

9/20/73

Memorandum 73-80

Subject: Study 36.500 - Condemnation (Comprehensive Statute; Amendments, Additions, and Repeals--Constitutional Provisions)

In connection with the Eminent Domain Law, conforming changes should be made in two constitutional provisions relating to eminent domain--Sections 14 and 14-1/2 of Article I of the California Constitution.

Article I, Section 14

Article I, Section 14 of the California Constitution contains the "just compensation" clause. It also contains, however, some unnecessary or obsolete provisions on miscellaneous matters and several limitations on the right of immediate possession that conflict with the Commission's recommended legislation. The Commission published, in 1967, a recommendation for amendment of Section 14 in connection with its immediate possession proposals. Exhibit I. For the Commission's draft of amended Section 14, see Exhibit II. Also attached, for purposes of comparison, is the Constitution Revision Commission's recommended revision of Section 14. Exhibit III.

The staff recommends that the amendment of Section 14 as set out in Exhibit II and as previously drafted and approved by the Commission be approved for inclusion in the Eminent Domain Law pamphlet.

Article I, Section 14-1/2

Article I, Section 14-1/2 of the California Constitution provides authority for protective condemnation with footage limitations. The Commission has previously reviewed this section and approved its repeal since the section serves no useful purpose, has not been given effect by the courts,

and is superseded by the more general provisions of the Eminent Domain Law. Exhibit IV is a staff draft of the repeal and Comment to Section 14-1/2 based on the similar draft of the Constitution Revision Commission. The staff recommends this draft be approved for inclusion in the Eminent Domain Law pamphlet.

Respectfully submitted,

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Staff Counsel

EXHIBIT I

CONSTITUTIONAL REVISION

The Commission has concluded that Section 14 of Article I of the California Constitution should be revised. This section grants the right of "immediate possession" only to specified public agencies in right of way and reservoir cases. It does not assure the property owner that he will actually receive compensation at the time his property is taken.

The addition of the immediate possession provisions to Section 14 reversed a longstanding policy of this state that property may not be taken unless compensation has *first been made*, which was originally adopted as a part of the present Constitution in 1879. Prior to that time, the Constitution had merely required that the owner of property taken for public use be given just compensation, and it was held that payment might be made within a reasonable time after the taking. In 1879, the present Constitution was adopted with the provision that private property may not be taken or damaged for public use "without just compensation having first been made." The provisions of Section 14 that now authorize immediate possession without payment to the owner "having first been made" were adopted to overcome this limitation.

The Commission believes that the policy underlying the original provision of the 1879 Constitution is sound and that the contrary policy now expressed in the immediate possession provisions of Section 14 is undesirable. A person's property should not be taken from him unless he has the right to be paid concurrently for the property, for it is at the time of the taking that he must meet the expenses of locating and purchasing property to replace that taken and of moving to the new location.

Another serious defect in Section 14 is that it severely limits the agencies by which and the purposes for which possession prior to judgment may be taken. This right is of great value to the public, for it permits the construction of needed public projects without undue delay. The Legislature should, therefore, have the power to decide from time to time what agencies are to have this right and for what purposes it may be exercised. It should not be necessary to amend the Constitution each time a change in the needs of the people of the state warrants either an extension or contraction of the purposes for which the right to possession prior to judgment may be exercised.

Accordingly, the Commission recommends that Section 14 of Article I be revised as follows:

1. An explicit provision should be added assuring property owners that they will be compensated concurrently whenever possession of their property is taken.

2. The lengthy proviso to the first sentence, which authorizes immediate possession in certain cases, should be deleted and a provision should be added giving the Legislature authority to specify (a) the purposes for which, and entities by which, possession may be taken prior to judgment and (b) subject to the requirement of concurrent

payment, the procedure for such cases. It should not be necessary to amend the Constitution every time that it is found that the existing procedures are faulty or can be improved.

3. In the first sentence, the phrase "which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law" should be clarified to state that "just compensation shall be assessed in a court of record as in other civil cases and, unless a jury is waived, shall be determined by a jury."

4. The second portion of the first sentence, prohibiting "appropriation" of property "until full compensation therefor be first made in money or ascertained and paid into court for the owner," should be deleted as surplusage.

5. The language of the first sentence requiring that, in certain cases, compensation be made "irrespective of any benefits from any improvement proposed by such corporation" should be deleted. The phrase applies only to "corporations other than municipal" and, oddly, only to takings for right-of way or reservoir purposes. The language may be inoperative under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. See *Beveridge v. Lewis*, 137 Cal. 619, 70 Pac. 1083 (1902). In any event, the complex question of the offsetting of benefits in cases of partial takings should be left to the Legislature.

6. The last sentence of the section, which declares certain logging and lumbering railroads to be "public uses" and specifies that the taking of property for such purposes constitutes the taker a common carrier, should be deleted. Takings for this purpose are authorized by existing legislation, and the constitutional provision is obsolete since it applies only to "a railroad run by steam or electric power." Such railroads have been largely replaced by railroads using diesel powered locomotives. Moreover, the sentence adds little if anything to decisional law (some of which is based on the Constitution of the United States) relative to takings for such purposes and also to the status and obligations of "common carriers."

EXHIBIT II

RECOMMENDED CONSTITUTIONAL AMENDMENT

The Commission's recommendations would be effectuated by the adoption of the following Constitutional Amendment:

Amendment of Section 14, Article I

SEC. 14. Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner. *Subject to the provisions of Section 23a of Article XII, just compensation shall be assessed in a court of record as in other civil cases and, unless a jury is waived, shall be determined by a jury. The Legislature may provide for the taking of possession of property and the devoting of such property to public use following commencement of an eminent domain proceeding and may prescribe the persons who may take such possession, the public uses for which such possession may be taken, and the manner in and the time at which such possession may be taken. Legislation authorizing possession to be taken shall require that (1) before possession is taken, the probable amount of compensation to be made for the taking of the property be paid into court for the owner, (2) the amount to be paid into court be subject to determination by the court on motion of any interested party, and (3) the total amount paid into court be available immediately to the persons that the court determines to be entitled thereto and be withdrawable by such persons in accordance with such procedure as the legislation may provide; and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law; provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor*

be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings. The taking of private property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier.

Comment. The effect of this revision of Section 14 is as follows:

First sentence. No change is made in existing constitutional law respecting "public use," "just compensation," "inverse condemnation," or the general requirement that property not be taken or damaged until compensation is made to or paid into court for the owner. See, e.g., *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959), and *City & County of San Francisco v. Ross*, 44 Cal.2d 52, 279 P.2d 529 (1955) (public use); *Metropolitan Water Dist. v. Adams*, 16 Cal.2d 676, 107 P.2d 618 (1940), and *Sacramento So. R.R. v. Heilbron*, 156 Cal. 408, 104 Pac. 979 (1909) (just compensation); *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955), and *Rosc v. State*, 19 Cal.2d 713, 123 P.2d 505 (1942) (inverse condemnation proceedings); *Heilbron v. Superior Court*, 151 Cal. 271, 90 Pac. 706 (1907), and *McCauley v. Weller*, 12 Cal. 500 (1859) (prepayment or payment into court).

Second sentence. This sentence states the established judicial construction of deleted language that required that "compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." See *City of Los Angeles v. Zeller*, 176 Cal. 194, 167 Pac. 849 (1917). With respect to the requirement that the power of eminent domain be exercised through judicial proceedings, see *Wilcox v. Engbrechtsen*, 160 Cal. 288, 116 Pac. 750 (1911); and *Weber v. Board of Supervisors*, 59 Cal. 265 (1881). Regarding the assurance of trial by jury in condemnation and inverse condemnation proceedings, see *Vallejo & No. R.R. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238 (1915), and *Highland Realty Co. v. City of San Rafael*, 46 Cal.2d 669, 298 P.2d 15 (1956). The words "Subject to the provisions of Section 23a of Article XII" are included to prevent any implication that Section 23a is superseded by the re adoption of this section. Section 23a empowers the Legislature to authorize the Public Utilities Commission to determine the compensation to be made

in takings of public utility property. Section 23a is limited in application to property that is already devoted to a public use. See *S.H. Chase Lumber Co. v. Railroad Comm'n*, 212 Cal. 691, 300 Pac. 12 (1931). The procedure for determining just compensation adopted pursuant to Section 23a (see Public Utilities Code Sections 1401-1421) is not exclusive and is an alternative to proceedings under Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure. Further, in cases in which compensation is determined by the Public Utilities Commission, the procedures of the Code of Civil Procedure other than those for assessing compensation are available to the parties. See *Citizens Util. Co. v. Superior Court*, 59 Cal.2d 805, 31 Cal. Rptr. 316, 382 P.2d 356 (1963). No change is made in these rules.

Third sentence. This sentence replaces the former authorization for the taking of "immediate possession" by certain entities in right of way and reservoir cases, and removes any doubt whether the Legislature may, by statute, provide for possession prior to judgment. See *Steinhart v. Superior Court*, 137 Cal. 575, 70 Pac. 629 (1902). Compare *Spring Valley Water Works v. Drinkhouse*, 95 Cal. 220, 30 Pac. 218 (1892); *Heilbron v. Superior Court*, 151 Cal. 271, 90 Pac. 706 (1907). See also Taylor, *Possession Prior to Final Judgment in California Condemnation Procedure*, 7 SANTA CLARA LAWYER 37, 56-74 (1966). The sentence also permits the Legislature to classify condemnors and public purposes in this connection.

Fourth sentence. This sentence clarifies the application of the first sentence of this section to the taking of possession in eminent domain proceedings. It requires that, before possession of the property is taken, the probable amount of compensation that eventually will be awarded in the proceeding be paid into court for the owner. It also adds a requirement, not heretofore imposed by this section, that the funds paid into court be available to the property owner prior to termination of the proceeding. This sentence thus accords with decisions of the California Supreme Court holding that, before property is taken, compensation must be paid into court for the owner. See *Steinhart v. Superior Court*, 137 Cal. 575, 70 Pac. 629 (1902). The sentence will permit the Legislature to specify whether the amount paid into court is determined initially by the plaintiff, by the court, or in some other manner, but requires that such amount be subject to determination by the court on motion of an interested party. The sentence will also permit the Legislature to specify the circumstances under which the property owner must give security to protect the plaintiff in cases where the amount withdrawn may be in excess of the compensation eventually awarded in the proceeding.

Language deleted. In deleting the second portion of the first sentence of this section, this revision eliminates language that prohibited "appropriation" of property in certain cases, "until full compensation therefor be first made in money or ascertained and paid into court for the owner." This language was held to add nothing to the meaning of the first portion of the sentence. See *Steinhart v. Superior Court*, 137 Cal. 575, 70 Pac. 629 (1902). A more explicit requirement is imposed by the fourth sentence of the section as revised.

The revision also deletes language which required that, in certain cases, compensation be made "irrespective of any benefits from any improvement proposed." This limitation as to the offsetting of benefits applied only to private corporations taking rights of way or lands for reservoir purposes and probably was inoperative under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. See *Beveridge v. Lewis*, 137 Cal. 619, 70 Pac. 1083 (1902). In deleting the language, this revision clarifies and unfetters the power of the Legislature to deal with the offsetting of benefits in eminent domain proceedings. The subject is now governed by Section 1248 of the Code of Civil Procedure.

The proviso to the first sentence of this section, and the next following sentence, which dealt with "immediate possession" in right of way and reservoir cases are superseded by the third and fourth sentences of the revised section.

This revision deletes the last sentence of the section which declared that the taking of property for a railroad "run by steam or electric power" for logging or lumbering purposes should be deemed a taking for a "public use." The provision was added by amendment in 1911 and was never construed or applied by the appellate courts. Its apparent purpose was to preclude a holding that takings for such purposes may not be authorized because they do not effectuate a "public use." (For a collection and discussion of the judicial decisions on this general question, see Annot., 86 A.L.R. 552 (1933).) Takings for such purposes are authorized by existing legislation. See CIVIL CODE § 1001, CODE CIV. PROC. § 1238(11), PUB. UTIL. CODE § 7526(g). The provision would appear to have been rendered obsolete by the replacement of steam and electric locomotives by diesel-powered ones. Moreover, in applying the "public use" limitation, the California courts have consistently refused to be bound by a general declaration and have held that the question must be resolved by reference to the facts of the particular case. For a thorough analysis of the California decisions on a closely analogous problem, see Comment, *Eminent Domain Powers Exercisable Over California Property by Oil and Gas Corporations*, 7 U.C.L.A. L. REV. 327 (1960).

The last sentence of the section also declared that any person taking property for such purposes "shall thereupon and thereby become a common carrier." This declaration duplicates the result reached independently of any constitutional basis in *Producers Transp. Co. v. Railroad Comm'n*, 176 Cal. 499, 169 Pac. 59 (1917). That decision held that the exercise by a carrier of the statutory power of eminent domain was conclusive evidence of a dedication of its condemned right of way to public use. (See also CAL. CONST., Art. 12, §§ 17, 23; CIVIL CODE § 2168; PUB. UTIL. CODE §§ 211, 216, 230. The judicial decisions on this problem are collected and analyzed in Annot., 67 A.L.R. 588 (1930).)

Deletion of the last sentence, therefore, makes no significant change in existing law respecting either the doctrine of public use or the status and obligations of common carriers.

EXHIBIT III

CALIFORNIA CONSTITUTION REVISION COMMISSION

PROPOSED REVISION OF THE CONSTITUTION (1971)

ARTICLE I—REVISED PROVISIONS

Proposed Constitution

Section 16

Sec. 16. Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings on deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

Existing Constitution

Section 14

Sec. 14. Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law; provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as in the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings. The taking of private property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier.

Comment: Existing Section 14 requires payment of just compensation for private property taken or damaged for public use through the power of eminent domain. The Commission recommends that this provision, and the right to have a jury determine the amount of compensation, be retained.

The final sentence in Section 14 declares that certain logging railroads constitute a public use and are common carriers. This provision was enacted for historic purposes and the same result could have been accomplished through statute. Because it is obsolete, the Commission recommends that it be deleted.

The balance of existing Section 14 is concerned with "immediate possession" of property by specified governmental entities. "Immediate possession" occurs when the condemning agencies take possession of the property before the final amount of compensation has been determined by a jury. This practice resulted from the necessity of obtaining possession to complete public works before determination of the final compensation by a lengthy judicial process. In the absence of such a provision, the single owner of a tract taken for freeway construction could delay completion of the entire project for several years. Since the power to take by eminent domain is clear, and only the amount of compensation is in doubt, such delays are unnecessary. Over the years Section 14 was amended several times to permit the State, counties, municipal corporations, metropolitan water districts, municipal utility districts, municipal water districts, drainage, irrigation, levee, reclamation or water conservation districts, or "other similar public corporations" to take prior possession for reservoirs and rights of way only. The phrase "other similar public corporation" has never been construed.

There have been many unsuccessful attempts to create additional agencies and purposes entitled to rights of prior possession. The Commission recommends that the existing specific references to agencies and purposes be deleted and that the Legislature be specifically authorized to provide for rights of prior possession. The Commission proposal provides for a deposit of money into court by an agency taking by prior possession, the money to be released promptly to the owner of the property. This device, which is presently provided by statute, assures that the property owner will at once receive in substance the amount of the award.

This recommended change in the law of prior possession conforms to the recommendation of the California Law Revision Commission, which has done extensive research on the subject of prior possession.

The Commission recommends enactment of a statute, to become effective upon approval by the people of this amendment of the Constitution, preserving the rights of immediate possession given in present Section 14 to certain public agencies.

EXHIBIT IV

Cal. Const., Art. I, § 14-1/2 (repealed)

~~Sec. 14 1/2. The State, or any of its cities or counties, may acquire by gift, purchase or condemnation, lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways and reservations in and about and along and leading to any or all of the same, providing land so acquired shall be limited to parcels lying wholly or in part within a distance not to exceed one hundred fifty feet from the closest boundary of such public works or improvements; provided, that when parcels which lie only partially within said limit of one hundred fifty feet only such portions may be acquired which do not exceed two hundred feet from said closest boundary, and after the establishment, laying out, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works.~~

~~The Legislature may, by statute, prescribe procedure.~~

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Comment. Section 14-1/2 provides for "excess condemnation" in specified cases. This phrase refers to a taking of more property than is actually physically necessary for the construction of a public work. At the time it was enacted, courts were very restrictive in the amount of land that could be taken for a public use through eminent domain. Since adoption of this section, courts have adopted an interpretation of the concept of "public use" which permits additional lands to be taken to provide median and surrounding areas. Moreover, the California Supreme Court has refused to construe Section 14-1/2 as a limitation on the power of the Legislature to provide for excess condemnation free from constitutional restraints. The case of People v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968), so held and effectively emasculated

the apparent limitations of Section 14-1/2. The section no longer serves a discernable purpose. For further discussion, see Capron, Excess Condemnation in California--A Further Expansion of the Right to Take, 20 Hastings L.J. 571, 588-591 (1969). The repeal of this section was recommended by the California Constitution Revision Commission. See California Constitution Revision Commission, Proposed Revision of the California Constitution, Part 5 at 31 (1971).