation Law, 10 Cal. L. Revision Comm'n Reports 111 (1971). See also Section 1268.490.