

#36.80

7/5/73

Memorandum 73-59

Subject: Study 36.80 - Condemnation (Chapter 8--Procedures for Determining Right to Take and Compensation)

Attached to this memorandum are two copies of a revised version of Chapter 8 of the Eminent Domain Law. We hope that this chapter can be tentatively approved (after any necessary revisions) and can be distributed to the State Bar Committee after the July meeting. The revised chapter attempts to carry out the directions given and the decisions made at the June 1973 meeting. We have renumbered the sections to conform to our proposed organization for the entire statute and have made some editorial revisions; however, we have little to note for your attention.

Subdivision (b) of Section 1260.210 has been added (at the Commission's direction) to state that neither the plaintiff nor the defendant has the burden of proof on the issue of compensation. What this means is that neither party has a greater burden of persuasion; query--what would happen if neither party presented any evidence on the issue of compensation?

Section 1260.230 is added to retain a portion of former Section 1245.3. This implements a general direction of the Commission from the June meeting.

We plan to go through this chapter section by section at the July meeting. Please mark your editorial revisions on one copy for the staff and raise any policy questions at the meeting.

Respectfully submitted,

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Assistant Executive Secretary

EMINENT DOMAIN LAW § 1260.010

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CHAPTER 8. PROCEDURES FOR DETERMINING RIGHT TO  
TAKE AND COMPENSATION

Article 1. General Provisions

§ 1260.010. Trial preference

1260.010. Proceedings under this title take precedence over all other civil actions in the matter of setting the same for hearing or trial in order that such proceedings shall be quickly heard and determined.

Comment. Section 1260.010 reenacts the substance of former Section 1264.

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§ 1260.020. Consolidation of separate proceedings

1260.020. (a) If more than one person has commenced an eminent domain proceeding to acquire the same property, the court, upon its own motion or upon motion of any party, shall consolidate the proceedings.

(b) In such consolidated proceedings, the court shall first determine whether the purposes for which the property is sought are compatible within the meaning of Article 6 (commencing with Section 1240.510) of Chapter 3. If the court determines that the purposes are compatible, it shall permit the proceeding to continue with the plaintiffs acting jointly. The court shall apportion the obligation to pay any award in the proceeding in proportion to the use, damage, and benefits engendered by each plaintiff.

(c) If the court determines pursuant to subdivision (b) that the purposes are not all compatible, it shall further determine which of the purposes is most necessary within the meaning of Article 7 (commencing with Section 1240.610) of Chapter 3. The court shall permit the plaintiff alleging the most necessary purpose, along with any other plaintiffs alleging compatible purposes under subdivision (b), to continue the proceeding. The court shall dismiss the proceeding as to the other plaintiffs.

(d) Nothing in this section limits the authority of the court to consolidate proceedings or sever issues for trial under Section 1048.

Comment. Section 1260.020 provides the basic procedure for "intervention" by plaintiffs. See Lake Merced Water Co. v. Cowles, 31 Cal. 215 (1866)

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(condemnor seeking to acquire same property in another proceeding may intervene); Contra Costa Coal Mines R.R. v. Moss, 23 Cal. 323 (1863). Rather than direct intervention by one person in the proceeding of another, however, Section 1260.020 provides for consolidation of the disparate proceedings. Section 1260.020 is intended to supplement Section 1048; it does not limit the authority otherwise provided in Section 1048 to consolidate actions or sever issues for trial.

Subdivision (a). Subdivision (a) specifies the basic rule that consolidation is the proper procedure where there are two or more actions pending to acquire the same property. A person who seeks to acquire the property, whether or not he has filed a complaint, may not intervene directly in the other proceeding. See Section 1250.230 (appearance by unnamed defendants). Likewise, a defendant who has had several complaints filed against him may not demur on the basis that there is another proceeding pending but may move to consolidate. See San Bernardino etc. Water Dist. v. Gage Canal Co., 226 Cal. App.2d 206, 37 Cal. Rptr. 856 (1964)(demurrer not available; however, under prior law, proper procedure was for second condemnor to intervene in the pending proceeding). A motion to consolidate may be made at any time prior to final judgment.

Where the proceedings to acquire the property have been commenced in different jurisdictions (for example, because the property straddles a county line (Section 1250.020)), there must first be a change of venue (Section 1250.040) before the proceedings may be consolidated by one court.

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Subdivision (b). The test for whether purposes are compatible is whether they would unreasonably interfere with or impair such uses as may reasonably be anticipated for each. See Section 1240.510.

Subdivision (c). For reimbursement of expenses and damages on dismissal, see Sections 1268.610 and 1268.620.

Article 2. Contesting Right to Take

§ 1260.110. Priority for hearing

1260.110. (a) Where objections to the right to take are raised, unless the court orders otherwise, they shall be heard and determined prior to the determination of the issue of compensation.

(b) The court may, on motion of any party, after notice and hearing, specially set such objections for trial.

Comment. Section 1260.110 makes provision for bringing to trial the objections, if any, that have been raised against the plaintiff's right to take. See Sections 1250.350-1250.370. Under subdivision (a), disposition of the right to take is generally a prerequisite to trial of the issue of just compensation. However, this does not preclude such activities as depositions and other discovery, and the court may order a different order of trial. See also Section 1048. Cf. City of Los Angeles v. Keck, 14 Cal. App.3d 920, 92 Cal. Rptr. 599 (1971)(parties stipulated to determination of compensation and tried only issues of public use and necessity).

Subdivision (b) makes clear that the determination of the objections to the right to take may be specially set for trial. See Rule 225 of the California Rules of Court and Swartzman v. Superior Court, 231 Cal. App.2d 195, 198-199, 41 Cal. Rptr. 721, \_\_\_-\_\_\_ (1964).

§ 1260.120. Disposition of defendant's objections to right to take

1260.120. (a) The court shall hear and determine all objections to the right to take.

(b) If the court determines that the plaintiff has the right to acquire by eminent domain the property described in the complaint, the court shall so order. An appeal may not be taken from such order.

(c) If the court determines that the plaintiff does not have the right to acquire by eminent domain any property described in the complaint, it shall order:

(1) The dismissal of the proceeding as to that property, or

(2) The plaintiff to take such corrective and remedial action as may be prescribed by the court subject to the condition that a dismissal will be ordered if such action is not taken. An order made under this paragraph may impose such limitations and conditions as the court determines to be just under the circumstances of the particular case including the requirement that the plaintiff pay to the defendant all or part of the reasonable litigation expenses necessarily incurred by the defendant because of the plaintiff's failure or omission which constituted the basis of the objection to the right to take. An appeal may be taken from an order of dismissal.

Comment. Subdivision (a) of Section 1260.830 provides for a court determination of right to take issues. (see Sections 1250.350-1250.370). This is consistent with the California Constitution and with prior law. See Comment to Section 1230.040 (rules of practice in eminent domain proceedings: court or jury trial).

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A determination that the plaintiff may condemn the defendant's property is not a final judgment. Subdivision (b). An appeal must await the conclusion of the litigation. See Section 904.1. However, review by writ may be available in an appropriate case. See, e.g., Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955).

A determination that the plaintiff has no right to condemn the defendant's property generally requires an order of dismissal. Paragraph (1) of subdivision (c). However, where the complaint alleges alternative grounds for condemnation, a finding which would require dismissal as to one ground does not preclude a finding of right to take on another ground and the proceeding may continue to be prosecuted on that basis. An order of dismissal is a final judgment as to the property affected and is appealable. See Section 904.1. Contrast People v. Rodoni, 243 Cal. App.2d 771, 52 Cal. Rptr. 857 (1966). Such order also entitles the defendant to recover costs and expenses. See Section 1268.610.

Paragraph (2) of subdivision (c) is designed to ameliorate the all or nothing effect of paragraph (1). The court is authorized in its discretion to dispose of an objection in a "just and equitable" manner. This authority does not permit the court to create a right to acquire where none exists, but it does authorize the court to grant leave to the plaintiff to amend pleadings or take other corrective action where "just" in light of all of the circumstances of the case. The court may frame its order in whatever manner may be desirable, and subdivision (c) makes clear that the order may include the

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awarding of attorney's fees to the defendant. For example, if the resolution of necessity was not properly adopted, the court may order that such a resolution be properly adopted within such time as is specified by the court and that, if a proper resolution is not adopted within the time specified, the proceeding is dismissed. The plaintiff is not required to comply with an order made under paragraph (2), but a failure to comply results in a dismissal of the proceeding as to that property which the court has determined the plaintiff lacks the right to acquire.

Article 3. Procedures Relating to  
Determination of Compensation

§ 1260.210. Order of proof and argument; burden of proof

1260.210. (a) The defendant shall present his evidence on the issue of compensation first and shall commence and conclude the argument.

(b) Neither the plaintiff nor the defendant has the burden of proof on the issue of compensation.

Comment. Section 1260.210 reenacts former Section 1256.1 which provided that "the defendant shall commence and conclude the argument." Section 1260.210 also makes clear that, although the defendant must present his evidence on the issue of compensation first, neither party bears a burden of proof (persuasion) on that issue. The rule as to the order of proof continues former law. See, e.g., City & County of San Francisco v. Tillman Estate Co., 205 Cal. 651, 272 P. 585 (1928). The rule as to burden of proof provided by subdivision (b) changes former law. Compare City & County of San Francisco v. Tillman Estate Co., supra. Assignment of the burden of proof in the context of an eminent domain proceeding is inapposite. It is a constitutional requirement that the owner of property sought to be taken be given just compensation. Cal. Const., Art. I, § 14. The trier of fact is generally presented with conflicting opinions of value and is not required to select one opinion on value or none at all but rather to fix value based on all the competent evidence before it. See, e.g., City of Pleasant Hill

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v. First Baptist Church, 1 Cal. App.3d 384, 408-410, 82 Cal. Rptr. 1, \_\_\_-\_\_\_ (1969); People v. Jarvis, 274 Cal. App.2d 217, 79 Cal. Rptr. 175 (1969). See also State v. 45,621 Square Feet of Land, 475 P.2d 553 (Alaska 1970); State v. Amunsis, 61 Wash.2d 160, 377 P.2d 462 (1963). Absent the production of evidence by one party, the trier of fact will determine compensation solely from the other party's evidence, but neither party should be made to appear to bear some greater burden of persuasion than the other. Subdivision (b) therefore so provides. Compare Ore. Rev. Stat. § 35.305(2).

§ 1260.220. Procedure where divided interests

1260.220. (a) Except as provided in subdivision (b), where there are divided interests in property acquired by eminent domain, the value of each interest and the injury, if any, to the remainder of such interest shall be separately assessed and compensation awarded therefor.

(b) The plaintiff may require that the amount of compensation be first determined as between plaintiff and all defendants claiming an interest in the property. Thereafter, in the same proceeding, the trier of fact shall determine the respective rights of the defendants in and to the amount of compensation awarded and shall apportion the award accordingly.

Comment. Section 1260.220 retains the existing California scheme of permitting a plaintiff the option of having the interests in property valued separately or as a whole. Subdivision (a) retains the procedure formerly provided by Section 1248(1)-(2). Subdivision (b) retains the procedure formerly provided by the first sentence of Section 1246.1. It is intended as procedural only. Cf. People v. Lynbar, Inc., 253 Cal. App.2d 870, 62 Cal. Rptr. 320 (1967). For the rules governing the amount of compensation where the plaintiff elects a two-stage proceeding, see Section 1265.010.

§ 1260.230. Court determination of compensation for deceased and unknown persons

1260.230. Where plaintiff has properly joined as defendants unknown persons or the heirs and devisees of any deceased person, the court shall determine the extent of the interest of each defendant in the property taken or damaged and the compensation to be awarded for such interest.

Comment. Section 1260.230 continues without substantive change a portion of former Section 1245.3 which provided for the court determination of the compensation to be awarded deceased and unknown persons. For provisions authorizing joinder of such persons, see Section 1250.220. For provisions relating to deposit of such compensation, see Section 1268.110.

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§ 1260.240. Compensation or fee for appraisers, referees, commissioners,  
and other such persons

1260.240. In any action or proceeding for the purpose of condemning property where the court may appoint appraisers, referees, commissioners, or other persons for the purpose of determining the value of such property and fixing the compensation thereof, and may fix their fees or compensation, the court may set such fees or compensation in an amount as determined by the court to be reasonable.

Comment. Section 1260.240 is identical to former Section 1266.2 except the last clause of Section 1266.2--which provided that "such fees shall not exceed similar fees for similar services in the community where such services are rendered"--is deleted because it imposed an undesirable limitation on the court's power.